



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO. 47 OF 2011

BETWEEN

A W K.....PETITIONER

AND

N N.....RESPONDENT

RULING

1. The divorce proceedings herein terminated on 18th October 2012, when the marriage between the parties was dissolved. Custody of the child of the marriage was granted to the petitioner with the respondent being given access to the child on terms to be agreed between the parties. The formal decree was extracted on 25th February 2013. *Decree nisi* was made absolute on 30th June 2014.
2. On 25th June 2013, the petitioner filed a motion dated 24th June 2013 principally seeking review of the orders made herein on 25th February 2013 on access of the child by the petitioner so as to embrace the concept that he calls “*the child of the family.*” He also seeks orders to restrain the respondent from exposing the child to his biological father pending determination of the application. He also seeks that two children’s cases filed on the child at the Children’s Court be stayed.
3. The decree of 18th October 2012 had granted access to the child by the petitioner on terms to be agreed. It would appear that the parties did not agree on terms of access and instead resorted to filing cases on the matter at the Children’s Court.
4. It must be stated in the outset that the court did not make any orders on 25th February 2013. The access orders were made on 18th October 2012 in the judgment of the court. 25th February 2013 is the date when the decree was formally extracted. As it is therefore there is nothing for me to review as there were no orders made on 25th February 2013. What the petitioner should have done is to seek review of the judgment of 18th October 2012 to the extent of the access orders.
5. The Motion dated 24th June 2013 prays for restraining orders against the respondent with respect to exposing the child to a third party who was not party to the divorce proceedings nor named as a party in

the Motion. It is not surprising that the said third party moved the court on 18th November 2013 to be joined as a party. The application was allowed by consent and the said party filed a reply to the Motion asking to be allowed access to the child.

To my mind this is untidy, the principal suit terminated on 18th October 2012 when the decree pronouncing the dissolution dissolved of the marriage was made. The Motion before me is a post – judgment application. There is nothing substantive pending to warrant joinder of a party to the proceedings. The involvement of parties in the dispute, other than the petitioner and respondent is indicative of the fact that the matters before me ought to be dealt with elsewhere in a substantive suit focusing specifically on the matters raised, where the third party can be brought in as either a co-plaintiff or co-defendant.

6. The matters raised in the Motion as they relate to issues of children born within wedlock but out of an adulterous liaison – specifically on the rights of the biological father of such a child – are novel, and are not suitable for determination in a post-judgment application in a divorce cause. Ideally, this is a matter that should have come up during the hearing of the divorce cause, in proceedings where the biological father had been named as a party.

7. The marriage legislation does not exhaustively deal with children’s issues. The legislation enacted to deal effectively with these matters is the Children Act, which establishes the Children’s Court and confers it with jurisdiction on children’s matter. The matters raised in the Motion dated 24th June 2014 should be placed before that court.

8. I shall review the judgment dated 8th October 2012 in exercise of inherent powers, to add the order that any disputes arising relating to custody of and access to the child the subject of the judgement shall be placed before the Children’s Court for determination. Indeed, all matters touching on the subject child shall henceforth be placed before the Children’s Court.

9. The application dated 24th June 2014 is hereby disposed of in those terms. There shall be no order as costs.

DATED, SIGNED and DELIVERED at NAIROBI this 28th DAY OF November 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Nyaga advocate of the petitioner.

In the presence of Mr. Kimotho for Mr. Chuigiti advocate for the respondent.

Mr. Mwenda for Mr. Machio of interested party.