



In re AQP, AAP & MAP (Minors) (Miscellaneous Application E039 of 2023) [2023] KEHC 20226 (KLR) (Family) (22 June 2023) (Ruling)

Neutral citation: [2023] KEHC 20226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E039 OF 2023
PM NYAUNDI, J
JUNE 22, 2023**

BETWEEN

ABP APPLICANT

AND

TZS RESPONDENT

RULING

1. The Applicant presents Notice of Motion dated February 22, 2023 under Article 159(2) (a), 165 (6) of the Constitution of Kenya, Sections 1A,1B and 3A of the Civil Procedure Act, Order 22, Order 51 Rule 1 of the Civil Procedure Rules, 2010, the inherent jurisdiction of the court and all enabling provisions of the law and seeks the following orders
 1. Spent
 2. Spent
 3. Spent
 4. That the Honourable court herein calls for the record of the Children’s Court in Children’s case MCCC 052 of 2012 Taurat Zaherali Punjani vs Ali Badruddin Punjani & Kim Sharma
 5. That the Honourable Court herein dismisses the suit as the subject matters of the suit are not within jurisdiction as they are currently in Canada wherein they are from the year 2019.
 6. That the Honourable Court herein direct that the matter herein be placed before a different court for hearing and determination.
 7. That costs be in the cause.



2. The Application is supported by the Affidavit of the Applicant sworn on February 23, 2023 and further Affidavit sworn on May 2, 2023.
3. The Application is opposed by the Respondent who filed Grounds of Opposition dated March 28, 2023 and Replying Affidavit sworn on March 28, 2023.
4. The Applicant also filed Preliminary Objection dated April 14, 2023 seeking to strike out the Respondent's papers for not complying with Order 9 of the Civil Procedure rules.
5. The parties agreed to canvass the Application by written submissions. The Applicants submissions are dated May 2, 2023. The Respondent's submissions are dated March 27, 2023 and May 9, 2023. The latter submissions specifically address the Preliminary Objection filed by the Applicant dated April 14, 2023.
6. The Respondent sets out the following grounds in the grounds of opposition
 1. That the Applicant has failed to satisfy the requirements and criteria set down by law for the grant of stay and any other orders sought;
 2. That the Applicants Advocate Notice of Change is not proper having failed to obtain leave prior after judgment, thus rendering the change of advocate irregular;
 3. That the applicant has failed to appreciate the urgency of the matter. Which urgency being in the interest of the children- more specifically academic needs.
 4. That the Applicant is guilty of material non- disclosure of facts misleading this court to believe that he was denied a fair hearing when the truth was that he failed to respond to the Notice of Motion to Show Cause dated December 6, 2023 and did not attend the virtual hearing on February 13, 2023.
 5. That the applicant moved this court for orders of stay of execution and proceedings prematurely without jurisdiction of the Court:
 - a. That the Applicant has failed to seek leave to appeal out of time in challenging the order dated February 15, 2023
 - b. That No material has been placed before this court to demonstrate the loss that maybe (sic) suffered by the Applicant neither has he addressed the issue whether or not he has a *prima facie* appeal
 - c. That this court lacks jurisdiction as an appellate court to entertain an application for stay of an order or decree
 6. That there isn't any existing substantive appeal against the judgment of the lower court. Therefore, the provisions cannot be applied under the guiding principles of Article 159 (2) (d) of the Constitution.
 7. That the Application is a fresh re-litigation of issues that are directly and substantially parallel to proceedings in the Children's Suit MCCC/52/2012 set for determination on April 4, 2023
 8. That the application is fatally defective as a suit cannot be commenced by way of Notice of Motion therefore Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act cannot be used to originate a suit.
 9. That the Applicant's Application has no merit and should be dismissed with costs



Analysis and determination

7. The Applicant in submissions (wrongly headed as Respondent's Submissions), contends that the Applicant has moved to court to 'set aside' the orders of the Court granted on February 15, 2023. The substantive orders are for the Court to call for the lower court file, the court to dismiss the lower court case and finally for the Court to order that the matter be remitted to another court for hearing.
8. The Respondent frames the following as the issues for determination
 1. Whether this court can grant the prayers 2 and 3?
 2. Whether the Children's Court has jurisdiction over the children of this suit?
 3. Whether the matter can be placed before a different court for hearing and determination?
 4. Whether this instant suit offends the principles of sub judice?
 5. Whether this suit is fatally defective?
9. The issue of the competence of the Application and the jurisdiction of this court to hear the Application having been raised I am compelled to determine whether the jurisdiction of the Court has been properly invoked as a preliminary issue even before I interrogate the other issues as raised by the parties.
10. The Applicant has raised a preliminary Objection touching on the validity of the Respondent's pleadings. I can only rule on that Preliminary Objection once I determine whether or not the Applicant himself is properly before this Court.
11. I am guided by the *locus classicus* decision in the case of *Owners of Motor Vessels (Lilian (S) v Caltex Oil (Kenya LTD)* [1989] 1KLR where the court pronounced *inter alia* that:

