



REPUBLIC OF KENYA



KENYA LAW
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**SMK v HS (Miscellaneous Case E170 of 2021)
[2022] KEHC 10077 (KLR) (Family) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 10077 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

MISCELLANEOUS CASE E170 OF 2021

MA ODERO, J

APRIL 22, 2022

BETWEEN

SMK PLAINTIFF

AND

HS DEFENDANT

RULING

1. Before this Court for determination is the notice of Preliminary Objection dated 25th October 2021. The objection was filed by the Respondent HS against the summons dated 22nd September 2021 filed by the Applicant SMK. The Preliminary Objection was premised on grounds That:-

- “ 1. The issues and matters raised the said Application are directly and substantially in issue between the same parties herein in High Court Miscellaneous Application No. E. 454 of 2021 filed on 15th September 2021.
2. The subject Application is consequently defective,frivolous, vexatious and an abuse of the process of this Honorable Court for the foregoing reasons.”

2. The Objection was canvassed by way of written submissions. The Respondent filed the written submissions dated 20th January 2022 whilst the Applicant relied upon her written submissions dated 25th February 2022.

Background

3. Vide an order dated 25th August 2021 warrants of Arrest were issued by the Senior Principal Magistrate Mandera, in Childrens Case No. 20 of 2014. As a result of said warrants the Respondent was arrested and was committed to civil jail.



4. On 15th September 2021, the Respondent filed in the Civil Division of the High Court Misc Application No. E454 of 2021 by which he sought a stay of execution of the orders issued by the Mandera Principal Magistrate. The Respondent secured the orders of stay and was released from civil jail.

5. Thereafter the Applicant filed the chamber summons dated 3rd November 2021 by which she sought the following orders:-

“ 1. Spent

2. Pending the interpartes hearing and determination of this application and the Applicant’s notice of motion dated 22nd September 2021, a warrant of arrest be and is hereby issued for the arrest of the Respondent herein Habat Shaikh and his immediate production before this Honourable court in order that the Respondent may show cause why he should not be committed to civil jail on account of his refusal to pay the outstanding child maintenance debt in the sum of Two Million Eight Hundred Thousand Shillings only (2,800,000).

3. Pending the interpartes hearing and determination of this application and the Applicant’s notice of motion dated 22nd September 2021 the Respondent be and is hereby restrained from issuing and sending unwarranted threats to the Applicant.

4. A warrant of arrest be and is hereby issued for the arrest of the respondent herein and his immediate production before this Honorable court in order that the Respondent may show cause why he should not be committed to civil jail on account of his refusal to pay the outstanding child maintenance debt in the sum of Two Million Eight Hundred Thousand Shillings only (2,800,000).

5. Directions be issued for the urgent hearing of this application together with the Applicant’s Notice of Motion dated 22nd September 2021.

6. The Respondent be and is hereby directed and compelled to pay the entire outstanding maintenance amounts owed to the Applicant and minors herein in the sum of Two Million Eight Hundred Thousand Shillings only (2,800,000) as at July 2021 to date failing which the Respondent be committed to civil jail until such time that the Respondent shall comply accordingly.

7. Costs of this application be borne by the Respondent.”

6. In response the Applicants chamber summons the Respondent filed this Notice of Preliminary objection.



ANalysis and Determination

7. I have carefully considered the Preliminary Objection as well as the written submissions filed by both parties. The definition of what constitutes a preliminary Objection was set out in the case of *Mukisa Bisucuit Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA as follows: -

“.....a preliminary objection consists of 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 of the suit.....”

8. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also captured the legal principle when it stated as follows:-

“A preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. The Applicant submits that the present matter is sub-judice as there exists another case being Misc E 454 OF 2021, which is still pending in the High court involving the same parties. That the said case raises the said issues as those raised in the present application.

10. According to the Respondent the Applicant ought not to have filed this application but rather should have awaited the determination of Misc 454 of 2021.

11. The sub judice Rule is codified in Section 6 of the [Civil Procedure Act](#) Cap 21, Laws of Kenya as follows:.

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

12. Therefore in order to establish the subjudice rule it must be shown that-There exist two suitsThe matter in both suits must be directly and/or substantially the same.The parties in the two suits are the same or are parties under whom they claim.The suits must be pending before courts having jurisdiction in Kenya to grant the same relief.

13. In *David Ndii & others v Attorney General & others* [2021] eKLR, a bench of five Judges stated inter alia that:-

“...The rationale behind this provision (Section 6 of the [Civil Procedure Act](#)) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts,” (own emphasis)

14. The application dated 15th September 2021 as filed by the Respondent in Misc No. 454 of 2021 seeks the following orders: -

“1. Spent



2. That orders issued by Justice said J Chitembwe on 16th September 2021 be reviewed and vacated.
 3. That the Defendant/Respondent be compelled to immediately provide maintenance of Kenya Shillings one million and five hundred thousand (Kshs 1,500,000) for the minors herein being unpaid maintenance debt pending hearing of this application.
 4. That the Defendant/Respondent pay school fees for the minors and related expenses thereof as per the school fees structure.
 5. That costs of this Application be borne by the Defendant/Respondent.”
15. Whereas the two applications involve the same parties the application in Misc 454 of 2021 seeks for a review of the orders made on 16th September 2021 as well as seeking for payment of arrears of maintenance amounting to Kshs 1,500,000.
 16. However the present summons dated 22nd September 2021 is seeking committal of the Respondent to civil jail for the failure to pay arrears of child maintenance amounting to Kshs 2.8 million. Therefore the orders being sought in the two applications are not entirely similar.
 17. Moreover I note that Misc 454 of 2021 involves prayers relating to the welfare of minors. As such the proper forum for said application is the Family Division of the High Court Not the civil Division.
 18. Finally my finding is that the application dated 22nd September 2021 is not sub-judice. I find no merit in the Preliminary Objection dated 25th October 2021. The same is dismissed in its entirety. Each party shall pay its own costs.

DATED IN NAIROBI THIS 22ND DAY OF APRIL 2022.

MAUREEN A. ODERO

JUDGE

