



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. E042 OF 2021

ANN.....APPELLANT/APPLICANT

VERSUS

R M K.....RESPONDENT

RULING

AN, the Applicant herein has brought this Notice of Motion dated 26th May 2021 seeking stay of execution of the orders of the lower court (Honourable M. A. Otindo (Ms) Principal Magistrate) dated 25th May 2021 in Milimani Children's Court Case No. 251 of 2020 pending the hearing and determination of this Notice of Motion and pending the hearing and determination of this Appeal. The impugned orders granted the RMK, the Respondent herein, actual and physical custody of the minors CK and RK and denied the Applicant access to the children. A Notice of Preliminary Objection (P.O) dated 6th July 2021 has been raised in respect of the Notice of Motion to the effect that the Applicant's Appeal is sub judice in nature as the Applicant has a pending Appeal in Civil Appeal No. E033 of 2021 before this court (Hon. Lady Justice Achode) touching on the same parties and on the same matter.

This court directed on 8th July 2021 that the P.O be disposed of first. Rival submissions were given orally by counsel for the Applicant and for the Respondent on 8th July 2021. Mr. Swaka, learned counsel for the Respondent submitted that the Appellant is in the habit of abusing court process; that the Appellant has filed an Appeal before this Court (Hon. Lady Justice Achode) on the same parties and on the same issues; that the Appellant is yet to prosecute that Appeal; that the Appellant has come to this court with a similar appeal and application and that the intention of the Appellant is to cloud the issues surrounding the children in this matter. It was submitted that every time the court grants orders in this matter, the Appellant appeals against those orders but fails to prosecute the appeal. It was submitted that the Appellant has failed to inform this court of the other pending appeal involving the same parties and raising the same issues; that the Appellant is forum-shopping and is not serious in taking care of the children.

Mr. Masake for the Respondent submitted that the P.O raises issue of sub judice but the annexures filed together with the P.O and the Replying Affidavit raise substantial issues. Mr. Masake pointed out that Section 6 of the Civil Procedure Act is clear on matters of sub judice. He submitted that the Appellant is seeking to appeal against the orders of the lower court on different decisions and that this court has been moved on a different issue than what has been raised before Hon. Lady Justice Achode; that it is an urgent matter and that the Respondent has been wasting this court's time. He urged that this court moves to hear and determine the pending appeal on merit. He urged that the P.O be dismissed and the matter be heard on merit.

In response Mr. Swaka submitted that Mr. Masake did not submit on any steps taken in both appeals or whether they have complied with orders of Justice Achode.

I have considered this matter. Section 6 of the Civil Procedure Act provides as follows on the issue of sub judice:

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.

Addressing the same issue in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [202] eKLR)* the Supreme Court of Kenya stated as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The

purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

I have had occasion to read High Court Civil Appeal No. E044 of 2021 now pending before my sister Hon. Lady Justice Achode. Even going by the number of the court file, it is clear to me that the file before the other court was filed earlier than this Appeal. That matter is not before me but for ends of justice to be met, it was imperative to read the file if only to acquaint myself with the issues argued in this matter before me given that both parties did not give detailed submissions on the two files. I noted that in Civil Appeal No. E033 of 2021, there is a Notice of Motion dated 20th April 2021 seeking stay of orders of the lower court (Hon. M. A. Otindo (Ms) Principal Magistrate) issued on a different date in 16th April 2021. The orders in this file that the Applicant seeks to have stayed are dated 25th May 2021. Civil Appeal No. E033 of 2021 contains a Memorandum of Appeal dated 20th April 2021 challenging the orders of the lower court issued on 16th April. 2021. In the matter before me, the orders being challenged are dated 25th May 2021 in both the Notice of Motion and the Memorandum of Appeal dated 26th May 2021. I need to add that the Record of Appeal has not been filed in the matter before me.

It is true that the orders being appealed from are different in that they were issued on a different date. However, both orders in the two appeals concerns the same minor children and the same parties. In both Memorandums of Appeal, one issue remains constant: that the lower court is accused of granting the orders without taking into account the report by the Children's Officer. What this court finds disturbing is that the Applicant, through her counsel, did not disclose to this court that there is another appeal pending in this court differently constituted. Both Appeals and Applications were done in a span of one month. It would have been prudent to mention to either of the courts that there is another file and apply to have the two matters consolidated. Whichever way we may wish to look at the issues herein, there is a high probability that the issues touching on both files in respect of the two minor children may attract orders that may conflict, the very situation that the decision of the Supreme Court of Kenya cited above on the rule of sub judice addresses. Although the orders appealed from may not be the same 100% given that they address different orders of the lower court, the fact that the issues in the two appeals surround the same minor children and affect the same parties means that both courts handle the two matters before them very carefully to avoid compromising on the best interest of the two children by giving conflicting decisions.

Turning on the issue of what constitutes a P. O, I now make reference to the case of *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696*, where it was held that:

“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. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

The issue raised in the P.O before me is that this matter is sub judice for the reasons I have stated above. It is my considered view that sub judice issue is a matter of law which if argued as a preliminary point may dispose of the suit. Consequently, it is my finding that although the orders appealed from were issued on different dates, they affect the same minor children and the issues touch on the same parties in this matter. For that reason this P.O succeeds. Mindful that I am dealing with issues affecting children and for ends of justice to be met, and to avoid the danger of conflicting decisions in both cases, I am giving the Applicant two options, either (a) to move the court hearing the earlier Appeal, being Civil Appeal No. E033 of 2021 to have the two Appeals consolidated and heard together; or (b) to have this court stay the proceedings in Civil Appeal No. E042 of 2021 until the Civil Appeal No. E033 of 2021 is heard and determined. To allow the Applicant time to make her choice, I will pend these proceedings until the orders of this court are complied with. Orders shall issue accordingly.

Dated, signed and delivered this 22nd July 2021.

S. N. MUTUKU

JUDGE