



**Kansagra v Kansagra & another (Petition E341 of 2021) [2024] KEHC 3488 (KLR)
(Constitutional and Human Rights) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3488 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E341 OF 2021
LN MUGAMBI, J
APRIL 12, 2024**

BETWEEN

PERRY KANSAGRA PETITIONER

AND

SMRITI MADAN KANSAGRA 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

Introduction

1. Pursuant to a Notice of Motion application dated 7th December 2021, the 1st respondent objected to the jurisdiction of this Court to hear this petition dated 26th August 2021 hence sought the following orders:
 - i. This Honourable Court be pleased to issue a declaratory order that, notwithstanding Articles 22(1) and (2), 23(1) and (3), 165(3) and 258 of *the Constitution*, it shall not exercise its jurisdiction over the petition for good and justifiable cause.
 - ii. Further to the afore-stated order, this Honourable Court be pleased to issue an order summarily striking out the Petition with costs to the 1st respondent.
 - iii. This Honourable Court be pleased to issue any further orders and directions against the petitioner that it may deem fit to protect the integrity and dignity of the Court from further abuse of due processes of the Court by the Petitioner.



1st Respondent's Case

2. The 1st respondent is an Indian citizen residing in New Delhi -India. She stated that she got married to the petitioner on 29th July 2007 at New Delhi. The Couple subsequently relocated to Kenya. They were blessed with a son, AVK, their only child, on 2nd December 2009. She swore that the petitioner is dual citizen of Kenya and United Kingdom (UK). In addition, he also holds Overseas Citizenship of India (OCI) card. Their son, AVK is also a dual citizen of Kenya and UK. He was also conferred with the Overseas Citizenship of India card (OCI) following an application by the Petitioner.
3. The 1st Respondent deponed that the dispute between her and the petitioner erupted on 26th May 2012. That is when the 1st Respondent filed Civil Suit (O.S) No. 1604 of 2012 against the Petitioner and his parents at the High Court of Delhi, India seeking a permanent injunction to restrain them from removing AVK from New Delhi. The orders were granted on the ground that the child was too young then (2 years old) and needed to be with his mother.
4. On 6th November 2012, the Petitioner filed a substantive Guardianship Petition No. 53 of 2012 before the District Courts, Saket, New Delhi, India (Family Court), seeking, an order to be declared the legal guardian and be granted permanent custody of AVK. After an initial rejection and a series of subsequent variation of the court orders over the years, the Petitioner was finally granted permanent custody order on 12th January 2018 with the Court granting the 1st respondent access and visitation rights.
5. An appeal by the 1st Respondent before the High Court of Delhi in Mat. App. (F.C.) No. 30 of 2018 and CM App. 49507/2018 was dismissed on 25th February 2020. Her subsequent appeal to the Supreme Court of India in Civil Appeal No. 3559 of 2020 suffered similar fate on 28th October 2020. The Supreme Court's decision however obligated the petitioner to obtain mirror orders from the relevant Kenyan Court and to file an undertaking that he will abide and comply with Supreme Court's decision in the matter.
6. Accordingly, the Petitioner filed Civil Suit (O.S.) No. HCFOS/031/2020 before the High Court of Kenya seeking orders that the Judgment delivered on 28th October 2020 by the Supreme Court of India be registered in Kenya. Hon. Justice Muchelule on 9th November 2020 granted leave to register the 'mirror order' giving recognition to the Indian Supreme Court decision.
7. The petitioner thereafter filed an ex-parte Miscellaneous Application No. HCFOS/E031/2020, In the Matter of AVK (A Child), Ex Parte Perry Kansagra seeking the final Judgment from the Family and Probate Division of the High Court. The matter went before Hon. Lady Justice M. Thande who delivered her decision on 21st May 2021.
8. Lady Justice Mugure Thande dismissed this application. The Judge held that India is not a reciprocating country with Kenya under the *Foreign Judgments (Reciprocal Enforcement) Act* hence Supreme Court of India's decision orders could not be enforced in Kenya.
9. The 1st respondent thus brought this application on a number of grounds. Firstly, that the petition offends the Doctrine on Mootness in view of the final judgment rendered in Miscellaneous Application No. HCFOS/E031/2020, In the Matter of AVK (A Child), Ex Parte Perry Kansagra by Hon. Lady Justice M. Thande on 21st May 2021.
10. Secondly that, this Court ought to decline exercising its jurisdiction under Articles 22(1) and (2), 23(1) and (3), 165(3) and 258 of *the Constitution* as the petitioner seeks to enjoin this Court in furtherance



of a scheme to commit fraud. This assertion was based on the claim that the petitioner had deliberately withheld disclosure to this Court of relevant and material facts to wit:

that the Supreme Court of India is the one vested with the jurisdiction to entertain the dispute between the petitioner and the 1st respondent as the petitioner had voluntarily submitted to the jurisdiction of the Indian courts and its judgment and orders in relation to AVK's (a minor) custody; that upon receiving custody of AVK the petitioner withdrew all instructions from the Indian Advocates whilst making himself inaccessible; that upon Hon. Lady Justice Thande pronouncement dated 21st May 2021 the petitioner returned back to the Supreme Court of India and filed further affidavits whilst omitting to depone Kenya's High Court judgment over the issue; the Supreme Court of India's issued an Order dated 17th August 2021 prohibiting the petitioner from instituting new proceedings in relation to the dispute over the custody of AVK; the Supreme Court of India issued a Show Cause Notice against him on account of his conduct, and lastly, that criminal proceedings were commenced against him arising from the same conduct.

