



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Misc Civ Appli 528 of 2005

MARY NDUNGE WAMBUA.....APPLICANT

VERSUS

FEDELIS WAMBUA MUSEMBI.....RESPONDENT

RULING

The applicant filed an application dated 26th July, 2005 seeking orders that Nakuru Children Case No. 22 of 2005 be transferred to Children's Court at Nairobi to be consolidated with Nairobi Children's Case Number 183 of 2005 for hearing and disposal. She also prayed for stay of proceedings of the aforesaid Nakuru Children's Case No. 22 of 2005.

However, before the said application could be heard, the respondent filed a notice of preliminary objection and raised the following grounds:-

- “1. The applicant is in contempt of the subordinate court's orders and she ought not be accorded audience in court unless and until she purges the contempt.**
- 2. The application is not before the correct court.**
- 3. The application is bad in law, duplex, incompetent, unsustainable and a total abuse of the court process.”**

Mrs Magana for the respondent argued that the applicant was in contempt of an order issued by the subordinate court in Children's Case Number 22 of 2005 at Nakuru on 15/4/2005 which required the applicant to present the child, George Musembi Wambua to the court on 18/4/2005. The said court issued another order on 26/4/2005 which required the applicant to present the child to the court on 29th April, 2005. That was not done and on that day the court issued another order that required removal of the said child from the custody of the applicant so that he could be produced before the Children's Court at Nakuru. The said order was to be executed by the Children's Officer, Nairobi in conjunction with the Officer Commanding Kilimani Police Station. The order did not state the date when that was to be done. Counsel for the respondent said that all the aforesaid orders were served upon the applicant.

Meanwhile, on 28th April, 2005 the applicant filed Children's Case No. 183 of 2005 at the Children's Court, Nairobi seeking custody and maintenance of the child.

On 23rd June, 2005 the respondent commenced judicial review proceedings in the High Court of Kenya

at Nakuru vide Miscellaneous Civil Application No. 402 of 2005 wherein he sought leave to apply for orders of certiorari to remove into that court and quash the proceedings in Children's Case No. 183 of 2005. He also sought leave to apply for an order of prohibition to prohibit the Children's Court from proceeding with or taking any further proceedings in the said case. The court granted leave as sought and further ordered that the said leave was to operate as a stay of all proceedings in Nairobi Children's Court Case No. 183 of 2005 aforesaid. The said leave having been granted, the respondent filed Miscellaneous Civil Application Number 487 of 2005.

In view of the foregoing, the respondent urged the court to hold that the applicant was in contempt of court and could not therefore be granted any audience and further, that the applicant's application was incompetent in that it sought transfer and consolidation of a matter that had been stayed by the High Court together with another one that was ongoing.

In reply Mrs Sijeny for the applicant denied that the applicant was in contempt of any court order. She stated that the orders that her client was alleged to have breached were issued ex parte and the same had not been served upon the applicant and had lapsed. Further more, the order obtained on 29/4/2005 did not require the applicant to do anything. In any event, she added, no contempt of court proceedings had been instituted as against the applicant if it was felt that she breached any court order. Counsel for the applicant said that the applicant became aware of the said Children's Case in Nakuru when she was served with an order of stay in High Court Miscellaneous Application Number 402 of 2005. Thereafter, counsel said that she made considerable effort to trace the Children's Court Case file without any success. She urged the court to reject the preliminary objections raised and invoke its inherent jurisdiction and transfer Nakuru Children's Court Case No. 22 of 2005 to Nairobi Children's Court for hearing.

I have carefully considered the arguments that were made by both counsel in this matter. I will begin by addressing the issue of the alleged contempt of court by the applicant. There is no proof that the applicant was ever served with the orders that she is alleged to have disobeyed. The said orders were issued in her absence and there was not a single affidavit of service that was filed herein to prove that she had actually been served with the same. Mrs Magana submitted that even if there was no evidence that the applicant was physically served with the said order, there was no dispute that she was aware of their existence and so she was obliged to respect and comply with the same in default of which she could be held to be in breach. There is authority to support that legal proposition, see **OMEGA ENTERPRISES (K) LTD VS KENYA TOURIST DEVELOPMENT CORPORATION & OTHERS** Civil Appeal No. 59 of 1993 (unreported). However, the applicant clearly explained how she became aware of the said orders. Thereafter she filed a memorandum of appearance in the Nakuru Children's Court case but by that time, some of the exparte orders had lapsed except for the child removal order of 29th April, 2005. The said order was not exactly directed against the applicant.

In the circumstances, I am unable to hold that the applicant is in contempt of the subordinate court's orders and consequently I have to dismiss the first ground of preliminary objection which I hereby do.

I now turn to the order of stay of proceedings in Nairobi Children's Court Case Number 183 of 2005 that was issued by Apondi J in Miscellaneous Civil Application Number 402 of 2005. The order was issued on 23rd June 2005 and the same is still in force. In effect, the proceedings in the said Children's Court Case cannot go on unless and until the order issued by Apondi J has been vacated and/or varied. No such application has been filed. In the circumstances, the applicant's application of 26th July 2005 seeking transfer of Nakuru Children's Case No. 22 of 2005 to Nairobi for purposes of consolidating the same with Nairobi Children's Case Number 183 of 2005 cannot be sustained. The children's Court is subordinate to the High Court and if the applicant was keen on proceeding with the Children's Court Case in Nairobi should have moved the High Court to set aside or vary the said order of 23rd June 2005. Further more, there is no order of stay of proceedings in respect of Nakuru Children's Court Case Number 22 of 2005 and the same cannot be consolidated with a case that has been stayed. Besides, Order XI of the Civil Procedure Rules is quite clear on the principles that are applicable in considering an application for consolidation of suits. They can be summarised as hereunder:-

(a) the two or more suits should be pending in the same court.

(b) the suits should be having similar questions of law or fact for determination.

While it is desirable that the dispute between the parties herein be resolved expeditiously and preferably in one court as the dispute is affecting the welfare of an innocent child, the court cannot overlook important legal and procedural principles.

I therefore uphold the second and third grounds of preliminary objections with the result that the applicant's application dated 26th July, 2005 is hereby struck out but with no order as to costs given the relationship of the parties herein and the nature of the dispute.

DATED at Nakuru this 8th day of September, 2005.

D. MUSINGA

JUDGE

8/9/2005

Ruling delivered in open court in the presence of Mrs Magana for the respondent and in the absence of the applicant.

D. MUSINGA

JUDGE

8/9/2005