REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 38 OF 2009

BETWEEN

L G M:::APPELLANT

VERSUS

R R :::RESPONDENT

RULING

The background information to this ruling is that there is in place a matter pending in the children's court as case number 480 of 2008. The plaint is annexed to the supporting affidavit in a bundle as annexture LGM1. The court has shoned through the same and for purposes of the ruling. These are the salient features.

- Vide paragraph 3, that the disputants are the biological parents of the subject children.
- The plaintiff had been granted sole custody by a court in Nepal on 26th April 1999.
- Vide paragraph 5 that the marriage between the disputants had been dissolved; the plaintiff remarried and joined with a wife in Nairobi and have indeed home for the children.
- Vide paragraph 6, that the stay orders which had been granted by the family court in Bombay were lifted and the defendant in the children's court,

was allowed to relocate the children to Nairobi because of her employment. The current Respondent to the appeal had been given visitation rights whose execution had become impracticable because of changed circumstances.

- Vide paragraph 11, that the plaintiff who is the current respondent to the appeal had secured a permanent job in Nairobi and was now in a position to maintain and secure the welfare and safety of his children as opposed to the defendant who had no permanent job by reason of her having lost her job through dismissal.
- Vide paragraphs 13, that the defendant has curtailed the plaintiff's access to the children which has affected the children emotionally.
- Vide paragraph 14, that the defendant while away on overseas trips, has been leaving children in the care of unknown male strangers a matter causing stress to the children.
- Vide paragraph 15, that teachers have complained about lack of discipline of the children, evidence of the defendants failure to meet her responsibility.
- Vide paragraph 21, that the children themselves have expressed a wish to spent more time with him.
- Vide paragraph 22 that the children have now settled in Kenya and cemted ties with their father and friends and will not be in their best interests for the defendant to attempt to remove them from Kenya.
- Vide paragraph 26, that the defendant has prevented the plaintiff from paying fees and make reasonable financial contribution to the welfare of the

children.

By reason of the afore said among others, the plaintiff in the children's, court, sought orders for joint handling of interests, welfare, health, education and any other issues involving the children, sole custody or joint custody , unlimited access, in the alternative, in order to enable him satisfy himself as to the standard of care, safety, maintenance and security of the subject children. In the second alternative, be given custody for half of every month or one – 2 weeks every month, the defendant to be ordered to leave the children with the plaintiff, whenever she travels outside the jurisdiction of this court, a restraint order to restrain the defendant, her agents, servants or whomsoever from removing the children from the jurisdiction of the court, in Kenya, the passports and other travel documents of the children be deposited in court.

The defence was filed under protest and for purposes of this ruling these are the relevant features of the same

- The matter is Resjudicata and the proceedings are an abuse of the due process of the court.
- That custody was given to the plaintiff because Nepalese law allowed custody to one person only.
- Vide paragraph 7, thereof, that the defendant was granted sole custody of the children pending appeal in the Bombay family court case and asserts that this court, has no jurisdiction to determine the proceedings here.
- Vide paragraph 17, that whenever she has gone out on holiday when the children are not with the plaintiff, she has always gone with them.
- Vide paragraph 18, that none of the children has expressed a wish to spent more time with the plaintiff.
- Vide paragraph 20, that the children have a stable and loving environment which need not to be disturbed.

It appears the defence was subsequently amended but since the issue are not directly under interrogation there is no need to scheme through it.

In the same bundle of documents there is an interim chamber summons dated the 9th day of December 2008. A total of 16 reliefs were sought. In a summary form, these related to restraint orders to restrain the defendant from removing the children outside the jurisdiction of the court, surrender and deposit of the children's travel documents into court, an order to issue to the immigration department in Kenya to bar the departure of the children from this jurisdiction, applicant be given sole custody or joint custody, unlimited access or alternatively according to the schedules suggested, access to the children whenever the defendant travels outside the jurisdiction access to records pertaining to the Education, health and medical care of the children, the defendant to be restrained from altering the names of the children, any other relief as the court may deem fit to grant.

It is apparent that during the pendence of the hearing of the said interim application, accompanying the plaint, the defendant in the children's court, who is the Appellant/Applicant put in an application dated 12th day of March 2009 and filed on 19th March 2009. It had been presented by way of chamber summons under order VI rule 13 (1) (b) and (d) of the CPR, section 3A, 7 and 9 of the CPA, section 4,7,3,and 76 of the children's Act 2001. Two reliefs were sought namely:-

1. *"The plaint dated and filed herein on 29th July 2008 and the plaintiffs entire suit herein be struck out with costs to the defendant.*
2. *The costs of and occasioned by this application be borne and paid by the plaintiff."*