11. For this reason, it is argued that the petition is a deliberate act to mislead this Court whilst shielding himself from contempt proceedings before the Supreme Court of India hence an abuse of the Court process and further, a violation of the salutary principle of private international law relating to comity between sovereign jurisdictions and the court. The 1st respondent as such urged this court to invoke the Doctrine of Abstention and notwithstanding its jurisdiction under Articles 165(3) of *the Constitution*.
12. Thirdly that the petitioner is mischievously seeking orders from this court against himself, to compel him to allow the 1st Respondent discharge her constitutional and statutory duties towards AVK, with knowledge that he is violating the child's and 1st respondent's rights and fundamental freedoms under Articles 53(1)(d) and 53(2) of *the Constitution* and Sections 6,23 and 24 of the *Children Act* No. 8 of 2001.
13. In the circumstances, the 1st respondent beseeched this court to invoke the common law of Doctrine of Abstention and notwithstanding its jurisdiction and to exercise restraint and refrain from adjudicating the petition in deference to other appropriate judicial forums and remedies available to the petitioner with respect to the private law issues on the disputed custody of AVK. She added that striking out the petition would be in AVK's best interests.

The Petitioner's Case

14. The petitioner in response opposed the application by filing his grounds of opposition dated 6th January 2022 on the premise that:
 - i. The 1st respondent has not filed a substantive response or reply to the Petition as required under Rule 15 (2) and (3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and therefore the prayers sought in the Petition should be granted.
 - ii. The 1st respondent's Notice of motion has been filed out of time and/or without this Court's leave for extension of time. In these circumstances, the 1st respondent has no right of audience unless and until she first obtains this Court's leave to file her pleadings out of time.
 - iii. The 1st respondent's Notice of Motion is premised on the provisions of Articles 10, 20, 21, 22, 23, 53, 165,258 and 259 of *the Constitution* which are not applicable to the matters in issue.



- iv. Based on the Orders issued by Honourable Justice A.C. Mrima on 27th October 2021 the 1st respondent was to file and serve her application on the jurisdiction of this Court within 14 days of Service by the petitioner. The 1st respondent failed to file the said application and has therefore conceded to the jurisdiction of this Court and there is no basis upon which this Court can be barred and/or prevented from adjudicating the matter raised in the Petition.
- v. The Petition has not been opposed by the 1st respondent and therefore the same should be heard Ex Parte and disposed.
- vi. Prayer 1 in the 1st respondent's Notice of Motion asking this Court not to exercise its jurisdiction is perverse, against principles of justice, contrary to public policy and illegal as it is tantamount to ousting the jurisdiction of the Constitutional Court and the High Court.
- vii. Procedurally the 1st respondent cannot ask jurisdiction not to be exercised and in the same breath ask for Orders to summarily strike out the Petition with costs.
- viii. That the 1st respondent's failure to respond to the Petition renders the instant Application nugatory.
- ix. The counter prayers being sought in the Notice of Motion cannot legally and procedurally be sought and granted under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
- x. The integrity and dignity of this Court has not been compromised and the Petition is not an abuse of the Court process. The 1st respondent has not disclosed any facts to warrant the issuance of any "further orders and directions"
- xi. No purported constitutional rights of the 1st respondent have been infringed and the applicant cannot purport to seek redress in the instant matter.
- xii. The Doctrine of Mootness arises when there is no longer an actual controversy between the parties to a case, and any ruling by the court would have no actual, practical impact. In the present case, the matters in controversy in this Petition are constitutional questions touching on the welfare of a child and for which various reliefs have been sought. This Court is best placed to resolve the controversy by issuing reliefs that will have a practical impact.
- xiii. The Doctrines of Abstention and Mootness are not known to Kenyan Law and on those grounds and otherwise the same are inapplicable to the facts in issue.
- xiv. Without prejudice to paragraph 13 above, the Petitioner has alleged a grave violation of *the Constitution* and in particular, the infringement of the fundamental rights and freedoms of the Minor, the subject of the Petition. The alleged infringement is capable and is likely to be repeated and this is therefore an exceptional case of paramount public interest that the Court needs to decide notwithstanding the Doctrine of Mootness
- xv. The doctrine of judicial economy is inapplicable and has no bearing in the matter. In any event and in the alternative, the principle of judicial economy will be better served by hearing and determining the questions raised in this petition on its merits.

