



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 10 OF 2018

JNT.....APPELLANT

VERSUS

JWO.....1ST RESPONDENT

ENT.....2ND RESPONDENT

(An Appeal from the Ruling of Honourable T. B. Nyangena, Senior Principal Magistrate in Children's Case No. 848 of 2017 delivered on the 19th January, 2018)

JUDGMENT

1. The appellant JNT and the 1st respondent JWO are husband and wife. They got married in 1990 in Nairobi. The 2nd respondent ENT is their daughter. She was born on 4th May 1991. She is now 28 years old. Both respondents live in the United Kingdom. The appellant was staying in the United Kingdom (to which they had relocated about 1991/1992) but returned to Kenya in 2010.
2. On 29th June 2017 the respondents filed a cause at the Children Court in which they alleged that the appellant had failed and/or neglected to pay for the 2nd respondent's education, upkeep and maintenance in the United Kingdom. The 2nd respondent had, as a result, accumulated arrears of college tuition, rent, transport and food. The appellant had allegedly also not paid for medical. It was further stated that he had abandoned the respondents in the United Kingdom, and had evicted the 2nd respondent from his house at 1st Parklands Avenue in Nairobi. The claim was for \$13447 in fees arrears and fees for the years 2017, 2018 and 2019 and subsequently \$1760 for each succeeding month since 2017 to be paid on the 2nd of each succeeding month pending the resolution of the suit; such payment in maintenance as the court may determine; and costs.
3. With the cause was filed a chamber application for the court to make an order of extending parental responsibility against the appellant, and for him to be ordered to pay maintenance for the 2nd respondent in such periodical sum or lump sum as may be sufficient to cater for her college education pending the hearing and determination of the suit. The 2nd respondent was stated to be a student at the University of [Particulars withheld] in the United Kingdom under student number xxxx. It was claimed that the appellant has refused, failed and/or neglected to pay for her maintenance, upkeep and college tuition fees. It was alleged that after he had made initial payment for the 2nd respondent's fees, upkeep and maintenance in 2015 he had made no further payment. The annexed fees structure was for \$12,888 for 2017.
4. The appellant filed a replying affidavit on 12th July 2017 in which he opposed the application. He stated that the 2nd respondent was an adult, and not a child, over whom he had no parental responsibility. He stated that he was not aware that the 2nd respondent was in college, because the last time he had checked she was employed. The respondents, he stated, were lawful British citizens who were entitled to all the benefits applicable to other citizens. If the 2nd respondent wanted to go to university, he said, there were public universities in the United Kingdom and that the Government provided grants and bursaries which would cater for food, accommodation and maintenance. He denied having paid for the 2nd respondent's tuition in 2015, and stated that, first, he did not know she was in school and, two, the little funds he sent her were gifts and not enough to pay for fees or maintenance. Regarding the allegation that he had chased her out of his house in Parklands, he stated that she had come for holiday and stayed with her. However, on 30th April 2017 there was a party at his brother's house. She got drunk and hurled unprintable abuses at him in front of guests. When asked to leave the party, she went to his house, took her things and left.
5. The respondents had pleaded that the appellant was a man of means having inherited a lot of property from the estate of his deceased father. He stated that he had inherited only shares from his father's estate which he had sold. The rest of the estate was still disputed. He stated that he was old and unwell following an operation and could not engage in any earning activity.

6. In a further affidavit, the 2nd respondent stated that from 2002 she was under the care of the appellant in the United Kingdom. In 2013 the appellant gave up his property when he was advised of his incapacity benefits. The 1st respondent was separated. The appellant moved to Kenya in 2013. She stated that she moved with him to Kenya. In 2014, she stated, he advised her to return to the United Kingdom and go to university which she did. She benefitted from student finance, grants and loans. On top of this, she stated, her father was-

“paying the majority of the balance”

of her fees, and upkeep. He was therefore voluntarily supporting her beyond age 18. That is why she asked that he be made to continue being responsible for her fees and upkeep. She denied that she has been employed. She said she was on job seekers allowance. Lastly, she stated that the appellant had inherited a lot of estate from the succession cause involving his late father; had sold some of the property but was still in funds.