The proceedings evidencing arguments and the ruling of the children's court on jurisdiction have not been exhibited. Save that there are also grieving orders made by the children's court, with regard to the interim application which has accompanied the plaint. These have been annexed to the replying affidavit of the respondent, to this application deponed by the respondent on the 29th September 2009, and filed the same date. They are

annexed in a bundle as annexture RR1 and these read:-

1. *"That the child do and is hereby allowed to travel with the mother.*
2. *That the advocate for the Respondent do and is hereby ordered to give professional undertaking to ensure the child is returned to the jurisdiction by Monday 1st day of June 2009.*
3. *That earlier orders do and is hereby stayed to allow the defendant travel with the child.*
4. *That the child be returned on or before 1st day of June 2009.*
5. *That hearing before Hon. Mutua (Mrs.) Resident magistrate on the 4th day of June 2009.*
6. *That leave and corresponding leave do and is hereby granted to file supplementary affidavit and further affidavit"*

It is not clear from the reading of the said orders, as to whether these orders are linked to the application for striking out. The lack of failure to annex the orders arising from the refusal to strike out the suit on the issue of lack of jurisdiction not withstanding, there is a memo of appeal dated 16th day of June 2009 and filed on 17th the day of June, 2009. It raises 8 grounds of appeal. The centrol and main one is that the learned magistrate erred:-

(i) By failing to strike out the plaint as well as the interim application.

(ii) By holding that the children's court, had jurisdiction to hear the matter.

(iii) By failing to hold that the issue of custody had been fully determined by a court, of competent jurisdiction in another jurisdiction.

(iv) By failing, to take note of the fact that the plaintiff in the childrens court, had even applied in other proceeding to have those orders

enforced.

(v) *By failing to hold that the plaintiff in the children's court, had falsely stated that there are no pending proceedings between the parties.*

Against the a fore set out background information, and on the basis of the appeal filed herein, the appellant /applicant has anchored an application by way of notice of motion dated 7th day of July 2009 and filed on 9th day of July 2009. Six reliefs are sought namely:-

1. *Spent*
2. *Pending the hearing and determination of this application, the enforcement and execution of and all proceedings to enforce and execute any and all orders given or issued by the children's court, in Nairobi children's court, children's case number 480 of 2008 be stayed and and or suspended.*
3. *All the proceedings in Nairobi children's court, children's case number 480 of 2008 be stayed pending the hearing and determination of this application.*
4. *Pending the hearing and determination of this appeal, the enforcement and execution of and all proceedings to enforce and execute any and all orders given or issued by the children's court, in Nairobi children's court children's case number 480 of 2008 be stayed and or suspended.*
5. *All the proceedings in Nairobi children's court, children's case number 480 of 2008 be stayed pending the hearing and final determination of the appeal.*
6. *The costs of this application be made to abide the result of the appeal.*

Interim orders were granted by Gacheche J on the 15/7/2009 and are still in force.

The application is supported by grounds in the body of the application, supporting affidavit, annextures, written skeleton arguments and oral high lights in court, and a summary of the same are as follows:-

- That there is in place children's court case number 480/2008 by the Respondent herein which suit was accompanied by an interim application seeking drastic measures some of which have been given by the children's court, among them an injunctive relief restraining the applicant from taking the children outside this jurisdiction.
- The applicant responded by filing an appearance and defence under protest, and subsequently sought to strike out the plaint and the accompanying interim application.
- That prior to the disposal of the striking out application, adverse orders mentioned in paragraph 7 of the supporting affidavit had been issued.
- Subsequently, other transactions have taken place among them restriction on the travel of the children without authority from the court.
- It is their stand that the appeal has high chances of success on the issue of lack of jurisdiction, and if upheld, it will determine the proceeding pending before the children's court. In the premises it is only proper that stay orders be granted herein.

The written skeleton arguments of the appellant, are dated 9th day of November 2009, and filed on 10th day of November 2009 and the salient features of the same are as follows:-

- This court, has jurisdiction to grant orders under the provisions of law, cited irrespective of those provisions dealing specifically with stay of execution as opposed to stay of proceedings being sought herein.

- The court, is invited to be guided by decisions decided by the court of appeal regarding stay of proceedings in relation to appeals directed to that court and hold that the same principles apply to stay of proceeding in respect to appeals directed to this court, so long as the court, is satisfied that the appeal is arguable.
- It is their stand that on the basis of the documentation exhibited herein, they have an arguable appeal on the issue of lack of jurisdiction of the lower court, to try the matter by reason of the issues raised having been adjudicated upon and ruled upon by a court of competent jurisdiction, and the respondent having filed proceedings to enforce the same court orders, where by the court had been given permanent sole custody of the children to the appellant with the respondent being given visitation rights and for this reason, it is their stand that the appellants' objection was well taken and has merit.
- For the reasons that the issue of custody of the children having been duly adjudicated upon by competent courts of law, the matter is now Resjudicata and to support their stand they rely on the provision of law, legal texts and case law on the subject submitted to the court.
- It is their stand that if stay orders are not granted, the appellant and the children will suffer psychological trauma which is irreparable.
- That the appellant moved to this court, promptly to seek the relief being sought and is not guilty of any delay in the circumstances of this case.
- That no security is necessary to be furnished by the appellant but are willing to furnish any should this court, so desire.

