



J.R.B.S v P.M.K.A & another; P.M.K.A & 3 others (Interested Parties) (Miscellaneous Cause 15 of 2022) [2022] KEHC 13135 (KLR) (Family) (22 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13135 (KLR)

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

MISCELLANEOUS CAUSE 15 OF 2022

AO MUCHELULE, J

SEPTEMBER 22, 2022

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
25, 27, 28, 31, 50 AND 53 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION
OF SECTION 3H OF THE MENTAL HEALTH ACT**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION
OF SECTIONS 5 (2) AND 11 OF THE HEALTH ACT, 2017**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS
25, 26, 28, 29, 30, 32, 43 AND 46 OF THE DATA PROTECTION ACT**

AND

IN THE MATTER OF SECTION 4 AND 6 OF THE CHILDREN ACT, 2001

BETWEEN

J.R.B.S PETITIONER

AND

P.M.K.A 1ST RESPONDENT

M.W. KIBE RESIDENT MAGISTRATE 2ND RESPONDENT

AND

P.M.K.A INTERESTED PARTY

OASIS HEALTH SPECIALITY HOSPITAL INTERESTED PARTY



**KENYA MEDICAL PRACTITIONERS AND DENTIST
COUNCIL INTERESTED PARTY
OFFICE OF DATA PROTECTION COMMISSIONER INTERESTED PARTY**

RULING

1. There is a dispute in Milimani Children Court Cause No E787 of 2022 over a minor N K A between the father P M K A (the 1st respondent) and the mother J R B S (the petitioner). The two had a relationship following which the child was born on August 26, 2018. In a plaint filed by the 1st respondent in the trial court he sought legal and actual custody of the child. It was his case that the petitioner was unsuitable parent to have the actual custody of the child because she had been diagnosed with bipolar disorder which was a mental illness. He stated that she was incapable of making right decisions concerning the child. Although she was on medication, he stated, she was emotionally unsuitable and was exposing the child to emotional anguish, violence and torture. He further claimed that the petitioner's home in South C had become unhealthy for the child because the petitioner takes her medication here thus exposing the child to possible drug abuse. Lastly, that the petitioner abuses alcohol, amongst other drugs, and brings multiple sexual partners into the home and that the partners have contact with the child. He sought that the child be allowed to live with the petitioner's sister V K M who has two children and who lives 5 km from the school where the child goes. He meets all the needs of the child.
2. On May 27, 2022 the trial court considered the chamber summons that had been filed along with the plaint on May 26, 2022 and issued exparte orders that the petitioner's sister V K M, who was then living with the child, continues to retain possession and custody of the child pending the hearing and determination of the chamber application. The application was set for hearing on June 14, 2022. The court asked that a comprehensive children officer's report be filed setting out the best/suitable custody arrangements for the child.
3. The petitioner filed a notice of preliminary objection dated August 30, 2022 in response to the chamber application. Her case was that the trial court lacked jurisdiction to issue an order for her examination regarding her mental or physical illness.
4. At the same time, and being aggrieved by the exparte interim orders, the petitioner went to the Constitution and human rights division of the High Court alleging the infringement of his constitutional rights and fundamental freedoms under articles 25, 27, 28, 31 50, and 53 of the Constitution; sections 4 and 6 of the Children Act, 2001; section 3H of the Mental Health Act, 2017; and sections 25, 26, 28, 29, 30, 32, 43 and 46 of the Data Protection Act. His complaint was that Dr P A K (1st interested party) and Oasis Health Speciality Hospital (2nd interested party), who had the legal obligation to safeguard her medical records, had breached the obligation and thereby contravened her constitutional rights to privacy and dignity by allowing the 1st respondent to access her medical records which he had used in the case before the children court, and on basis of which he had obtained the exparte interim orders. She claimed that based on the medical records the 1st respondent had obtained exparte orders without her being afforded the right to be heard. She further alleged that she had consequently been discriminated against as her suitability as a parent to the minor had been compromised. Her case was that the court that had the jurisdiction to deal with matters mental health was the High Court, and not the children court. He claimed that the medical records were confidential both under the Mental Health Act and the Data Protection Act, and that her confidentiality had been breached.



