



**EMK v RNW (Miscellaneous Cause 10 of 2022)
[2022] KEHC 13205 (KLR) (Family) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS CAUSE 10 OF 2022
AO MUCHELULE, J
SEPTEMBER 29, 2022**

BETWEEN

EMK PETITIONER

AND

RNW RESPONDENT

RULING

1. The applicant EMK and the respondent RNW had a marriage relationship which resulted into the birth of BN on October 27, 2018. The custody, access and maintenance of this child is the subject of a raging dispute between the parties before the children court at Nairobi in Cause No 1677 of 2019. When the instant petition dated June 22, 2022 was filed in the Constitutional and Human Rights Division in Petition No E262 of 2022, and later transferred to this court, it would appear that the applicant was running away from possible punishment by the children court. She had on January 20, 2022 been found guilty of contempt of the orders of access issued by the court, and asked for purge before being granted audience. On June 8, 2022 the respondent had taken out a notice to show cause why the applicant should not be committed to civil jail. There has been no appeal against any of the orders by the children court, including the judgment that was delivered against the applicant on April 30, 2020. It is quite clear that all these orders have aggrieved the applicant, and this is the reason that she has approached this court by way of this petition.
2. In the meantime, the applicant reported to the police that the respondent had sexually assaulted the child. The police are investigating the report. Her case is that under those circumstances the respondent should not access the child.



3. The present petition seeks the following orders:-

- “(1) A declaration that the child’s rights to live with and to be cared for by his parents, to be protected from abuse and inhuman treatment, to be treated with dignity, parental care and protection as guaranteed by article 53 of the Constitution have been violated by the respondent.
- (2) A declaration that the child’s rights to inherent dignity protected, right to freedom and security of the person including the right not to be subjected to torture in any manner whether physical or psychological, and the right not to be treated in a cruel in human and degrading manner as guaranteed by articles 28 and 29 of the Constitution have been violated by the respondent.
- (3) A declaration that the child’s and the petitioner’s right to be treated equally before the law and the right not to be discriminated as guaranteed by article 27 of the Constitution have been violated by the respondent.
- (4) An order that following the numerous violations of the child’s and the petitioner’s right as above by the respondent and the violation of the maintenance orders of April 30, 2020 and September 17, 2021 the respondent shall be excluded from having access to the minor and the respondent shall no longer have the shared actual custody on alternate weekends from Friday 4:00 pm to Sunday 5:00 pm, shared school holidays and that actual custody of the child be granted to the petitioner.
- (5) An order compelling the respondent to pay the arrears of maintenance of kshs150,000/= and monthly maintenance of kshs15,000/= as decreed on September 15, 2021 to the petitioner.
- (6) An order for stay of proceedings in Children’s Case No. 1677 of 2019. An order directed at the Officer Commanding Station (OCS) at Pangani police station to complete the investigations concerning the petitioner’s complaint on the minor’s sexual assault recorded on OB 64 of March 11, 2022 and file a report with the court.
- (7) A declaration that the child is entitled to full enjoyment of all fundamental rights and freedoms available to all Kenyans as enshrined in the Constitution of Kenya.
- (8) A declaration that the child is entitled to parental care and protection provided under article 53 of the Constitution.
- (9) A declaration that the child and the petitioner are entitled to the right to access to justice and that the right of access to justice entails the right to enjoy the fruits of litigation by having he respondent pay maintenance and right upon discovery of new and important matter or evidence which after the exercise of due diligence was not within her knowledge or could not be produced by her at the time when the decree was made to set aside, vary and review the decree of September 17, 2021 and the order of January 20, 2022.”



4. The petition and application were opposed by the respondent who, among other things, questioned the jurisdiction of this court to entertain this dispute while the children court was seized of the same and when this court's appellate jurisdiction had not been invoked.
5. I note that in the notice of motion filed with the petition, there was a prayer that the OCS Pangani police station should be directed to complete the investigations concerning the complaint about the minor's alleged sexual assault in the hands of the respondent. One, the police are an independent service whose work cannot be directed by the court. Article 245(4) of the Constitution provides as follows:-

- “(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—
- (a) the investigation of any particular offence or offences;
 - (b) the enforcement of the law against any particular person or persons; or
 - (c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.”

Secondly, the inspector general of police or the OCS Pangani police station were not made parties to these proceedings for them to be heard before any orders are given against them.

6. The Children Act, 2001 has since been amended. The proceedings were commenced under the old Act whose section 73 gave civil and criminal jurisdiction over all matters relating to Children to the children court. As was submitted by the counsel for the respondent, this court does not have original jurisdiction to entertain matters relating to children. The High Court has only appellate jurisdiction as provided under section 80 of the Act. Such appellate jurisdiction was not invoked before this court. The dispute over the minor relating to its custody, care, maintenance and sexual assault are still going on in the children court.
7. I am aware of the powers of this court under article 165(3) of the Constitution, but I am also alive to the general restraint attached to the exercise of this jurisdiction where the Children Act has provided to the children court sufficient and adequate mechanism to deal with the questions raised in this petition over the minor. The children court should be given the necessary space to exhaustively deal with the questions, and the party aggrieved having the liberty to challenge the orders on appeal to this court. I notice that prayer 9 of the petition seeks the setting aside, varying and/or review of the decree of September 17, 2021 and order of January 20, 2022 by the children court. The basis for the request is that there is new and important matter or evidence that was not available at the time the orders were made. The power to review an order or decree on account of new and important matter or evidence that was not available at the time of the order or decree is available to the children court. Such application and evidence should be placed before that Court.
8. Lastly, this petition is not a challenge on the manner the children court is carrying out the proceedings relating to the parties and/or the minor. If that is true, then it would be an abuse of the court for the applicant to have the same dispute and the same issues being litigated both in the children court and this court.
9. In conclusion, for want of jurisdiction, I strike out with costs the petition and notice of motion.



DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 29TH DAY OF SEPTEMBER
2022.

A.O. MUCHELULE

JUDGE