- That there is no issue that arises from the children's travel outside the jurisdiction as they have been doing so since 2004.
- The court, to ignore allegations of children suffering as the child welfare officers report filed in the lower court reveals otherwise.

The Respondents response to that application is confirmed in a replying affidavit sworn by the Respondent and filed on 29th September 2009, and an application dated 27th July 2009 and filed on 28th day of July 2009, written skeleton arguments, annextures, case law and oral highlights in court. A summary of the same for purposes of the ruling are as follows:-

- Reliance is placed on the centrol prayer in the Respondent's application to set aside the exparte stay order issued on 15/7/2009 on the grounds that they have curtailed the rights of the Respondent in so far as the visitation rights are concerned.
- That it is their stand that the appellant and her fiancé husband are foreigners, with no permanent jobs, and if the children are taken out of the jurisdiction of the court, then the respondents visitation rights will be hampered.
- The court, is invited to hold that the appellant is a person of unquestionable integrity, as she has failed to disclose both to the children's court, and this court, that she has been dismissed thrice from her employment since she came back to Kenya in 2004, to be with her fiancé/husband where as he came to Kenya solely to be with his children.
- It is his stand that the appellant did not appeal against the orders restraining movement of the children outside the jurisdiction, and the application for stay of proceedings is meant to serve that purpose.

- It is their stand, that there is no arguable appeal on the issue of lack of jurisdiction because the jurisdiction given to the children's court, is unlimited. More so when the orders issued by Indian courts are incompetent in enforcing matters relating to the welfare of children currently residing in Kenya and who have been so residing in Kenya for a period of over 5 years.
- That prior to the children's court, granting him access to the children, he had been having access to his children sporadically and at the whom of the appellant and not in any streamlined schedule thereby inconveniencing him and the children greatly.
- That the welfare of his children, is at risk considering the fact that they, the appellant and her fiancé attend counseling therapy and they also perform dismally at school.
- Reiterates that the proceedings in the Indian courts', were incompetent at the time the appellant relocated to Kenya and having taken place more than 5 years ago are incapable of taking care of the interests of the children here in Kenya because the prevailing circumstances are different.
- He has sole custody of one child, in respect of whom he is not the biological father but whose access he cannot access because of the hindrance from the appellant.
- That interim orders being sought in the lower court, are not draconian as they only intend to cater for the welfare and bests interests of the children.
- That seeking stay orders in the manner sought indefinitely will be detrimental to the welfare of the interests of the children.

The respondents written skeleton arguments, are dated 17th November 2009 and filed the same date, and the salient features of the same are as follows:-

- That all the orders sought by the respondent in the children's court deal with the welfare and upbringing of the children who are subjects of these proceedings and have nothing to do with them being draconian.
- The main objection to the children's court, having jurisdiction to hear the matters herein was based on the assertion that the issues have been determined by courts of competent jurisdiction in Mumbal India, a matter not correctly stated as the appeals are still pending in those courts.
- Further that there is no way the argument can be sustained that him Respondent is debarred from pursuing the pending proceedings before the children court, because he had made an attempt to have those orders adopted herein for enforcing because, there is a clear provision in the foreign of enforcement of judgements Act that those procedures do not relate to judgement relating to the custody of children.
- A reading and or construction of the provisions of section 4 and 76 of the children's Act reveals that the orders made in India are not operational herein.
- If the orders of stay sought by the applicant herein are granted, they will go against the clear provisions of the children's Act which requires that matters relating to the welfare of the children should be processed speedily.
- Regarding the reliefs sought in the interim application dated 29th April 2009, the court, is invited to take note that the measures were taken because the appellant is a foreigner in Kenya and she can easily relocate herself and the children to some other places to the detriment of his visitation rights, and it was only prudent of him to take remedial steps to

avoid future hardship to the children and himself.

- It is his stand, that he was entitled as a father to be mindful of his children welfare, more so when their welfare is not well catered for by the appellant.
- Both disputants and the children are currently residing in Kenya and it is only proper that issues relating to that relationship be decided by Kenyan courts.

On case law cited by the appellant, they contend these do not assist the appellant as they relate to different set of circumstances whereas those cited by them are relevant because the state of affairs as pertains to the disputants and the children will not be altered in any way by the outcome of the appeal.

The appellant counsel filed a response to the Respondents submission dated the 20th day of November 2009 and filed on the 24th day of November 2009.

The salient features of the same are as follows:-

- Maintain that the foreign judgements (Reciprocal enforcement Act cap 43 laws of Kenya was promulgated to make new provisions for the enforcement of certain foreign judgement by way of registration.
- The court is invited to be guided by the preamble to the said Act which reads:-

"Act of parliament to make new provision in Kenya for the enforcement of judgements in countries outside Kenya which a accord reciprocal treatment to judgements given in Kenya and for other purposes in connection therewith.