5. In the petition that she filed in the constitutional and human rights division she sought the following prayers:-

- a) A declaration that the 1st respondent's access, acquisition, marking and production of the petitioner's medical records as evidence in Children's Case No E787 of 2022 without the petitioner's consent violated the petitioner's rights under articles 27, 28, 31 and 50 of the Constitution of Kenya.
- b) A declaration that the making and production of exhibit PMK-4 which constitutes medical records obtained in a manner that violates the petitioner's rights and fundamental freedoms rendered the petitioner's trial unfair and was detrimental to the administration of justice.
- c) A declaration that the 2nd respondent's order issued on May 27, 2022 violates the petitioner's rights under article 50 of the Constitution of Kenya.
- d) An order be issued expunging the exhibit marked PMK-4 attached to the supporting affidavit sworn by P M K A on May 26, 2022 and filed in Children's Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi) from the court record and subsequently that the said exhibit be irrecoverably destroyed.
- e) An order of prohibition be issued directing the 2nd respondent and all other magistrates and judges who will preside over Children's case No E787 of 2022 in Nairobi not to admit into their records any of the documents in the Exhibit marked PMK-4 attached to the supplementary affidavit sworn by PMKA on the May 26, 2022 and filed in Children's Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi)
- f) An order be issued setting aside the order dated May 27, 2022 issued by Hon M W Kibe (Ms) RM presiding over Children's Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi)
- g) An order be issued that Children's Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi) be transferred to the High Court of Kenya, Milimani law courts family division for hearing and determination.
- h) An order for the 1st respondent to pay general and punitive damages to the petitioner for breach of the petitioner's rights as guaranteed under article 28 and 31 of the Constitution of Kenya 2010.
- i) Costs of the petition.
- j) Interests on (h) and (i) above.
- k) Any other relief that the court may deem necessary for the ends of justice."

6. Along with the petition was the present notice of motion seeking the following orders:-

- a) That this application be certified urgent and heard *ex parte* in the first instance.
- b) That at all times this matter be heard in chambers and that the file be kept under lock and key.



- c) That this honourable court be pleased to stay the proceedings before the Chief Magistrate Court at Nairobi in Children’s Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi) pending the hearing and determination of the application.
- d) That this honourable court be pleased to stay the proceedings before the Chief Magistrates Court at Nairobi in Children’s Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi) pending the hearing and determination of the petition.
- e) That this honourable court be pleased to transfer Children’s Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi) to the High Court of Kenya, Milimani law courts family division for hearing and determination.
- f) That this honourable court be pleased to issue an order expunging the exhibit marked as PMK-4 in the supporting affidavit sworn by Peter Munyiri Kaka Arina on the May 26, 2022 and filed in Children’s Case No E787 of 2022 - Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi pending the hearing and determination of this application.
- g) That this honourable court be pleased to issue an order expunging the exhibit marked as PMK-4 in the supporting affidavit sworn by Peter Munyiri Kaka Arina on the May 26, 2022 and filed in Children’s Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi) pending the hearing and determination of the petition.
- h) That this honourable court be pleased to set aside the *ex parte* orders issued by the 2nd respondent on May 27, 2022 in Children’s Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi) denying the applicant access to the minor pending the hearing and determination of this application.
- i) That this honourable court be pleased to set aside the *ex parte* orders issued by the 2nd respondent on May 27, 2022 in Children’s Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi) denying the applicant access to the minor pending the hearing and determination of the petition.
- j) That in the alternative of (h) and (i), this honourable court do grant the petitioner unlimited access to the minor who is subject of the Children’s Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi). pending the hearing and determination of this application.
- k) That in the alternative of (h) and (i), this honourable court do grant the petitioner unlimited access to the minor who is subject of the Children’s Case No E787 of 2022 (Peter Munyiri Kaka Arina v Juanita Roxanna Bosibori Siagi). pending the hearing and determination of the petition.
- l) That costs of the application be provided for.”

7. The constitutional and human rights division transferred this petition and application to this court for hearing and disposal.



8. This court has supervisory jurisdiction under article 165(6) of the *Constitution* over the children court, but such jurisdiction should be used circumspectively and not as a tool to unduly interfere with the children's court mandate to hear and determine all matters relating to the custody and well-being of children (*Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others* [2020]eKLR). I am mindful that the appellate and revision powers of this court have not been sought or invoked.
9. It is also important to point out that, what is before the children court is basically the question whether the petitioner is a fit parent to have the child's actual custody. The court is investigating the issue. The orders that were issued were *ex parte* and interim. Following the orders, the petitioner has questioned the jurisdiction of the court. That jurisdictional issue has not been heard or determined. The petitioner or this court cannot anticipate what the trial court will say.
10. Lastly, the same question of jurisdiction (whether or not the trial court can deal with the question touching on mental ability of the petitioner to live with the child) is the same that was raised before that court. It is an abuse of the process to have the same issue to be litigated before the children court and this court at the same time. If the children court finds against the petitioner on the issue, and on the issue whether the 1st respondent illegally obtained the petitioner's medical reports, this court can be approached on appeal.
11. This court cannot stop, stay or set aside the proceedings before the children court, as that court is properly seized of the dispute regarding who will have actual custody of the minor child. This court would be interfering with the jurisdiction and mandate of the children court under the *Children Act*.
12. In conclusion, for want of jurisdiction, I dismiss with costs both the petition and the application, and direct the children court to expeditiously deal with the dispute before it over the child.

DATED AND DELIVERED IN NAIROBI THIS 22ND SEPTEMBER 2022.

A.O. MUCHELULE

JUDGE

