

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT (CAP 144)

IN THE MATTER OF THE INFANTS MK

AND PN

RULING

This Ruling is in respect of two cases namely,

1. H.C. Misc. Application No. 83 of 2001 (O.S.) (PO v VNO and JMW)
2. H.C. Misc. Application No.45 of 2001 an application under the Guardianship of Infants Act, Cap.144, Laws of Kenya, now repealed. These two applications were filed before 1st March, 2002, the date of commencement of the Children's Act No.8 of 2001, which repealed the Adoption Act, the Guardianship of Infants Act, Cap 144 and the Children and Young Persons Act.

The new Children's Act No. 8 of 2001 does not have appended to it Rules of Practice and Procedure.

Also missing in the Children's Act is a saving clause to save cases filed before 1st March, 2001.

Urging the court to proceed with and finalize the cases filed before the commencement of the new Act, Mrs. Kiarie submitted that Section 23 of Cap. 2 – i.e. the Interpretation of General Provisions Act deals with issues arising out of the repeal or amendment of any written law. Referring to Sec. 23 (3)(e) of Cap. 2 she submitted, "I understand this section to mean that if we had commenced the proceedings before a court having competent jurisdiction prior to the repeal of that Act, the court is empowered to continue under the old Act as if it had not been repealed I therefore submit that in view of the principle of the best interest of the Child the court must continue under the old Law until finalizes the matter".

But Mr. Burudi submitted that the enactment of Act 8 of 2001 go hand in hand to the jurisdiction of court.

He referred to Section 73 of Act 8 which gives the High Court appellate jurisdiction in any proceedings of custody etc etc. He further submitted further that the High Court purporting to exercise original jurisdiction is a nullity. According to him fresh proceedings have to be instituted before the proper forum i.e. the Children's Court. Miss Mucheru whose application was for Guardianship adopted the arguments of Miss Kiarie in Misc. App No.83 of 2001 and asked the court to allow the application to proceed for hearing.

I have considered the submissions of the Learned Counsel representing the parties herein. I have also scrutinized the provisions of Sec. 23 3(e) of the Interpretation of General Provisions Act, Cap. 2, Laws of Kenya which stipulates, (Section 23(3)(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 –

(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, as if the repealed written law had not been made".

From the wording of the section above quoted, I am Satisfied that the "legal proceedings" commenced before 1st March 2002 are save and can be "continued" until completion. In my considered opinion, the issue of commencing fresh proceedings does not arise. I therefore rule that H.C Misc. Application No.83 of 2001 and 45 of 2001 and indeed any proceedings commenced in this court before the commencement of the Children's Act No.8 of 2001, can legally be continued to their logical conclusion.

Dated at Nairobi this 17th day of May, 2002

JOYCE ALUOCH

HIGH COURT JUDGE