



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 41 OF 2016**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION  
AND PROTECTION OF FUNDAMENTAL RIGHTS & FREEDOM OF THE INDIVIDUAL)  
HIGH COURT PRACTICE AND PROCEDURE RULES 2013**

**ARTICLES 22, 23, 159, 165, 259, 53 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE CHILDREN'S ACT 2001 SECTIONS 211, 206, 193, 192, 246, 245, 207  
LAWS OF KENYA**

**AND**

**IN THE MATTER OF CHILDREN'S CASE NO. 226 OF 2016 AT TONONOKA MOMBASA**

**BETWEEN**

**A M M (SUING AS THE MOTHER AND NEXT**

**FRIEND OF THE MINOR S M). .....PLAINTFF/APPLICANT**

**VERSUS**

**[Particulars withheld] SCHOOL AND BOARD OF**

**GOVERNORS ..... DEFENDANT /RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. The petitioner, the mother to a minor child, SM, had her child, a minor, picked up by the respondent's driver from her home on the morning of 13<sup>th</sup> June, 2016. According to her, the child was in good health. It is the petitioner's contention that later that day she was summoned to [particulars withheld] School and had a meeting regarding her child's health status. The petitioner indicated that she was not allowed to see her child whom she later learnt had been placed in the custody of Tumaini Children's Home. This prompted her to file children's case No. 226 of 2016 in Tononoka Children's Court, Mombasa. In the petitioner's view, the children's court has not taken the interest of the minor which is paramount under

article 53 of the Constitution of Kenya, into consideration, leading to continued illegal confinement of the child in a secret place.

2. It is the foregoing circumstances that catapulted the petitioner into filing the present petition on 15<sup>th</sup> August, 2016. The petitioner seeks the following orders:-

(i) A declaration that the petitioner's and the minor's constitutional rights to equal protection and equal benefits of the law be exercised administratively and the matter before the children's court be dispensed with as prayed for in the suit before it upon a request for judgment filed and do consider the petitioner's preliminary objection filed on 3<sup>rd</sup> August, 2016 respectively;

(ii) A declaration that the petitioner's and the minor's fundamental rights against being treated in a discriminatory manner as guaranteed by articles 10, 19, 20, 27 and 50 of the Constitution of Kenya have been and are likely to be violated by failing to promptly address the issues in regard to the minor's unlawful detention in a questionable home without any court order having been in place to warrant the same;

(iii) An order of prohibition, prohibiting the respondent, its agents, officers, employees or servants or any person(s) acting under its authority from further doing any dealings with the minor the subject of this petition;

(iv) An order of certiorari to remove into this court and quash all the documents filed by the respondent through its lawyer filed on 3<sup>rd</sup> August, 2016 and the date fixed by the Tononoka children's court for directions and enter judgment in a summary manner;

(v) An order of mandamus to be issued to the respondent, its agents or officers or any other person(s) be compelled to release the minor to the petitioner and or her guardians forthwith; and

(vi) Costs of the petition be borne by the respondent.

3. The petition is predicated on the supporting affidavit of the petitioner A M M filed on 15<sup>th</sup> August, 2016. The respondent's counsel filed a notice of appointment on 26<sup>th</sup> August, 2016 which is unsigned. In addition thereto, the respondent filed a replying affidavit sworn by Ruth Wanjiru on 26<sup>th</sup> August, 2016 to oppose the application.

#### **PETITIONER'S SUBMISSIONS**

4. The petitioner commenced her submissions by drawing to the attention of the court technical issues to the effect that the respondent's replying affidavit dated 25<sup>th</sup> August, 2016 was made by an incompetent person, who is a class teacher of her minor child, SM. Secondly, she argued that the names of the persons who gave authority to the class teacher to swear the said affidavit are not reflected on the letter of authority. Thirdly, no minutes of the board meeting were attached to show that the deponent was granted authority to swear the said affidavit.

