



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ADMIRALTY CAUSE NO.. 7 OF 2001 (OS)**  
**IN THE MATTER OF: THE GUARDIANSHIP OF INFANTS ACT CAP**  
**144 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF: M F, M F, M F**  
**AND**

**M F..... INFANTS**

**BETWEEN**

**G F alias M.....APPLICANT/FATHER**

**VERSUS**

**A A A ..... RESPONDENT/ MOTHER**

**RULING**

The protagonists in this saga are husband and wife. The husband is an Italian National who converted to the Muslim faith before marrying the wife, a Kenyan National of similar faith, in 1987. Both were previously married to other spouses and had children, but they were blessed with three other daughters and a son, aged between 14 and 8 years.

Serious differences in the marriage however arose after 10 years and the husband moved out of the matrimonial home in 1997. There is now pending before the Kadhi’s court a matrimonial dispute filed by the wife on 7th September, 2000, (CC 251/2000) seeking maintainance for herself. She also came to this court on the same day 7th September, 2000 and took out an originating summon under S. 6 & 7 of the Guardianship of Infants Act in respect of the son, known as M F. It is Misc. App. 223/00 which is pending hearing and determination. The husband also came to court on 3rd May, 2001 and took out an originating summons of his own under S. 7, 9 and 17 of the same Act, in respect of the same son. This is the matter before me. As it relates to the infant I will henceforth refer to the husband as “the father”, the wife as “the mother”, and the infant as “M”.

Mis sadly a problem child. He is autistic or as described by both parents, mentally retarded. Both have shown a keen interest in addressing M medical condition but disagree fundamentally on the best way to assist him, hence the court battle.

Other than the main originating summons in this matter, there are four other interlocutory matters pending hearing and determination. One of them however is a Preliminary point of law and I decided that it would be considered first as it would determine the outcome of the other pending matters. That is the subject matter of this Ruling.

The objection was raised in a Notice filed on 16th May, 2001 by learned counsel for the mother, Mr.

Taib and states:

***“1. That the said Originating Summons and all subsequent applications making up the entire proceedings are sub judice the same matters in issue herein also being directly and substantially in issue in previously instituted suits or proceedings between the same parties litigating under the same title where such suits or proceedings are still pending in other courts having jurisdiction in Kenya to grant the relief claimed in:***

***(i) HCCC No. 223 of 2000 (OS) Amina Abdi Aden Vs Mimmo Fazzini; and***

***(ii) KCCC No. 251 of 2000 Amina Abdi Aden Vs Mimmo Fazzini”.***

A Preliminary objection is raised on a pure point of law on the premise that there is no dispute on the facts. In essence Mr. Taib invoked the provisions of S. 6 of the Civil Procedure Act which states:

***“S.6 “ No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.***

He submitted that the parties in both cases are the same and are litigating under the same title on the same issues. Both suits are about 8 months apart the earlier one having been filed in September 2000. He also submitted that the case filed by the mother in the Kadhi’s Court renders this suit sub-judice.

In response, learned Counsel for the father Mr. Ole Kina submitted that there was an amendment in the father’s Originating summons seeking orders that M be made a ward of court and his custody be decreed to the father. He further pointed out the although the father was aware of the earlier Originating summons, there was an intended amendment seeking wider prayers which was not served on them. In his view, the prayers sought in both suits were not the same. The father seeks guardianship while the mother seeks treatment. He called for the two suits to be heard separately or alternatively the latter suit be treated as a cross-suit and both be heard together.

I have considered the objection made and the submissions of Counsel. It is common ground that there are earlier suits filed by the mother against the father before the current suit was filed. Both parties annex Copies of pleadings in those suits. The only issue to determine is whether the latter suit is caught up by S.6 of the Civil Procedure Act and ought therefore to be stayed. The object of the section is to prevent courts of concurrent Jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief. Thus the possibility of contradictory and embarrassing verdicts by two or more courts is obviated.

On persuasive authority derived from commentaries on S. 10 of the Indian Civil Procedure Act which is in pari materia with S. 6, the scope and application of S. 6 is four-fold;-

***“(1) The matter in issue in both suits must be substantially the same***

***. (2) The previously instituted suit must be pending in the same court in which the subsequent suit is brought or in any other court having jurisdiction in Kenya to grant the relief sought.***

***(3) Both the suits must be between the same parties or their representatives.***

***(4) Such parties must be litigating in both suits under the same title”.***

(See “The AIR Commentaries on the Code of Civil Procedure”, “The Law of Civil Procedure by Sarkar & Sarkar” and “The Code of Civil Procedure by F. S Mulla).

Although the suit filed before the Kadhi's court (CC 251/2000) is between the same parties; I express my doubts that it is capable of rendering the current suit sub-judice. In the first place the parties are litigating as husband and wife and the relief sought is by and for the wife only. A decision in that suit is not capable of non-suiting the High Court Suit or rendering it Res Judicata'. I would not grant any prayer on the basis of the existence of that suit.

It cannot be denied however that the earlier Originating summons filed by the mother, whether in its original or amended state, involves issues which are substantially the same as those in the current originating summons. Section 6 does not require that the subject matter and the causes of action of the two suits should be the same. It requires that they should be "substantially the same".

The Central issue is the welfare of the infant Mohamed. Both parties are the same and are litigating under the same titles of father and mother. A decision in the earlier suit would non-suit the latter suit since the court is under a duty to consider the welfare of the infant as the central issue.

In the result I hold that the latter suit is caught up under S. 6 of the Civil Procedure Act and this court has no discretion in the matter. The originating Summons is stayed pending determination of the earlier matter filed in HCCC 223/2000 (OS). The Preliminary objection is upheld. Costs in the cause.

**Dated this 9th day of August, 2001.**

**P. N. WAKI**

**JUDGE**