



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 26 OF 2015

1. A B

2. H B.....APPELLANTS

VERSUS

R B.....RESPONDENT

RULING

1. By an application dated 16th October, 2015 and filed on 22nd October, 2015 the Applicants sought a **stay** of proceedings in Mombasa Children’s Court Case No. 156 of 2015, **R B vs. A B and H B** pending the hearing and determination of the appeal filed herein. The application was supported by the Affidavit of A B sworn on 16th October, 2015, and the grounds on the face of the Application.

2. The issue raised in the application is whether the lower court – the Children’s Court has concurrent jurisdiction to entertain and determine a matter concerning the rights of children when there is in existence and pending determination in the High Court, a suit raising the same or substantially the same issues.

3. This court is keenly aware of the acrimonious litigation between the parties in this matter, and no party or counsel will want to see merit in the party or counsel’s argument to the contrary. The facts herein cannot however be controverted by either party. I do not propose to recite all the facts not in dispute. There is no dispute that there exists in this court Mombasa High Court Civil Suit No. 8 of 2014, **R B vs. A B and H B** in which the Applicant claimed that she had been evicted from her house, and sought an order to evict the Defendants from the subject premises, and allow her absolute occupation of the premises. On 15th June, 2015 the court delivered an interlocutory Ruling in the matter allowing the plaintiff to be restored to the said premises.

4. It is also not controverted that on 16th September, 2014, the Respondent herein filed **Mombasa High Court Succession Cause No. 301 and 395 of 2014; R B vs. A B and Another**, in which the Respondent sought to be paid KShs. 1.5 million as maintenance for herself and her children, and KShs. 1,056,780.00 being payment for school fees for the minors.

5. Upon considering the application vis-à-vis the fact that the second Appellant/Applicant was voluntarily paying the said school fees of KShs. 1,056,780.00 for his said siblings and remitting to the Respondent a monthly maintenance sum of 150,000/= coupled with the fact that the Respondent lived in her own house, the court declined to grant the Application at the ex parte stay, but later recorded a

consent, thus allowing the said application.

6. It is further not controverted, and perhaps to exert pressure on the Applicants to concede to the Respondent's demands, the Respondent filed in Tononoka Children Court Case No. 15 of 2015, **R B vs. A B & H B** seeking the same orders as sought in the subsisting court cases pending determination before the High Court.

7. Preliminary objection taken by the Respondents that a party cannot lawfully file the same dispute for simultaneous determination by two courts, and the fact that the court, being a Resident Magistrate has no jurisdiction to grant a monthly payment of KShs. 5,889,000/= as sought by the Respondent in the case.

8. It is also on record that the lower court on 30th July, 2015 delivered its Ruling dismissing the Preliminary Objection and holding that it had **concurrent** jurisdiction to determine issues raised in the purported Children Case No. 156 of 2015 (**R B vs. A B & Another**), which issues are pending before the High Court being Mombasa High Court Civil Suit No. 8 of 2015; **R B vs. A B & Another** and Mombasa High Court Succession Cause Nos. 301 and 395 of 2014; **R B vs. A B & Another** between the same parties herein which issues are pending hearing and determination before this court.

9. Despite these clearly uncontrovertable facts, counsel for the Respondent passionately urged that this court has no jurisdiction because there was no decree of the lower court for this court to order a stay of execution under order 42 rule 6 of the Civil Procedure Rules 2010 [the Civil Procedure Rules]. Counsel described the application as mischievous, and what is attached to the application are notes of proceedings and directions of the lower court, to have the matter heard in January, 2016. Counsel argued that such notes of proceedings are not a decree capable of execution, and that such directions are not appealable against. In this regard counsel relied on the decision of the court in the case in **HIRSCHFIELD AND ANOTHER VS. MANAGEMENT ASSOCIATES (PTY) LIMITED [2003] 1 BLR 174 (IC)**. In that case, the Botswana court dismissed an application for stay of proceedings on the grounds that a stay would seriously delay proceedings in the Industrial Court and not resolve issues in contention in Industrial proceedings.

10. Counsel also relied upon the decision of the Botswana Court in **NORTH WEST DISTRICT COUNCIL VS. J ampamp T DECORATORS PTY LIMITED IN RE J ampamp T DECORATORS PTY LIMITED VS. NORTH WEST DISTRICT COUNCIL 2010 1 BLR 551 HC** in which the court held –

“A judgment or order was appealable only if it was final in effect and not susceptible to alteration by the court of first instance, was definitive of the parties’ rights, and had the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.”