5. She prayed that the replying affidavit be struck out because it was filed out of the 7 days period granted by the court. The petitioner informed the court that the annexure marked as RW4 to the respondent's affidavit which is a letter from the children's department did not authorize Tumaini Children's Home to detain the minor and to deny the petitioner access to the said children's home.

#### **RESPONDENT'S SUBMISSIONS**

6. Ms. Waihenya, Learned Counsel for the respondent prayed for the petition to be dismissed with costs. She relied on the replying affidavit of Ruth Wanjiru filed on 25<sup>th</sup> August, 2016. She requested the court to determine the petition without undue regard to procedural technicalities as provided in articles 159 (2)(d) and 53 of the constitution and section 4 of the general rules and regulations to the Children's Act. She

submitted that the child is 7 years of age as per the letters from the Children's Officer dated 4<sup>th</sup> July, 2016 and 4<sup>th</sup> August, 2016. Counsel submitted that the child is in standard 2 in the respondent school and that on 13<sup>th</sup> July, 2016 she urinated on herself, which the teacher (deponent) noted was not normal. The child was also walking with difficulties. On being asked what was wrong, the child stated that her father was inserting fingers in her private parts making her to feel pain.

7. Ms. Waihenya submitted that the deponent tried to call the child's mother whose phone was off and that the alternate phone number given to the school was also off. The child was taken to Tumaini Children's Home (The Home) for a check up. Counsel further submitted that a Clinical Officer examined the child and found that her private parts were swollen and bruised. The child was referred to Coast General Hospital where an examination revealed that she had scratches in her private parts and that someone had touched her. The Clinical Officer recommended that the matter be referred to the children's department and the police who instructed her to retain custody of the child.

8. The court was informed that the child was taken to the home and the matter was reported to Kiembeni Police Station on 14<sup>th</sup> June, 2016 under OB 31/13/6/2016. It was submitted that on 4<sup>th</sup> July, 2016 the children's department issued the respondent with a letter confirming that the child was placed in custody of the home for temporary shelter, protection and care pending investigations by the police. The court was referred to the annexure marked as RW4 to the respondent's affidavit. Counsel informed the court that the children's department requested the home to give the petitioner unlimited access to the child after proper identification. Ms Waihenya asserted that the petitioner has full access to the child on visits. It was further submitted that the child attends school and is well settled.

9. Counsel submitted that the annexure marked RW5 to the respondent's affidavit discloses that the child was borne by the petitioner out of another marriage before her current marriage. The said report further reveals that the child told the deponent that she reported to the petitioner that her father had been touching her vagina and inserting his fingers therein but the petitioner took no action. She added that it was the children's office at Kisauni that placed the child in the temporary custody of the home; a sister institution to Sirio school.

10. The court's attention was drawn to section 120 of the Children's Act that details the steps to be taken if a child is in need of care and protection. It was submitted that the child, the subject of the petition, has been sexually abused and defiled which is against her rights. The court was referred to article 19(1) of the convention on the rights of the child and articles 16 and 27 of the African charter of the rights and welfare of the child wherein state parties are expected to protect children from sexual abuse. It was submitted that Kenya has domesticated the said rights under article 2(5) of the Constitution of Kenya.

11. In requesting this court to find that the child in issue has been exposed to sexual abuse, Ms. Waihenya cited the provisions of section 119(1) paragraph (n) of the Children's Act which provides that a child in need of care and protection is one who has been sexually abused or is like to be sexually abused. Counsel stated that all the steps required by the children's court have been undertaken and the matter is awaiting hearing by the said court. In her view, it was in the best interest of the child to remain at the home pending the hearing of the case. Ms Waihenya concluded her submissions by stating that the orders being sought are not applicable as the petitioner has not followed the right procedure as under section 80 of the Children's Act, an appeal lies to the High Court. She informed the court that no summons were served on them to attend court thus they filed a notice of appointment and replying affidavit on 26<sup>th</sup> August, 2016.

