



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 158 OF 2019

IN THE MATTER BM and BMK (Minors)

RKM.....APPLICANT

- VS -

DMM.....RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary Objection dated 16.10.2019 against the Application dated 19.9.2019 on the following grounds:

(i) THAT the Applicant's Miscellaneous application is a nullity, hopelessly misconceived, frivolous, totally devoid of merit and mala fides and the Honourable Court has no jurisdiction to hear the Miscellaneous application for the reason inter-alia, that the applicant has not preferred any appeal against any orders made by the Nairobi Children's Court in case No. 269 of 2016 particularly the orders issued on 28th October 2016, 14th June, 2017, 11th May 2018 and 26th July 2018.

(ii) Further that the Miscellaneous Application is grossly incompetent, fatally defective and non-starter as it is not based on the provisions of the law it is purported to be brought under particularly order 43 of the Civil Procedure Rules which provides for Appeals from Orders of Court and consequently the Honourable Court has no jurisdiction to hear the same for there is no appeal against any orders in the said Nairobi Children's Court Case No. 269 of 2016.

(iii) That the issues canvassed in support of the miscellaneous application are sub-judice the same being directly and substantially in issue in the Nairobi Children's Court Case No. 269 of 2016 between the same parties litigating under the same title, and pending before the children's Court having jurisdiction to grant the relief's sought.

(iv) That the applicant is forum shopping and has no right of audience before this Honourable Court and the Miscellaneous application constitutes a gross abuse of the Court process and should be struck out at once with costs.

2. The parties were directed to file Written Submissions. The respondent in her written submissions dated 17.10.2019 stated that the children's court has exclusive jurisdiction in the first instance over all children matters including custody and/or maintenance to Judicial Officers gazetted under the Children Act.

3. Further, there is no record of Appeal, pleadings and the proceedings of the trial Court and/or an order giving leave to appeal and therefore there is no appeal at all in the Miscellaneous Application dated 19.9.2019.

4. The Respondent also submitted that this court has no jurisdiction to hear the Miscellaneous Application dated 19/9/2019 as it is not based on the provisions of the law it is purported to be brought under particularly order 43 of the Civil Procedure Rules which provides for Appeals from orders of the Court.

5. The Respondent submitted that the Application date 19.9.2019 is sub-judice as the case is pending in Nairobi Children's Court Case No. 269 of 2016 and the parties are the same and are litigating under the same title.

6. Further that the said application is an abuse of the Court Process as the applicant is hoping from one court to another on the same issue.

7. The Applicant opposed the Preliminary Objection and submitted that the Preliminary Objection is not on a pure point of law and that it is not argued on the assumption that all the facts pleaded by the other side are correct and further that a preliminary objection cannot be based on disputed facts.

8. The applicant submitted that the application dated 19.9.2019 did not seek orders of appeal as alleged by the Respondent and that the trial court made the orders in vacuum and has determined the issue of paternity which was an issue.

9. The applicant further submitted that the doctrine of sub-judice fails as the subject matter in both suits are different.

10. The Applicant filed the Application dated 19.9.2019 seeking the following orders;

(i) THAT the Application be certified urgent and be heard ex-parte in the first instance.

(ii) THAT this Court be pleased to set aside and/or vary the orders dated 27.7.2017, 31.10.2016, 31.7.2018 and undated orders issued on the 11th May, 2018 in Milimani Children's Case No. 269 of 2016.

(iii) THAT the court be pleased to stay the hearing and further proceedings in this case pending the hearing and determination of this Application

(iv) THAT the Notice to Show Cause Application dated 18.2.2019 and the Ruling thereof be stayed pending the hearing and determination of this Application.

(v) THAT fresh orders be issued upon the results of the second (2) DNA test.

(vi) THAT costs of this Application be in the same cause.

11. The Notice of Preliminary Objection dated 16.10.2019 against the application dated 19.9.2019 is seeking to have the said application dated 19.9.2019 struck out with costs to the Respondents on the grounds that this court lacks jurisdiction to hear the same and further that the same is sub-judice as it is directly and substantially in issue in Nairobi Children's Court Case No. 269 of 2016.

12. I find that it is not true that this Court lacks jurisdiction to entertain the said application since the applicant has a right to move to the High Court if he is dissatisfied with orders issued in the trial Court.

13. In the case of **Dr. Kiama Wangai v John Mugambi & Republic, [2012] eKLR** which restated the res sub judice principle as provided for in Section 6 of the Civil Procedure Act that,

"A court shall not proceed with any proceedings in which the matter in issue is also directly and substantially in issue in previously instituted proceedings between the same parties where such proceedings are pending before the same or any other Court having jurisdiction to grant the same relief claimed."

14. Sections 6 and 7 of the Civil Procedure Act prohibits a court from hearing a matter that is sub judice or res judicata as follows:

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

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.;"

15. The test to determine whether the matter is sub-judice or resjudicata was laid in the case of **DSV Silo vs the Owners of Sennar [1985] 2 ALL ER 104** as cited in **Bernard MugiNdegwa v James Nderitu Githae & 2 Others [2010] eKLR** and in **Henderson v Henderson [1843] 67 ER 313**, res judicata is described as:

"...where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not(except under special circumstances) permit the same parties to open the same subject of litigations in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The pleas of resjudicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

16. In **Attorney General & Another ET vs [2012] e KLR** it was held:

" The courts must always be vigilant to guard litigants evading the doctrine of resjudicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs NBK & Others [2001] EA 177 the court held that " parties cannot evade the doctrine

of resjudicata by merely adding other parties or causes of action in a subsequent suit.” In that case the court quoted Kuloba J, (as he then was) in the case of Njanju v Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated : If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of resjudicata...”

17. However, in the current case, the Applicant moved to this court after being aggrieved by the trial court and issue of *resjudicata* does not arise in the circumstances. I also find that to strike out the Application without giving the Applicant a chance to canvass or amend the same would be tantamount to deciding the application on a technicality.

18. I find that the Applicant has a right to approach the High Court at any time by way of appeal or to seek review. It is not in the interest of justice to strike out pleadings on technicalities.

19. **Article 159(2) (d)** of the Constitution of Kenya, 2010 which also captures the same spirit of the law.

Article 159(2)(b);

(a).....

(b).....

(c).....

(d) Justice shall be administered without undue regard to procedural technicalities; and

(e).....

20. In Raila Odinga v. I.E.B.C & others (2013) eKLR, this Court observed further:

“Article 159(2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice”

21. For that reason the Preliminary Objection dated 16.10.2019 is dismissed for want of merit. Costs to abide the Cause.

22. I direct that the application dated 19.9.2019 be heard interpartes on a date to be taken by consent.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 8TH DAY OF NOVEMBER, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.