



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL PETITION NO. 71 OF 2014
(FORMERLY CONSTITUTIONAL APPLICATION NO. 546 OF 2014 AT NAIROBI)
K M N.....APPLICANT/PETITIONER
VERSUS
CHILDREN'S COURT, TONONOKA.....RESPONDENT
AND
E G.....INTERESTED PARTY
JUDGMENT

Introduction

1. The Petitioner and the Interested Party were married under Islamic Law on the 4th May 2012 and between them had one child FKM born on the 1st April 2013. They have lived separately since November 2013, when the Interested Party moved from the matrimonial home in Nairobi and relocated to Mombasa where she lives with the child of the Marriage. At the time of filing the proceedings before this court, there were pending proceedings before both the Kadhi's Court at Nairobi and the Children's Court at Tononoka, Mombasa, in which the same issue of the custody of the child was pending determination.

2. By an 'Originating Notice of Motion' [it ought to have been an interlocutory Notice of Motion pending the hearing of the petition] and a Petition both dated the 5th November 2014 and originally filed in the High Court at Nairobi and subsequently transferred to Mombasa, the petitioner seeks the orders as follows:

- 1. That a Declaration do issue declaring all the proceedings in the **Senior Resident Magistrate's Court at Tononoka Children's Case No. 291 of 2014 E G v. K M N** as being unfair and against the due process of the law and unjust to the petitioner on basis of bias and therefore null and void.*
- 2. That an order do issue setting aside all orders issued by the Honourable B. Koech, the Senior Resident Magistrate in **Tononoka Children's case No. 291 of 2014 E G v. K M N**.*
- 3. That an Order do issue staying the proceedings in **Tononoka Children's case No. 291 of 2014 E G v. K M N**.*

4. That an Order do issue directing that **Nairobi Kadhi's Court Civil Case No. 103 of 2014 K M N v. E G** do hear and determine the suit pending before it.

5. That an Interim order of access to the minor be granted to the Applicant herein.

6. That this Honourable Court do make, issue and give such further, other and consequential orders, writs and direction as it may consider appropriate.

Facts of the Case

3. The primary facts of the case relevant to the Petition are not in dispute. In Paragraphs **14 – 17** of the Petition, the petitioner sets out the facts that he relies on as follows:

14. *On or about 28 March, 2014, following a series of events, the petitioner herein filed a case at the Kadhi's Court Nairobi being Civil Case No. 103 of 2014 K M N vs. E G seeking amongst other orders, the custody of the minor.*

15. *While the suit was going on, the Interested Party herein filed an preliminary objection to the jurisdiction of the Kadhi's Court in handling the matter.*

16. *While the preliminary objection by the Interested party herein at the Kadhi's Court in Nairobi was pending hearing and determination, the interested party filed an application at the Children's Court in Tononoka being Children's Case No. 291 of 2014 E G vs. K M N, seeking among other orders that the petitioner be restrained from taking away the minor from the interested Party and from the jurisdiction of that court either in person, agents or vide any other court order.*

17. *On or about 8th august, 2014, Hon. B. Koech Senior Resident Magistrate at Tononoka Children's Court granted an ex parte order restricting the petitioner from taking away the minor from the Interested Party herein and the jurisdiction of the court either in person, agents or vide any other court order pending the hearing and determination of the application that had been filed therein.*

The respective cases of the parties

4. On the basis of these facts, the petitioner contended, principally, that the proceedings before the Children's Court were **sub judice** in view of the earlier proceedings before the Kadhi's Court and that through the Children's Court magistrate's bias his rights to a fair hearing under Article 50 of the Constitution and the child's right under Article 53 to have its best interests respected had been infringed, respectively, "by failing to give an opportunity to defend his case before granting the restrictive order" and "by granting an order that is not in the best interest of the child and in total disregard of the fact that both parents of the minor have equal rights and responsibilities." The petitioner claimed that he had suffered 'emotional and psychological pain' since the order of the Children's Court while he continued to pay monthly maintenance for the care of the child.

