



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
CIVIL APPEAL NO 65 OF 2015
(CHILDREN CASE 2 OF 2015)

H M N.....APPELLANT

VERSUS

R W M.....RESPONDENT

RULING

PLEADINGS

By applications filed on 16th September, 2015, 7th August, 2015 and 8th July, 2015 under certificate of urgency, the Appellant through learned Counsel filed an appeal against the orders of the Ruling of Hon. Resident Magistrate S. K .Arome of Kiambu Law Courts delivered on 18th June, 2015.

The grounds were as follows;

The Appellant filed the Application on 8th July 2015 brought under **Order 42 Rule 6 Section 3A, 18 & 63 (e) of CPR & Section 80 of Children’s Act, 2001** and sought;

- a) Hearing of the appeal on priority basis
- b) The Proceedings in Kiambu Children’s Court 2(b) of 2015 be stayed.
- c) The proceedings before the Court be nullified and the Court orders fresh proceedings in another Court.

The Appellant filed the Application on 7th August 2015 and attached the Magistrate’s Court’s Ruling delivered on 18th June 2015 which had been inadvertently been left out.

The Applicant filed Application on 16th September 2015 under **Section 1A 1B 3A of CPR Order 51 R 1 CPR 2010 Article 159 of Constitution 2010** and sought; the application of 8th July, 2015 be set down for hearing *interpartes* at the earliest convenience on priority basis as it had not been listed during the Court vacation.

The Respondent was served with the applications and in turn filed a Preliminary objection on 2nd October 2015.

The Preliminary Objection consists of;

- a) The appeal offends **Section 75 of the Civil Procedure Act**
- b) The Appeal did not comply with **Order 42 Rules 1& 2 CPR 2010**.

HEARING

The matter was scheduled for hearing on 2nd October 2015 but the Respondent's learned Counsel was not served with the Preliminary Objection. Legally the Preliminary Objection takes precedence and is heard first before the substantive hearing. The matter was postponed to 9th October 2015.

Learned Counsel for the Respondent informed the Court that she withdrew the 1st part of the Objection as the Ruling appealed against was now attached to the Appeal and part of the Court record.

The issue at hand is that the Appellant did not apply for leave to appeal in the Magistrate's Court and did not apply for leave in this Court. The appeal in Court does not fall in the category of cases that an appellant can appeal without leave as provided under **Order 43 (1) 7 (2) & Section 75 of the Civil Procedure Rules 2010**.

Learned Counsel for the Appellant informed the Court that **Section 80 of the Children Act 2001 and The Children (Practice and Procedure Parental Responsibility) Regulations 2002 Rule 20** provides for the right to appeal to the High Court within 30 days.

ISSUES

- 1) Should the Court uphold or dismiss the Preliminary Objection
- 2) Should the Court grant stay of execution of the Ruling of 19th June 2015?
- 3) Should the proceedings in Kiambu Law Courts be stayed, stopped? and started afresh before another Court?
- 4) Should this Court issue any interim orders?

ANALYSIS

The issue before this Court is whether the Preliminary Objection has merit or not. A preliminary objection is described in the celebrated case of **MUKISA BISCUITS MANUFACTURING CO LTD VS WESTEND DISTRIBUTION LTD [1969] E.A. 696 A Preliminary Objection is ;**

“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 the suit.”

Order 43 (1) CPR 2010 outlines the orders from which an appeal shall automatically lie without leave of Court.

Order 43 (2) CPR 2010 all other orders leave shall be obtained.

The instant case is based on children issues, specifically, whether a notice to show cause should be issued to the Respondent due to non-compliance of orders issued by the court on 1st April 2015 and 10th April 2015; to produce a child in Court, take custody of the older child and for the family to attend Counseling sessions.

With respect, this Court finds that children issues are dealt with under specific legislation that takes precedence over the Civil Procedure Rules that is general Civil Law procedures. **Section 80 of the**

Children Act, 2001 allows an appeal and is silent on whether leave of Court is sought or not. The Regulations under the same Act allow for automatic appeal to the High Court within 30 days. Therefore the appeal is properly filed in the High Court. The preliminary Objection is not upheld.

To the appeal itself, the Court finds that the Appellant sought stay of execution of the Ruling delivered on 19th June 2015. Further that this Court orders transfer of the case to another Court on the basis of bias of the Court.

