



**Khaemba v Khambira & another (Miscellaneous Application E191 of 2022)
[2023] KEHC 21341 (KLR) (Family) (9 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E191 OF 2022
MA ODERO, J
AUGUST 9, 2023**

BETWEEN

SAMUEL BARASA KHAEMBA PETITIONER

AND

MAUREEN KHAMBIRA 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The petitioner herein Samuel Barasa Khaemba filed the Notice of Motion application dated October 30, 2022. The said application was quite rambling but what could be deciphered was that the Petitioner was seeking the following orders:-
 - “ 1. That the proceedings in Nairobi Children’s Court Misc. Civil Case No. 1849 of 2020 be stayed pending the hearing and determination of this Petition.
 2. That orders of granting actual care and custody of the three (3) minors to the 1st Respondent be stayed pending the hearing and determination of the Petition.
 3. That a Bench of an even number of Judges be appointed to hear and determine the Petition.
2. The 1st respondent Maureen Khambira filed grounds of opposition dated December 16, 2022. The Hon. Attorney-General who was named as the 2nd respondent did not file any reply to the Motion.
3. The matter was canvassed by way of written submissions. The petitioner filed the written submissions dated January 22, 2022. Neither the 1st nor the 2nd respondents filed any submissions.



4. The Petitioner has sought orders to stay the hearing of Nairobi Children’s Court Misc. Civil Case No. 184/2020 pending the hearing and determination of his Petition.
5. The petitioner has not given concrete reasons why the matter in the Children’s Court ought to be stayed. It must be remembered that this is a matter dealing with the welfare and maintenance of minors. As such any decision made by this court must be made in the best interests of the minors.
6. Article 53 (2) of the Constitution of Kenya 2010 provides that:-

“ a child’s best interests are of paramount importance in every matter concerning the child.”
7. In deciding upon any matter involving a child, courts are obliged to give priority to the best interests of the said child. Section 8 (1) of the Children Act 2022 provides:-

“(8). (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

(a) the best interests of the child shall be the primary consideration;” [own emphasis]
8. I have perused the petition filed by the petitioner. In my view it raises issues which the Children’s Court has jurisdiction to hear and determine. It cannot be in the best interest of the minors to stay the hearing of a case touching on their welfare and maintenance.
9. In MAK -vs- RMA & others [2023] eKLR the court stated as follows:-

“We need to emphasize that it is never in the best interest of a child when the parents are engaged in a protracted court battle. Court battles relating to children are more often than not very selfish in nature and is easy to overlook the psychological and mental harm done to the child in the process.”
10. As a general rule courts do all they can to expedite cases involving minors. To stay and therefore prolong a matter involving a child is never in the best interest of that child. I reiterate that the Children’s Court is best placed to handle matters relating to the custody, Welfare and maintenance of minors in the first instance. I find no valid grounds to stay the case in the Children’s Court and I dismiss this prayer.
11. Secondly the petitioner to stay the orders made by the Children’s Court granting custody care and control of the minors to the 1st respondent. This is a matter that does not require a Constitutional Petition to resolve.
12. If the Petitioner is aggrieved by the orders made in the Children’s Court then the proper course of action would be to file an application for review or to file an appeal to the High Court challenging that decision.
13. Moreover, the court is guided by the ‘Doctrine of Exhaustion’ which provides that a case should not be resolved by deciding a Constitutional question when it can be resolved in another forum.
14. The record indicates that numerous cases involving the petitioner and the 1st respondent have been filed in various courts being:-
 - (i) Nairobi Children’s Case No. 184 of 2020
 - (ii) Nairobi Chief Magistrates Court Misc No. 1939 of 2021



- (iii) Makadara CMCC No. 1747 of 2021.
15. These cases all need to be resolved and there is no justification to add a Constitutional Petition to the list of pending cases involving the same parties. This would be merely to cloud issues.
 16. In short I find no reason to stay the orders of custody made in the Children's Court. The Petitioner has other remedies which he is at liberty to explore.
 17. Thirdly, the petitioner prays that this matter be referred to The Hon. The Chief Justice to set up a Bench of Judges to hear and determine the Petition which in his view raises substantive issues for interpretation.
 18. As far as I can tell the issues raised in the Petition include entitlement of spouses in a marriage, child rights, custody and division of matrimonial property. The above issues are neither new nor novel. There exist a Plethora of decisions both in the Children's Court and in the High Court touching on said issues.
 19. These are all issues which can be properly addressed using the existing statutory framework. I find no grounds to merit setting up a special bench of judges.
 18. Finally, I find no merit in this petition. The same is dismissed in its entirety. Each side to meet its own costs.

Dated in Nairobi this 9th day of August, 2023.

MAUREEN A. ODERO

JUDGE