5. The respondent did not file any affidavit in reponse to the petitioner's case.

6. By her replying affidavit of 3rd December 2014, the Interested party set up her defence to the petitioner's case on the grounds that the Children's Court has exclusive original jurisdiction to deal with children matters and that faced with the orders of the Kadhi's Court which did not have jurisdiction over the matter, the Children's Court in the best interests of the child to prevent the petitioner from taking her out of jurisdiction of the Children's Court made the *ex parte* order impugned herein pending hearing *inter partes*; and that the issue of bias of the Children's Court did not arise as the court acted procedurally in accordance with the Children Act, and, in any event, bias had not been demonstrated; and, finally, that the Children's Court had not denied the petitioner access to the child or otherwise interfered with his rights and responsibilities over the child.

Submissions

7. The Petition and Notice of Motion were heard on the 12th January 2015 when Counsel for the Parties – Mr. Lakicha for the Petitioner, Ms. Namahya for the Respondent and Mr. Cheruiyot for the Interested Parties made oral submissions and judgment was reserved. The full text of the submissions is as follows:

“12/1/2015

Miss Namahya for the respondent

We do not wish to file any replying affidavit. We do not oppose the setting aside of the Children’s Court order. The order could be set aside and the matter proceeds before the children’s court.

Mr. Lakicha for the Petitioner

Application and petition seek setting aside of order. Applicant filed proceedings before Nairobi Kadhi’s Court in civil case no. 103 of 2014. The Kadhi’s Court granted custody for 7 days on 28/7/2014. Subsequently, parties agreed that the applicant be granted for a few days the custody of the child.

The interested party filed a Preliminary Objection that Kadhi’s Court had no jurisdiction. While the matter was pending ruling the interested party filed at Tononoka Children’s Court Civil Suit no. 291 of 2014, and obtained ex parte order restricting the applicant from going anywhere near the child.

The order granted by the Children’s court is at p. 77 of the Record. The order barred any other court order. The children’s Court has no power to order any other court. The court had been informed that the matter was before the Kadhi’s Court. It was not shown that the Kadhi’s Court had given an order against the interests of the child. The order is null and void. At the time of the order of the Children’s court on 8/8/2014 there were no orders staying the proceedings of the Kadhi’s Court. Yet the court issued orders restraining any other court from issuing any other order.. The order of the Children’s Court was not made in the interests of the child. There was nothing before the court to show that the orders of the Kadhi’s Court were against the interest of the child.

There is an appeal before the High Court in Civil Appeal No.42 of 2014 from the decision of the Kadhi’s Court on the issue of jurisdiction. The appeal was filed subsequently after the Interested Party had gone to the Children’s Court.

The Children’s Court could not bar any other court. The Kadhi’s Court and the children Court have equal jurisdiction. The order of the Kadhi’s Court could only be stopped by a superior court. It is not for the Children’s Court to determine whether the Kadhi’s Court had jurisdiction over the custody of children.

The Children’s Court was unfair in issuing an order of that nature. The interested Party’s intention was to deny the applicant access by filing the appeal and the proceedings before the children’s court barring any other court from dealing with the custody of the child. The proceedings were against the paramount interests of the child. It is the interested party obstructing the access of the father. I rely n th supplementary affidavit and the supporting affidavit to the Petition.

Replying affidavit of the Interested Party does not explain why they filed the issue pending before the Kadhi’s Court in the Children’s Court. The application filed before the Children’s court is worded in the same manner as the order issued by the court. The unfairness of the court is paramount.

Best interests of the child. Child was born in a family unit where there are other children of similar age. She has been taken away from that environment to an environment where she is alone. We have not filed a Children Officer's report on the two environments. The orders of the Kadhi's court were made in the best interest of the child. The interested party did not raise any issue with the Kadhi's Court.

I have filed some authorities on the authority of the Kadhi's Court. Pending ruling of the court, we pray for prayer no. 5 of the Originating Notice of Motion dated 5/11/2014. We also pray that the Children Officer do file a report with the court. We propose a period of 30 days for the applicant.

