



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 2 OF 2018

PM.....PLAINTIFF/APPLICANT

VERSUS

IB.....DEFENDANT/RESPONDENT

RULING

1. Peter Marshall herein referred to as the plaintiff moved to this court through a plaint dated 15th May 2017 and filed on 18th May 2018 seeking orders as follows:

(a) That this honourable court do confirm the judgment delivered on 31st December 2007 by the Supreme Court of New York by Honourable Justice Laura E. Drager in Index No. [xxxxxx]/2006 I,B vs PM.

(b) That upon prayer one being granted this honourable court be pleased to vary the said judgment and vest custody of the children to the plaintiff.

(c) That this honourable court be pleased to order the defendant to pay the sum of Kshs.100,000/= to the plaintiff as child maintenance.

(d) That this honourable court be pleased to order the defendant to pay 50% of the children's reimbursed school fees and other school related expenses.

(e) That this honourable court be pleased to restrain the defendant from removing the children from this jurisdiction without the written consent of the plaintiff as stipulated.

(f) That all other provisions of the stipulation of settlement remain valued and valid and in force.

2. On 19th July 2018, the plaintiff filed a notice of motion of even date seeking several orders inter alia; an order granting the plaintiff/applicant leave to serve summons to enter appearance upon the defendant in Somalia; that the defendant be restrained from removing their children PGM and JBM from the jurisdiction of this court and the republic of Kenya; that the defendant be ordered to pay a sum of US Dollars 2,500 as child support.

3. Consequently, the prayer restraining the movement or removal of the children from the jurisdiction of this court and republic of Kenya was issued on 31st July 2018 on interim basis. On 3rd August 2018, the respondent/ defendant entered appearance. Subsequently, on 25th September 2018 the defendant/respondent filed a response by way of an affidavit titled 'supporting affidavit which I believe was a mistake as it should have had the heading of a 'replying affidavit'. The same was challenging the application of 19th July 2018 and the entire suit. At Paragraph 15 of the said affidavit, the respondent raised the issue of lack of jurisdiction by this court to entertain the application and generally the entire suit hence sought for the same to be struck out.

4. She further termed the suit and the application as being frivolous, misconceived and an abuse of the court process. She therefore intimated of her intention to raise a preliminary objection in limine seeking to struck out the suit and the application.

5. In a supplementary affidavit sworn on 8th October 2018 and filed on 9th October 2018, the applicant contended that the court has jurisdiction to entertain the matter. On 1st February 2018, the plaintiff filed yet another application dated 12th February 2019 seeking unlimited access to the children. The application was certified urgent and a date for hearing to be taken at the registry.

6. When parties appeared on 7th March 2019, Mr. Wetangula appearing for the respondent sought to have the preliminary objection on lack of jurisdiction heard first. Parties agreed to canvass the preliminary objection first before the hearing of the main suit and the pending application.

7. It was Mr. Wetangula's submission that, the issue before court is a matter that has fully been adjudicated upon by a court of competent jurisdiction which is the Supreme Court of New York. Mr. Wetangula opined that, the said court having determined the suit and entered judgment on 31st December 2007 this court cannot therefore vary or review the said judgment.

8. To buttress his case, counsel argued that under the Foreign Judgments (Reciprocal Enforcement) Act Chapter 43 Section 3(3) c, d and e, foreign judgments touching on matrimony, child custody and maintenance are not provided for.

9. To bolster his case, counsel made reference to the case of AZU vs ZUM (2015) eKLR where Justice Musyoka held that:

“The judgment sought to be adopted for enforcement is a foreign judgment which falls under section 3(3) c, d and e of the Foreign Judgments(Reciprocal Enforcement) Act. It follows that the Act does not apply to the said judgment and the same is therefore not available for adoption and enforcement by the court under the said Act”.

Mr. Wetangula further referred to the case of Macharia Kamau and Another vs Kenya Commercial Bank Ltd and 2 others (2012) eKLR which further recognizes that a court without jurisdiction cannot entertain a suit.

10. Mrs. Wambugu appearing for the applicant opposed the preliminary objection stating that, by the respondent filing a replying affidavit, they have acquiesced to the fact that this court has jurisdiction. Counsel relied on the provision under Article 53 (2) of the constitution stating that this court has powers to entertain this suit in the best interests of the children and justice. Mrs. Wambugu made reference to the case of AOG vs SAJ and another (2011) eKLR where the court of appeal overturned a high court decision in which the court had ordered return to U.K a child who was allegedly abducted from U.K.

