



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 130 OF 2011

JULIUS KIBURE NYANGI.....APPELLANT

-VERSUS-

SOPHIA BOKE MACHOGU.....RESPONDENT

RULING

The applicant/appellant moved the court through her application dated 5th October, 2011 seeking the following orders:

- “1. *This application be certified as urgent and service thereof be dispensed with in the 1st instance.*

2. *This Honourable Court be pleased to grant a temporary stay of execution of the Decree of the Subordinate court appealed against herein together with all the consequential orders arising there from which decree is dated 9th June, 2011 pending hearing and determination of this application.*

3. *This Honourable Court be pleased to grant a temporary stay of execution of the decree of the subordinate court appealed against herein together with all the consequential orders arising there from which Decree is dated 9th June, 2011 pending hearing and determination of the appeal herein.*

4. *Costs of this application be provided...*”

The application is anchored on sections 1A, 1B, 3A and 63(e) of the **Civil Procedure Act** and Order 42 Rule 6(1) of the **Civil Procedure Rules 2010**. The application came before **Sitati J.** on 6th October, 2011 under certificate of urgency and the same was so certified with a further order for an inter-partes hearing. The parties subsequently appeared before me on 17th October, 2011 for the hearing of the application.

The brief background to the application is that the applicant/appellant are **Sophia Boke Machugu** had sued the respondent/defendant, **Julius Kibuke Nyangi** vide Kehancha District Magistrate’s Court Maintenance Cause NO. 7 of 2010 seeking orders for:-

- a. *Maintenance of the issues (sic) for kshs. 10,000 per month.*
- b. *Rent for kshs. 1500/=*
- c. *An order of variation of (a) and (b) above and*
- d. *Costs of the suit.*

The suit was heard and determined vide the Judgment of **Hon. Temba Sitati (DMII)** Kehancha dated 9th June, 2011 and a decree for the attachment of kshs. 7,455 being the defendant's salary to satisfy the maintenance order.

Dissatisfied with the Judgment the applicant brought the present application seeking stay of execution. The applicant has also filed a Memorandum of Appeal.

When the matter came before me, **Mr. Kisera** in urging the application relied on the grounds set out in the application and the supporting affidavit sworn on the 5th October, 2011 by **Julius Kigure Nyangi**, the defendant. The grounds are:-

“a. The appellant/applicant is bound to suffer substantial loss as his meager salary is bound to be illegally attached in settlement of an illegal Decree.

b. The appellant/applicant has an arguable defence which raises triable issues interlia that the trial court was not a gazetted court by the Honourable Chief Justice pursuant to section 73 of the Children Act thereby rendering the entire proceedings, the Decree and any consequential orders therefrom a nullity in law.

c. There is no inordinate delay in bringing the appeal and the application herein.

d. The respondent is intent on illegally attaching the appellant/ applicant meager salary and if same is allowed then the appeal herein shall be rendered superfluous and spent before hearing and determination

e. The appellant is ready to abide by any just and fair condition as may be ordered by this Honourable court...”

In the supporting affidavit, the appellant states that he is an employee of the department of defence on a net salary of kshs. 13,000/= per month and that attaching kshs. 7,000/= per month in satisfaction of the decree would cause him substantial loss. He further reiterates the ground that the matter should have been heard and determined by a children's court as may be gazetted by the Hon. Chief Justice in terms of section 73 of the Children Act.

In replying to the application, **Sophia Boke Machugu**, the respondent, relied on her replying affidavit sworn on 14th October, 2011 and filed in court the same day. She avers that the respondent's net salary after statutory deductions is kshs. 33,306.00 and that the respondent has parental responsibility which ought to take precedence over any other projects that the respondent may have committed his salary to. She further avers that while she admits that children's matters are triable in children courts, her case is

special as she was seeking maintenance for self and children and therefore the trial magistrate though not gazetted to handle children's cases was well seized of jurisdiction under the **Subordinate Courts (Separation and Maintenance) Act**, Cap 153 Laws of Kenya.

The respondent further submitted extensively on the issue of the rights of the children to wit their right to shelter, education and maintenance as provided for under the **Convention on the Rights of the Child, the Constitution (Article 53)** and the **Children's Act** (Section 3, 4 and 9). She implored the court that such rights override every other interest and that the court should dismiss the application in order that the respondent discharge his duty to the children. She further cited various authorities in support of her proposition that the maintenance ordered by the subordinate court was proper.

