



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL CASE NO. 78 OF 2018

SHEILLA JEBET BWALEI.....1ST APPELLANT/APPLICANT

JOSEPH BWALEI.....2ND APPELLANT/APPLICANT

MARY BWALEI.....3RD APPELLANT/APPLICANT

VERSUS

BENJAMIN BONDET..... RESPONDENT/RESPONDENT

RULING

The application before this court is about an amended Notice of Motion dated 19th July 2018, in which the applicant seeks to rectify interim orders issued by this court on 5th July, 2018 to read, “in the interim there be stay of execution of orders issued by *Hon. E. Kigen* on 28th June, 2018 and or further proceedings in Eldoret Children case No. 106 of 2018 pending hearing and determination of the application, instead of “in the interim the court be pleased to order stay of orders granted by *Honorable E. Kigen* in Eldoret Children Case No. 196 of 2018 pending hearing and determination of the application.

The Respondent raised a preliminary objection to the application dated 5th July, 2018, in that it is a reproduction of the application dated 19th July, 2018 which was fixed for hearing inter-parties on 2nd October, 2018, and that it is Res-Judicata. They contend that in the affidavit dated 5th July, 2018, the applicant sought that the court stays interim order granted in Children’s case No. 196/2018 pending hearing and determination of the application. Moreover, the application as well sought that the orders issued in the said suit be set aside and vacated and the application earlier filed be heard on merit before a different magistrate. The applicant soon thereafter, on 19th July, 2018, filed an application dated 19th July, 2018 with the exact contents of the application of 5th July, 2018, save for the change of case No. 196 of 2018 to 106/2018 citing typographical errors. The respondent avers that he was not a party in Children’s case No. 196 of 2018 and the application made is fatally defective and was made with intention of misleading the court. He urges this court to dismiss it.

Section 7 of the *Civil Procedure Act*, on Sub-judice, prescribes that:-

“No court shall try any suit or issue in which the matter 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”.

As was correctly held in the case ***Benard Mugo Ndegwa –vs- James Githae and 2 others [2010] eKLR***, the applicant alleging res-judicata must show that:-

- (a) That the matter in issue is identical in both suits;
- (b) The parties in the suit are substantially the same;
- (c) There is concurrence of jurisdiction of the court;
- (d) The subject matter is the same and
- (e) That there is a final determination as far as the previous decision is concerned.

The issue herein involves an application and not a suit; There’s no final determination in the application dated 5th of July 2018 which was

pending interparte hearing on 2nd October, 2018. Sub-judice rule does

not therefore property apply in this matter. In the case of **Microsoft Corporation –vs- Mitsumi Computer Garage Ltd and Another, Civil Case No. 810 of 2001** Ringera J expressed that:-

“Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evidence that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out a suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the court should rise to its higher calling to do “justice by saving the proceedings in issue”.

To this, there is now *Article 159 (d)* of the *Constitution of Kenya 2010*, which states that; ***“Justice shall be administered without undue regard to procedural technicalities”.***

The application of 5th July, 2018 had a typographical error of the case number of which the application of 19th July, 2018 sufficiently addresses and aims to correct. Such a move cannot be held res-judicata/sub-judice. The preliminary objection therefore lacks merit and is dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 19th day of November, 2018.

In the absence of

1. The applicants
2. The respondent

And in the presence of Ms Ann - Court assistant