



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARSEN**

**CIVIL APPEAL NO. 57 OF 2016**

**Z Z.....APPELLANT/RESPONDENT**

**VERSUS**

**AMB.....APPLICANT/RESPONDENT**

**RULING**

1. By Notice of Motion Application dated 29th January 2018, the Applicant AMB (who is also the Respondent) in the instant appeal, sought orders *inter alia* that:-

(1) That pending the hearing and determination of this application inter partes there be there be a stay of all proceedings in Children Case No. 23 of 2017 FA & MZ suing through ZZ vs AMO pending at Lamu Principal Magistrates Court.

(2) THAT (at the sic! inter-parties hearing of this application there be a stay of all proceedings in Children Case No. 23 of 2017 FA & MZ suing through ZZ vs AM pending the hearing and determination of this Appeal.

(3) THAT cost of this application be costs in the cause.

2. The application was supported by the Affidavit of AMB, the Applicant/Respondent, dated 29<sup>th</sup> January 2018, where he averred that the Appeal was filed against the judgment in Kadhi Case No. 23 of 2016 where the Honourable Kadhi granted the Appellant custody of the children and further directed the Respondent to pay Ksh. 5,000/- per month for maintenance. That while the appeal was still pending, the Appellant proceeded and filed another suit before the Children's court at the Lamu Principal Magistrate Court for maintenance of the children where she obtained interim orders requiring him to pay KSh. 15,000/- per month as maintenance pending the determination of the case. That as a result there are two conflicting orders for maintenance.

3. The Applicant/Respondent stated that the Kadhi having determined the issue of custody and maintenance, the children's court at Lamu should not have entertained the same issue. He further averred that the issues for determination in the appeal and the case before the Children's court in Lamu are substantially the same and that the Appeal would conclusively determine with finality all issues relating to maintenance of the children. He stated that if the children's case was allowed to proceed to its conclusion while the appeal was still pending, the appeal would be rendered meaningless. He averred that the appeal was filed before the children's case in Lamu and therefore the appeal ought to be determined before any proceedings in the children's court at Lamu.

**Respondent/Appellant's case**

4. The Respondent/Appellant opposed the application through her Replying Affidavit dated 19<sup>th</sup> April 2018, where she averred that the Kadhi's court was not a children's court and therefore acted outside its jurisdiction in delving into children maintenance issues. That the Kadhi's court did not take a lot of matters into consideration and she was therefore justified in approaching the children's court at Lamu as the Respondent herein was not catering for their maintenance. She further stated that the appeal and the suit at the children's court were distinct from each other.

5. In addition, the Respondent/Appellant averred that after she obtained interim orders in the children case No. 23 of 2017, the Respondent instructed his advocate on record to file a application dated 3<sup>rd</sup> November 2017 which was similar in word and substance to the current application before this court and which application had not been heard and determined.

6. That the current application is res judicata as it had been filed earlier and was still pending before another court and that the Applicant/Respondent was engaged in forum shopping so as to avoid his responsibilities and should not deceive the court into barring the children's case at Lamu.

**Applicant/Respondent's supplementary Affidavit**

7. The Respondent in replying to the Appellant's Replying Affidavit, filed a Supplementary Affidavit dated 31<sup>st</sup> May 2018 where he stated that although the Kadhi's Court was not a children's court as defined in the Children's Act No. 8 of 2001, nothing prevented it from hearing and making a determination on a matter before it as provided in Section 73(d)(iii) of the Children's Act. He further stated that the Appellant having filed the current appeal, it was not open to her to file another case for custody and maintenance of the same children. That that it was the Appellant who was engaged in forum shopping as there are two existing court orders.

### Submissions

8. Both parties agreed to dispose the Application by way of written submissions. The Applicant/Respondent filed his submissions dated 31<sup>st</sup> May 2018 on the 5<sup>th</sup> June 2016, while the Appellant filed her submissions dated 1<sup>st</sup> July 2019 on the 3<sup>rd</sup> July 2019.

### Applicant/Respondent's submissions

9. It was the Applicant/Respondent's submission that the custody and maintenance of the children had been determined by the Kadhi's court and therefore the Children's court at Lamu should not have entertained the suit as it raised the same issues and; that the Appellant being aggrieved with the judgment had already filed the current appeal. That the judgment and decree of the Kadhi's court was still in force as it had not been set aside.

10. The Applicant/Respondent argued that the provisions of section 6 & 7 of the Civil Procedure Act barred the children's court at Lamu from entertaining the suit as the matters for determination in the Children's court at Lamu were substantially the same as those in Kadhi's court and in this appeal and further, that the suit at the children's court is an abuse of the court process. He submitted that if the children's case at Lamu proceeded it would render the appeal nugatory and there would be two conflicting orders and urged the court to stay the suit pending the determination of this appeal.

### Respondent/Appellant's submissions

11. On her part the Respondent/Appellant submitted that the appeal against the judgment of the Kadhi's court was in relation to the dissolution of the marriage between the Respondent and herself and it did not raise an issue of the custody and maintenance of the children and therefore the appeal would not be rendered meaningless if the children's case proceeded. She submitted that she had filed a divorce petition in the Kadhi's court but that when issuing his judgment the Kadhi proceeded to issue custody and maintenance orders. That section 73 and 118 of the Children's Act gives the children's court absolute jurisdiction to hear children's matter and therefore the Kadhi's court did not have jurisdiction and she was thereby justified in filing the children's case in Lamu. She cited the case of **J.K.L vs C.O.O Div Cause No. 52 of 2013 (2014) eKLR**.