Mr. Cheruiyot for the Interested Party

I rely on the affidavit of E G of 3/12/2014

Order sought by the applicant is in respect of an order of a children's court. The complaint is that the children's court has denied him access to the child.

The order is clear. It is an interim restriction order from taking away the issue. The applicant can go before the same court and make an application for access. The court made an order because the child was within the jurisdiction of the court. The applicant could have filed in the Children's court where the child is. The applicant should have filed in the Children's court at Tononoka as the child was resident in Mombasa.

The applicant filed the matter in the Kadhi's Court at Nairobi. To safe-guard the interest of the child, the Interested Party filed the case in the Tononoka Children's court. The interests of the child as a minor of one and a half years should at all time be with the mother. The applicant has not been denied access by the mother. The mother cannot restrict the access of the applicant as a father.

The Interested Party was advised by Counsel that the Kadhi's Court deals with matters of divorce, inheritance and issues of personal status. The order of 8/8/2014 has no bias. It only stopped them from taking away the child. There is no evidence that they have sought to set aside the order at the Children's court. There has been no application for the magistrate to disqualify herself despite there being two magistrates at the Tononoka Court. The applicant has not exhausted all the avenues. The matter is still pending hearing and determination. The same is coming up on the 28/1/2015 for the inter partes hearing of the application giving rise to the orders challenged.

There is no evidence that the applicant's rights have been violated. The applicant has not made an application before the children's court. There is no proof of breach of fundamental rights. The applicants have not exhausted his rights before the children's court. The petition is premature and only calculated to stop the children court from proceedings with matter. The applicant can apply for access before the Children's court.

Miss Namahya for the Respondent

As the issue is one of interpreting the order, there is no difficulty in the order being set aside so that parties go before the children's court for final determination of the matter. The children Officer can only make a report upon a court order. The Children Officer can make a report on both sides of the family, on the father's and mother's side.

Mr. Cheruiyot for the Interested Party

I do not consent to the setting aside of the order as proposed by the Counsel for the respondent.

Mr. Lakicha in Reply

A party should not proceed before a court on a matter pending before another court of competent jurisdiction. The Children's Court took upon itself to determine the issue of jurisdiction of the Kadhi's Court. There was no order of transfer or stay of proceedings before the Kadhi's Court. The order of the Children Court was meant to forestall the order of the Kadhi's court of 4th August 2014. They went to court on the 7th August 2014, and that is why it was worded as it was. The deprivation of the applicant of access is not in the interest of the child. The court has unlimited jurisdiction. There was nothing shown that the orders of the Kadhi's Court were against the interest of the child. It is true that the child had lived in Mombasa since December 2013. The applicant filed an application for setting aside the order of 8/8/2014. The application was filed on the 18/8/2014 (at p.79) and is set for hearing on 28/1/2015. It is not an issue of interpreting the Order of 8/8/2014."

8. The parties did not at the hearing seek any orders on access pending the final judgment of the Court, and none was made.

The Issue for determination before the Court

9. The issue for determination by the Court in this Petition is whether the trial magistrate in Children's Court at Tononoka was biased against the petitioner herein, and therefore in breach of the petitioner's Article 50 right to fair hearing and the child's best interest right under Article 53 of the Constitution, in the proceedings filed by the Interested Party against the Petitioner as ***Children's Case No. 291 of 2014 E Go v. K M N*** for the determination of the issue of the custody of the child of the parties, and, consequently, whether the Court will set aside the order made in the Children's Court on the 8th August 2014 and stay further the proceedings there as prayed in the petition.

10. Although contention arose as to whether the Kadhi's Court had jurisdiction to deal with a matter of custody of children, the determination of the question was not fully canvassed before this court as there is already an appeal – Mombasa HC Civil Appeal No. 42 of 2014, ***E G v. K M N***, from the decision of the Kadhi's Court determining in the affirmative the same issue, which is pending hearing in the Appeals Division of the Court. Moreover, the point in this petition is not whether the Kadhi's Court had jurisdiction but rather whether the Children Court's Magistrate at Tononoka did order, and whether she had jurisdiction to lawfully order that no other court could make an order relating to the child pending the hearing of the application by the Interested Party by the said Children Court.