- The court, to note that the Respondent has admitted that the Indian court order relating to the children's custody and access form the basis of enforcement proceedings in Kenya, otherwise other than under cap 43 laws of Kenya.
- Still maintains that the Respondent herein filed Nairobi HCCC NO. 9 of

the 2000 seeking recognition and enforcement of the said Indian court, orders, and as such he cannot now be heard to say that the said Indian court, orders do not hold.

- The fact that a foreign court judgement is not registrable under Cap 43 laws of Kenya does not mean that such foreign judgement is of no effect.
- The court is invited to take note of the fact that section 7 of the CPA express bares courts', which would definitely include the children court, which is a subordinate court, to the high court for the purposes of the definition of "court" under section 2 of the CPA from retrying an issue or matter which has been decided in a former suit between the same parties.
- They assert that since there is no mention in section 7 of cap 21 CPA of cap 43 as to whether such former suit resulting in judgement which is registrable under cap 43 laws of Kenya is covered by this section 7 of cap 2 CPA or not, it is not right for the respondent to allege that these matters (of Resjudicata) are irrelevant to the proceedings herein.
- Content that sections 4 (3), 76 (1) and 76 (2) of the children's Act which the Respondent has cited in his application cannot have the effect of overturning the effect of the provisions of section 7 of the CPA and override the doctrine of Resjudicata. More so when they only enjoin courts seized over matters dealing with children to have the welfare of the child being paramount. This situation does not prevail in the circumstances of this case because matters pertaining to the welfare of the children subject of these proceedings have already been determined by courts of competent jurisdiction which have expressly stated that it had the welfare of the

children as being paramount when making the requisite orders. As such these provisions cannot be used as a basis for ignoring those determinations.

- Further, the allegations and or complaints levelled against the Appellant/Applicant and her husband by the Respondent herein are not sufficient to unseat the provisions of section 7 CPA in so far as the decisions made by the Indian courts are concerned, thus, they cannot unseat the doctrine of Resjudicata.
- It is their argument that had the issue of custody of the children subject of these proceedings been determined by Kenyan courts', other than the childrens' court, the respondent would not have commenced other proceedings to have the same issues be re determined a fresh. Using this to fortify their stand, they argue that the same position prevails in respect to decisions by other courts of foreign jurisdiction. As such they have made out a case to the effect that, lack of jurisdiction on account of Resjudicata was validity raised by them and should have been upheld by the lower court. On this fortifying still reiterate that they have an arguable point on appeal.
- If indeed it is correct that circumstances have changed since the orders complained of were made, It is their view that the proper forum to determine the changed circumstances if any are the same courts that made the orders namely Indian courts.
- Still maintains that the affected orders having been made by the Family court in Mumbai High court, and supreme court of India, they doubt if the childrens' court in Kenya can have appellate jurisdiction over those forums

and have the capacity to upset the same. It therefore follows that the proceedings in the children's court were an exercise in futility.

- It is not true as alleged by the Respondent, that the appellant ran away from Indian to Kenya. Their stand is that she sought and was granted permission by the courts of that jurisdiction to come to Kenya with the children.
- There is no foundation for the fear of the appellant taking children out of the jurisdiction and not returning at all as it is common knowledge to the Respondent that the appellant has often travelled out of the jurisdiction of the court, with the children and returned to the same jurisdiction with one such trip having occurred or been undertaken in July 2009.
- Contend both the appellant and her husband as well as the Respondent and his wife are foreigners. As such neither can claim to have a superior audience before Kenyan courts, than the other. All are on equal tooting before the courts of this jurisdiction.
- Contend there are valid access orders issued by the childrens' courts, which orders the Respondent should have sought to enforce instead of commencing fresh proceedings.
- It is their stand that the Respondents' relationship with the children subject of these proceedings have detercorated to an extend that the said children do not want to see him as often as he would like, a circumstance which should not be blamed on the appellant on the one hand, and cannot be ignored by the court on the other hand.
- Lastly that the alleged changed circumstances have no bearing on the

appellants' capability to look after the welfare of the children subject of these proceedings. As such these are in consequential to the determination of this application.

