



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 20 (OS) OF 2002

IN THE MATTER OF: THE CHILDREN ACT NO.8 OF 2001

AND

IN THE MATTER OF INFANTS: (i) S.Y (11 YEARS)

(ii) S.Y (8 YEARS)

(iii) S.Y (6 YEARS)

BETWEEN

N.A.S..... PLAINTIFF/APPLICANT

VERSUS

N.A.Y.....DEFENDANT/RESPONDENT

RULING

For hearing was the application by Amended Chamber summons dated 10th June 2002 by the plaintiff. However counsel for the defendant raised a preliminary point of objection to the effect that the whole suit was incompetent as it was brought under the provisions of the now repealed Guardianship of Infants Act instead of the current law governing the issues touching on children which are embodied in the Children's Act.

On record and still pending hearing is an application by the plaintiff seeking leave of the court to amend the Originating Summons dated 24th May 2002 but Mr. Balala for the defendant said this was an exercise in futility as no amount of amendment can cure a suit that is initially defective.

I have had the opportunity to consider the issues raised in the Originating Summons as well as the Replying Affidavits on record.

On the issue as to whether the suit is a nullity abinitio, I would say that it is clear from the body of the pleadings and prayers that the orders sought can issue under the provisions of the Children's Act. However it is true that the suit was brought under the provision of a repealed law. The question is whether the plaintiff is to be punished for the wrong acts or omissions of her counsel in failing to ensure such technicalities do not apply against her? The courts have held before that the mere failure to cite the proper provisions of the law will not render the suit/application a nullity if it is shown from the prayers sought that counsel is aware of the correct relief to seek for as provided by law. It has also been held that a party is not to suffer as a result of the acts of omission or otherwise of a counsel and especially so on issues that the party cannot be held responsible.

The suit pending involves young children and the issue of custody is in controversy. At this stage, it is clear, there is a lot of acrimony between the parties. The court is aware that the provisions of the Children's Act put the welfare of the children on top of the list. In the circumstances, without going into the merits or demerits of the preliminary objection as counsel for the plaintiff did concede there was an error in presenting the suit under the repealed Guardianship of Infants Act, I order as follows:

- 1. The plaintiff's counsel is to take the necessary action to put the pleadings in order within a period of 4 weeks.**
- 2. The custody of the children to remain with the plaintiff pending further orders.**
- 3. Parties to ensure the suit does proceed to hearing within a Minimum period of 30 days unless otherwise ordered by the court.**

That is the order of the court. Dated and delivered this 12th day of July 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE