REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CONSTITUTIONAL PETITION NO 7 OF 2019

JMN.....PETITIONER

VERSUS

MWG - MOTHER OF

1. JK – NAME INITIALS OF THE CHILD

2. RN - INITIALS OF THE CHILD

3. EW - INITIALS OF THE CHILD

ALL SUED THROUGH THEIR MOTHER

MWG (initials of mother's name).....RESPONDENT

(*Arising from the ruling of Hon. M.I.G. Moranga, PM, dated 25/9/2018 in the Chief Magistrate's Court at Kitale in the Children's Case No. 75 of 2012,* MWG v JMN)

RULING

Pursuant to the provisions of articles 1, 2, 3, 22, 23 (2), 26, 27, 339 (2), 34, 36, 40 and 50 of the 2010 Constitution of Kenya and sections 1A, 3, 3A, Orders 1 rule 1, 3 rule 10, 59 rule 2, 22 rule 5, 26 rule 1 and all enabling provisions of the law, the petitioner petitioned this court to declare his trial in the magisterial court as irregular and unconstitutional.

Following the said trial, the petitioner was directed to continue paying school fees and the balance of maintenance in the sum of shs 291,850/= which was due and owing. The order also required the petitioner to show cause how he intended to settle the same or be committed to civil jail.

The petitioner has supported his petition with 17 grounds and a 21 paragraphs supporting affidavit; which I find unnecessary to set out herein in view of what I will shortly state below in this ruling.

The petitioner has prayed that the sum of shs 300.000/=, which he had paid be refunded to him.

The respondent, (who was the mother of the three minors), although served with the petition did not file any replying affidavit.

I find from the prayers of the petitioner that the petition is incompetent. The petitioner ought to have appealed against the ruling and order of the magistrate's court within 30 days from the date of the decree or order; as set out in section 79G of the Civil Procedure Act (Cap 21) Laws of Kenya.

The ruling and order cannot be challenged by way of a petition.

I find as persuasive the decision of the Environment and Land Court (Angote, J) court in *Kibwana Ali Karisa & Another v. Said Hamisi Mohamed & 3 Others [2015] e-KLR,* in which that court pronounced itself as follows:

> "*Having lost the case, the petitioner's only recourse was to file an appeal challenging the said decision and not to file a petition in this court.*
>
> *It is inappropriate for the petitioner to challenge the decision of the magistrate by way of a petition in a matter where the said*

magistrate had the requisite jurisdiction just because the time within which to lodge an appeal has lapsed. That, in my view, is an abuse of the court process."

Furthermore, I find that the instant ruling and order were delivered on 25/9/2018 by the magisterial court. If the appellant was aggrieved by the said ruling and order he ought to have filed his appeal within 30 days from the date of the ruling. It was not open to him to start a fresh suit by way of a petition in the High Court. The law requires litigants to follow the prescribe procedure both in terms of initiation and appeals or review; for any departure from the prescribed procedure amounts to an abuse of the court process.

In the premises, I find that the petition is incompetent and is hereby struck out with no order as to costs.

It is for the foregoing reasons, that I found it unnecessary to set out the grounds and the averments in the supporting affidavit of the petitioner.

Ruling signed and dated and delivered at Kapenguria via Post Office Box 117- 30-600 Kapenguria this 30th day of March 2021

J. M. BWONWONG'A

JUDGE

In the Presence of

Mr. Okodoi -Court Administrator