## **ANALYSIS AND DETERMINATION**

(i) The issue for determination is if the respondent's deponent was a competent person to swear an affidavit on behalf of the respondent.

(ii) If the respondent's counsel filed her notice of appointment and the respondent's replying affidavit out of time; and

(iii) If the petitioner’s child’s rights under the constitution have been infringed.

12. The petition herein is anchored on the provisions of articles 22, 23, 159, 165, 259 and 53 of the constitution and sections 211, 206, 193, 192, 246, 245 and 207 of the Children’s Act.

13. To address the preliminary issue first on the competence or otherwise of the respondent’s deponent, Ruth Wanjiru, to swear the affidavit filed in court on 26<sup>th</sup> August, 2016; the deponent attached a copy of a letter of authority from the Board of Governors of [particulars withheld] School authorizing her to adduce evidence on behalf of the respondent. The said letter of authority bears two signatures of authorized signatories and the official rubber stamp of [particulars withheld] School dated 29<sup>th</sup> July, 2016. The said letter of authority is dated 29<sup>th</sup> July, 2016. Order 19 rule 7 of the Civil Procedure Rules provides as follows:-

***“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or any other technicality.”***

14. Although the names of the two signatories that gave authority to the deponent to give affidavit evidence in this petition are not disclosed, I am convinced that the deponent is not acting as a lone ranger who has no authority from her employer to swear the affidavit in issue. From an analysis of the facts on record, the deponent being the class teacher to the petitioner’s child was the best placed person to give evidence on behalf of the respondent. Any defect in form of how she came about to swear the said affidavit is a technicality that is curable under the provisions of order 19 rule 7 of the Civil Procedure Rules.

15. Another technical issue raised by the petitioner is that the respondent filed its replying affidavit out of the 14 days required in law. On the issue of the respondent’s pleadings having been filed out of the required time lines, the provisions of rules 14 and 15 of the Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013 provide thus:-

***“14(1) The petitioner shall serve the respondent with the petition, documents and relevant annexures within 15 days of filing or such time as the court may direct.***

***(2) proof of service shall be the affidavit of service set out in Form B in the schedule with such variations as may be necessary.***

***15(1) The Attorney General or any other state organ shall within fourteen days of service of a petition reply by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.***

***(2) (a) A respondent not in the category of sub-rule (1) shall within seven days file a memorandum of appearance and either a***

***(i) Replying affidavit; or***

***(ii) statement setting out the grounds relied upon to oppose the petition.****(emphasis added)*

***(b) after filing either of the documents referred to in sub-rule (2) (a), a respondent may respond by way of a replying affidavit to provide any other written document as a response to the petition within fourteen days.***

***(3) .....***”

16. The petition herein was filed on 15<sup>th</sup> August, 2016. The provisions of rules 14 and 15 of the

Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013 (the rules) require a petitioner to serve the intended respondent with the petition after which the respondent is expected to file a memorandum of appearance and a replying affidavit or a statement within 7 days.

17. The law firm of Jacqueline Waihenya Maina & Co. Advocates filed a notice of appointment on 26<sup>th</sup> August, 2016 and a replying affidavit on the same date. The said documents were filed outside the 7 days stipulated under rule 15(2)(a) of the rules. The respondent filed its documents late by a day. The respondent's counsel was served with a hearing notice for the petition on 19<sup>th</sup> August, 2016 as borne by their rubber stamp on the said hearing notice. The respondent filed an affidavit of service on 29<sup>th</sup> August, 2016 confirming that the said law firm was served with a copy of the petition and a hearing notice. The provisions of rule 15(2)(a) are in mandatory terms in that appearance and a response to the petition must be filed within 7 days of service of the petition. In the present petition time started to run when the petitioner served the respondent with the petition on 19<sup>th</sup> August, 2016. Rule 14 of the said rules makes no mention of the need for a petitioner to serve a respondent with summons to enter appearance. The argument by counsel for the respondent along those lines therefore holds no water.

