



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

MISC. CIVIL APPL. NO.30 OF 2019

JWN.....APPLICANT

V E R S U S

LNN.....RESPONDENT

R U L I N G

The applicant JWN filed the Notice of Motion dated 13/3/2019 seeking 8 prayers. He is aggrieved by the order made by Hon. Mwangi SRM, in which she gave Judgment in favour of the respondent, LNN.

As per the order extracted and dated 2/12/2018, the applicant was ordered to pay Kshs.49,500/= to the respondent on or before 31/12/2018 in default, be committed to jail and he was also ordered to pay fees for the subject minor.

The application is expressed to be brought under Articles 22, 23, 50, 53, 159 and 105 of the Constitution, Rules made under the Constitution, Sections 22, 24 and 111 of the Children's Act.

On 22/3/2019, M/S. Ndegwa Wahome, Advocates for the respondent filed a notice of preliminary objection to the Notice of Motion. The objection is to the effect that the application is incompetent, bad in law, fatally defective and an abuse of the court process; that the application contravenes provisions of the law; that the orders sought are incapable of being granted in that:

- (a) There is no suit instituted in this court upon where the application will be stand up;***
- (b) That the trial court pronounced itself in Children Case No.67/2013 on 26/11/2014 and on 5/10/2016 and then 13/12/2018 and so far, no appeal has been preferred;***
- (c) That the applicant has sought orders against persons who are not parties to this suit;***
- (d) That the counsel did not exhibit a copy of the judgment or ruling that was sought to be reviewed.***

Counsel urged the court to strike out or dismiss the application.

Ms. Mwaniki, counsel who appeared on behalf of the respondent added that since the application is hinged on the Rules made under the Constitution, 2013, an application should have been brought pursuant to Rule 10 which should be a petition drawn under Form F of the schedule; that this application has not complied with those Rules. The counsel also submitted that if the Notice of Motion was brought under the Civil Procedure Rules, then it should have been filed as a suit under the Civil Procedure Rules; that the application arises from Children's Case No.67/2013 from which no appeal has been preferred; that though the applicant seeks review and setting aside of the trial court's orders, this is not the procedure to be followed.

Counsel also observed that prayers 2, 4, 7 and 8 are sought against persons not parties to this application and hence no orders can issue against them. Counsel therefore urged the court to strike out the application.

Mr. Sigilai, counsel for the applicant opposed the preliminary objection and submitted that the preliminary objection is a waste of the court's time, frivolous and an abuse of court process. He urged that under Order 2 Rule 14 and 15 Civil Procedure Rules, pleadings cannot be struck out for want of form. He also relied on Order 51 Rule 10 which provides that an application cannot be defeated for want of form or failure to cite provisions of the law; that he has invoked all the enabling provisions of law, though this is a case that relates to children's matters and Children Act; that the motion is a suit in a broad sense since it's a Miscellaneous Application; that the Constitution has provided avenues through which an order of the court can be challenged and this court has supervisory jurisdiction over the trial court and therefore able to deal with the matter.

In a rejoinder, Ms. Mwaniki submitted that the procedures put in place are meant to enable a party know the case which they are going to meet, which the applicant has not done.

I have considered the rival submissions of counsel. Most glaring in the application by the applicant is prayers 2, 4 and 8 which are directed at the Chief Magistrate's Court Nyahururu. Prayer 7 is directed at Joyce Mwaniki, the respondent's counsel. The Chief Magistrate and the respondent's counsel are not parties to this application. Even if orders were made against them, they cannot be enforced against them. Further, the said C.M.'s court and the counsel, not being parties to this Notice of Motion, have not been served with the application and cannot therefore defend themselves. It means that, if the application proceeds as is, then, they would be condemned unheard contrary to the cardinal rules of natural justice, that all parties to a suit must be given a fair hearing to be heard. The application would not see the light of day for that reason.

As pointed out by the respondent's counsel, if the applicant wishes to challenge the process by which the C.M.'s court arrived at its decision, then the applicant must come by way of Judicial Review. On the other hand, if the applicant only wishes to challenge the merits of the decision of the trial court, then it should be by way of appeal or review.

So far, there is no appeal filed. A Notice of Motion cannot stand on its own especially if it is seeking substantive orders as demonstrated in the Notice of Motion. A Notice of Motion must be anchored on a suit.

If the applicant seeks a review under the Civil Procedure Rules, then the application would not encompass so many prayers. It would be limited to orders issued by the trial court. The application would have been brought under Order 45 Civil Procedure Rules. The grounds upon which a review are made are; where there is a mistake, or an error apparent on the face of the record or other sufficient reason. It would be expected that the applicant would be specific and plead the above grounds in order for the court to review an order.

The applicant has also invoked the provisions of the Constitution. The applicant invoked Article 22 of the Constitution which grants every person the right to move the High Court for enforcement of fundamental rights and freedoms. The rights under the Bill of Rights are very specific and a petitioner who comes before the court must set out with some level of particularity of the specific right allegedly breached and how it is violated. The principle was set out in the case of *Anarita Karimi Njeru v Republic No.1 (1979) 1 KLR, 54* and which was echoed in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) e KLR*: the court said:

“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

In *Mumo Matemu Case*, the Court said:

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

Looking at what is before the court in the form of the Notice of Motion, there is no semblance of a Constitutional Petition pleading breach of fundamental rights. The applicant cannot expect the court go on a fishing expedition to try and weed out what the applicant wants. What of the respondent, how does she know what to respond to. The respondent has not been given a fair notice on what to respond to.

As Clearly pointed out, the application arises out of a children's matter. Children's matters are governed by the Constitution and the Children's Act. In matters relating to children, the primary consideration is the welfare of the child not the rights of the applicant. The applicant has to move to court appropriately.

In my view, the application before the court is all jumbled up. The applicant is represented by counsel who knows the law and procedure. There is no excuse why counsel should approach the court in this way. The matter before the court cannot be fairly adjudicated upon by the court in the manner it is presented. I uphold the preliminary objection that the application is incompetent, and an abuse of the court process. It is hereby struck out with costs to the respondent.

Dated, Signed and Delivered at NYAHURURU this 30th day of April, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Sigilai for the applicant

Ms. Ng'ethe holding brief for Ms. Mwaniki for respondent