The 2nd Respondent's Case

15. The 2nd respondent in reply filed its grounds of opposition response dated 20th January 2022 on the basis that:



- i. The present matter is primarily a custody dispute between the petitioner and the 1st respondent in relation to the subject minor.
- ii. The subject minor here is a Kenyan Citizen by birth, under Article 14(1) of *the Constitution*, having been born to a Kenyan Citizen, and that citizenship has not been contested.
- iii. The minor being a child who is a Kenyan Citizen, is entitled to protection under Articles 23 and 53 of *the Constitution*.
- iv. This Court is enjoined to determine questions of alleged violations of human rights under Articles 23 and 165, and such determination ought to be made in line with Article 259 of *the Constitution*.
- v. The dispute herein goes to the welfare of a minor, protected under Article 53 of *the Constitution*, as well as the Children’s Act.
- vi. Since the issues in question relate to violation of the rights of the minor, the Court herein has the jurisdiction to determine the same.
- vii. In determining the present Petition, this Court ought to consider the best interests of the child and provided for in Article 53(2) of *the Constitution* and as was explained in the High Court Decision by Musyoka J., in SAJ v AOG & another [2019] eKLR.
- viii. The subject minor is a young boy of around 11 years and therefore not a child of tender years and the court ought to hear his opinion before making a determination on the alleged violation and threatened violation of his rights.
- ix. The 2nd respondent herein, is enjoined under Article 156(6) of *the Constitution* to promote, protect, and uphold the rule of law and defend public interest. It is on this basis that the 2nd Respondent invites this court to pronounce itself on the alleged violation of the rights of the subject minor.

1st Respondent’s Submissions

16. The firm of Muthoga Gaturu and Company Advocates filed written submissions and a list of authorities dated 9th February 2022 on behalf of the 1st respondent.
17. Counsel citing Article 23(1) and 165 of *the Constitution* acknowledged the jurisdictional principle fortified by the Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR that the High Court has jurisdiction to entertain and determine proceedings relating to allegations on violation, threat or infringement of fundamental rights and freedoms. Reliance was also placed on the case of RC v KKR [2021] eKLR. Nonetheless, Counsel stressed that where there exist good and justifiable reasons, the High Court can decline to assume jurisdiction over a dispute as may be determined on a case by case basis.
18. In particular Counsel submitted that this Court’s jurisdiction is contested by the 1st respondent firstly on the basis of the doctrine of mootness. This argument was made based on the notion that the dispute between the petitioner and the 1st respondent, on the proper interpretation of Sections 2(1), 3(1) and (2) and 13(3) (e) of *Foreign Judgments (Reciprocal Enforcement) Act* vis-à-vis the judgment of the Supreme Court of India is a moot and non-justiciable. Likewise, that Hon.Lady Justice Thande in HC Misc. Appl. No. E031 of 2020; In the Matter of AVK (A Child) made a final finding in the matter and no appeal has been preferred by the petitioner so far.



19. Counsel as such urged the Court to decline the exercise of its jurisdiction over the moot prayers under Prayers 1, 2, 4, 5 and 6 of the petition. In support reliance was placed in National Assembly of Kenya & Another v Institute of Social Accountability & 6 Others, [2017] eKLR where the Court of Appeal held that:

“(14) ...“Common law courts have long recognized the strict requirement that permits only cases presenting judicial controversies to be decided. This is a jurisdictional limitation. If the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, the case is moot and the court is without power to render a decision.”

20. Secondly, on the doctrine of judicial abstention or judicial restraint, Counsel submitted that the dispute between the petitioner and the 1st respondent is a private law dispute with regard to the custody of their child and related access and visitation rights hence the dispute falls within the jurisdiction of the *Children Act*, 2001. The Act establishes the Children’s Court under Section 73 of the Act to exercise original jurisdiction over such matters while granting the High Court Appellate jurisdiction over custody issues. It was argued hence that this Court should not grant Prayers 7, 8 and 9 in the petition in that regard.

21. Further it was noted that this Court’s supervisory authority under Article 165(6) and (7) of *the Constitution* can only be invoked when there are ongoing proceedings in the lower court however that in this case there is no pending case before the lower court over the custody of AVK.

22. Reliance was placed in the Court of Appeal caution in Kibos Distillers Limited & 4 Others v Benson Ambuti Atega & 3 Others (2020)eKLR where it was observed that the Environment and Land Court had erred in arrogating itself an original jurisdiction it did not have simply because the claims and prayers in a petition are multifaceted. Like reliance was placed in the Supreme Court decision in the matter in Benson Ambuti Atega & 2 Others v Kibos Distillers Limited & 5 Others, [2020]eKLR.

23. Turning to the point of fraud in the Courts in India and Kenya which was deemed an abuse of court process, Counsel cited the definition of the term as found in the Black’s Law Dictionary, 10th Edition, which states that “fraud on court “in a judicial proceeding, is a lawyer’s or party’s misconduct so serious that it undermines or is intended to undermine the integrity of the proceeding”. Counsel thus submitted that the petitioner in lodging this Petition made depositions on certain allegations against the Courts in India, in an attempt to justify his rejection of the several Court orders granted to him by the same Courts and which he continues to benefit from. Equally, that he withheld material facts and information from this Court as detailed in the 1st respondent’s affidavit. Counsel further asserted that the 1st respondent’s averments had not been controverted by the petitioner hence ought to be deemed as admitted. Reliance was placed in Daniel Kibet Mutai & 9 Others v. Attorney General, [2019] eKLR where the Court of Appeal determined as follows:

“(32) The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value



of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants' claims.”

