



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
MISCELLANEOUS CIVIL APPLICATION NO. 65 OF 2014 (OS)
IN THE MATTER OF THE CHILDREN'S CAUSE NO. 1563 OF 2013

IN THE MATTER OF D J

AND

IN THE MATTER OF F W

BETWEEN

K W S APPLICANT

AND

D A O RESPONDENT

RULING

1. The application dated 17th July 2014 seeks review of orders that had been made on 30th June 2014 and their setting aside.
2. The applicant argues, in her affidavit sworn on 17th July 2014, that the Children's Court at Bungoma had cognisance of the matter pending before the Children's Court at Nairobi, and had indicated that it would give directions on the matter after the Children's Court at Nairobi had ruled on whether it had jurisdiction to hear the matter or not. It is averred that the orders of this court made on 30th June 2014 had "overruled" the decision of the Children's Court at Bungoma. It is further averred that the children, the subject of these proceedings, are in Nairobi and the interests of the matter would favour having the matter being heard at Nairobi. It is further contended that the orders were made without the applicant being heard.
3. The respondent to the application replied to it through an affidavit sworn on 20th August 2014. The respondent contends that the matter had been given a date for hearing by the court, but when it came up the applicant chose to absent herself. He contends further that the Children's Court at Bungoma had not reserved the matter before it for directions on jurisdiction after the Children's Court had ruled on the issue. It is argued that the Children's case filed at the Children's Court at Nairobi was so filed in response to orders obtained from the Children's Court at Bungoma. So that instead of the applicant obeying orders made by the Bungoma court she chose to obtain orders on the same subject matter from a Nairobi court.
4. There is a response to the reply to the application. The response by the applicant is vide a

supplementary affidavit sworn on 2nd October 2014 by the applicant.

5. Directions were given on 4th December 2014, that the application dated 17th July 2014 would be disposed of by way of written submissions. Both sides did file their respective written submissions. The applicant's submissions are dated 16th January 2015 and were filed in court on even date, while the respondent's submissions are dated 26th February 2015 and were filed in court on 26th February 2015. I have carefully read through the same and noted the arguments made by the parties.
6. The application dated 17th July 2014 seeks review of orders that were made on 30th June 2014. The said orders touched on two Children's Causes relating to the children of the parties. The first cause in time was **Bungoma Children's Cause No. 29 of 2013**, the second in time was the Nairobi Cause, being **Nairobi Children's Cause No. 1563 of 2013**. This court, in its ruling of 30th June 2014, noted that it was an abuse of court process to have two suits touching on the same subject matter being handled by two courts of competent and concurrent jurisdiction, and proceeded to direct the transfer of the latest suit, the Nairobi Cause, to the Bungoma Children's Court for its consolidation with the Bungoma Cause and after consolidation for the determination of the matter.
7. Although the applicant seeks review of the order made on 30th June 2014, it has not been demonstrated that the grounds for a review of a court order have been met. Review is granted on the reasons that there is an error apparent on the face of the record, or discovery of new and important matter of evidence which was not available at the time the order was made, or on the basis of any other sufficient reason.
8. The applicant appears to be advancing two grounds. One being that the Bungoma court had recognised the Nairobi Cause and was awaiting the Nairobi Court's decision on jurisdiction before it proceeding with the matter. The other ground is the fact that the children were in Nairobi, which was good reason to have the Nairobi cause being heard and determined by the Nairobi court. It is argued that the best interests principle favours a trial in Nairobi, and therefore the transfer of the Nairobi cause ought not have been ordered.
9. I have carefully gone through the papers filed by both sides in the said application. None of them filed copies of the proceedings in either **Bungoma Children's Court Case No. 29 of 2013**, nor **Nairobi Children's Court Case No. 1563 of 2013**. There is therefore no material before me demonstrating that the Bungoma Children's Court had made the orders or the directions alluded to by the applicant. It behoved the applicant to place before court material to support her assertions. She had the opportunity to do so but she did not take advantage of it. It is not enough for her to make assertions in her affidavits, she should support such assertions with evidence as the said evidence is actually available and obtainable from the court records.
10. Even if she were to avail such evidence, I am not convinced that the same would diminish the fact that two suits touching on the same subject matter had been filed in two different courts of concurrent jurisdiction, and it appeared quite clearly that one of the suits was filed solely to defeat the other.
11. In my view it cannot be said that there was an error on the face of the record as regards the matters the subject of paragraphs 9 and 10 above, neither can it be said there was discovery of any new matter with regard to the same.
12. As regards the best interests of the children being served by the matter being heard in Nairobi, I have noted from the record that the dispute was initially filed at Bungoma by the respondent to the instant application. The applicant filed the Nairobi Cause in response to certain orders that had been given by the Bungoma Court in respect of which she was said to be in contempt of court. The applicant was aware of the Bungoma suit before she filed the Nairobi one. She filed the

Nairobi suit while well aware that there was another suit elsewhere. She had the option of joining the Bungoma suit and thereafter seeking its transfer for hearing and disposal at Nairobi for the reasons that she is now advancing. She cannot surely act in abuse of court process and thereafter plead the paramountcy of the children's welfare to sanitise her questionable conduct.

13. I find no merit in the application dated 17th July 2014, for the reasons given above, and I hereby proceed to dismiss the same. The respondent to the said application shall have costs thereof.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH DAY OF FEBRUARY, 2016.

W. MUSYOKA

JUDGE