12. In addition, she submitted that the present application was an abuse of the court process as the Applicant/Respondent had filed a similar application in the children's case at Lamu seeking similar orders and which application was yet to be determined. That the Applicant/Respondent had further failed to notify the court of the said application and was attempting to hoodwink the court into barring the proceedings in the children's court. She prayed that the court dismisses the Application. She relied on the case of **Ndungu Mugoya & 473 others vs Stephen Wangombe & 9 others 2005) eKLR**.

### Analysis and Determination

13. I have considered the application, supporting affidavit and the replying affidavit. I have also given due consideration to the submissions filed by the parties. The only issue for determination is whether Children Case No. 23 of 2017 in the Principal Magistrates Court at Lamu is *res sub judice* and if so whether the same should be stayed pending the hearing and determination of the appeal before this court.

14. **Section 6** of the Civil Procedure Act, Cap. 21 (CPA) provides that:

**“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.”**

15. In **Munawar Shuttle County Government of Kilifi & 2 others [2018] eKLR Constitutional Petition 6 of 2017**, Korir J stated with respect to the principle of *res sub judice* thus:-

**“The purpose of Section 6 is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter. It is meant to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same dispute. 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. The conditions to be met by a party who seeks to stay suit (res sub judice) under Section 6 of the CPA is that there must be two suits or more. One suit should have been instituted previously and the other instituted subsequently. Both suits should be pending before courts of competent jurisdiction and must be between the same parties or their representatives. The subject matter of the suits should be same.”**

16. I am persuaded by the above authority on the applicable principles. In the present case, it is clear that the parties in the appeal before this court and in the Children's Case No. 23 of 2017 at the Principal Magistrate's Court in Lamu are the same. It is further clear that the two suits are still pending before courts of competent jurisdiction in the High Court in its Appellate jurisdiction and the Children's Court in its original jurisdiction.

17. As to which of the two suits was instituted first, a cursory glance at the pleadings in each case shows that the plaint in the children's case before the Principal Magistrate's Court at Lamu was filed on the 18<sup>th</sup> July 2018; while the Memorandum of Appeal was filed on the 28<sup>th</sup> July 2017. It is clear that the suit before the children's court was instituted before this appeal.

18. On the issue of whether the subject matter is the same in both suits, the court in **Barclays Bank Of Kenya Ltd vs. Elizabeth Agidza & 2 Others [2012] eKLR** held that:

**“...the entire subject matter in the subsequent suit must be covered by the previously instituted suit. That proposition of law is informed by the extract from the learned text in Judicial Hints on Civil Procedure Vol. 1 by Justice Kuloba where at page 42 it is stated:-**

**‘Authorities are clear that ‘matters in issue’ does not mean any matter in issue in the suit but has reference to the entire subject matter in controversy, it is not sufficient that one or some issues are in common. The subject matter of the subsequent suit must be covered by the previously instituted suit and not vice versa. Sir Newnham Worly, VP, in *Jadna Karsan –Vs- Harnam Singh Bhogal (1953) 20 EACA 74 at 76 (10<sup>th</sup> March, 1953).*’**

**... if a substantial part of the matters in issue of controversy in the subsequent suit is covered by the previous suit, Section 6 should be invoked to save the previous judicial resources.”**

19. I have perused the Memorandum of Appeal dated 26<sup>th</sup> July 2017 as well as the plaint in the Children's case No. 23 of 2017 dated 17<sup>th</sup> July 2017. It is evident that this appeal contests the judgment of the Kadhi's court solely in respect to the divorce and does not contest any issues on the custody and maintenance of the children of the parties; while the plaint is strictly on the issue of the custody and maintenance of the children. It is evident that the subject matter before this court and in the children's court are not substantially the same and therefore the doctrine of *res sub judice* does not arise.

20. The Applicant/Respondent has further argued that the Principal Magistrates' court in Lamu and the Kadhi's Court in Garsen had issued conflicting orders. On this, I observe that the Respondent has filed an application in the children's court challenging the legality of the suit and therefore I shall not say anything further on the matter.

21. Having come to the conclusion that the two suits are not substantially the same, I find that the application dated 29<sup>th</sup> January 2018 lacks merit and is hereby dismissed.

22. The orders of this court (Ongeri J) issued on 12<sup>th</sup> February 2018 staying proceedings in the Lamu PMC Children Case No. 23 of 2017 be and are hereby discharged.

23. This being a family matter, I decline to award costs

24. I further direct the parties in the appeal to take the necessary steps to prosecute the appeal expeditiously.

25. Orders accordingly.

**Ruling delivered, dated and signed at Garsen this 30<sup>th</sup> day of September, 2019**

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**R.LAGAT KORIR**

**JUDGE**

In the presence of S. Pacho, Court Assistant, Mr. Nyongesa for Mr. Gekanana for the Respondent/Appellant, and in the absence of Mr. Mwarandu for the Applicant/Respondent