11. The question of the jurisdiction of the Kadhi's Court was raised herein in an obtuse way, and this court cannot properly determine it without hamstringing the appellate court that will hear the appeal from the Kadhi's Court. By an ex parte order made on 12th November 2014, the Court (Odero, J.) stayed the Nairobi Kadhi's Court Case No. 103 of 2014 pending hearing of an application by the Interested Party in this petition for stay of the proceedings pending appeal on a date to be fixed at the registry. There was no indication that the appeal has been fixed for hearing.

12. In determining the issue before the court, it is necessary to consider several points under the rubrics as shown below.

Determination

Proceedings before the Kadhi's Court at Nairobi

13. This court does not exercise supervisory jurisdiction over proceedings before superior court as its jurisdiction is ousted under Article 165 (6) of the Constitution in terms that:

"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

14. Accordingly, the court cannot consider the prayer in Prayer No. 4 of the Petition, that "an Order do

issue directing that *Nairobi Kadhi's Court Civil Case No. 103 of 2014 K M N v. E G do hear and determine the suit pending before it*" as the same question is pending determination by the High Court on an appeal filed by the Respondent on the question of the jurisdiction of the Kadhi's Court to deal with children matters.

Was the trial Children Court's Magistrate biased against the petitioner?

15. As in *Miller v. Miller* (1988) KLR 555 bare allegations of bias are not sufficient for the court to act in disqualification of a judge. Moreover, where allegations of bias are made against a judge, or indeed other judicial officer, the appropriate procedure is to have the objection first considered by the judge or the judicial officer involved first so that he/she may exercise discretion before reconsideration by a higher court, unless it is shown that the applicant "was denied opportunity to raise the issue of disqualification and test it before the judge." See Ibrahim, J (as he then was) in *Trust Bank Ltd v. Midco International (K) Ltd. & 4 Ors.* (2004) eKLR.

16. This preference of prior consideration by the affected judge(s) is the effect of the decision of Miller CJ in *Otieno v Ougo & another (No 3)* (1987) KLR 402 in considering a request for disqualification of certain judges of appeal in a pending appeal where the CJ said:

"I rule that this is not an appropriate instance for a Chief Justice to disqualify Judges from hearing a matter or case in their absence; and that in order that justice may be seen to have been done, it is hereby ordered that the objection be dealt with ... in Open Court before Judges of Appeal."

17. It has not been shown that the Magistrate in the Children Magistrate's Court at Tononoka was asked to disqualify herself and she declined, thereby making this application before the court necessary. This Court would ordinarily not make orders for the disqualification of the learned magistrate before an application for disqualification has been made before her. However, the issue before the court is one of fair hearing concerns wider than simply a question of disqualification of the particular trial magistrate in proceedings which are properly before the court. There is the further question whether the proceedings of the Children's Court were properly instituted.

18. The test for bias is objective rather than subjective based on reasonable apprehension rather than real bias that the applicant will not receive a fair and impartial trial, or hearing as in this case. See *Shilenje v. The Republic* (1976-80) KLR 1662 Attorney General where Trevelyan J. in considering a case for the transfer of a criminal trial on the grounds of bias cited with approval the following passage of *Commentary and Notes on the Indian Code of criminal Procedure 1908* by Sir H. T Prinsep and Sir John Woodroffe at p.647:

"What the court has to consider is not merely the question whether there has been any real bias in the mind of the presiding judge against the accused, but also whether incidents have not happened which though they may be susceptible of explanation and have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial...."

Whether such apprehension is reasonable must be determined with reference to the mind of the court rather than to the mind of accused. The court cannot accept as reasonable grounds what the judges know to be insufficient and unreasonable, simply because the litigants were foolish enough to entertain them. To do so would be to encourage a distrust in the integrity and independence of the courts which would amount to a serious evil."

