



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 116 OF 2016 (A)**

**MISCELLANEOUS CIVIL APPLICATION NO.116 OF 2016 (B)SKELETON FILE**

**IN THE MATTER OF CHILDREN’S CASE NO. 1196 OF 2014 (NAIROBI)**

**AND**

**IN THE MATTER HIGH COURT MISCELLANEOUS APPLICATION NO. 87 OF 2015 (NAIROBI)**

**AND**

**IN THE MATTER OF CIVIL APPEAL NO. 288 OF 2015 (NAIROBI)**

**AND**

**IN THE MATTER OF K S (MINOR)**

**A N C..... APPLICANT**

**VERSUS**

**C K S..... RESPONDENT**

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**RULING**

**PLEADINGS:**

On 23rd September 2016, Counsel, Muniafu advocate for the Applicant A N C filed under certificate of urgency an application brought under Order 39 rule 1 & Oder 51 Rule 1 of CPR 2010 and sought orders of the Court to issue to the Department of Immigration to prevent the Respondent C K S ID [particulars withheld] from leaving jurisdiction and he deposits his pass port in Court and/or deposit sufficient security in Court and summons issue for him to attend Court to show cause why he should not furnish security for his attendance in Court for the following reasons;

a) The Respondent had/has the following pending cases;

**i) Children Case 1196 of 2014**

**ii) High Court Misc App. 87 of 2015**

**iii) High court Civil App. 288 of 2015**

- b) The Respondent resigned from his employment in *[particulars withheld]* in preparation for his travel to Australia.
- c) He disposed of his property in Lavington-village in preparation to leave.
- d) He intended to leave the jurisdiction of this Court before the hearing and determination of cases centred on the welfare of one K S L a child alleged to be both the Applicant and Respondent.

The applicant's affidavit supporting the application she deposed that she is mother to the child in question. She sought in **Children Case 1196 of 2014** (Nairobi) from the Respondent maintenance of the child. The Respondent denied paternity and the Trial Court ordered DNA testing to confirm the issue of paternity. The Court order of March 2015 was annexed to the application and marked **ANC5**. A further order of DNA testing was also issued by the Trial Court annexed to the application and marked **ANC6**. As a result of non compliance of Court order she filed **High Court Misc App 87 of 2015** on contempt of Court orders. The Respondent in turn filed **High Court Civil Appeal 288 of 2015**. Thereafter, she learnt from a member of the Respondent's family that he was about to leave the jurisdiction of this Court and hence filed the instant application.

When the application was served as per the Court order of the Duty Court Hon. Justice W. Musyoka and scheduled for hearing on 29th September 2016, the Respondent filed Preliminary Objection on 20th September 2016.

On the hearing day, the Respondent did not appear in Court, there was no information or communication on his absence. In the midst of the Counsel for the Applicant addressing the Court, Counsel for the Respondent came in Court and announced the Respondent left the country. He did not file any documents to controvert the pending application. This Court was to start hearing with the Preliminary Objection. There was an Affidavit of Service filed on 28th September 2016 to confirm service of pleadings. This Court in the absence of presence of Respondent and /or pleadings filed, dismissed the Preliminary Objection and granted orders sought *ex parte*.

Later both Counsel for the parties sought from the Court a chance to resolve the matter and allow the parties to discuss the matter with a view to reaching a settlement. After mentions on 9th March and 27th April 2017 the Applicant's Counsel informed Court that consultations were fruitless and submitted to court on the application and sought court orders. The matter was reserved for Ruling. As the Court was in the process of rendering Ruling on the matter another Court File was opened with regard to the matter after certificate of urgency was filed on 16th November 2017.

By the time of writing the Ruling to confirm the Court orders issued *ex parte* on 29th September 2016, the Applicant/Respondent filed under certificate of urgency the application filed on 16th November 2017 and the same on being placed before the Duty Court was referred to this Court for hearing and determination.

The Applicant states that the Respondent vide application dated 22nd September 2016 approached this Court and obtained orders barring the Applicant from leaving the country. At the time the orders were obtained, the Applicant had already left the country and consequently the orders were overtaken by events.

The orders are still recorded with Immigration officials embarrassing the Applicant and infringing his fundamental rights as a Kenyan hence the need to have a specific order stating those previous orders are not in force.

The Applicant/Respondent in his supporting affidavit confirmed that the Respondent filed the various

cases in subordinate Courts and sought maintenance for the minor subject matter from him as father of the child.

By an application dated 15th October 2014, the Respondent filed the application and he opposed it as he had no parental responsibility over the child who is the subject matter of this matter.

