



KB v RJ & 4 others (Petition E010 of 2024) [2024] KEHC 7562 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

PETITION E010 OF 2024

OA SEWE, J

JUNE 20, 2024

BETWEEN

KB PETITIONER

AND

RJ 1ST RESPONDENT

KCB BANK KENYA LIMITED 2ND RESPONDENT

NCBA BANK LIMITED 3RD RESPONDENT

EQUITY BANK KENYA LIMITED 4TH RESPONDENT

HARAMBEE SACCO SOCIETY 5TH RESPONDENT

RULING

1. The Notice of Motion dated 7th May 2024 was filed by the 1st respondent, RJ, pursuant to Article 159(2)(d) of *the Constitution*, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Rules 18, 19 and 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. She thereby seeks the following orders:

- (a) Spent
- (b) That pending hearing and determination of the application, the Court be pleased to:
 - (i) Arrest and/or reschedule delivery of its judgment of its judgment scheduled on 9th May 2024, review, discharge and/or set aside its orders and/or directions of 29th March 2024 including the one issued on 15th April 2024 reserving the suit for judgment on 9th May 2024, the proceedings thereto and all other consequential orders;
 - (ii) Stay execution of its orders issued on 29th March 2024 and all other consequential orders.



- (iii) Upon such review, the Petition be set down for hearing and determination on merit.
 - (c) That pending the hearing and determination of the 1st respondent's Preliminary Objection dated 7th May 2024 and the Petition, the Court be pleased to:
 - (i) Arrest and/or reschedule delivery of its orders and/or judgment scheduled on 9th May 2024, review, discharge and/or set aside its orders and/or directions of 29th March 2024 including the one issued on 15th April 2024 reserving the suit for judgment on 9th May 2024, the proceedings thereto and all other consequential orders;
 - (ii) Stay execution of its orders issued on 29th March 2024 and all other consequential orders.
 - (iii) Upon such review, the Petition be set down for hearing and determination on merit.
 - (d) That the petitioner be condemned to pay costs of the application.
- 2. The application was premised on the grounds that, on the 15th April 2024, the Court, without affording the 1st respondent a hearing reserved this suit for judgment on 9th May 2024 which in effect means condemning the 1st respondent unheard. The 1st respondent further deposed that the suit revolves around custody and maintenance of a minor; and that justice would best be served if she is granted an opportunity to ventilate her case before the Court for a determination on the merits.
- 3. The 1st respondent further averred that the Petition is clouded with half-truths, misrepresentation and non-disclosure of material facts, which are of a decisive nature. An example of non-disclosure given by the 1st respondent was the existence of Mombasa Civil Appeal No. 7 of 2022: Kipchirchir Biwot v Risper Jerotich. The 1st respondent also mentioned that the petitioner has misrepresented facts and failed to disclose that, in Tononoka Children Case No. 326 of 2015, the court never issued orders for the release of funds from the petitioner's FOSA Account toward the minor's maintenance; and that the said funds were only released upon compulsion vide the 1st respondent's application dated 4th December 2023.
- 4. The 1st respondent also posited that, looked at in its totality, the Petition is a gross abuse of the court process; and therefore the Court lacks the jurisdiction to entertain it in its present form. She deposed that the minor, the subject of these proceedings, has been kept out of school and stands to suffer great prejudice unless the Motion is heard and determined on priority basis.
- 5. The grounds set out hereinabove were adverted to in the Supporting Affidavit sworn by the 1st respondent on 7th May 2024. The 1st respondent also annexed copies of the pleadings filed in Mombasa Civil Appeal No. 7 of 2022 as well as the Garnishee Order dated 16th May 2023, among other documents.
- 6. The petitioner opposed the application vide his Replying Affidavit sworn on 13th May 2024. He averred that, upon filing the Petition together with the Notice of Motion dated 28th March 2024, service was duly effected on the 1st respondent, not only of the pleadings and the application but also of the court orders made herein on 29th March 2024. The petitioner further averred that upon service, the 1st respondent appointed an advocate to represent her and a notice to that effect was duly filed; but that the 1st respondent thereafter failed to file any other document as was expected. The petitioner accordingly surmised that the 1st respondent had waived her rights to be heard and cannot now purport that she would be condemned unheard if the Court proceeds to deliver its judgment in this matter.



