



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 3 of 2012

B.M. APPELLANT

VERSUS

S.M.M. RESPONDENT

RULING ON PRELIMINARY OBJECTION

(1) The Respondent husband has raised a Preliminary Objection to the present appeal on the ground that there is previous similar proceedings between the parties over the same children and that therefore the Children Court Case No. 652 of 2012 from which the appeal arises is an abuse of process and barred by the sub-judice rule by virtue of the previous suit. In response, the counsel for the Respondent has referred the court to paragraphs 4 and 5 of the affidavit support of the application in Children Court Case No. 652 of 2012 to indicate that the previous suit No. 117 of 2007 was settled and the parties resumed cohabitation and in fact formalised their marriage at the Registrar's office in 2008. Counsel contented therefore that the matter is not sub-judice and the Children's Court Case No. 652 of 2012 is not an abuse of the process of the court.

(2) I have considered the matter and I have established that the Children's Court Case No. 117 of 2007 prayed for judgment against the Defendant/Respondent herein for: -

“(a) Custody of the children MNM and AM

(b) Monthly maintenance of Kshs.45,400/= to be paid to the Plaintiff or such amount as the court shall deem it fit for the maintenance of the said issues.

(c) The Defendant to pay school fees and all other charges for MNM directly to [particular withheld]

(d) The Defendant to pay medical care for the children.”

The Plaintiff in Children's Court Case No. 652 of 2012 has significantly sought **“a declaration that both the Plaintiff and the Defendant have equal parental responsibility for the issues herein namely MNM and AM and an order giving that effect”** and for an order that **“the Defendant be compelled to see the children have every alternate weekend”** in addition to prayers for custody, maintenance at higher rates than sought in Case No. 117 of 2007, payment of school fees at Busy Bee and provision for medical care for the children.

(3) The appellant was not able to produce the notice of withdrawal of the previous suit Children's Court

Case No. 117 of 2007 and indeed paragraph 5 of the supporting affidavit in Children Case No. 652 of 2012 only referred to instructions to withdraw the suit having been given by the appellant to her advocate. However, I would in view of the additional prayers for declaration of equal parental responsibility and order for weekend visits against the Respondent sought Children Case No. 652 of 2012 find that the two suits do not relate to substantially the same issue as required by section 6 of the Civil Procedure Act. Moreover, in accordance with the observation of the Learned authors of Mulla on the Code of Civil Procedure (2001) 6th Ed. at pp. 150-1: -

“The basic object of section 10 (similar to our section 6 of the Civil Procedure Act) is to protect a person from multiplicity of proceedings between the same parties ... This section does not bar the power of the court to consolidate for the purpose of hearing an earlier suit and a latter suit.”

(4) Most significant is the overriding objective under sections 1A and 1B of the Civil Procedure Act for the effective and fair determination of civil disputes, which I find warrants the hearing of the present suit separately or in consolidation with Children's Court Case No. 117 of 2007 in the interests of the determination of the custody and maintenance issues raised herein for the welfare of the children as mandated by the Children Act.

Further, and in deference to the contention by counsel for the Respondent, even if the Children's Court Case No. 652 of 2012 were held to be barred by reason of sub-judice principle, it is trite law that an order for stay of a suit on the sub-judice principle is no bar to the hearing and determination of interlocutory applications in the stayed suit. On this aspect of effect of sub-judice principle, Mulla on the Code of Civil Procedure, *ibid.* at p.151 notes: -

“Interlocutory orders pending stay

Where in a suit further proceedings are stayed for some reason or the other, in such cases in order to carry on the process of the suit certain steps are to be taken in aid of proceedings to keep them alive. Thus, if the interlocutory matters are decided and the suit is kept ready to proceed further as soon as the stay of further proceedings ceases to be operative from a stage which could have been arrived to ripen the case, by disposing off interlocutory matters in between, without affecting the merit of the case would be in aid of Judicial process. A prayer to stay all further proceedings in the suit cannot be allowed. The application under section 10 cannot bar the court from entertaining interlocutory application. A stay under this section does not take away the power of the court in the stayed suit to make interlocutory orders, such as orders for a receiver or an injunction, or an attachment before judgment”.

The Children's Court could therefore competently hear and determine the interlocutory application in the civil suit No. 652 of 2012 from which the appeal to this court has been preferred.

(5) Accordingly, for the reasons set out above, I find that the Children's Court Case No. 652 of 2012 from which this appeal has been brought is not barred by the principle of sub-judice by virtue of the previous suit No. 117 of 2007 between the parties. I further hold that even if it were otherwise the two suits could be consolidated and heard together in interests of the overriding objective of the Civil Procedure Act to effectively and fairly determine the dispute on the custody and maintenance of the children the subject of these proceedings consistently with the mandate of the Children Act. Furthermore, interlocutory applications under a suit stayed by the sub-judice principle are not barred.

(6) I therefore find no merit in the Preliminary Objection raised by the Respondent and I dismiss the same with costs to the Appellant and direct that the application proceeds to hearing as scheduled.

Dated and delivered on this 16th day of October 2012.

**EDWARD M. MURIITHI
JUDGE**

In the presence of:

Miss Anyumba for the Appellant

Mr. Kiume for the Respondent

Miss Linda Osundwa - Court Clerk