



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 93 OF 2014

PROFESSOR M J.....APPELLANT

Versus

N K (Suing through his next friend and mother)

S N K.....1ST RESPONDENT

S N K.....2ND RESPONDENT

(Appeal arising from the Ruling and Order of Hon. Z. M. Gichana (Ms) RM delivered on 28th October 2014 in Children's case Number 460 of 2014 at Nairobi.)

RULING

1. This appeal is in respect of the ruling from an order of the Children's Court following an application where the said court dismissed the appellant's preliminary objection raised on the territorial jurisdiction of the said court to hear and determine the suit. The preliminary objection was dismissed by the learned Magistrate on the basis that the issue of maintenance in the present case would still fall under Schedule VII of the Children Act.
2. The facts of the case are that the respondents filed a suit against the appellant being Children's case number 460 of 2014 for school fees, upkeep of the child and maintenance and medical cover for the 1st respondent. The respondents also filed chamber summons dated 26th March 2014 for interim maintenance orders pending the hearing and determination of the suit. The Appellant filed his replying affidavit, a statement of defense and a notice of preliminary objection on a point of law citing that the children's court did not have territorial and other jurisdiction to hear and determine the suit.
3. The appellant in his memorandum of appeal appeals against the whole judgment on the following grounds;
 - i. That the learned Magistrate erred in law and in fact in dismissing and or not allowing the Appellant's/ Defendants preliminary objection dated 23rd June 2014 filed on 25th June 2014.
 - ii. That the learned Magistrate erred in her duties, abdicated and abrogated her responsibility as such by failing to make findings on relevant matters in issue.
 - iii. That the Learned Magistrate erred in law and in fact in failing to consider that the appellant/ Defendant has never at any material or other times resided, worked for gain or had an address in Kenya or otherwise subjected himself to the jurisdiction of Kenyan courts.

iv. That the learned magistrate erred in law and in fact in failing to appreciate/ recognize the Appellant's/defendant's overwhelming and unchallenged evidence that he was/in not a Kenyan citizen or resident within the jurisdiction.

v. That the learned Magistrate erred in law and in fact by not appreciating and finding that appellant/respondent is a citizen and resident of the United Republic of Tanzania.

vi. That the learned Magistrate erred in law and in fact by failing to appreciate that the prayers sought by the respondents/plaintiff are not enforceable against the appellant whether under the children's Act 2001 or Foreign Judgment (Reciprocal Enforcement) Act cap 43 Laws of Kenya or any other law.

vii. That the learned Magistrate erred in Law and in fact by failing to find that it is not in the best interest of the child to allow, continuation of the proceedings whose enforcement of orders/ Judgment thereof is not allowed in law and or would be futile.

The appellant thus prays for orders that;

a. The ruling of the Subordinate's Court delivered on 28th October 2014 be set aside and the defendants preliminary Objection dated 23rd June 2014 be allowed.

b. The Children Case no. 460 of 2014 at Nairobi be struck out/dismissed

c. This appeal be allowed with costs in favour of the Defendant/Appellant.

4. In the appellant's submissions, he contends that the trial court misdirected itself by failing to make findings on relevant matters in issue;

i. That the defendant/ appellant is not a Kenyan citizen or resident within the jurisdiction of Kenyan courts, he has never at any material time or other times resided, worked for gain or had an address in Kenya or otherwise subjected himself to the jurisdiction of Kenyan courts.

ii. That the prayers so sought are not enforceable under the children Act and the Foreign Judgments (Reciprocal Enforcement Act and therefore not in the best interest of the child to allow continuation of proceedings which will otherwise be futile.

5. The main issue raised by the appellant is whether the Children Court in Kenya had jurisdiction in the suit where the defendant in neither a Kenyan citizen nor resident within the jurisdiction of the Kenyan court. The appellant contended that the Children's Act acquires its jurisdiction based on Section 15 of the Civil Procedure Act which provides,

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(3) the cause of action, wholly or in part, arises.