On case law and legal texts, the appellant/applicant referred the court to the following:-

Halis burys laws of England 3rd Edition volume 15 page 176-237 paragraph 347 which reads:-

"***Records of courts of law***. *The doctrine of estoppel by record thus limited, finds expression in two legal maximums interests reipublicae Ut Sit finis, Utium and nqmodebet bis vexari pro unaet eadum Causa". It accords with the first of these maxims that a party relying on estoppel by record, should be able to show that the matter has been determined by a judgement in its nature finali (a) the word "final" is here used as opposed to "interlocutory" (b) a judgement which purports finally to determine rights is none the less effective for the purposes of creating an estoppel because it is liable to be reversed on appeal (c) or because an appeal is pending (d) or because for the purposes of working it out inquiries or accounts have to be taken"*

Page 183 paragraph 356 which reads:-

"***Estoppel and Resjudicata in matrimonial proceedings***. *The question of estoppel in matrimonial cases is one of difficulty , A petitioner in the divorce court, whose claim for relief is based on an alleged matrimonial offence of the respondent cannot oblige the court, to decide the issue in his favour on the grounds that the Respondent is estopped from denying the charge by the finding of some other court, as this would prevent the court, from exercising its statutory duty to inquire into the truth of the facts upon which the petition is based and thus be contrary to public policy (p) However a party who attempts to bring a claim for relief based on facts that have already been judicially determined adversely to him will be estopped from bringing evidence of those facts before the court (q), and a party will not be allowed to re litigate by way of defence claims of a positive nature*

which have previously been decided against him"

Paragraph 357 page 184…….

"Meaning of Resjudicata:- the parties are estopped by the findings of facts involved in the judgement (c). As respects the determination of questions of law, the true view seems to be that the legal rights of the parties are such as they have been determined to be by the judgement of a competent court, the conclusion of the determination however rest upon the same principles in each case. The doctrine of Resjudicata is not a technical doctrine applicable only to records, it is a fundamental doctrine of all courts that these must be an end of litigation (d). It will therefore be convenient to follow the ordinary classification and treat it as a branch of the law of estoppel"

Page 186 paragraph 360*…… the court, has inherent jurisdiction to strike out as frivolous and vexatious a claim or defence which has either been already decided in previous proceedings against the party raising it, or might have been raised in a previous proceeding in which the facts necessary to raise it have been decided against the party desiring to raise them"*

Page 187 paragraph 362*….. "the doctrine applies equally in all courts, and it is Immaterial in what court the former proceedings was taken, provided only that it was a court, of competent jurisdiction (d) or what form the proceedings took, provided it was really for the same cause"*

Page 195 paragraph 371 conclusiveness *in criminal and matrimonial causes:…….. Adecree absolute in a divorce case, therefore concludes the facts of dissolution of the marriage, but nothing further, and it is apprehended that a decree of nullity pronounced by the English court on a marriage celebrated here or of a foreign court, or a marriage celebrated in the country (t) between persons domiciled there, is equally conclusive as to the non-existence, of the marriage"*

Halis burys laws of England Fourth Edition volume 37 page 322 paragraphs 434. ***striking out pleadings which are an abuse of the process……****An abuse of the process of the court, arises where its process is used, not in good faith and for proper purposes but as a means of vexation or oppression or for viterior purposes, or more simply, where the process is misused, in such a case, even if the pleadings or endorsement does not offend any of the other specified*

ground for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court, may be justified in striking out the whole pleadings or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an viteria motive to the prejudice of the opposite party, he may be guilty of an abuse of the process and where subsequent events render what was originally a maintainable action one which become inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court"

The code of Civil Procedure Act V of 1908 12th Edition page 35-39. page 35 section 13 No*. court shall try any suit (page 38) or issue in which the matter directly and substantially in issue (pp. 40,47) has been directly and substantially in issue in a former suit (page. 38) between the same parties (page. 62) or between parties under whom they or any of them claim (page 65) litigating under the same title (page 71) In a court, competent to try such subsequent suit or the suit in which such issue has been subsequently raised (page 73) and has been heard and finally decided (page 80) by such court"*

The case of **SHAH VERSUS ORODHO AND 2 OTHERS (1990) KLR 246** where it was held interalia that: - *"Having brought a suit before the rent Restriction Tribunal, it was not open to the plaintiff to institute from proceedings before this court, praying for the same remediless"*

At page 248 paragraph 20-35 it is observed:-

"The plaintiff was not right to institute concurrent proceedings before two separate courts. (Section 6 of the civil procedure Act refers) Having brought a suit before the tribunal in effect seeking a declaration that the defendants were not entitled to increase rent for the suit flat, or to evict her without the consent of the tribunal, it was not open to her to institute other proceedings before this court, praying for more or less precisely the same remedies….."

The case of **GARDEN SQUARE LIMITED VERSUS KOGO AND ANOTHER (2003) KLR 20** in which it was held interalia that:-

"The suit before the court, was Resjudicata as the same issues were directly and substantially in issue in a previously instituted suit between the same parties"

Page 23 paragraph 1-10…… *the relevant provisions in section 7 which bars a court, from trying any suit or issue in which the matter directly and substantially in issue therein, was a matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim and the same matter was heard and determined by a court of competent jurisdiction….."*

The Shah case was decided by Bosire J as he then was (now JA) whereas the garden square limited case was decided by Ringera J as he then was.