24. In light of this, Counsel urged the Court to take note of the petitioner's fraud and determine that this is another justifiable and good cause to decline assuming jurisdiction over the petition.
25. Counsel further pointed out the petitioner's mischief in seeking orders against himself under Prayer 9. It was submitted that the petitioner was intent on misleading the Court in that the petitioner swore unequivocal undertakings to submit to the jurisdiction of Indian Courts yet approached the Kenyan Court concealing this material fact, asserting that the same judgments and orders granted by the courts in India were illegal and invalid.
26. Further that the petitioner, misrepresented to the Supreme Court of India that the “Mirror Orders” he had obtained from the High Court of Kenya in HC Misc. Appl. No. E031 of 2020; In the Matter of AVK (A Child) were valid notwithstanding the provisions of the [Foreign Judgments \(Reciprocal Enforcement\) Act](#), Cap. 43 which bars enforcement of such judgments and the Court's final pronouncement affirming the same. Counsel urged the Court to decline this mischief which in essence is a deliberate violation of AVK's right and the 1st respondent's right of access and visitation rights as granted to her by the Supreme Court of India.
27. Moving to the ground of breach of Private International Law Principle of Comity of Courts, Counsel submitted that since the judgments of the Indian Courts are not registrable and enforceable in Kenya by virtue of the Act, the substance of common law and doctrines of equity pursuant to Section 3(1)(c) of the [Judicature Act](#), Cap. 8 apply in this case. This principle as defined in the Black's Law Dictionary, 10th Edition states that it is “a practice among political entities (as countries, states or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts.” Reliance was placed in the American Supreme Court opinion in *Hilton v. Guyot*, 159 U.S. 113, S. Ct. where judicial comity was described as follows:
 - a. “Comity’, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”
28. That was also upheld in *Jayesh Hasmukh Shah v. Navin Haria & Another*, [2016] eKLR where the Court of Appeal stated as follows:
 - “19. The pertinent issue in this appeal is what is Kenya law on enforceability of foreign judgments from non-designated countries and what is the procedure for enforcement of foreign judgments from non-designated countries... In the absence of a reciprocal enforcement arrangement, a foreign judgment is enforceable in Kenya as a claim in common law. The common law principles on enforcement of foreign judgments were extensively elaborated in the case of *Adams & Others – v- Cape Industrials PLC*, (1990) Ch. 433.”
29. In view of this, Counsel submitted that this Court should decline the invitation at Prayers 1 and 2 in the petition to further interrogate the jurisdiction of the Supreme Court of India on the private law dispute between the petitioner and the 1st respondent, since it was demonstrated by the 1st respondent that the petitioner knowingly and voluntarily submitted to that Court's jurisdiction.



30. Owing to the case made out, Counsel submitted that the Court ought not to assume jurisdiction over the dispute and strike out the petition. Counsel as well proposed that some of the further orders and directions suitable in the circumstances of the petition include:
- i. A declaration that it will reserve any declarations on the alleged violation of the rights of AVK touching on his custody and related access and visitation rights, to allow the petitioner or any other party seek appropriate judicial orders from the Children’s Court on the issues touching on the Minor’s custody.
 - ii. That in the meantime, pending the outcome of ongoing legal proceedings directed by the Supreme Court of India, in the best interests of AVK and in pursuance of Articles 53(1)(d) and (e) and 53(2) of *the Constitution*, in order to ensure both parents are equally involved in the development of AVK, this Honourable Court be pleased to direct that the 1st respondent shall have access and visitation rights in relation to AVK in terms of the Judgment passed on 28th October 2020 passed by the Supreme Court of India.
31. Counsel in this regard relied on the Supreme Court decision in *Rai and 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR where it was noted that:

“...there is no injustice that *the Constitution* of Kenya is powerless to redress”.

Petitioner’s Submissions

32. The petitioner through the firm of Bowry and Company Advocates filed written submissions and a list of authorities dated 23rd February 2022. Counsel begun by submitting that the 1st respondent’s application is a Preliminary Objection and so should be determined according to the principles in *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd* (1969) EA 696.
33. On jurisdiction, Counsel submitted that the High Court has jurisdiction to entertain issues relating to children under Article 165 of *the Constitution*, as well as supervisory authority under Article 156(6) of *the Constitution* and Sections 22(1) and 80 of the Children’s Act and the United Nations Convention on the Rights of the Child. Considering this, this Court is best suited to entertain the issues raised in the instant petition as the AVK, the minor was born in Kenya and been domiciled in Kenya. Reliance was placed in *B v Attorney General* (2004)eKLR where it was held that:
- “I do not agree that claims based on child-rights, so comprehensively provided for in the Children’s Act, with a clear jurisdiction vested in the High Court, must exclusively be taken up before the Children’s Magistrate’s Courts The plain words of section 22 of the *Children Act* entrust to the High Court full jurisdiction in resolving disputes pertaining to the rights of children.”
34. Comparable reliance was also placed in *Republic v Kadhis Court Nairobi & 2 others Ex- parte T L* [2018] eKLR.
35. Counsel contended therefore that 1st respondent was attempting to argue the petition in an interlocutory manner which would deprive the petitioner an opportunity to be heard on the merits of his case. It was further pointed out that the 1st respondent had not demonstrated the “good and justifiable cause” limiting this court’s jurisdiction. Nonetheless, the ground was deemed a vague reason to oust this court’s jurisdiction.
36. Counsel challenged the 1st respondent’s reliance on the doctrine of mootness in which it was claimed that there was no live issue between the parties. Relying in *Zubeda Waziri v Speaker of the National*



Assembly and 4 others (2017)eKLR, Counsel submitted that a matter becomes moot only when it is impossible for a court to grant any relief whatsoever to the prevailing parties. It was stated that in the instant matter the declarations sought are crucial in safeguarding the best interest of the child.