The appellant relied on the case *of Nickson M Chanda v Angela Kamwaira (2009) eKLR* where the

court being guided by section 15 of the civil procedure Act held that,

“the suit filed in Tononoka Children’s Court is as good as nonexistent since it ought to have been filed in Malindi where the defendant resides. This was the case in *NGM V AG eKLR* where the court held that,” I have considered the Applicant’s application and I am satisfied the suit pending at *Tononoka Court Mombasa, Children’s Case No.70 of 2015* ought to have been filed at Meru Chief Magistrate’s Court as the Defendant at the time of filing the suit was residing at Meru.”

6. With regard to the question of enforcement of orders, the appellant submitted that the prayers and orders prayed for cannot be enforced under the Children’s Act and that the Foreign Judgments (reciprocal enforcement) Act. He submitted that section 3 (3)(c) and (e) of the foreign Judgments (reciprocal enforcement) Act provides that

(3) This Act does not apply to a judgment or order—

c. for the periodical payment of money as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependent of the person against whom the order was made

e. in proceedings in connection with the custody or guardianship of children

As such the appellant contends that the prayers so sought would be in vain as they would not be enforceable and as such not in the best interest of the child.

6. The respondent filed written submissions on 2nd November 2016. The issues highlighted were on whether the Kenyan courts have jurisdiction in the matter and whether the Foreign Judgments (Reciprocal Enforcement) Act applies in this case. On the first issue the respondent submitted that jurisdiction is key in any judicial matter. Counsel for the respondent relied the case of *Jeanne W. Gacheche and six others V The Judges and Magistrates Vetting Board and 2 others*. The same was reiterated in *Owners of Motor Vessel Lillian S v Caltex Oil(Kenya) ltd 1989 KLR*. The respondent submitted that the law pertaining to Children’s matters is sui generis and that Article 53(2) of the Constitution provides that a child’s best interest is of paramount importance in every matter concerning the child.

DETERMINATION

This Appeal stems from a Preliminary Objection filed by the Appellant on grounds that the Children’s Court lacked jurisdiction to hear and determine the suit as the appellant was not a party to the jurisdiction of the Kenyan courts and secondly that any order issued by the court would fail in its execution as such orders are not in line with the Foreign Judgments (reciprocal enforcement) Act. A preliminary objection was defined in the celebrated case of *MUKISA BISCUITS MANUFACTURING CO LTD VS WESTEND DISTRIBUTION LTD [1969] E.A. 696* where the courts defined it as

“a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit.”

On this the appellant contends that the Children’s Court derives its jurisdiction from Section 15 of the Civil Procedure Act, however, the Children’s Court derives its jurisdiction from the Children’s Act under Section 73 that states,

There shall be courts to be known as Children’s Courts constituted in accordance with the provisions of this section for the purpose of—

(a) conducting civil proceedings on matters set out under Parts III, V, VII, VIII, IX, X, XI and XIII;

(b) hearing any charge against a child, other than a charge of murder or a charge in which the child is charged together with a person or persons of or above the age of eighteen years;

(c) hearing a charge against any person accused of an offence under this Act;

(d) exercising any other jurisdiction conferred by this or any other written law

The magistrate courts derive their jurisdiction from the same section under sub section ii where it states,

‘the Chief Justice may, by notice in the Gazette, appoint a magistrate to preside over cases involving children in respect of any area of the country.’

The doctrine of *lex specialis derogate generali* is a Latin doctrine that means that the specific law prevails over general law. In **Commercial Tax Officer, Rajasthan V M/S Binani Cement Ltd. & Another** the Indian Supreme court held that,

‘It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the latin maxim of generalia specialibus non derogant, i.e., general law yields to special law...’

The Supreme Court went on and stated that,

The rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction. This rule is particularly applicable where the Legislature has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions. A subject specific provision relating to a specific, defined and describable subject is regarded as an exception to and would prevail over a general provision relating to a broad subject

The provisions provided in the Children’s Act give the Children’s court the necessary mandate to hear and determine matters as set out by the Children’s Act. It is for the above reasons that the appeal that I find no merit in the appeal and it is hereby dismissed with costs. It is so ordered.

Dated, signed and delivered this 8th day of June 2017

R.E. OUGO

JUDGE

In the presence of;

Absent For the Appellant

Mr. MacRonald For the Respondent

MS. Charity Court Clerk