

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.74 OF 2009

C M G.....APPELLANT

VERSUS

M M M.....RESPONDENT

JUDGMENT

The Respondent, M M M, filed suit against the Appellant at the Children’s Court seeking orders from the said court to compel the Appellant to provide maintenance and upkeep for their two (2) children namely I W M born on 24th April 1990 and M M M born on 29th December 1991. The Appellant was duly served. He entered appearance and filed defence to the suit. After hearing the case, the Children’s Court (Kassan RM) ordered the Appellant to pay college fees and related expenses for I W M. He was also required to provide medical cover for the said I W M. He was further directed to provide shelter and other expenses for the said children. The Appellant was aggrieved by the decision and filed an appeal to this court.

In his memorandum of appeal, the Appellant raised several grounds of appeal challenging the decision of the Children’s Court. He was aggrieved that the said court had proceeded to entertain the case when it lacked jurisdiction to do so because the child was over the age of eighteen (18) years. He was aggrieved that the Children’s Court had proceeded to hear the case before an application had been made for the extension of parental responsibility beyond the age of the child of 18 years. The Appellant faulted the trial magistrate for failing to take into consideration an earlier Ruling which had been made on 9th July 2009 concerning the same parties, which in effect rendered the subsequent decision *res judicata*. The Appellant was aggrieved that the Children’s Court had failed to take into consideration that he had no means to provide for the children because he had been declared redundant on medical grounds by his employer. He faulted the trial magistrate for failing to take into consideration that, as a peasant farmer, he lacked means to provide for the children who are already adults. In the premises therefore, he urged the court to allow the appeal, set aside the decision of the trial court, and substitute it with any other relief that the court may deem fit to grant. He further prayed to be awarded costs of this suit.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced and the arguments made by the parties before the trial court before reaching its own independent determination whether or not to uphold the decision of the trial court. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses that testified at the trial (**see Selle –Vs- Associated Motor Boat Co. Ltd. & Another [1968] E.A. 123**). In the present appeal, Mr. Ngige for the Appellant submitted that the trial court ignored the Appellant’s plea which was to the effect that the Children’s Court did not have jurisdiction to determine the case of maintenance of a child who was over the age of 18 years. He stated that another court dealing with the same parties, over the same issue, had ruled that the suit was incompetent because the Respondent had sought maintenance for a child who was over the age of 18 years without first seeking the court’s leave as regard extension of parental responsibility. It was his submission that the subsequent court (the subject of this appeal) had no authority to overrule the previous court which had rendered a decision over the same matter. He was of the view that the trial court erred in proceeding with the case when it had no jurisdiction to do so. He urged the court to allow the appeal. Mrs. Macharia for the Respondent submitted that prior to the court making the orders that is sought to be impeached, it had extended parental responsibility of the Appellant. The trial court therefore had jurisdiction to hear and determine the case. She was of the view that the appeal was in the circumstances an abuse of the due process of the court. She stated that the Appellant was using the court process to avoid his responsibility of paying for the education of his child.

Having re-evaluated the facts of this case, it was clear to the court that the issue for determination is whether the trial court had jurisdiction to hear the maintenance case when it was alleged that no court had extended parental responsibility of the Appellant beyond the child's 18th birthday. The parties to this appeal are essentially seeking the court's interpretation of **Section 28** of the **Children Act** which provides thus:

“(1) Parental responsibility in respect of 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 of 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 for after the child's eighteenth 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.”

In the present appeal, it was the Appellant's case that the trial court, as a court established under the **Children Act**, lacked jurisdiction to hear a case regarding maintenance of a child who was over the age of 18 years where an application had not first been specifically made to extend the parental responsibility of the Appellant. On her part, it was the Respondent's case that she had sought extension of parental responsibility before she made the application for maintenance for the child. In any event, it was her case that the trial court had jurisdiction to hear and determine the matter in dispute which related to the maintenance of the child.

This court has taken the following view of the matter: under **Section 4(3)** of the **Children Act**, this court is required, in exercising its judicial power, to always treat the interest of the child as of first and paramount consideration. That is the consideration too that the trial court was also required to uphold. It appears that the Appellant is labouring under legal misapprehension that the Children's Court did not have jurisdiction to determine a case involving maintenance for a child who is over 18 years when a specific application has not been made by such party for extension of parental responsibilities as envisaged under **Section 28(1)** of the **Children Act**. **Section 28(1)** grants the Children Court jurisdiction ***“if the court is satisfied upon application or of its own motion”*** that special circumstances exist with regard to the welfare of the child that would necessitate such extension to be made. In the present appeal, the special circumstance was that the Respondent required the Appellant to pay the college fees for the child. It is this court's holding that it is not necessary that an application to be made by an applicant for the Children's Court to extend parental responsibility in respect of the welfare of a child. When the court formed the opinion that it would be in the best interest of a child, on its own motion, it can grant such extension of parental responsibility beyond the 18th birthday of the child and proceed to issue an appropriate maintenance order. This was the case in the proceedings of the Children's Court that resulted in the order that is being sought to be impeached in the present appeal. The court cannot fault the Children's Court in the decision that it took because the decision was made with the best interest of the child in mind.

Taking into consideration the entire facts of this appeal, this court has come to the conclusion that the appeal lacks merit. It is hereby dismissed with costs.

DATED AT NAIROBI THIS 2ND DAY OF JULY, 2014.

L. KIMARU

JUDGE