In reply, **Mr. Kisera** disputed that the cause before the subordinate court was one on maintenance not requiring to be brought under the ambit of a properly constituted Children court. He drew the court's attention to the provisions of section 73 paragraph (e) of the **Children Act** stating that maintenance of children which falls under parental responsibility is the preserve of chapter 3 of the said **Act** and must therefore be presided over by a gazetted children's magistrate. **Mr. Kisera** reiterated that having decided the matter without jurisdiction, the judgment and orders of the magistrate's court were a nullity.

From the pleadings and the respective submissions, I find that the issues for determination are:-

- i. *Whether or not the subordinate court had jurisdiction over the cause.*
- ii. *Whether or not the consequential order and Decree should be upheld and executed.*
- iii. *Whether or not to stay the execution of the Decree(iv) subsequent to (i), (ii) and (iii) above, the duty and jurisdiction of this court in protecting the rights of the child.*

I first address the first, second and third issues. The application seeks to stay the execution of the Decree and consequential orders. I have carefully perused the proceedings and judgment of the subordinate court, the present application, the supporting affidavit and the respective oral submissions by the parties. I find that the cause before the subordinate court in Kehancha was one primarily seeking the maintenance of the children as set out in the prayers listed on page one of the Judgment to quote "*maintenance of the issues for kshs. 10,000/= per month for upkeep of the issues*". Indeed the Judgment dwells a lot on whether or not the applicant has parental responsibility over the two children. This finding is further supported by the respondent's oral submissions before me when she time and again emphasized that the application should be dismissed in order that the maintenance of the children be safeguarded and that in the event the court allowed the application, the children would suffer.

Having found that the cause was for maintenance of children, I find that the said cause ought to have been prosecuted within the provisions of the **Children Act** chapter 141, Laws of Kenya. Consequently, I further find as a fact that **Hon. Temba Sitati** not being a gazetted magistrate in terms of the provisions of section 73 of the said Act was not seized of jurisdiction to preside over the cause. Having so found, I must then address myself on the impact of lack of jurisdiction. As submitted by counsel for the respondent, the whole application turns on whether or not the court was seized of jurisdiction. Though learned counsel did not support his submissions with authorities, it is settled law that acting without jurisdiction is indeed fatal to judicial proceedings. In the case of **Sir Ali Bin Salim –vs- Shariff Mohamed Shary (1938) KLR 9**, it was held that:

"...If a court has no jurisdiction over the subject matter of the litigation, its judgment and orders however precisely certain and technically correct are made nullities and not only voidable, they are void and may be set aside at any time by the court in which they are rendered but declared void by every court in which they may be presented..."

In **Kabita Karanja** and the **Attorney General, (Civil Appeal No. 310 of 1997)**, the Court of Appeal sitting in Nyeri stated at pg 3 of its Judgment thus:-

“..Any Order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order. What is a nullity remains a nullity...”

I am guided by the above authorities to find and hold as I must that the judgment and consequential orders of the **Hon. Temba Sitati** are incapable of execution and therefore not only order a stay thereof as prayed but declare the same a nullity. That disposes of the first, second and third issues.

I turn now to the fourth and critical issue namely the position of the affected children. Having found the judgment and Decree a nullity, I must ask myself a pertinent question. What then happens to the children who are the subject matter of the Decree in question? Should their rights which are guaranteed under the international law, the Constitution and the Children Act fall by the wayside along with the fatally defective Decree? The answer is an emphatic No. This court is seized with original and unlimited jurisdiction under Article 165 3(a) of the Constitution. It also has and exercises supervisory jurisdiction over subordinate court under Article 165 (6) and (7), which provide that:-

“...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. (Article 165 (6)).

For purposes of clause (6) the High Court may call for the record of any proceedings before any subordinate court, person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice...”. (Article 165 (7)).

In exercise of this jurisdiction and the inherent power of the court under section 3A of the **Civil Procedure Act**, I further make a consequential order and direct that maintenance cause No. 7 of 2010 previously determined by the subordinate court in Kehancha be tried afresh and expeditiously determined by a gazetted magistrate in accordance with section 73(d) (ii) of the **Children Act**. I make this order pursuant to section 4(3) (a) and (b) of the **Act** which imposes a duty on this court to safeguard and promote the rights and welfare of the child.

Finally, and in view of my earlier finding in respect of the Judgment and Decree appealed against, I find Civil Appeal No. 130 of 2011 filed in this court subsequently rendered superfluous and incapable of prosecution.

Each party will bear their costs in this application.

Ruling dated, signed and delivered at Kisii this 19th day of December, 2011.

R. LAGAT KORIR
JUDGE

Before:

Hon. R. Lagat Korir J.

..... court clerk

Appellant

Respondent