18. I am therefore in agreement with the petitioner that the respondent's counsel filed her documents out of time. The court hereby strikes out the notice of appointment of Advocates which this court notes is unsigned by Counsel for the respondent. The court also strikes out the replying affidavit dated 26<sup>th</sup> August, 2016 for the sole reason that the two documents were filed outside the time lines stipulated in the Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013.

19. As regards the substantive prayers sought by the petitioner, the court notes that sections 211, 206, 245, 246 and 207 of the Children's Act, as amended, are non-existent. The issues that have been brought to the court's attention in the petition are in respect to a matter that is pending in the children's court, namely:-

(i) That the Notice of appointment of an Advocate drawn and filed by Jacqueline Waihenya Maina & Co. Advocates on 8<sup>th</sup> July, 2016 was not served to the petitioner and was not signed contrary to order 2 rule 16 of the Civil Procedure Rules, Laws of Kenya;

(ii) That no memorandum of appearance and defence were filed in time as by law required;

(iii) That although the petitioner has filed a request for Judgment in default of appearance and filing of the defence, the court has overlooked the request and has done nothing about it;

(iv) That the respondent on 3<sup>rd</sup> August, 2016 unlawfully filed a statement of defence before filing a memorandum of appearance without seeking leave of the court;

(v) That the respondent was granted 14 days to file a replying affidavit to the petitioner's application which they failed to do prompting the petitioner to file a notice of preliminary objection on 3<sup>rd</sup> August, 2016; and

(vi) That the children's court has not taken the interest of the minor (sic) which is paramount under article 53 of the constitution of Kenya and the occasioned delay will render the minor to continue being illegally confined in a secret place hence be subjected to further suffering especially during the closure of schools.

20. Article 22(2)(a) of the Constitution empowers the Petitioner to move this court on behalf of her child if a fundamental right in the Bill of Rights has been denied, violated or is threatened. The petitioner at the first instance filed children's case No. 226 of 2016 at Tononoka Children's Court, Mombasa. In the said suit, she prays for a permanent injunction to restrain the respondents, by themselves, their servants and agents (sic) from further withholding the minor the subject of the suit and for any other relief that the

court may deem fit. The said case is awaiting hearing and determination.

21. This court takes cognizance of the provisions of article 53(1)(d) of the Constitution that provides that every child has the right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. Sub-article 2 thereof provides that a child's best interests are of paramount importance in every matter concerning the child. The foregoing provisions must be read together with the provisions of section 119(1)(n) of the Children's Act which provides that a child in need of care and protection is one who has been sexually abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography. Section 120(1) of the said Act provides that any person who has reasonable cause to believe that a child is in need of care and protection may report the matter to the nearest authorised officer. It is pretentious for the petitioner to state in her pleadings that her child is being held in a secret place while it is well within her knowledge that her child is in the safe custody of the home due to allegations of sexual assault.

22. The petitioner is unhappy with the shape that the proceedings are taking in the lower court. This is what has prompted her to file this petition. It is my view that the issues that the petitioner herein has raised as regards the proceedings in the said court are issues that this court cannot address without pulling the carpet, so to say, right under the feet of the learned Magistrate. The said issues would be best addressed on appeal in the event that the petitioner will be dissatisfied with the decision of the said Magistrate. In the case of the **Speaker of the National Assembly vs Karume** [1992] eKLR it was stated thus:-

***“Where a dispute resolution mechanism is provided for in a statute, and where there is a clear procedure for the redress of any particular grievance by the constitution or statute that provision ought to be strictly followed.”***

23. For the foregoing reasons, I find that the petition is an abuse of the court process. The upshot of the foregoing is that the petition dated 15<sup>th</sup> August, 2016 is hereby struck out with no order as to costs.

**DELIVERED, DATED and SIGNED at MOMBASA on this 28<sup>th</sup> day of October, 2016.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Petitioner present in person

Ms Oyier holding brief for Ms Waihenya

Court clerk Mr. Oliver Musundi