The case of **ZAKAYO MAKUMI VERSUS MAINA GITHAIGA NAIROBI MISC APPLICATION NO. 1066 OF 1998** decided by Mbogholi J on the 28th day of October 1998, where the learned judge held interalia that:- *"In an application for stay pending appeal, the applicant has a duty to show substantial loss shall result if the order is not granted, that the application has been made without unreasonable delay, and security may be ordered for the due performance of the decree or other which may ultimately be binding on the applicant"*

The case **of MARK OMOLLO AGENCIES AND 2 OTHERS VERSUS DANIEL KIOKO KAINDI AND ANOTHER NBI HCCC 1061/90** decided by Nyamu J as he then was (now JA) on the 25th day of March 2004. At page 4 line 10 from the bottom to page 5 the learned judge as he then was (now JA) made the following observations:-

"……..my finding is that what is being sought is a stay of proceedings and the monetary condition set out (a) and (b) above do not apply to applications for stay of proceedings. They only apply to applications for stay of execution. The applicant seeks a stay of hearing so that major legal points he intends to pursue on appeal is determined. If the hearing were to proceed on the basis of the amended pleadings, this would render the appeal nugatory. I consider that the applicant is correct in that if fresh cause of action were to be added and the matter proceeds to full hearing, the intended appeal would certainly be rendered nugatory.

The case of **SHANTILAL VAGHJI SHAH AND ANOTHER VERSUS NZANZA SPINNING MILLS LIMITED NAIROBI HCCC MILIMANI COMMERCIAL COURTS CC NO. 1675 OF 2001** decided by Azangalala J on the 18th day of March 2004. At page 3 line 5 from the top the learned judge quoted with approval the case of **NAIROBI MILIMANI HC WINDING UP CAUSE**

NO. 43 OF 2000 (Un reported) in the matter of **GLOBAL TOURS AND TRAVELS LIMITED AND IN THE MATTER OF THE COPERATIVE ACT** where Ringera J as he then was held interalia that:-

"The court has a discretion to order stay of proceedings pending appeal from its order or decree and that such discretion is unfettered……"

The case of **AMERICAN LIFE INSURANCE COMPANY (K) LIMITED VERSUS DAVID OYATTA NAIROBI CA NO. 168 OF 2004** decided by A. Visram J on 27th day of May 2004 as he then was (now JA). At page 5 line 10 from the top, the learned judge as he then was (now JA) had this to say:-

"However, the fact that the Rules committee left the matter of stay of proceedings to the court, does not imply that the court, will decide the same on caprice the court, is always bound to decide cases before it on sound judicial principles and exercise its discretion judiciously……"

At the same page 5 line 3 from the top the learned judge as he then was had this to say:-

"Since they did not apply the same conditions to application for stay of proceedings is any ones guess. In my view, they did not want to apply the same strict principles to applications for stay of proceedings. They left that to the wisdom of the court."

The Respondents counsel on the other hand relied on the provisions of Foreign judgments (Reciprocal) Act cap 43 laws of Kenya and provisions of the children's Act specified in the skeleton arguments. On case law reliance is placed on the case of **DAVID MORTON SILVERSTAIN AND ATSANGO CHESONI CIVIL APPLICATION NO. NAI 189/2009** decided by the CA on the 1st day of March 2002. At page 11 line 1 from the top the Law Lords of the CA had this to say:-

"……..he has not satisfied us that if we do not grant to him the stay of proceedings his appeal in this court will be rendered nugatory….."

The case of the **STANDARD LIMITED AND 2 OTHERS VERSUS WILSON KALYA T/A KALYA AND COMPANY ADVOCATES NAIROBI CA NAI 367 OF 2001 (196/ 01 UR)** decided by the CA on the 26th day of April 2002 where the Law Lords of the CA approved their reasoning in the Atsango Chesoni case (supra).

The Respondents counsel also relied on the decision in the case of **AMERICAN LIFE INSURANCE CO. (K) LIMITED (SUPRA**) decided by A. Visram J as he then was (now JA) whose decision has already been set out herein.

Due consideration has been made by this court, of the rival arguments herein in the light of the case law cited and the court, is of the opinion, that before it proceeds to asses those facts, it is important to mention than an urgency arose herein before the drafting and delivery of the current ruling, leading to the consent orders entered between the parties on the 16th day of December 2009 along the following lines:-

"Upon hearing counsel for the Appellant/Applicant and counsel for the Respondent. It is hereby ordered by consent:-

1. *That the appellant be at liberty to travel with the children to India from 21st December 2009 to 6th January 2010 on conditions that:-*
    - *(a) The appellant and her advocate give an undertaking to this Honourable court that the children will return to Kenya by 6th January 2010.*
    - *(b) The appellant signs surety forms by 18th December 2009.*
    - *(c) The children's return tickets and a copy of the Appellants employment contract be filed in court by 18th December 2009.*
    - *(d) Copies of the childrens' re-entry passes be filed in court by 18th December 2009.*
2. *That the Respondent to have access to the children for 5 days from 16th December 2009 to 20th December 2009 and for five days from 6th January 2010 to 10th January 2010 and for 3 long weekends 1(one) in February 2010, one in March 2010 and one in April 2010.*

3. *That the parties to share access of the children during the summer holidays in 2010 and be at liberty to travel with the children to the United States of America during that period. The access to be shared at 30% to the appellant and 70% to the Respondent excluding the time spent by the children at summer camp.*

Given at Nairobi under my seal of the court this 16th day of December 2009.

