



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
H.C. MISC. APPLICATION NO. 92 OF 1998

WAITHAKA KAREITHI & ANOTHER PLAINTIFF

V E R S U S

JOHN KAGUU GITHAU..... DEFENDANT

R U L I N G

The applicants are paternal grandparents of two infants namely Edwin Waithaka Mureithi. They are also the administrators of the estate of their mother. Both parents of these infants are deceased. The Defendant John Kaguu had physical custody of the two infants and claims that he was married to their mother who has left them in his custody.

The applicants have thus filed the application by way of Originating Summons dated 5th February, 1998 under Section 7 of the Guardianship of Infants Act (Cap 144) now repealed under the provisions of the Children Act, 2001 which came into force on 1st March, 2002.

The first issue to be determined by me would be, obviously, whether this application is properly before this court in the face of its repeal.

The Guardianship of Infants Act (Cap 144) was repealed under Section 200 of the Children Act, 2001. The latter Act has not provided for any savings of the proceedings filed before its commencement and no contrary intention is also manifested. The present application is filed long before the commencement of the Children Act, 2001.

Under the circumstances, I shall have to fall back on the provisions of the Interpretation and General Provisions Act (Cap 2). Section 23 of this Act stipulates for this kind of eventualities I shall take support from the provisions of Section 23 (3) (b) and (e) when finding that the application survives the advent of the Children Act, 2001 and I should proceed to hear and determine the application under the Guardianship of Infants Act (Cap. 144).

The said provisions stipulate as under:-

(Section 23 (3) (b) & (e) –

(3) Where a written law repeals in whole or in Part another written law, then unless a contrary intention appears, the repeal shall not –

(b) affect the previous operation of a written law so repealed or anything duly done or

suffered under a written law so repealed; or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid , and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealed written law had not been made.

At the time of commencement of hearing of the Originating Summons it was agreed and so directed that this summons shall be heard and determined by Oral evidence based on affidavits on record.

2nd Plaintiff gave evidence in support of the application. She reiterated the facts that the applicants are paternal grandparents of the infants who were at the time of her deposition, 14 and 10 years of age. She also stated that their petition for the grant of letters of administration for the estate of Jane Wangari Mureithi, the mother of the infant, was not opposed. According to her, Jane did not remarry after the death of her son Stanley Maina Waithaka. Jane was also buried at her place. She emphasized that they would not need any financial assistance to look after the infants. They had educated their children to different professions including father of the infants who was an Engineer. Their mother was a qualified medical doctor and was practicing medicine. She also stated during Cross-examination that the Defendant is after the property of both her deceased son and daughter-in-law and stated that all the moveable properties were carried away by the Defendant. When he refused to release their grandchildren they filed this application. In short, according to them the Defendant is a stranger and has no right of care or custody of the infants. She also alleged that the Defendant had stopped the infants from going to school and intends to teach them traditional medical practice. The younger son www.kenyalawreports.or.ke 5 Dennis was released to them when he was six years and he was not going to school when she took his custody under a court order.

The older one Edwin is with the Defendant and she is not allowed to visit him.

The Defendant deponed that he was married to Jane the mother of the infants and they lived together for two years before she died. He claimed that they had a child of marriage who also died in December, 1996 but no documents to show either her birth or her death were produced. He admitted that he is practicing traditional medicine. He also did not substantiate his claim of marriage as per Kikuyu custom with the mother of the infants. He then added that they did not perform any traditional ceremonies of the marriage although he averred to have been married under Kikuyu custom. He also did not depone on how he was looking after Edwin who he claims to be asthmatic. Furthermore he admitted during cross-examination that the mother of infants died within eleven months of their marriage.

As I have stated earlier the Defendant fell short of proving his claim of being a step father of the infant as well as his means to look after the welfare of the infants. He was totally silent on the activities of Edwin who is in his custody and steps he has taken to look after his welfare and future. It seemed he was not serious on his claim of custody of the infants.

The infants in this case have lost both their parents. The Defendant eventhough had physical custody of the children did not bother to file a formal application. On the contrary he refused to release them to attend their mother's funeral and have not come out clear as to how he intends to look after the welfare of the infants. The applicants on the other hand are their grandparents who have taken all prompt actions to bring the infants under their fold. They have shown their means and capacities to look after the welfare of the infants. They are old but not that old as to be incapable to look after the infants. They have reared all their children who have become professionals. They value good education which they have started giving to younger son under their custody. Their efforts to look after welfare of Edwin the Older son have been frustrated by the Defendant, who has, in my view, no right over the child socially or legally as he has failed totally to convince me that he has their welfare at heart.

Section 17 of the Guardianship of Infants Act enjoins the court to regard the welfare of the infants as the first and paramount consideration, while determining the application of custody under the Act.

Needless to say that it is the factor which has withstood the test of time.

This court before the determination of the application had asked to be shown how the grant of letters of administration is proposed to be confirmed. The application for confirmation is produced in this case which seeks all the properties of the estate to be held in trust for infants in equal share.

Despite the ages of the applicants I am inclined to grant their application considering also the ages of the infant the older one almost being 16 years.

I therefore allow the Originating Summons dated 5th February, 1998 and grant the custody of the two infants namely Edwin Waithaka and Dennis Mureithi to the Plaintiffs who are appointed as their guardians. I further direct the Defendant to release Edwin Waithaka to the custody of the Plaintiffs forthwith.

The Defendant shall also pay the costs to the plaintiffs. Dated and delivered at Nairobi this 5th day of June, 2003.

K. H. RAWAL

JUDGE.