7. The trial court heard the application and on 19th January 2018 delivered a ruling in the following terms:-

“There is no dispute that the defendant is the father of the 2nd applicant and that she has been receiving support from his as his father. In my view the issue is whether he should continue supporting her even though she is 27 years. I find that he has admitted supporting her and since she has no employment and needs further studies and is desirous to undertake, I order that parental responsibility be extended for purposes of payment of fees only.”

8. On 1st February 2018 the appellant filed the present appeal against that ruling. His grounds were that:-

a) the trial court had erred in law and fact in arriving at the conclusion that he was supporting the 2nd respondent when there was no evidence in that regard;

b) the trial court had erred in law and fact in failing to appreciate that the 2nd respondent was aged 27 and that there were no special circumstances that had led to extending parental responsibility to her;

c) the trial court had failed to determine whether the appellant had capacity to pay for the 2nd respondent's fees in the United Kingdom;

d) the trial court had failed to appreciate that there were sufficient facilities for tuition and maintenance for the 2nd respondent in the United Kingdom which she had utilised; and that

e) the trial court had made a blanket order in regard to fees without determining the amount thereof, the portion payable by the 1st respondent and the appellant, and without considering the amount received by the 2nd respondent in terms of grants from the United Kingdom.

9. The appellant was represented by Mr. Gikonyo and the respondents by Mr. Karanja. They filed written submissions which I have considered.

10. I am aware of the responsibility of this court to re-evaluate and reconsider the evidence tendered before the trial court and be able to reach own conclusions, bearing in mind that it did not see or hear the parties (**Selle –v- Associated Motors Boat Company [1968]EA 23**). Secondly, this court should not interfere with the decision arrived by the exercise of discretion by the lower court unless it is satisfied either that the lower court had misdirected itself in some matter and as a result arrived at the wrong decision, or that it is manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that, as a result, there was injustice (**Choitram v. Nazari [1984] KLR 527**).

11. The application that resulted into the ruling subject of this appeal was stated to be under **Sections 6(1), 7, 9, 13, 22, 28 and 91** of the **Children Act, No. 8 of 2001**. Under **Section 2** of the **Act** a “child” means:-

“any human being under the age of eighteen years.”

Since the 2nd respondent is not a child, the relevant provisions are therefore **Sections 28 and 91** of the **Act**.

12. **Section 28** of the **Act** deals with extension of parental responsibility beyond eighteenth birthday. It provides as follows:-

“28 (1) Parental responsibility in respect as a child may be extended by the court beyond the date of the child's eighteenth birthday if the court is satisfied upon application or on its own motion, that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made.

Provided that the order may be applied after the child's eighteen birthday.

(2) An application under this section may be made by:-

(a) the parent or relative of a child;

(b) any person who has parental responsibility for the child;

(c) the Director;

(d) the child.”

13. **Section 91** deals with power to make a maintenance order. It provides as follows:-

“Any parent, guardian or custodian, of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child, in this Act referred to as a “maintenance order,” as the court may see fit.

Provided that:-

(a)

.....

(b) a person who has attained the age of eighteen years may, with leave of the court, apply to the court for a maintenance order to be made in his favour in the following circumstances:-

i) The person is or will be involved in education and training which will extend beyond the person’s eighteenth birthday; or

ii) The person is disabled and requires specialised care which will extend beyond the person’s eighteenth birthday; or

iii) The person is suffering from an illness or ailment and will require medical care which will extend beyond the person’s eighteenth birthday; or

iv) Other special circumstances exist which would warrant the making of the order.”

