



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO.129 OF 2018

NJ (Suing as the next friend of 'JNK', "QNK", KNK (Minors).....APPLICANT

VERSUS

AGA KHAN EDUCATION SERVICES.....RESPONDENT

RULING

1. The Application coming for consideration in this Ruling is dated 19.9.2018 filed under Certificate of Urgency seeking the following orders;

(i) THAT pending the hearing and determination of this application, the Court be pleased to issue an order restraining the Respondent by itself or its agents and/or its employees from violating any further orders issued on 24.5.2017 by Hon. Z. W. Gichana (Ms) Senior Resident Magistrate at Nairobi Children's Court.

(ii) THAT this Court be pleased to cite for contempt and commit to Civil jail the following Directors and Members of the Respondent for disobeying the Court Order dated 24.5.2017 issued by Hon. Z. W. Gichana (Ms) Senior Resident Magistrate Nairobi Children's Court:

(a) Mr. Mohamood Manji

(b) Mr. Apollo Gabazira

(c) Mr. NavrazGulam

(d) Mr. NimmetHirjiRener

(e) TashminKhamis

(f) Gulzar Khoja

(g) AleemThararil

(h) Ismael M. H. Mawji

2. The Respondent who opposed the Application filed grounds of opposition and a Notice of Preliminary Objection both dated 1.10.2018. The Respondent stated in both the grounds of opposition and NOPO that the Miscellaneous Application No. 52 of 2017 was dismissed on 29.3.2018 and any orders made thereunder were discharged. The Respondent also filed a Replying Affidavit dated 27.6.2019.

3. The Parties were directed to file written submissions in the Application dated 19/9/2018 which are on record both dated 24/6/2019.

4. I have considered the application dated 19/9/2018 together with the Affidavit in support of the said Application and a supplementary Affidavit filed by the applicant dated 19.2.2019. I have also considered the rival submissions filed herein both dated 24.6.2019. I find that it is not in dispute that on 24.5.2017, Hon. Z. W. Gichana issued an order in the following terms.

“THAT the Respondent be and is hereby restrained from publishing/revealing the names of the Applicant's three children, their identities, photographs or any depiction or caricature of the children.”

5. The issues for determination in the Application dated 19.9.2018 are as follows:

(i) Whether the said order is still in force

(ii) Whether the Respondents are in contempt of the said order.

(iii) Whether the Directors of the Respondent should be cited for contempt of Court for disobeying the said order and be committed to Civil Jail.

(iv) Who pays the costs of this suit?

6. On the issue as to whether the said order is still in force, I find that the answer is NO. The reason being that Misc. Application 52 of 2017 was dismissed on 13.3.2017 for want of Prosecution and on 13.12.2018 when it was reinstated, the applicant did not ask the Court to extend the said orders which were issued on interim basis.

7. The Applicant was also directed to move the Court within three months to prosecute the mother Application and to bear punitive costs of Ksh.3, 000/-.

8. There is no indication that the mother Application was ever prosecuted and on 6.6.2019, Misc. Children's Case No. 52 of 2017 was again dismissed.

9. I find that the Applicant is guilty of the doctrine of laches in delaying to prosecute his case.

10. This is what the case of Ivita V Kyumba [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

11. In Naftali Onyango v National Bank of Kenya [2005] e KLR, the court reiterated the burden of proof a defendant seeking for dismissal of suit for want of prosecution must meet. Citing Salmon L.J. in Allan V Sir Alfred MC Alphine and sons Ltd [1968] 1 ALL ER 543, F. Azangalala J (as he then was) stated as follows:-

“The defendant must show:

i. That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

ii. That this inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.

iii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between themselves and the plaintiff or between each of other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule the longer the delay the greater the likelihood of prejudice at trial.”

12. I therefore find that the order issued on 24.5.2017 is not in force. There is no indication that it was ever served upon the Respondents with a penal notice attached to it as required by law and I find that the Respondents are not in contempt of the said order which is not in force.

13. I accordingly find that the Directors of the Respondent are not in contempt of the order and they cannot be cited for being in contempt of an order that is not in existence.

14. I dismiss the Application dated 19.9.2018 with no orders as to costs.

15. I order that each party bears its own costs of the said application.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 12TH DAY OF JULY, 2019.

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.