Determination

11. I have considered the preliminary objection herein and the rival submissions by both counsel. It is common ground that the suit herein filed by way of a plaint seeks to have this court adopt and confirm a foreign judgment delivered on 31st December 2007 by a New York Supreme Court in which the applicant and respondent both American citizens then residing in America entered into a settlement(stipulation) for divorce, children custody and maintenance. The said settlement was adopted by the said court as judgment and physical or actual custody of the children (subject of this case) given to the respondent and the plaintiff granted legal custody. Further, the plaintiff was to have the right of visitation to his children besides paying US dollars 2,500 per month in child support. It is also not in dispute that the plaintiff is currently residing in Nairobi while the respondent is working in Somalia with UN but has rented a house in Nairobi where the children are staying.

12. The plaintiff is seeking the judgment entered in New York to be adopted, confirmed and then be varied in terms of his prayers spelt out in the plaint.

13. The key question is whether this court has jurisdiction to entertain the suit. In the celebrated case of Owners of the Motor Vessel “Lillian’s” vs Caltex Oil (Kenya) Ltd, 1989) KLR 1 it was held that:

“whenever a court arrives at the conclusion that it has no jurisdiction, then it should down its tools and move no further step”.

Equally, in a commonly referred to case on preliminary objections Mukhisa Biscuit Manufacturing and Co. Ltd vs West End Distributors (1969) EA 46 the court observed that

“.....a preliminary objection raises a pure point of law, which is argued on the assumption that the facts pleaded by either 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”.

14. Similarly in Hassan Ali Joho and another vs Suleiman Said Shabal and 2 others SCK Petition No. 10/2013 (2016) eKLR the court held:

“..... a preliminary objection consists 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.

Same position was held in Macharia Kamau and another vs Kenya Commercial Bank Ltd and 2 others (Supra).

15. The procedure and requirements governing adoption or confirmation of foreign judgments is “the Foreign Judgments (Reciprocal Enforcement) Act Cap 43. Section 3 (3) of the said act provides –

(a) Whereby a sum of money is payable or an item of movable property is deliverable in respect of taxes or other charges of a similar nature or in respect of a fine or other penalty;

(b) To the extent to which it provides for the payment of a sum of money by way of exemplary, punitive or multiple

damages.

(c) For the periodical payment of money as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of the person against whom the order was made;

(d) in a matrimonial cause or matter, or determining rights in property arising out of a matrimonial relationship, not being a judgment referred to in paragraph (a) or (b) of Sub-section (1), whereby a sum of money is payable or claim of movable property deliverable;

(e) in proceedings in connection with the custody or guardianship of children;

(f) in proceedings concerning the administration of the property or affairs of a person who is incompetent or incapable of managing and administering his property and affairs;

(g) in a matter of succession to, or administration of, estates of deceased persons whereby a sum of money is payable or movable property is deliverable.

(h) in a matter of social security or public assistance which a sum of money is payable by or to a public authority or fund.

16. From the above quoted provision, it is apparent that the subject of the suit herein falls squarely under Section 3 (3) c, d and e of the aforesaid Act. It then means that this court cannot adopt a judgment concerning exempted areas which unfortunately are the subject of the suit herein. I do agree with Mr. Wetangula that this court is precluded from handling anything touching on the issues in controversy. Further, I do agree with J. Musyoka's holding in the case of AZU vs ZUM (Supra) that foreign judgments covering on matrimonial property, custody or maintenance of children is not a subject for deliberation by the adopting court pursuant to the Foreign Judgments (Reciprocal Enforcement) Act.

17. Parliament in its wisdom thought it wise to exclude such judgments from enforcement and reciprocity. It cannot be said to be unconstitutional nor in contravention of Article 53 (2) of the Constitution which underpins the importance of the best interest of a child principle. Even assuming that this court had jurisdiction which it does not have, how can an adopting court review a foreign judgment and set new terms on custody and maintenance as if it is exercising appellate jurisdiction or revision under Order 45 of Civil Procedure Rules? What would happen when the parties eventually go back to America? Which orders will be applicable? Those are hard questions which actually justifies in my opinion refusal to assume jurisdiction on adoption of foreign judgment touching on such issues affecting matrimonial property and children. I do not see any relevance in the case quoted by Mrs. Wambugu in the case of A.O.G vs S.A.J and Another (Supra) as the subject is totally different and circumstances are dissimilar given that it was concern with a criminal activity in this case abduction.

18. Unfortunately, Mrs. Wambugu did not comment or submit on the requirements for adoption of foreign judgment as provided under the Foreign Judgments (Reciprocal Enforcement) Act and the exceptions thereof.

19. For the above reasons stated, the suit herein filed by way of a plaint dated 11th May 2017 and the subsequent applications thereof are hereby struck out and the orders arising thereof set aside. This being a family matter, each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2019.

J.N. ONYIEGO

JUDGE