The right to a fair hearing

19. I consider that the same principles of bias with respect to the fair trial in criminal cases would apply to allegations of denial of fair hearing in civil cases. Article 50 (1) on the right to a fair hearing and Article 50 (2) (d) on the right of an accused to fair trial, respectively, require "a **fair** and public hearing before a

court” and “a public trial before a court established under this Constitution.” Fairness and impartiality are the fundamentals of any court or quasi judicial tribunal.

20. The order of the Children Court’s magistrate made on the 8th August 2014 in Tononoka Children’s Court Case No. 291 of 2014 was in terms principally as follows:

“That Interim restrictive order do and are hereby issued against the defendant from taking away [FKN] from the plaintiff and the jurisdiction of the court whether in person, agents or vide any other court order pending the hearing and determination of this application.”

21. The Children Court magistrate was clearly aware of the proceedings and various orders made by the Kadhi’s Court. The magistrate was informed of the Kadhi’s Court proceedings by the Plaintiff’s (the Interested Party herein) application dated 7th August 2014 which at ground 4 whereof pleaded that “the defendant has been obtaining orders from a Kadhi’s Court in case No. 103 of 2014, Nairobi which Court the plaintiff has challenged its competency and jurisdiction.” The fact of the pendency of the suit before the Kadhi’s Court was also pleaded in the Plaint dated 7th August 2014 in terms that:

“10. The plaintiff further avers that the defendant filed case no. 103 of 2014, Nairobi Kadhi’s Court for custody inter alia which court the plaintiff has challenged its competency and jurisdiction thus there is no suit pending and that there have been no previous proceedings in any competent court between the plaintiff and the defendant over the same subject matter.”

22. In her affidavit in support of the application in the Children Court, the plaintiff (Interested Party herein) deponed to the background of the case, so far as material, as follows:

4. That I deserted the matrimonial home on 19th November 2013 having suffered cruelty and abuse at the hands of the defendant and my in-laws.

5. That I relocated to Mombasa together with the child for my own safety and that of the child.

6. That I have never denied the defendant access to the child, despite his violence, as I consider the child’s well being and upbringing should involve both parents with him having parental responsibilities over the child.

7. That however instead of the defendant politely and rightfully accessing the child the defendant filed a case and obtained orders vide Kadhis Court case No. 103 of 2014, Nairobi, to take away the child for two days with the assistance of police officers from Central Police Station, Mombasa.

8. That the defendant and the police officers stormed my premises and without any explanation snatched and took away the child as I pleaded with them to be humane and allow me first to bathe, clothe and feed the child but in vain.

9. That I have challenged the competency and jurisdiction of the Kadhi’s Court to issue such orders and the same is pending determination.

10. That the same court granted the defendant orders to take the child for seven days from 18th July 2014 to 24th July 2014 which I dutifully obeyed however the defendant violently denied me access to the child during that period despite the child’s cries and plea.

11.

12.

13.

14.

15. *That I now have information that he is attempting to obtain another court order from the same court which I have challenged jurisdiction to come and take the child for unspecified number of days.*

23. That the Children Court was conscious of the proceedings and orders of the Kadhi's Court is conceded by paragraphs 21 and 22 of the Interested Party's replying affidavit herein sworn on 3rd December 2014 as follows:

21. *That thus all the orders issued by the said Kadhi were null and void **ab initio** and the Children's Court has the jurisdiction to stop orders originating from a court that was not competent to deal with the matter in order to protect the best interest of the child.*

22. *That the Children's Court did not in any way act **sub judice** in entertaining the case number 291 of 2014- Tononoka. The Court appraised itself of the circumstances and since it had original jurisdiction and the Kadhi's Court being incompetent to deal proceeded to entertain the matter and issued the orders as procedurally required and enabled by the said Act.*

24. The Children's Court as a magistrate's court has no supervisory jurisdiction over other subordinate courts. According to Article 169 of the Constitution, the Magistrate's Court and the Kadhi's Court are both subordinate courts over which the High Court exercises supervisory jurisdiction in terms of Article 165 (6) of the Constitution. Article 169 (1) of the Constitution provides:

169. (1) *The subordinate courts are—*

(a) the Magistrates courts;

(b) the Kadhis' courts;

(c) the Courts Martial; and

(d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).