37. On the doctrine of judicial abstention and judicial restraint, Counsel submitted that contrary to the assertion that the matter ought to be determined within the ambit of the Children's Act No.8 of 2001, the Children's Court is not vested with the jurisdiction to determine enforcement of rights. This is also stipulated under Section 22 of the Act which grants the High Court jurisdiction. As such the Petition is not an abuse of the Court process.
38. On the allegation of breach of Private international Law Principle of Comity of Courts, it was submitted that this was not correct in the light of the child's best interest and further the fact that a foreign Court has taken a particular view on the welfare of the minor in question is not enough to bar this Court from making an independent pronouncement over the issue especially since AVK is a citizen of Kenya. Reliance was placed in Indian case of Ruchi Majoo vs Saujeev Majoo [2011] where it was held that:

“The interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication.”
39. Counsel further stressed that other than India is not only an unrecognized country for purposes of *Foreign Judgments (Reciprocal Enforcement) Act* (Cap 43), Section 3(3)(e) of the Act but also, the Act excludes Judgments or Orders in matters of custody or guardianship of children. As such, this Court's failure to exercise its jurisdiction over the matter would be inconsistent with Section 3 of the *Judicature Act*, Cap 8 of the Laws of Kenya which places legislation higher than common law principles. To this end, Counsel urged the Court to decline the 1st respondent's invitation and dismiss the application.

2nd Respondent's Submissions

40. State Counsel, Jackline Kiramana filed written submissions and a list of authorities dated 12th March 2022 wherein Counsel was keen to discuss the jurisdiction of the Kenyan court as relates to the custody of AVK and if so, which Court has the jurisdiction to entertain the instant matter.
41. Counsel on the issue of jurisdiction answered in the affirmative arguing that Kenyan Courts jurisdiction cannot simply be ousted by the existence of proceedings before another foreign court. In fact, allowing the application would be tantamount to abdicating its constitutional mandate. It was submitted that Article 14 of *the Constitution* provides that any child whose parent is a Kenyan is a citizen irrespective of where he/she is born and so AVK acquired Kenyan citizenship upon his birth. As such, Article 23(1) of *the Constitution* makes it clear that the High Court has jurisdiction in accordance with Article 165 of *the Constitution* to determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
42. According to Counsel, the petition relates to the welfare of the AVK a minor with regard to his custody and place of residence. It was noted that the minor has been legally within the Republic of Kenya and so subject to the jurisdiction of the Kenyan courts. Counsel further emphasized that the Courts have held that in such matters, the Court ought to be guided by the principle of the best interest of the child.



Reliance in this regard was placed on the Court of Appeal's decision in *A.O.G. VS. S.A.J. & Another* [2011] eKLR a matter similar to this where it was held as follows:

“... so that the child ZAJ was in Kenya under circumstances which were yet to be explained like all children however, he was protected under the laws of Kenya. There was a dispute on his custody and the applicant had already invoked the jurisdiction of Kenya courts which had made interim orders in respect of the child. In our view, and in compliance with Section 6 above, subsequent suits which were substantially similar ought to have been stayed until the hearing and determination of the earlier suit. The Children's Court, like all other courts, is bound by the provisions of Section 4 above in exercise of its jurisdiction under Section 76 of the Act. As such it is competent as any other court to issue orders in respect of the child, the UK's court orders notwithstanding. The superior court held, correctly in our view that the Foreign Judgments (reciprocal enforcement of judgments) Act did not apply in the matter. There was no basis therefore to disregard the existing valid orders of the Kenyan Court and defer to orders of a foreign court.”

43. Having established that Kenyan Courts have jurisdiction, Counsel submitted that Section 73 of the Children's Act No. 8 of 2011 establishes the children's court and grants it the jurisdiction to hear all matter relating to children, except for charges of murder and where a child is charged in an offence alongside an adult. Counsel considering this submitted that although the High Court has unlimited jurisdiction it is prudent for the special courts vested with the mandate to entertain the matter. To buttress this point Counsel relied in the principle of avoidance which entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. Reliance was placed in the South Africa case of *S v. Mhlungu*, 1995 (3) SA 867 (CC) where it was held that:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

44. Equal reliance was also placed in the cases of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR.

Analysis and Determination

45. Two major issues arise for determination going by the extensive arguments made by the counsels in this application, namely:
- a. The jurisdiction of this Court to entertain the matter.
 - b. Whether this Court should summarily strike out the Petition.

