



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC.CIVIL APPLICATION CASE NO. 22 OF 2018

FRANKLINE YAOLA MANYONGE PLAINTIFF/RESPONDENT

VERSUS

LUCY KURGAT DEFENDANT/APPLICANT

RULING

The application pending before the court is a notice of motion application dated 7th March 2018. The applicant seeks that there be a stay of execution of the orders issued against him by the trial court on 7th March 2018, 31st October 2017 and 12th February 2018.

Additionally, the applicant seeks that all other orders emanating from that suit be varied, suspended or set aside pending the hearing and determination of the application.

Applicant also seek that there be a stay of proceedings in ELDORET CHILDREN'S CASE NO. 63 OF 2017. He further seeks to be allowed to remit Ksh. 5000/- per month (varied from Ksh. 9,500 per month) as well as meet the minor's medical needs as per the medical cover whose insurance card is in the Respondent's possession.

The Application is premised on the grounds that;

- i) An ex-parte order was issued on 14th March 2017 ordering the defendant to remit Ksh. 33,460 per month to cater for therapy, medication and the house-helps salary yet the applicant had not had a chance to be heard on the issue of his financial ability.
- ii) That the orders sought are defective and hence the claims emanating thereof are defective. A notice to show cause scheduled for 26th February 2018 was followed by a warrant of arrest of 5th March and the Applicant was committed to civil jail for 7 days.
- iii) On the medical expenses, the applicant states that the child is a beneficiary of his medical cover and the claim for these sorts of payment is unwarranted. In addition, he discredits the genuineness of the decision by the Respondent to have the child undergo therapy at home, saying that this is a gimmick to extort money from him.
- iv) He stated that the fact that pleadings of ELDORET CHILDREN'S CASE NO. 54/2017 were served on the Respondent by the court was prejudicial since the same was filed before ELDORET CHILDREN'S CASE NO. 63/2017
- v) The Applicant cites a non-disclosure of material fact where he states that the minor is medically covered hence the orders for therapy and medicines were uncalled for. He stated that it was unfair to seek to deduct medical expenses from his salary and yet he had a cover.
- vi) The Applicant states that no prejudice will be occasioned to the Respondent if the orders sought herein are granted as prayed as the Applicant will continue providing for the minor as aforestated.
- vii) The Notice of Motion was supported by the Affidavit of Franklin Yaola where he claims that the amount claimed from the Notice to Show cause as ordered by the trial court are a ploy to extort money.
- viii) The Applicant claims that as of 19th November 2017 the Respondent produced a letter from one Dr. Francis Njenga claiming that the minor underwent therapy three times a week at a cost of Ksh. 2000 per session.
- ix) Applicant notes that the receipts and attendance schedule are suspect because among other reasons the letter indicates that the sessions cost Ksh. 6000 while the letter referred to above indicates that each session cost Ksh. 2000/-

x) Applicant states that the documentary evidence issued was not looked through by the trial court.

A preliminary objection has been raised by the Respondent against the said application of which is the issue for consideration herein. In Court, counsel for the applicant stated that an interim stay of committal orders had been issued pending the hearing of the applicant's application.

The preliminary objection is based on the grounds that the application is fatally defective. The court was approached through a miscellaneous application which has no basis in law and hence the suit is nonexistent.

The applicant cited the case of *Joseph Kibowen Chemjor vs. William (2013) ekr* where it was stated that miscellaneous applications are preferred where rights of parties are not determined and disputed. In this case, counsel submitted that there are rights of parties to be determined i.e. rights of the minor.

It was stated that the application is sub-judice and offends *Section 6* of the *Civil Procedure Act* following the fact that the case ELDORET CHILDRENS CASE NO. 63 OF 2017 is still pending. Counsel says that this case needs to be sorted out before other issues are raised. Counsel urges that the preliminary objection be upheld.

Counsel for the respondent stated that on an order issued on 31st October 2017, the amount payable was reduced from Sh. 33,460 to Sh. 9,500 per month as cost of maintenance.

On sub-judice counsel for the applicant states that the application is not a new proceeding. He states that the application sought stay of proceedings in ELDORET CHILDRENS CASE NO. 63 OF 2017 where the amount claimed by the respondent included medical expenses of the minor yet the applicant had demonstrated that the child is medically covered. Counsel described what it means when a matter is sub-judice and stated that the application questioned the legality of orders of an existing suit and averred that the matter is not fatally defective.

He further stated that the only way to seek orders in an existing suit is through a miscellaneous application. The instant application sought to find out whether committal orders are legitimate and therefore the Preliminary Objection is misplaced.

Counsel for the applicant stated that the Preliminary Objection deals only with matters of law while the order pursues matters of fact such as varying the amount from Ksh. 9,500/- to Ksh.5,000/-. She stated that the preliminary objective has merit and ought to be allowed.

Following this, counsel for the Respondent sought a temporary stay pending the ruling, saying that unless such stay was granted, the ruling would be rendered nugatory. Counsel for the applicant opposed this citing that if a stay is granted, the minor stands to suffer.

Counsel for the respondent told the court that she would ensure Ksh. 5000/- is paid pending ruling. The court granted prayer (d) of the application pending the ruling on the matter on the Preliminary Objection.

Prayer (d) sought stay of proceedings in **ELDORET CHILDRENS CASE NO. 63 OF 2017** pending hearing and determination of the application.

In determining issues raised in the Preliminary objection, I have considered that a preliminary objection, as was held in the case of *MUKHISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A. 696*,

“... 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 has to be ascertained or if what is sought is the exercise of judicial discretion”.

Moreover, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued, may dispose of the suit.

In the Supreme Court case of *AVIATION & ALLIED WORKERS UNION KENYA V KENYA AIRWAYS LIMITED & 3 OTHERS APPLICATION NO. 50 OF 2014* the court held that;

This Court has had occasion in the past, to consider the nature of a preliminary objection. The Court endorsed the long-standing jurisprudence set in the *Mukisa Biscuit case*, on the nature of a preliminary objection.

“The principles in the *Mukisa Biscuit* case were restated by this Court in the *Joho* case [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. 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 has to be ascertained or if what is sought is the exercise of judicial discretion’.”

In the instant case, the matters raised are clearly points of fact and not points of law as prescribed above. The preliminary objection application is therefore unmerited and is dismissed with costs to the Applicant, Frankline Yaola Manyonge.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of March 2019.

In the absence of:-

Defendant/Respondent

Plaintiff/Applicant

And in the presence of Mr. Mwelem - Court clerk