25. In granting the orders of 8th August 2014, the Children Court was asserting sole jurisdiction to determine the issue of custody of the child by restraining the petitioner "from taking away the child from the plaintiff and the jurisdiction of the court "either in person, agents or **vide any other court order** pending the hearing and determination of this application", and in effect determining the plaintiff's said challenge on "the competency and jurisdiction of the Kadhi's Court" and setting aside the proceedings and orders of the Kadhi's Court in the previously filed proceedings. This it had no jurisdiction to do.

26. To hold otherwise would be to accept that one subordinate court could, faced with a matter before another subordinate court which it considers had no jurisdiction over the matter and considering itself to have exclusive jurisdiction, notwithstanding orders issued by such other subordinate court, take up the matter and issue orders not only contrary to those made by the other subordinate court but purporting to restrain any orders, or action in reliance on orders, from such other subordinate court. This scenario would breed chaos in the judicial system where varied orders over the same subject matter would be in existence contemporaneously, leading to confusion of litigants as to which of conflicting orders of the different subordinate courts are effective and binding on them.

27. The Interested Party attempted to justify the intervention of the Children's Court as necessary in the best interest of the child to stop void orders of a court that was not competent, stating at paragraph 21 of the replying affidavit:

"That thus all the orders issued by the said Kadhi were null and void ab initio and the Court has

jurisdiction to stop orders originating from a court that was not competent to deal with the matter in order to protect the interest of the child.”

With respect such powers only exist in an appellate court or a superior court with supervisory jurisdiction over, and not in a court of the same level, as the incompetent court.

28. To be sure, there is no evidence of real bias against the Children’s Court magistrate but the test is whether there is reasonable apprehension on the part of the petitioner that he will not receive a fair hearing. On the basis of the events in this case, where the Children’s Court in disregard of the prior Kadhi’s Court proceedings and orders and while a ruling on the question of its jurisdiction was pending, made orders *ex parte* reversing the order of the Kadhi’s Court, there is objective reason to believe that the magistrate made the order to counter the proceedings and defeat any orders that may be granted by the Kadhi’s Court in favour of the petitioner herein. In these circumstances, there is material upon which this court may find on objective basis that there exists a reasonable apprehension of bias in the mind of the Petitioner based on the learned magistrate’s willingness to assume a supervisory jurisdiction that it did not have over the Kadhi’s Court.

29. I consider that the petitioner’s right to a fair hearing under Article 50 of the Constitution is violated when the Children’s Court is persuaded as averred by the Interested Party to grant restrictive orders against the petitioner who has obtained orders for access to the child in previous proceedings before the Kadhi’s Court. As held above, the Children’s Court action of assuming jurisdiction in a matter already seized by another court and of making pre-emptive orders against any other court orders would raise a reasonable apprehension of bias in the mind of the Petitioner. It matters not, I think, that the order of the Children’s Court was interim pending hearing *inter partes* as the damage had already been done when the court in effect reversed the access orders obtained by the Petitioner in the Kadhi’s Court.

30. However, I do not find sufficient material was placed before the court to lead to a conclusion that the Children’s Court in making the order breached the best interest of the child under Article 53 (2) of the Constitution. The impugned order appeared only to restrain the taking of the child out of jurisdiction of the Children’s Court at Mombasa not all access of the Petitioner.

Should the proceedings of the Children’s Court be stayed.

31. There is no doubt that to file proceedings for custody of the child in the Children’s Court while previous proceedings before the Kadhi’s Court had determined the same issue is an abuse of the process of the Court. Whether the Kadhi’s Court had jurisdiction or not, the Interested Party was obliged to comply with the order or seeking to discharge or reverse the order of the Kadhi’s court by review or appeal. To file fresh proceedings before another court, whether of equal or higher jurisdiction while the order of the Kadhi’s Court remained in force, is to abuse the process of the court.