The jurisdiction of this Court to hear this Petition

46. The crux of this application is the objection to the jurisdiction of this Court. The applicant challenges the court's jurisdiction on the basis of the doctrine of mootness and also, on account of the doctrine of abstention/the principle of comity of courts by urging this Court to defer to the decision of the Supreme Court of India decision. The 2nd Respondent while acknowledging the Jurisdiction of Kenyan Courts to consider the issues in controversy nevertheless urged this Court to apply the doctrine of judicial restraint and decline to hear the matter and instead defer to the Children Court since it is essentially a child custody dispute.



47. The petitioner and 2nd respondent united in opposing the objection and stressed that the minor, AVK, is a Kenyan citizen and this Court cannot shun its responsibility of resolving the constitutional questions raised in this Petition concerning him.
48. The first issue raised by the 1st Respondent on jurisdiction was that the Petitioner had voluntarily submitted himself to the jurisdiction of Indian Courts in relation to the issue of custody of AVK.
49. Jurisdiction refers to the Court's general authority or competence to deal with a particular matter and to decide on the same. It is either emanates from *the Constitution* or the Statute.
50. The Supreme Court of Kenya in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR explained:

“A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

51. Equally, the Supreme Court In the Matter of Interim Independent Electoral Commission [supra] pronounced as follows:

“(29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

- 30 The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity...”

52. The jurisdiction of the High Court is provided for in *the Constitution* under Article 165(3) which provides as follows:



- (3) Subject to clause (5), the High Court shall have—
- a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191.
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.

53. It is not in dispute that the minor at the centre of the present controversy is a dual citizen of Kenya and United Kingdom. It is also not disputed that presently, he is residing in Kenya. Being a Kenyan national and a resident, Kenyan Courts have personal jurisdiction (jurisdiction in personam) over him hence is subject to the laws of this county in regard his rights and custody matters. The claim that this Court lacks jurisdiction on the basis of an existing foreign judgment lacks merits. As was correctly settled by Lady Justice Mugure Thande, Kenya Law, *Foreign Judgments (Reciprocal Enforcement) Act*, Cap 43 excludes registration and recognition of foreign judgments in proceedings relating to the custody and guardianship of children. In any event, India is not a recognized Country under the said Act. In Miscellaneous Application No. HCFOS/E031/2020, In the Matter of AVK (A Child), Ex Parte Perry Kansagra Justice Thande quipped on 21st May 2021:

“ 13. The Court therefore makes a finding that the judgment from the Supreme Court of India, being from a superior court of a non-reciprocating country, and further being one in proceedings in connection with the custody or guardianship of a child, is not registrable in this Court by dint of Sections 13(1) and 3(3)(e) of the Foreign Judgment (Reciprocal Enforcement) Act.”

54. As to whether the matter is moot, borrowing from the Black’s Law Dictionary, the Court of Appeal in *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] eKLR defined mootness as follows:

“ 64. In Black’s Law Dictionary, 8th edition, a “moot case” is defined as “a matter in which a controversy no longer exists; a case that presents only an abstract



question that does not arise from existing facts or rights”, and as a verb, as meaning “to render a question as of no practical significance”.

55. In *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR, the Court stated:

“26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.”

56. And in the South African case of *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others* [2020] ZACC 5 the Court guided thus:

“(47) Mootness is when a matter “no longer presents an existing or live controversy”.³⁶ The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are “abstract, academic or hypothetical”.

(48) This Court has held that it is axiomatic that “mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require”. This Court “has discretionary power to entertain even admittedly moot issues”.

50 Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter.

These include:

- a. whether any order which it may make will have some practical effect either on the parties or on others;
- b. the nature and extent of the practical effect that any possible order might have;
- c. the importance of the issue;
- d. the complexity of the issue;
- e. the fullness or otherwise of the arguments advanced; and
- f. resolving the disputes between different courts.”

57. Considering that the Indian Supreme Court judgment is unenforceable in Kenya, the claim that the doctrine of mootness applies by reason of the existence of the Indian Supreme Court Judgment is dead on arrival. The 1st Respondent cannot rely on the foreign judgment to claim that issues of custody



are moot as the judgement is unenforceable in Kenya. The minor at the centre of this dispute is a Kenyan citizen who is subject to laws of this Country. Kenyan Courts have a Constitutional and legal obligation to evaluate the issues raised having regard to the principles of the Kenyan Constitution and other relevant laws in regard to the minor who is a citizen and permanently residing in this Country. There is no denying however that the Indian Courts, having exercised the primary jurisdiction over the minor who was residing in that Country, their decisions may be of great persuasive value but they are not of the decisive factor. Indeed, the Supreme Court of India was very much alive to this fact when it remarked as follows at pg. 42 of the Judgment (Civil Appeal No. 3559 of 2020):

“...The judgment of the Court which has exercised primary jurisdiction of the minor child is however not a matter of binding obligation to be followed by the Court where the Child is being transferred...The judgement of the Court exercising primary jurisdiction would however have great persuasive value...”

58. The claim that this Court lacks jurisdiction on the basis that the Petitioner submitted himself to the jurisdiction of Indian Courts when decisions were made regarding the custody of the minor is thus untenable.

59. The 1st respondent further urged this Court to find that even if the Indian Supreme Court judgement was not registrable in Kenya under the *Foreign Judgments (Reciprocal Enforcement) Act*, the same could still be upheld on the basis of the comity of courts principle. That since the Petitioner had voluntarily submitted to Indian Courts this Court can defer to the Supreme Court of India judgment.