7. The petitioner further deposed that the application dated 7th May 2024 is belated and has been overtaken by events. As to the allegations of non-disclosure of the appeal filed by him, the petitioner deposed that the said appeal was withdrawn and was therefore non-existent as at the time of filing this Petition. He annexed a copy of the Notice of Withdrawal as Annexure “KB3”. He explained that the orders for the 3rd DNA test and the Garnishee orders issued on 26th August 2022 and 16th May 2023, respectively, were issued way after the filing and withdrawal of the appeal; and therefore the orders the subject of the Petition never formed part of the appeal.
8. In the same vein, the petitioner averred that the 1st respondent’s Preliminary Objection is belated in so far as it was brought after the matter had been reserved for judgment. The petitioner pointed out that, since the lower court suit was filed on 27th August 2015, it is now about 9 years of indolence by the 1st respondent. He therefore urged the Court to look beyond the 1st respondent’s subterfuge of appearing to seek justice on the pretext of upholding Article 53 of *the Constitution* when in real fact she is merely out to extort money from him. The petitioner accordingly prayed for the dismissal of the application dated 7th May 2024 with costs. He annexed several other documents, including the Affidavits of Service and the DNA reports to buttress his averments.
9. Directions were thereafter given for the disposal of the application by way of written submissions; and while the petitioner complied and filed written submissions dated 4th June 2024, no submissions were filed by the 1st respondent. In his written submissions, the petitioner proposed several issues for determination, namely:
 - (a) Whether the Court failed to accord the 1st respondent an opportunity to be heard;
 - (b) Whether the mere fact that this case revolves around a minor is sufficient to arrest the intended judgment;
 - (c) Whether or not the Petition herein is grounded on half-truths, misrepresentations and non-disclosure of material facts;
 - (d) Whether or not the court in Tononoka Children’s Court Case No. MCCC 326 of 2015 issued orders for the release of funds from the petitioner’s FOSA Account towards the minor’s maintenance;
 - (e) Whether or not the Petition herein amounts to a constitutional petition;
 - (f) Whether or not the petitioner is challenging the order for DNA test conducted at Pathcare facility;
 - (g) Whether or not the Court has jurisdiction to handle the instant Petition.
 - (h) Whether or not the educational progress of the minor has been affected.
10. A brief background of the matter is necessary to help put the instant application in proper perspective. The petitioner filed his Petition dated 20th March 2024 essentially complaining about the Garnishee proceedings instituted before the lower court in Tononoka MCCC No. 326 of 2015 at the instance of the 1st respondent. This explains why he has impleaded the Garnishees as the 2nd, 3rd, 4th and 5th respondents. He also took issue with an order by the lower court for him to submit to a 3rd DNA test. Accordingly, the petitioner prayed for the following reliefs, among others:
 - (a) A declaration that the claims and court proceedings by the 1st respondent in Tononoka MCCC No. 326 of 2018 contravene his rights under Articles 10(b), 27(1), 28, 29(f), 47 and 50 of *the Constitution* and therefore are unconstitutional, illegal, null and void.



- (b) A declaration that he owes no monetary duty to the 1st respondent in Tononoka MCCC No. 326 of 2015 and is not bound by the Children Act to meet any financial or statutory obligations over the Garnishee Proceedings.
 - (c) A declaration that the sum of Kshs. 10,732,610/= the subject of the Garnishee Proceedings before the lower court is erroneous, unsubstantiated, excessive, exaggerated and therefore unlawful, null and void ab initio.
 - (d) A declaration that the 3rd DNA test ordered to be conducted at Lancet Kenya, Mombasa, is illegal as the 1st respondent never pleaded the same in her earlier application dated 20th July 2022.
 - (e) An order directing the respondents cited to refund all monies received by the 1st respondent through the Garnishee Proceedings.
 - (f) An order of Certiorari quashing and/or lifting the Decrees and Garnishee Orders in Tononoka MCCC No. 326 of 2015.
 - (g) A declaration that the Garnishee Proceedings before the lower court are illegal, null and void ab initio.
 - (h) A declaration that the petitioner is not the father of the minor, S K.
11. The Petition was filed concomitantly with a Notice of Motion of even date seeking, inter alia, stay of execution of the orders issued in Tononoka MCCC No. 326 of 2015 on the 16th May 2023 pending the hearing and determination of the Petition. Interim orders were given by the Duty Judge, Hon. Mutai, J. on the 29th March 2024 staying execution of the orders issued by the lower court on 16th May 2023 and directing that the application be served for inter partes hearing on 8th April 2024.
12. On the 8th April 2024, there was no appearance for the 1st respondent in spite of service. There being no response to the application by the 1st respondent, the Court directed that hearing be held ex parte, pursuant to Rule 16(1) of the Mutunga Rules, which states:
- “If the respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the petition in the respondent’s absence.”
13. It was on that basis that the Notice of Motion dated 20th March 2024 was allowed and stay of execution of the lower court’s order dated 16th May 2023 as well as stay of proceedings of the lower court granted pending the hearing and determination of this Petition. Directions were then given to ensure the expeditious disposal of the Petition. In those directions the Court set the date of judgment as 9th May 2024. Two days prior to the date of judgment, the 1st respondent filed the instant application seeking orders to arrest the judgment and stay proceedings so as to have her Preliminary Objection heard and determined.
14. In the premises, it is plain that most of the issues proposed by the petitioner in his written submission dated 4th June 2024 are irrelevant to the instant application. The single issue for determination in my view is whether the 1st respondent has shown sufficient cause for re-opening of the proceedings.
15. I have given careful consideration to the application and the averments set out in the parties’ respective affidavits. Although the application is expressed to have been filed under the provisions of the Civil Procedure Rules, the applicable procedural rules to constitutional petitions and the applications made thereunder are the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice



and Procedure Rules, 2013 (otherwise known as the Mutunga Rules). In this regard, I entirely endorse the position taken by Hon. Musyoka, J. in Francis Angueyah Ominde & Another v Vihiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others (Interested Parties) [2021] eKLR that:

“...it should be pointed out that the constitutional petitions are governed and regulated by the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, so far as procedures and processes are concerned. They are not subject to the Civil Procedure Rules, which governs processes that are brought under the Civil Procedure Act, Cap 21, Laws of Kenya. So far as procedure is concerned, the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 captures the spirit of Article 159(2)(d) of the Constitution, which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to protect and promote the principles of the Constitution. The focus is trained on substance rather than process. The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 are more flexible compared with the provisions of the Civil Procedure Rules, with respect to who may bring proceedings and the manner of initiating the proceedings.

16. Hence, the applicable procedural provision is Rule 16(2) of the Mutunga Rules which provides that:

“The Court may set aside an order made under subrule (1) on its own motion or upon the application of the respondent or a party affected by the order.”

17. It is plain then that the Court has unfettered discretion to set aside ex parte proceedings so long as sufficient cause has been shown to warrant such action. In *Shah v Mbogo* [1967] EA 116, it was held that the discretion is intended to be exercised “...to avoid injustice or hardship resulting from inadvertence or excusable mistake or error,” but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Similarly, in *Patel v East Africa Cargo Services Ltd* (1974) EA 75, this principle was expressed thus:

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.”

18. The assertion by the 1st respondent that by proceeding ex parte the Court, in effect condemned her unheard cannot be a plausible excuse in the circumstances of this case. The petitioner exhibited the affidavits of service to demonstrate that the 1st respondent was duly served with the pleadings in this matter, including the ex parte order dated 29th March 2024. Indeed, it was in response to such service that her counsel filed a Notice of Appointment 8th April 2024. There is no explanation at all as to why she thereafter took no action to comply with the express orders of the Court and the rules of pleadings as set out in Rule 15 of the Mutunga Rules.

19. It is nevertheless not lost on the Court that the matter concerns the welfare of a minor; and therefore the Court must keep in view the provisions of Article 53(2) of the Constitution. It states:

A child’s best interests are of paramount importance in every matter concerning the child.”



20. In this instant matter, the best interests of the subject minor would dictate that the 1st respondent be given an opportunity to present her case in respect of the Petition, granted the nature of the reliefs sought by the petitioner. Indeed, in Philip Keipto Chemwolo and Mumias Sugar Co. Ltd v Augustine Kubende [1986] eKLR the Court of Appeal acknowledged that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits ... Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

21. In the result, the Notice of Motion dated 7th May 2023 is hereby allowed and orders granted as hereunder:

- (a) That the proceedings and orders of 8th April 2024 be and are hereby set aside and time given to the respondent to file its response to the Petition within 7 days from the date hereof.
- (b) Corresponding leave be and is hereby given to the petitioner to file a Supplementary Affidavit if need be. The same be filed within 7 days of service by the 1st respondent.
- (c) The costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF JUNE 2024

OLGA SEWE

JUDGE

PETITION NO. E010 OF 2024 RULING 4