Pending the hearing and determination he underwent DNA testing at the Government Chemist to ascertain if he was father to the child. He attached the results of the DNA annexed as **CKSI 1** a report dated 22nd December 2014 which states as follows;

***The conclusion and opinion is that C K S is excluded as the biological father of the child K.S.H the Respondent's child.***

The orders sought by the Applicant /Respondent are to review, vary and/or set aside the orders issued on 29th September 2016.

### **ISSUES**

From the Court record, there are 2 applications;

- a) Application filed on 23rd September 2016 seeking the Respondent to be restrained from leaving the country pending the Court cases; complying with Court orders of Children Court and High Court; Proving he is not Father to the child subject-matter of this matter by conduct of DNA testing; in the absence of which he makes payment for the child's maintenance.
- b) To ensure presence and participation in hearing and determination of the matters at hand in the best interests and welfare of the child.
- c) Application filed on 16th November 2017 seeks review, vary or setting aside of this Court's orders of 29th September 2016 restraining/preventing the Applicant from leaving the country due to pending cases and the issue of the child unresolved.

### **DETERMINATION**

**This matter relates to the best interests and welfare of the child as stipulated by the following provisions;**

**Article 53 (2) of the Constitution** which is to the effect that:

***A child's best interests are of paramount importance in every matter concerning the child.***

**Section 4 (2) (3) of the Children Act** which outlines the principle that ought to guide the Courts in determining matters where the welfare of children is at stake. The said provision states as follows:

***(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.***

***(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.***

***(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-***

***(a) Safeguard and promote the rights and welfare of the child;***

***(b) Conserve and promote the welfare of the child;***

***(c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.***

The interests of the child are provided by parents or persons with parental responsibility as provided by Section 23 and 24 of the Children Act 2001.

With the above background, the Applicant and Respondent are mandated by law to provide and protect the child subject-matter of this case.

The Respondent by dint of the Court orders from Children Case 1196 of 2014 did not/has not complied with Court order of 29th January 2015 by Hon. A. Nyoike SRM Children Court and 23rd

March 2015 by Hon D.K. Kuto SRM Children Court both ordered mandatory DNA testing to establish paternity of the Respondent as father of the child or not.

In spite of these Court orders, the Respondent took flight from the Court's jurisdiction and by design or default failed to attend and/or provide instructions/proposals on the upkeep of the child.

Hence this Court granted the orders *ex parte*.

The above circumstances disclose Respondent's contempt of all Court orders in Children Court and High Court over the same subject matter. This contempt ought to be purged.

To the Application filed under certificate of urgency on 16th November 2017, the Respondent disclosed that he travelled back to Kenya after he took flight despite Court orders of 29th September 2017 to prevent/restrain/bar his exit from the Court's jurisdiction. Upon his exit he was restrained from leaving pursuant to the said orders and therefore had/has to have the same vacated, varied, set aside and reviewed as the same are in contravention of his constitutional rights and a basis of unwarranted embarrassment. The Respondent attached a DNA report of 22nd December 2014 concluding that he is not the father of the child. Yet the Children Courts issued orders for DNA testing in 2015. If DNA was conducted in 2014 as shown by instant report, why was it not presented to the relevant courts at the time? How did the same parties; child and mother who according to the said report presented themselves for DNA pursue similar orders in both Children Court & High Court?

**With regard to the existing orders; the Applicant ought to obey court orders; attend Court and/or present any challenges for the Court to consider on merits instead of disregarding orders.**

**In the case of;**

**ECONET WIRELESS KENYA LTD VS MINISTER FOR INFORMATION & AND COMMUNICATION OF KENYA AND ANOTHER [2005] 1 KLR 828,**

where the Learned Judge expressed the view thus:

***“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”***

To this application it is premature to determine in the absence of *interpartes* hearing. Hence, the Court sought the Applicant/Respondent be served to appear in Court on 27th November 2017 for directions on the way forward. Secondly, this application has arrested Ruling of this Court that was due and pending.

**DISPOSITION**

**1. Therefore at this stage the application for review, varying, setting aside or vacating shall await to hear from parties with regard to compliance of Court orders and the orders for the upkeep of the child if the Respondent is father of the child.**

**2. As to the Court orders of 29th September 2016 they are valid orders of this Court pursuant to *ex parte* proceedings after the Respondent absconded from the Court's jurisdiction. The orders are not time-bound or limited to a specific incident but to existing and prevailing circumstances.**

**3. Further Mention on 27th November 2017**

**SIGNED AND DELIVERED AT NAIROBI THIS 27TH NOVEMBER 2017**

**M. MUIGAI**

**JUDGE**