60. Comity of Courts principle is an important doctrine that permits extra-territorial application of judicial decisions based on mutual respect and courtesy.

61. Explaining the essence of the doctrine in private International law, a South African Court in the case of *Organi Mark (PTY) LTD vs. GNE Akoodie and another* (Case No.11435/2020) remarked as follows:

“(26) Private international law is often referred to as ‘conflict of laws.’ It, however, refers to the law regulating private relationships across national borders, or to put it differently, private relationships involving a foreign element. Private international law deals with three main issues: the jurisdiction of a court to deal with a case, the law applicable to the case, and the recognition and enforcement of foreign judgments...”

(27) The question is thus whether this court has judicial competence over the dispute. A court can only adjudicate a dispute over which it has jurisdiction. Bennett and Granata explain that where a court is not bound by international or regional private international law instruments, the national legal principles will determine which court is competent to decide the matter at stake...”

62. *Wex* dictionary notes that the principle of comity refers to courts of one state or jurisdiction respecting the laws and judicial decisions of other jurisdictions – whether state, federal or international – not as a matter of obligation but out of deference and mutual respect.

63. The scope of this principle was underscored in the case of *John Kaluai & 4 others v Colonel Mark Christie & another* [2014] eKLR as follows:

“17. Sovereign immunity is one of the fundamental principles of International Law, providing that states are immune from legal suits in other states, save where such immunity is waived or otherwise limited.



18. In the US case of *The Schooner Exchange v Mc Fadden*, Justice Marshall of the US Supreme Court observed that state immunity was based upon the perfect equality and absolute independence of sovereigns and common interest impelling them to mutual intercourse. Referring to the importance of maintaining friendly relations with other nations, the American Supreme Court confirmed that state immunity is based upon international comity among nations...However Lord Denning proceeds to qualify this general proposition of the law when he observes:

“So it seems to me that the general principle must be applied unless it comes within any of the recognized exceptions.”

64. On the application comity principle in Kenya, the court in *SFK v PLL* [2022] eKLR observed as follows:

“International comity

34. There may be no reciprocal arrangements between USA and Kenya. But, how does one execute a judgment from a foreign country which has no reciprocity with Kenya?
35. It is important to discuss how courts have resolved the dilemma? Courts have considered comity a relevant factor in the granting of recognition to foreign and international judicial decisions. And, despite much traditional scholarly critique, the use of comity as a judicial tool by the judiciary remains extensive- it is seen to constitute a framework for judicial dialogue in the “global community” as well as enhancing respect for judicial authority of nations (Anne-Marie Slaughter[1])
36. Perhaps the most influential statement of the doctrine was made in *Hilton v Guyot*[2], where Justice Gray of the Supreme Court defined comity as follows:

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Comity in the legal sense is neither a matter of absolute obligation, on one hand, nor a mere courtesy and goodwill, on the other; it is the recognition which one allows within its territory to the legislative, executive or judicial act of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under protection of its laws...we are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting a trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it is sitting, or fraud in procuring the judgment, or any other special reason why the country of this nation should not allow its full effect, the merits of the case should not, in an action brought in this country upon the judgment be tried afresh, as on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.



37. A Uganda Court was faced with the dilemma of lack of reciprocity borrowed the work in *Hilton vs Guyot* into the case of *Christopher Sales & Carol Sales vs The Republic of Uganda & Apollo k. Kironde* (HCCC No. 2011 which was cited with approval by Court of Appeal in Nairobi Civil Appeal No. 147 of 2009, *Jayesh Hasmukh Shah Vs Navin Haria & Another*, where the court held that: -

The issue that is raised here is not one of reciprocity because quite clearly, there are no reciprocal arrangements between Uganda and USA. The question raised is as to what a judgment debtor who is “stranded” with a judgment from a country with no reciprocal arrangements with Uganda, like in this case, is supposed to do with the judgment. What is he supposed to do to enforce it if at all?

38. The court in Uganda adopted dictum in *Hilton vs Guyot* and held that the USA judgement was enforceable in Uganda. The learned judge in that case, Mwangusya, J held: -

The Judicial system under which the case was tried is beyond reproach. A judgment creditor armed with such a judgment should be allowed to realize the fruits of his judgment which should be afforded recognition by our courts in absence of a reciprocal arrangement. This court grants him the prayer that judgment is enforceable in Uganda.

39. The point to note here is that just as was the case in Uganda, the judgment sought to be enforced in the instant application originates from the United States which has no reciprocal arrangement with Kenya. Even if there was no reciprocal arrangement between the two countries, or express statute governing recognition of such judgment, in so far as the test under international comity is met, Kenya would give the judgment recognition and enforcement. Of course the Foreign Judgment herein does not fall in those judgments which cannot be recognized or enforced in Kenya, such as taxation judgment, for tax regimes do not extend beyond the territorial jurisdiction of the state.”