Issued at Nairobi this 17th day of December 2009"

The court, has incorporated the content of the consent order in this ruling because it is still binding on the parties and is still effective.

Turning to the assessment of the facts in order to determine whether the stay orders are to issue or not, it is clear that there is no dispute that the applicant has presented the application under the law relating to stay of judgement and court orders and not proceedings. This court, has given due consideration to the content of these provisions in the light of case law relied upon and the court, is persuaded by the reasoning and ruling of the learned judges who made those rulings that they stated the correct position in law. These are Nyamu J as he then was (Now JA) in the case of **MARK OMOLLO AGENCIES AND 2 OTHERS (SUPRA)** Azangalala J in the case of **SHANTILAL VEGHJI SHAH AND ANOTHER (SUPRA),** A Visram J as he then was (Now JA) in the case of **AMERICAN LIFE INSURANCE COMPANY (K) LIMITED (SUPRA)** that indeed the CPR rules under which the Apellant/Aplicant has presented her application related to stay of orders and not proceedings.

It is also trite and this court, has judicial notice of the same to the effect that there is no other provision applicable to the superior court, governing granting a relief for stay of proceedings pending appeal to the superior court.

The court, also agrees and is accordingly persuaded by the said cited case law than that the only express provision on stay of proceedings is rule 5 (1) of the court of Appeal appellate jurisdiction rules not applicable to the superior court, proceedings. The court is also in agreement that the absence of a clear provision on the granting of the relief of stay of

proceedings by the superior court, if satisfied as found by the learned judges in the case law cited is not a bar to the court granting the same as jurisdiction exists for the court, to grant the same. No doubt this can be accessed on granted vide the inherent jurisdiction of the court enshrined in the provisions of the CPA.

It is further to be noted that as found by the said learned judges, the absence of a provision for the grant of the said relief of stay of proceeding, it means that the rules committee left it to the court, to determine the conditionalities to be set when granting the relief and not necessarily those of stay of orders namely:-

(i). *Presentation of the application without undue delay*

(ii). *Establishment of likelihood of suffering substantial loss if stay is not granted and*

(iii). *Provision of adequate security.*

Having established that jurisdiction exists to grant or deny the relief sought, the court, proceeds to examine the merits of the application, in doing so, the court, has to bear in mind the following:-

1. That both the plaint and the accompanying interim application presented to the lower court, still stand undetermined.

2. That the centrol theme in those processes is that the Respondent herein who is the plaintiff therein, moved to the lower court, and among others, seeking relief that he does not want the children to be removed from the jurisdiction of the court, namely Kenya, that he has a job, a home and wife meaning he has an environment condusive to the welfare of the said children and therefore an ideal party to be granted the custody, care and control of the said children as contrasted to the position of the Appellant/Applicant who allegedly, she and her husband are foreigners without any meaningful

employment.

In addition they are persons of doubtful integrity and therefore fit only to be accorded visitation rights in respect to the said children.

Further that the said processes were presented to court, with good intention all for the purposes of the securing the welfare and best interests of the said children. In this court opinion that the soundness and or unsoundness of this assertions cannot be interrogated at this state because in doing so would preempt the lower court proceeding.

3. It is undisputed that before the Respondent was heard on the interim application for interim relief the Appellant/Applicant herein put in an application seeking to strike out both the plaint as well as the interim application on the grounds that the childrens' court lacked jurisdiction to entertain the said processes because the court, lacked jurisdiction by reason of the matter being Resjudicata as the issues touching on the subject matter of the proceedings namely the children had been decided between the disputants by courts of competent jurisdiction in India. That it is doubtful as to whether the childrens' court, would have the jurisdiction and capacity to upset orders of the high court, and supreme court in India considering the fact that it has no appellate jurisdiction. This too goes to the root of the lower court proceedings. As such it is not prudent to interrogate it at this interim stage.

4. To take note that it is now trite that whenever issue of jurisdiction has been raised, the same has to be determined first. See the case of **LILIANS VERSUS CALTEX OIL (K) LIMITED (1989) 1053 (CAK**). The centrol theme in the decision is that where the issue of jurisdiction is raised, the court, has to put everything aside and determine it first.