32. In ***Wanguhu v. Kania*** (1987) KLR 51, the Court of Appeal held that the filing of a new application after the dismissal by a court of a similar application is an abuse of the process of the Court. In the lead judgment, Platt, Ag. JA with whom Hancox and Nyarangi, JJA agreed said:

*“If a party to a suit does not appear to prosecute his application, and it is dismissed can he be allowed to bring a second application? Obviously not, since there would be no end to litigation. Having failed to appear, he must seek to explain to the Court why he failed to appear and thus pray for reinstatement. It is an abuse of the process of the Court, to ignore its order given when the party is at fault and simply, bring further proceedings without explaining or redeeming the fault, (Compare ***Lawrance v. Lord Norreys*** (1888) 39 CH. D 221 at page 237) as to an abuse of the court in duplicated proceedings). It might also lead to later judges sitting on appeal over their previous decisions or those of other judges;”*

33. In the present case, the filing of the suit before the Children’s Court after orders had been made by the Kadhi’s Court at Nairobi is, in my view, analogous to filing a repeat application after the dismissal of an earlier one and a clear abuse of the Court. The Interested Party’s prayers in the Defence and Counter

Claim dated 8th April 2014 in the Kadhi's Court Civil Suit No. 103 of 2014 is similar to the relief sought in the Plaintiff dated 7th August 2014 in Children's Court Suit No. 291 of 2014, as follows:

Defence and Counter Claim dated 8th April 2014 Kadhi's Court Civil Suit No. 103 of 2014 prays for:

- a. An order that the plaintiff has parental responsibility over the child.
- b. An order that the plaintiff do provide Ksh.110,000/- per month as maintenance towards the child.
- c. Custody of the child with supervised visitation rights to the plaintiff.
- d. This Honourable Court to grant khulia.
- e. Any other relief that this Honourable Court may deem fit to grant.
- f. Cost of the counter-claim.

Plaint dated 7th August 2014 in Children's Court Suit No. 291 of 2014 prays for:

- a. An order for custody, care and control of [the child] FKN to the plaintiff.
- b. An order that the defendant has parental responsibility over FKN.
- c. Order directing the defendant to settle maintenance amounting to Kshs.85,000/- to the plaintiff.
- d. Order for limited and supervised access of FKN to the defendant.
- e. Costs of the suit.
- f. Such further relief that the court deems fit and just to grant.

34. In the old case of *Lawrance v. Lord Norreys* (1888) 39 CH. D 221, cited by Platt, Ag. JA (as he then was) in *Wanguhu v. Kania*, supra, the Court of Appeal for England and Wales dismissed as an abuse of the process of the Court an action filed in the Chancery Division on allegations of fraud being nearly the same as those in proposed amendments in an earlier suit commenced in the Queen's Bench Division which had been dismissed for no cause of action shown after the Court refused leave to amend the statement of claim.

35. The issue whether the matter of custody and access of the child is *sub judice* by virtue of the previous proceedings filed and pending hearing and determination before the Kadhi's Court will be decided upon determination of an appeal from the Kadhi's Court which will determine whether the Kadhi's court has jurisdiction over the matter and therefore a court of competent jurisdiction within the meaning of section 6 of the Civil Procedure Act.

36. Accordingly, even the gratuitous suggestion by counsel for the Respondent, that the orders of the 8th August 2014 be set aside and the matter proceeds before the court on the basis of *inter partes* hearing before the magistrate of other magistrate, cannot be granted as that would be to condone proceedings that **may** be in breach of the cardinal principle of *sub judice* and definitely an abuse of the process of the court in view of the prior order of the Kadhis's Court. Even if the Children's Court proceedings matter were held not be barred by *sub judice*, it is an abuse of the process to file the fresh proceedings in the Children's Court over the same matter without seeking to discharge or set aside the orders made in the prior proceedings in the Kadhi's Court in which the Interested Party had actively participated by filing a replying affidavit to the petitioner's application therein for custody, a Defence and Counter-Claim and a preliminary objection on jurisdiction, all dated 8th April 2014, and a ruling thereon was pending delivery.