65. The comity principle works perfectly if there is exists reciprocal arrangements between the concerned countries. However, there may be situations where there are no formal reciprocal arrangements in place. In such instances, the Court of Appeal in *Jayesh Hamsukh Shah Vs Navin Haria & Anor* (2016) eKLR guided that the judgment can be enforced as claim based on common law. However, this not possible in instant case as there is an express statutory provision barring the enforcement of foreign judicial decision in matters of guardianship and custody of children pursuant to section 3 (3) (e) of Foreign Judgements (Reciprocal Enforcement) Act.

66. In matters of guardianship and custody of children the reciprocity principle is explicitly excluded. It therefore means that the principle of comity of courts in matters of guardianship and custody is not feasible. The best the Kenyan Court can do in view of the fact that Indian Courts had primary jurisdiction when they first entertained the matter as the minor was then residing in that territory, the Kenyan Court to take of that fact and read the judgment for its persuasive value or as a relevant factor to take into consideration.



67. The bottom line however is that guardianship and custody of children in Kenya has to be decided in accordance with the principles laid down by the Kenyan Constitution and laws of Kenya where the primary focus is best interest of the child principle which is secured by Article 53 (2) of *the Constitution* and as more elaborately set out in the Children’s Act. Further, Article 3 (1) of the UN Convention on the Rights of the Child and the African Union Charter on the Rights and the Welfare of the Child as those principles forms part of laws of Kenya by dint of Article 2(5) and (6) of *the Constitution*.
68. That approach is in sync with the observations of the Court of Appeal AOG v SAJ & another (supra) when it expressed its disapproval of the High Court decision that appeared to surrender the minor to a UK Court for determination of the best interest principle.

“ 45. The responsibility to answer both issues appears to have been left to the UK Court on the basis that it was best suited to determine the issues as well as the custody and welfare of the child.

In our view, it was incumbent on the superior court, in the course of exercising its discretion, to consider the best interests of the child which is a duty imposed on the court under section 4(3) of the Act, which states: -

“(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to -

- (a) safeguard and promote the rights and welfare of the child;
- (b) conserve and promote the welfare of the child;
- (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”

The court made no attempt to do so, and in our view, it was in error.”

69. The 2nd respondents although acknowledging the jurisdiction of the Kenyan Courts in this matter nevertheless argued that the original jurisdiction for children custody matters is vested in the Children Court and this being primarily a child custody matter, this Court should, under the doctrine of Constitutional avoidance, defer to the jurisdiction of the Children Court.
70. Section 73 of the *Children Act* provides as follows:

Jurisdiction of Children’s Court

There shall be courts to be known as Children’s Courts constituted in accordance with the provisions of this section for the purpose of—

- a. conducting civil proceedings on matters set out under Parts III, V, VII, VIII, IX, X, XI and XIII;



- b. (b) hearing any charge against a child, other than a charge of murder or a charge in which the child is charged together with a person or persons of or above the age of eighteen years;
- c. (c) hearing a charge against any person accused of an offence under this Act;

71. The jurisdiction of the High Court in the Act is provided under two instances:

a. Section 22 which deals with enforcement of rights and provides as follows:

1. Subject to subsection (2), if any person alleges that any of the provisions of sections 4 to 19 (inclusive) has been, is being or is likely to be contravened in relation to a child, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress on behalf of the child.
2. The High Court shall hear and determine an application made by a person in pursuance of subsection (1) and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 19 (inclusive).
3. The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it or under this section including rules with respect to the time within which applications may be brought and references shall be made to the High Court.

b) Section 80 which deals with appeals and provides as follows:

Unless otherwise provided under this Act, in any civil or criminal proceedings in a Children’s Court, an appeal shall lie to the High Court and a further appeal to the Court of Appeal.

72. The court in *DNU v Chief Registrar of the Judiciary & another; GAO (Interested Party)* [2022] eKLR observed as follows:

“ 10. The substratum of this matter rotates around custody of children. The court with jurisdiction to deal is either the Children’s Court (see section 73 of the Children’s Act cap 141 Laws of Kenya) OR Family division of the High Court and not this division. The petitioner may be complaining about violation of his constitutional rights, to be a father to his children. Bottom line is the quest for custody as a father. The Children’s court and Family division are the courts empowered to make that determination.”

73. A casual glance at the present Petition reveals pertinent questions of constitutional nature. Prayer 2 of the Petition seeks a declaration that: “that the minor is a dual citizen of Kenya and United Kingdom and a resident of Kenya and that India has no territorial and/or geographical jurisdiction over the personal matters relating to the minor’. Prayer 3 seeks in part declaration to the effect that “...compelling the minor, a citizen of Kenya to take out Overseas Citizen of India (OCI card) in the Office of Indian Embassy at Nairobi.... is contrary to Section 13 (1) of the *Children Act* and is a violation of fundamental right of the minor enshrined under Article 28 and 53 of *the Constitution*...”

74. The present dispute might appear like an ordinarily child custody dispute but given the peculiar circumstances of this case, this Petition is not. It raises significant constitutional questions which are



beyond the scope of the Children Court to determine. I find that the right forum for the adjudication of the issues raised is the High Court. I decline to strike it out the Petition or defer the matter to the Children Court. The Petition shall now go to the full trial.

75. The upshot is that the 1st Respondent's Application fails and is hereby dismissed. I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

.....

L N MUGAMBI

JUDGE