At page 9 of the judgement line 18 from the bottom it is stated " *Jurisdiction is everything. Without it a court, has no power to make one step where a court, has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court, of law downs tools in respect of a matter before it, the moment it holds the opinion that it is without jurisdiction (At line 13 from the bottom), by jurisdiction is meant the authority which a court, has, to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limits is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the extend and nature of the actions and matters of which the particular court, has cognizance, or as to the area over which the jurisdiction shall extend or it may partake of both there characteristics"*

Applying this principles to the rival arguments herein, it is clear that interrogating the merits of that principle at this stage will not only pre -empt the outcome of the appeal but also the proceedings pending in the lower court. This being the position, the court, is satisfied that this is an arguable point to be raised on appeal. It is now trite that existence of an arguable point even if it is only one, is sufficient to earning an interim relief, irrespective of whether it will ultimately this being the case, it is prudent to interrogate the issue on appeal succeed or not.

5. The issue of Resjudicata has also been control in the Rival arguments. It arises because of there being in existence orders made by Indian courts, which the current Appellant/Applicant alleges that

these are still valid and are binding on the disputants herein. Where as the Respondent argues that these no longer apply as there are changed circumstances in the first instance, and on the other hand, they cannot bar the lower court from becoming seized of those matters. This too is an arguable point to be taken upon appeal.

6. To take note that both sides have raised facts on the basis of which they intend to rely to support or oppose the appeal and pending processes in the lower court. A reading through them reveals that the centrol theme in these rival facts stretch from the grounds in support of the process pending in the lower court, the grounds of appeal and grounds for and against the stay being sought. These are intertwined with the grounds of appeal and it is better they are interrogated in depth at the appeal argument stage.

7. The court, to note that the grounds of appeal are basically issues of law mainly issues of lack of jurisdiction on the lower court to entertain the matter, and issues of Resjudicata by reason of the fact that the issues that the lower court, is seized of have already been finally adjudicated and determined by courts of competent jurisdiction in India both of which are arguable points on appeal.

8. Issue has been raised by the Respondent regarding the general manner and apparent finality in which the stay orders have been framed on the one hand, and the conditionality to be satisfied by the recipient of the intended relief, issues which can be handled by the court as it is competent to grant the relief with or without conditions,

and also to reframe appropriate orders so that the orders handed out serve the interest of both sides and not to favour one side.

In normal circumstances, what the court, is usually called upon to consider is to ensure that the appeal is arguable, and if arguable that the same is not rendered nugatory, and lastly that the court has to ensure that the order of stay if granted are not going to be used as a sword and shield by the recipient against his opponent. These ingredients have been applied herein and the court, is of the opinion, that the interests of the parties to be considered here is not the interests of the appellant and the Respondent perse but the subjects of the proceedings as well namely, the children. Section 4 (2) of the children Act No. 8 of 2001 reads:-

"In all actions concerning children, whether undertaken by public, or private, social welfare institutions, courts of law, administrative authorities, or legislative authorities, the best interests of the child shall be a primary consideration"

Applying this welfare consideration to the facts herein, the court, is of the opinion that the best interests of the children will be best served if the issues of want of jurisdiction and Resjudicata are ruled upon by the superior court first before the matter is interrogated by the children's court. This is so because it is common ground that there is already in place orders made by courts, outside this jurisdiction. The lower court, in this jurisdiction seeks to address the issues in its original jurisdiction and not in its appellate capacity. This means that, if the proceedings were to proceed in the lower court, culminating in final orders being made there in these may trigger an appeal process in respect of the wound be resultant orders, and should the pending appeal ultimately succeed, then the subordinate courts', proceedings would have been rendered unnecessary and a waste of judicial time and costs, which can be avoided. Subjecting, the subject children to two competing processes will be too traumatizing, not only to them, but the disputants as well. There is also a possibility of the two processes giving rise to opposing orders from different tribunals, should an appeal from the subordinate courts' final orders arise.

For the reasons given in the assessment, the court, proceeds to make the following orders in its disposal of the Appellant/Applicant s'application for stay pending appeal herein

namely:-

(a) The court, is satisfied that the points raised by the Appellant/Applicant of want of jurisdiction and Resjudicata are arguable points capable of being taken up on appeal irrespective of whether they succeed or not.

(b) The best interests of the children subject of these proceedings demand that status quo prevailing between their parents be maintained pending the disposal of the appeal herein so that we do not have a situation where the subject children are exposed to parallel proceedings that is an appeal and the subordinate court which may result in two conflicting competing decisions from different tribunals which in the process might prolong the proceedings.

(c) To avoid the Appellant/Applicant using the stay orders as a sword and shield against his opponent, the court, is of the opinion, that the best interests of both sides as well as the children will be served if a conditional stay order is granted stay of proceedings pending appeal is granted on condition that:-

(i) The Appellant/Applicant readies the appeal for hearing and disposal within 90 days from the date of the reading of this ruling.

(ii) That terms and conditions of the consent orders entered into by the parties on 16/12/2009 be observed since they are still operational and binding on the parties.

(d) In default of the condition in (c) above, the stay orders shall stand discharged.

(e) The Respondent to these proceedings will have costs of the application.

(f) There will be liberty to apply to either party should need be.

DATED, READ AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH 2010.

R.N. NAMBUYE

JUDGE