



DS v CWS (Civil Appeal E010 of 2023) [2024] KEHC 592 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 592 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KWALE
CIVIL APPEAL E010 OF 2023
A. ONG’INJO, J
JANUARY 25, 2024**

BETWEEN

DS APPELLANT

AND

CWS RESPONDENT

JUDGMENT

Brief Background

1. The Respondent filed Children’s Case No. E003 of 2022 in the Magistrate’s Court Kwale praying for judgment to be entered against the appellant for an order vesting legal custody, care and control of HPWS, LNWS, and GW upon the Respondent. An order be issued requiring that the children in question reside with the Respondent and the Appellant be ordered to pay Kshs. 475,000/- per month for maintenance of the children in question. The Respondent also prayed for costs of the suit and interest at court rate.

Preliminary Objection by Defendant

2. The Respondent filed a preliminary objection dated 22nd September 2022 seeking that the Respondent’s suit and application dated 26th July 2022 be struck out on the basis that: -
 - a. The children who are subject of the suit are in Malawi
 - b. The courts in Malawi are the courts with eminent jurisdiction
 - c. That the court lacks geographical and/or territorial jurisdiction over the children who are subject of the suit as provided by Section 90(2) of the Children’s Act No. 29 of 2022.



Ruling on Preliminary Objection

3. Upon consideration of the preliminary objection, the trial magistrate overruled the same with reasons that the best interest of the child shall always take precedence above everything else and therefore it was ordered that the parties would proceed to litigate over the substantive issues that have been raised in the suit before the court.

Appeal on Ruling on Preliminary Objection

4. The appellants have approached this court as they are aggrieved by the decision of the trial magistrate dismissing their objection on the following grounds: -
 1. That the Learned Magistrate erred in law and fact by failing to give a definite ruling on whether the court is clothed with jurisdiction over the children in Malawi.
 2. That the Learned Magistrate erred in law and fact by materially disregarding the law with regard to magistrate court territorial jurisdiction.
 3. That the Learned Magistrate erred in law and fact by relying on the court's discretion on a matter of law.
 4. That the Learned Magistrate erred in law and fact by materially disregarding the fact despite taking judicial notice that the Respondent is in Malawi and admitting into the court record a replying affidavit that was improper before the court, a fact substantially canvassed in the appellant's submissions.
 5. That the Learned Magistrate erred in law and fact by failing to rule on the Respondent's affidavit that was improperly before the court and granting the appellant's preliminary objection.
5. The appellant prayed that the appeal be allowed and the ruling delivered on 12th April 2023 in Kwale Children's Cause No. E003 of 2022 be set aside and substituted by an order on whether the Children's Court sitting in Kwale has jurisdiction over the children resident in Malawi.
6. The appeal was admitted and directions taken that the same be canvassed by way of written submissions.

Analysis and Determination

7. The court has considered the grounds of appeal, the preliminary objection raised by the appellant in the trial court, the ruling by the trial magistrate overruling the preliminary objection, and the submissions by the parties herein, and find that the trial magistrate properly arrived at the conclusion that the interest of the children in question was paramount and that the substantive issues raised concerning them should be canvassed before the court determines whether or not the same should be allowed or dismissed.
8. Although the appellant claims that the magistrate's court in Kenya does not have jurisdiction over the children who are residing with their mother in Malawi where the Respondent works, he had also filed Milimani Children's Court Case No. E1156 of 2022 and an application in Tononoka Law Courts seeking to be discharged as a guardian to one of the minors and his application was allowed.
9. The appellant has confirmed in his submissions that the Nairobi matter was declared to be sub judice and it was declared that the matter in Kwale proceeds to full hearing and determination.



10. The many allegations raised by the appellant in support of the Preliminary Objection are issues of fact that can only be determined by way of proof during the hearing of the substantive matter.

11. The appeal herein does not have merit and the same is dismissed. Appellant to bear costs of the appeal.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 25TH DAY OF JANUARY 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Otolo- Court Assistant

Ms. Nelina H/B for Ms. Walubengo Advocate for the Appellant

Mr. Kihira Advocate for the Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Kihira Advocate: I pray for a copy of the judgment

Order: Certified copies of judgment to be supplied to advocates for parties upon payment of copying charges

HON. LADY JUSTICE A. ONG'INJO

JUDGE

25.1.2024