The Court relies on the following cases that speak to the issue of bias of a judicial officer, judge or magistrate presiding over a matter;

1) MILLER VS MILLER (1988) KLR 555. Bare allegations of bias are not sufficient for the Court to act in disqualification of a judicial officer. There should be specific grounds that suggest bias of the Judicial Officer.

2) TRUST BANK LIMITED VS MIDCO INTERNATIONAL (K) LIMITED & 4 OTHERS (2004) ECLR. IBRAHIM J (as he then was) stated; the appropriate procedure is to have the objection first considered by the judicial officer involved first, so that she can 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.

3) OTIENO VS OUGO & ANOTHER NO 3 (1987) KLR 402 MILLER CJ (as he then was) stated that it was not appropriate for the 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 was ordered that the objection be dealt with in open court before the Judges.

This Court finds that the allegations of bias have not been substantiated in the pleadings. Better still; the matter ought to be raised in the first instance before the Trial Court before being raised in the appellate Court.

This Court has read the Ruling of 19th June 2015 whose gist is that the Court declined to issue the Notice to show cause to the Respondent. This is because the Respondent wrote a letter to the Appellant's Advocate that she was out of the country. The Trial Court found the letter was genuine and satisfactory extenuating circumstance why she did not avail herself for counseling sessions, to take custody of the older child and to produce the younger child in Court.

This Court is cognizant of the fact that the Children Court is the 1st instance court to hear and determine the Children issues. However, it is clear from the Court record and pleadings that the Trial Court issued Court orders on 1st April 2015 and 10th April, 2015 that the Respondent did not comply with.

The Constitution 2010 ensures that all parties have a fair trial. Even in the absence of bias the party may harbor apprehension of

“the dispute not being resolved by application of law [and] decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body”

as envisaged by **Article 50 of the Constitution.**

In the instant case; the Trial Court gave orders on physical custody and visitation rights between the parents over the children. These orders were not complied with. The Appellant moved the Court under **Section 86 of the Children Act 2001** as he was denied access to his child as ordered by the Court. Despite the explanation given by the Respondent and dismissal of the application to issue Notice to Show Cause, compliance of the Court Orders ought to have been pursued, complied with and enforced before orders of the *inter partes* hearing. Any impediments, challenges or hindrances ought to have been addressed to the Court, ventilated and amicable or workable solution sought to ensure compliance.

This is important because children interests are of paramount importance in every matter concerning the children as espoused in **Article 53 (2) Constitution 2010 and Section 4 of the Children Act 2001**. Parental responsibility is shared as outlined in **Article 53 (e) Constitution 2010** and each parent ought to access child or children of the union. If one parent has physical custody the other parent ought to exercise visitation rights as prescribed by the Court order. It is the lack of enforcement of these orders that generated the instant appeal.

This Court with learned Counsel for the parties held closed sessions with the parents and thereafter with each child. From the informal discussion a modality of compliance of these orders was amicably reached subject to implementation.

Therefore, whereas the Court dismissed the preliminary objection and stayed the appeal so that issues of alleged bias are ventilated first in the Trial court; this Court under **Article 165 (3) Constitution and Section 88 of the Children Act 2001**, shall grant interim orders pending hearing before the Trial Court.

FINAL ORDERS

- 1. The preliminary objection raised by the Respondent is dismissed**
- 2. The appeal is stayed pending allegations of bias to be ventilated if need before the Trial Court.**
- 3. The parties Appellant and Respondent to comply with the Trial Court orders before hearing *interpartes* as follows;**
- 4. The parties through respective Counsel to discuss and agree on date, place and person to conduct family Counseling sessions**
- 5. The Appellant and Respondent through Counsel to facilitate the visitation of the younger child by the Appellant on Sundays after church from 1pm up to 6pm until the hearing and determination of the matter.**
- 6. The Appellant and Respondent to facilitate through Counsel the reconciliation process between the Respondent and older child and possible visitation at the Respondent's home and younger sibling on school holidays until hearing and determination of the matter before the Trial court.**
- 7. The *interpartes* hearing is stayed until there is compliance of earlier Trial Court orders.**
- 8. Each party is at liberty to apply**
- 9. Each party to bear their own costs**

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS DAY OF 21ST OCTOBER 2015

M.W. MUIGAI

JUDGE

In the presence of;

Parties & Counsel