11. Reliance was also placed upon the Judgment of Asike-Makhandia J (as he then was now JA) in **JOHN MASESE MOGOI VS. NELSON ASIANGO MOGOI [2011] eKLR** in which the learned Judge struck out an appeal under Order 42 in the absence of a final decree or order.

12. The real question counsel argued is whether the reliefs sought in the Children Court can be granted in the superior court. Counsel submitted that the Succession Cause was limited to the extent of succession relief, and that the reliefs sought for the children cannot be obtained in the Succession Cause. Counsel consequently urged the court not to allow the application, that it is brought in bad faith because the Succession Cause does not provide for any order, consent or otherwise for the maintenance of the Respondent and payment of tuition fees that do not provide for children maintenance, counsel urged the court to dismiss the application with costs to the Respondent.

13. On his part counsel for the Applicant urged the court to allow the application. His argument was basically that the reliefs sought in the Children Court have been sought in this court, that the reliefs sought are part of the consent orders, and these include a monthly payment of KShs. 150,000/= and payment of school fees, and that further provision can be made in the same court, and that the law was

clear a party cannot proceed in several fora in the same cause.

14. Counsel argued that this court had the necessary jurisdiction to entertain the application and the appeal, that the issues before the lower court are exactly the same issues before the Children Court. The matters in this court have not been withdrawn and consequently urged the court to allow the application and grant the stay orders.

Consideration

15. I have considered the rival arguments. The issue as already stated is whether this court has jurisdiction to stay proceedings in the lower court pending the termination of the appeal.

16. Counsel for the Respondent made heavy water over the fact that the application and appeal are premised upon the provisions of Order 42 rule (6) of the Civil Procedure Rules that there was no formal decree or order from the lower court on the basis of which the appeal or application would be made. By definition a decree is a formal expression of the final order or judgment of the court. It is as a procedural matter attached to the document or statement of appeal. The non-attachment thereof is not in my humble view, fatal to an appeal or interlocutory application under the appeal. It is in my humble view sufficient to attach a record of the proceedings appealed against which would contain the decision being appealed against. That is why the court has discretion under sections 3A and 63 of the Civil Procedure Act, and this is anchored under Article 159 of the Constitution of Kenya 2010.

17. There is however a more fundamental point for allowing the application. It is the express statutory prohibition of conducting parallel claims between the same parties seeking the same remedies or substantially the same remedies, in different courts or fora. Section 6 of the Civil Procedure Act, (Cap 21, Laws of Kenya) the anchor statute on civil litigation provides –

“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.”

18. In this case, there is pending in this court, High Court Civil Case No. 8 of 2014 (OS), and Mombasa Succession Causes Nos. 301 and 395 of 2014 filed respectively by the parties hereto on 8th and 16th September, 2014 between the same parties hereto. It is in Succession Cause No. 301 of 2014 in which the Respondent was granted KShs. 150,000/= monthly upkeep with effect from 1st March, 2015 and every succeeding month until the cause is determined or the orders varied. It was on the like basis that consent was also arrived at to cater for the children tuition fees.

19. I do indeed note my learned brother’s observation in his Ruling of 15th June, 2015 regarding the proceedings before the lower court (Children Court) that -

“appropriate orders for stay in accordance with rules of court, that the plaintiff (Respondent herein) is at liberty to seek orders for maintenance of children from that specialized court.”

20. I am not an appellate court, and cannot therefore make any comment on the aspect of that observation. This Ruling is limited to the application for stay of any proceedings in that “*specialized court*”, as indeed the learned Judge envisaged in his observation. In light of the clear provisions of Section 6 of the Civil Procedure Act and in as much as the Children Act, 2001 is a comprehensive piece of legislation regarding the welfare or interests of children, those interests must however be determined in the most efficacious manner, taking into account the legal policy codified under Section 6 of the Civil Procedure Act against the simultaneous maintenance of parallel litigation in different courts, and still worse if those courts are subordinate and the superior courts. The danger of different opinions cannot be over-stated. It must be avoided by staying proceedings in the lower court in this case. The jurisdiction to interpret the constitution is largely vested in the High Court, and this court has the necessary jurisdiction

to determine any matters concerning the welfare of the children under Article 53 of the Constitution.

21. For those reasons, the Application dated 16th October, 2015 and filed on 22nd October, 2015 succeeds and there shall be orders in terms of paragraph (c) thereof staying the proceedings in Tononoka Children Court Case No. 156 of 2015, **R B vs. A B & H B**. Costs usually follow the event. However, in light of the circumstances of these cases, I direct that the costs incurred in relation to the application herein do abide the determination of the Succession Causes.

22. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 4th day of March, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Oduor holding brief Agwara for Appellants

Miss Mwainzi holding brief Miyare for Respondent

Mr. Kaunda Court Assistant