14. It does appear to me to be that an applicant who is seeking under **Section 28** of the **Act** that parental responsibility over him or her be extended beyond the eighteenth birthday has to bring himself or herself within the special circumstances enumerated in **Proviso (b)** of **Section 91** of the **Act**. The 2nd respondent is not disabled, does not require specialised care and is not suffering from illness or ailment requiring medical care from the applicant. It was not stated or shown that she was ill and required medical care on her eighteenth birthday. What she was asking for was tuition fees and maintenance while at the [Particulars withheld] University. She stated that she joined the university in 2014. She was 23 years old at the time. She was not at the time involved in education and training which was to extend beyond her eighteenth birthday. She was above 18 years when she joined the university.

15. The trial court indicated that the appellant had admitted supporting the 2nd respondent in the payment of fees at the university. The appellant challenged this. His case was that there was no evidence before the trial court to support the observation; that there was no time he admitted to supporting the 2nd respondent in her education or the university.

16. The respondents’ suit in the trial court was based on the claim that the appellant had refused to pay the arrears of college tuition, maintenance and upkeep for the 2nd respondent for the years 2017, 2018 and 2019. In the supporting affidavit to the application for extension of parental responsibility, it was stated by the 1st respondent that the appellant had paid the 2nd respondent’s fees for 2016 but had failed to pay for the subsequent years. In paragraph 17 of the 2nd respondent’s further affidavit sworn on 25th September 2017, she stated:-

“17. THAT contrary to the respondent’s allegations made in paragraph 27 of his affidavit, he had been paying for majority of the balance of my university fees less the loan amounts I received from the Government since 2014.”

The appellant had stated in the replying affidavit that:-

“7. THAT since the year 2002, I have never maintained the 2nd respondent and the allegations that I paid tuition for the year are unfounded and baseless.

.....

.....

26. THAT in June 2015, I went to U.K and met the 2nd plaintiff. She was then working but she did not mention to me that she was attending any college for studies.

27. THAT I have never paid any fees for the 2nd plaintiff since year 2002.

.....

.....

30. THAT in the U.K, there are Public Universities and if one wishes to study, the Government provides grants and bursaries to the students which include accommodation, food and maintenance.”

17. In short, there was nowhere in the pleadings and in the affidavits that the appellant admitted that he had been supporting in the payment of the university fees of the 2nd respondent. The trial court did not point out where in the evidence of the applicant there was admission of payment of tuition fees. I find that there was no such admission, and therefore the challenge to the ruling by the trial court on this point was merited. I do not want to say that it would have been quite easy for the 2nd respondent to place on record any evidence to show that the appellant was making fees remittances to her or to the university. Further, from the evidence on record, both the appellant and the respondents were, at the time the former was in the United Kingdom, being maintained by the Government. There was no evidence that after the appellant relocated to Kenya he had any means to pay fees for the 2nd respondent. Of course, his fortunes changed when he inherited part of his late father’s estate. That was long after the 2nd respondent had become an adult. It was stated by the appellant that he sent small gifts by way of remittances to the 2nd respondent, but that they were not such that would cover her tuition fees.

18. The 2nd respondent is looking at the windfall that the appellant inherited from the estate of his late father to be able to say that he now has the means to support her education at the University of Buckingham. Quite unfortunately, the appellant has no legal obligation to provide for his adult children. He may have a social responsibility, but the responsibility is not legal.

19. In conclusion, I find that there were no special circumstances that would have formed the basis for the trial court to extend parental responsibility in respect of the 2nd respondent beyond her eighteenth birthday, or to order the appellant to pay for her university education in the United Kingdom.

20. Consequently, I allow the appeal. The orders contained in the ruling delivered on 19th January 2018 by the trial court are hereby set aside. In their place, there shall be an order dismissing the Chamber Summons dated 29th June 2017 and filed on the same date.

21. This was a family dispute. I order that each side shall pay own costs, both here and below.

DATED and DELIVERED at NAIROBI this 18TH NOVEMBER, 2019

A.O. MUCHELULE

JUDGE