37. As the question of the jurisdiction of the Kadhi's Court on children matter is pending determination before the High Court, it is inexpedient to have the Children Court proceed to determine the issue of petitioner's access to the child as such determination will render the appeal on the jurisdiction of the Kadhi's Court, and the orders it made which are the subject of the appeal, nugatory. The Interested Party will have succeeded in overturning and or disregarding the orders of the Kadhi's Court, without an appeal or review by a superior court and in abuse of the process of Court.

38. The proceedings before the Children Court must accordingly be set aside for being an abuse of the process of the court and stayed pending the determination as to the jurisdiction of the Kadhi's Court.

Access to the minor child

39. Only an Interim Order of Access was sought. Section 88 of the Children Act provides for the grant of an interim order of custody as follows:

“88. (1) The court shall have power to make interim custody orders and may from time to time review, suspend or vary such orders.

(2) An interim custody order shall not be made in respect of a period exceeding twelve months.”

40. Under section 85 (4) of the Children Act, where the court makes an order of custody it may make an order for reasonable access:

“85. (4) Whenever a court makes a custody order with respect to a child it shall, in addition, give such directions as to any rights of access to the child, and with regard to the maintenance of the child as the court may deem fit.”

41. I consider that the interim custody of the child pending the hearing and determination of the appeal on the jurisdiction of the Kadhi's Court should lie, in accordance with the general principle, with the Interested Party mother of the child, in view of the tender age of the child at almost **1 year 10 months** at the time of this Judgment.

42. I further consider that access to a child should not be granted with such fluctuations in the daily life of the child as to make a stable development of the child – especially one at the very early stages of mental growth – difficult. Reasonable access in the circumstances of this case, allowing for the need for stable development in association with one environment, is in my view met by an order that the petitioner father do have unhindered access to the child for a period of **seven (7) days** every 30 days of the month, subject to a Children Officer's Report.

43. For a determination as to whether the petitioner may take the child away to Nairobi where he lives, the court considers that in giving effect to the best interests of the child, an expert's report on the circumstances of the petitioner's home at Nairobi in relation and comparison to the Interested Party's circumstances in Mombasa is crucial. For this purpose, the Court shall invite the Children Department, Mombasa to visit the homes of the petitioner and the interested Party and file a report thereon with the court within fourteen (14) days to enable an expedited determination of the issue of access pending determination of the appeal on jurisdiction of the Kadhi's Court.

Orders

44. Accordingly, for the reasons set out above, I make the following orders on the applicant's Petition and 'Originating Notice of Motion' dated 5th November 2014:

1. The Tononoka Children's Court Case No. 291 of 2014 *E Goralwalla v. K M N* is stayed pending the hearing and determination of the Interested Party's appeal Mombasa HC Civil Appeal No. 42 of 2014 *E G v. K M N*, whose hearing date shall be fixed in the Registry on priority basis.

2. The proceedings and Order of the Children's Court (Hon. B. Koech) made on the 8th August 2014 are set aside.

3. The physical custody of the child will remain with the Interested Party, in view of the tender age of the child, and the petitioner father shall have unhindered access to the child for at least seven (7) days every month until further orders of a competent court.

4. Such access shall be facilitated at Mombasa and both the petitioner and the Interested Party shall not take the child outside Mombasa and the jurisdiction of this Court without leave of the Court.

5. The Children Officer, Children Department Mombasa is requested to visit the homes of the Petitioner and the Interested Party in Nairobi and Mombasa respectively and to file, within the next fourteen (14) days, a report with respect to the circumstances of each in relation to the best interest of the child the subject of these proceedings.

6. For final orders as to the petitioner's access to the child pending hearing and determination of the Interested Party's Appeal, Mombasa HCCA NO. 42 of 2014, this Petition will be mentioned on the 6th February 2015 at 10.00am.

45. On account of the matrimonial and child custody nature of the proceedings herein each party will bear its own costs.

DATED AND DELIVERED THIS DAY OF 26TH JANUARY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Lakicha for the Petitioner

Miss Namahya for the Respondent

Mr. Cheruiyot for Interested Party

Mr. Murimi Court Assistant.