“Jurisdiction is everything, without it, a court has no power to make one more step where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence.”
12. In the instant case the Applicant seeks to move this court by way of Notice of Motion and presents the Application under Article 159 (2) (a) , 165 (6) of the *Constitution* of Kenya , Sections 1A,1B and 3A of the *Civil Procedure Act*, Order 22, Order 51 Rule 1 to challenge the orders of the lower court and specifically the decision of the court rendered on August 27, 2021 from whence emanates the Notice to Show Cause issued on February 15 2023.
13. The Application is 2 pronged. In the first instance under Order 51 rule 1 of the Civil Procedure Rules, the Applicant seeks that the Court 'set aside' the orders of the Court issued on February 13, 2023 and dismiss the suit. On this limb what the Applicant seeks in outcome is to Appeal the decision of the lower court.
14. This court can only interfere with the decision of the lower court on Appeal. Under Order 42 Rule 1 the way to approach this Court is vide a Memorandum of Appeal. In this instance the Applicant has not filed a Notice of Appeal or Memorandum of Appeal.
15. The rationale for this requirement is to ensure that the Respondent is aware of the issues intended to be canvassed on appeal and also for the court to determine whether the intended appeal raises arguable issues so as to justify delaying the successful party enjoying the fruits of their judgment.



16. The primacy of procedure is well settled, the Court of Appeal in the case of *FCS LTD v Odhiambo & 9 Others* [1987] KLR 182 – 188. held inter alia:

“The rules of procedure carry into effect two objectives; first to translate into practice the rules of natural justice so that there are fair trials and the second, procedural arrangements whereby the steps of a trial are carried out in good order and within reasonable time. In my opinion where the rules are dealing with the precepts of natural justice, the court would be slow to conclude that they are mere technicalities, which may be swept under the carpet by the brush of Section 3A of the *Civil Procedure Act* on inherent jurisdiction of the court to do justice.”

17. Rules of procedure cannot therefore be regarded as procedural technicalities provided for under Article 159 (d) of the *Constitution*. In the case of *Speaker of the National Assembly v Karume* [2008] KLR 425, the Court of Appeal held:

“Where there was a clear procedure for the redress of any particular grievance prescribed by *the constitution* or an Act of Parliament; that procedure should have been strictly followed.”

18. It is well settled that an application of this nature, where what is sought is a stay of the decision of the lower court, cannot be initiated by a notice of motion in the absence of a memorandum of appeal. I am persuaded by the decisions in *Raymond M Omboga vs Austine Pyan Maranga* Kisii HCCA No 15 of 2010 and *Muhammed Yakub & Anor Vs Mrs Badur Nasa* Civil Application No. Nai 285 of 1999.

19. On the 2nd limb, the Applicant seeks to invoke the Supervisory jurisdiction of the Court under Section 165 (6) of the *Constitution* of Kenya. The basis for invoking the jurisdiction of the court is that the proceedings in the lower court are marred with irregularities that have occasioned injustice to the Applicant.

20. It is well established that this court’s supervisory jurisdiction should be exercised sparingly and only in exceptional circumstances. Courts have laid down principles that should guide the court in exercise of its supervisory jurisdiction.

21. In *Alice Sisina v Land Registrar Kajiado & Anor* [2015] eKLR the court states as follows:

13 In exercising inherent supervisory powers under Article 165 (6) and (7) of the *Constitution*. The proceedings and orders granted cannot be allowed to stand the test of legality and propriety. There is therefore constitutional and statutory necessity to set aside the orders against the respondent.

22. In *Republic v Chief Magistrate’s Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot* [2020] eKLR the court stated as follows:

“59. There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs. (see, *Gallagher v Gallagher* 212 So. 2d 281,283(La. Ct.App.1968)).

60. This power of superintendence conferred by Article 165 (6) of *the Constitution*, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee* AIR



1951 Cal.193 is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of *the Constitution* to interfere” (see D.N. Banerji v P.R. Mukherji 1953 S.C 58).

23. In *National Social Security Fund V Sokomania Ltd & Anor* [2021] eKLR, the court reiterated that the Courts supervisory jurisdiction should be exercised sparingly and only in exceptional circumstances and added that the power should not be exercised where there is an alternative remedy. The Court observed that in that case the Applicant had a right of appeal against the orders sought to be reviewed.
24. In the instant case, the Applicant had the option of applying to set aside the orders or appeal against the impugned order. The Applicant has not persuaded me that there exist exceptional circumstances to invoke this court’s supervisory jurisdiction. The proceedings of the lower court were not availed to enable this court determine whether indeed the allegations made against the Court are well founded.
25. Following from the foregoing analysis I find that the jurisdiction of this Court has not been properly invoked and the prayers sought cannot be granted. Consequently, the Application is dismissed with costs to the respondent.

It is so ordered

SIGNED DATED AND DELIVERED IN VIRTUAL COURT

THIS 22nd DAY OF JUNE, 2023.

P M NYAUNDI

HIGH COURT JUDGE

Ruling

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