



**ANM v PMN (Civil Case 14 of 2015) [2016] KEHC 1770 (KLR)
(Family) (5 September 2016) (Ruling)**

ANM v PMN [2016] eKLR

Neutral citation: [2016] KEHC 1770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

CIVIL CASE 14 OF 2015

MW MUIGAI, J

SEPTEMBER 5, 2016

BETWEEN

ANM APPLICANT

AND

PMN RESPONDENT

Res judicata doctrine not applicable to children matters

In an application for parental responsibility and maintenance in which a preliminary objection was raised on grounds that the application was res judicata, the court held that res judicata was not applicable to children matters as it was not expressly provided for in Children Act. Practically, it behooved parents, family, community and society to support the child in growth and development up to the stage the child or young adult had ability to fend for himself/herself. Therefore, naturally there would be upcoming issues with regard to the child to safeguard the child's interest.

Reported by Nelson Tunoi & Silas Kandie

Civil Practice and Procedure – res judicata – whether the doctrine of res judicata applied in children matters - where the Applicant had filed an application regarding parental responsibility and maintenance for her children who had reached the age of majority – preliminary objection on grounds that the application was res judicata – whether the application had merit – section 7; sections 28(1) and (2), 91

Family Law – parental responsibility - extension of parental responsibility - rights of the child - best interests of a child - application for order to extend parental responsibility beyond the 18th birthday - special circumstances under which a person could make an application to the court for maintenance of a child - whether it was fatal if the application was brought one of the parent instead of the child himself - sections 28(1) and (2), 91

Brief facts

The applicant filed an application regarding parental responsibility and maintenance for her children who had reached the age of majority. In response, the respondent filed a preliminary objection application stating that



the matters raised in the applicant's application were *res judicata* and that they had already been determined by a court of competent jurisdiction in Children's Case 902 of 2015, hence the application was bad in law and an abuse of the court process and as such, ought to be dismissed with costs.

The ruling of the Children Court was that the application for the respondent to pay school- fees for the child over 18 years was denied and dismissed as the child did not lodge the application herself as required under section 91 of the amongst other reasons.

Issues

- i. Whether the application regarding parental responsibility and maintenance was *res judicata* as raised in the preliminary objection.
- ii. Whether the principle of *res judicata* applied in children matters.

Relevant provisions of the Law

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 can 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.

Explanations 1-3:

Explanation (1) — The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) — For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) — The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Parental responsibility in respect of a child may be extended by the Court beyond the date of the Child's 18th birthday, if the Court is satisfied upon application or of its own motion, that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made; provided that the order maybe applied for after the child's 18th Birthday.

An application under this section maybe made by;

- a. a) the parent or relative of the child;
- b. b) any person who has parental responsibility for the child;
- c. c) the Director;
- d. d) the child.

Held

1. The doctrine of *res judicata* implied that for a matter to be *res judicata*, the matters in issue had to be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court would as well invoke the doctrine in instances where a party raised issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties.
2. The application revolved around the question of parental responsibility and parental care. The application was not *res judicata* because;
 - a. Matters relating to children were determined on the basis of the best interests of the child which were paramount as espoused in article 53 (3) of the .
 - b. *Res judicata* was not applicable to children matters as it was not expressly provided for in . Practically, it behooved parents, family, community and society to support the child in growth and development up to the stage the child or young adult had ability to fend for himself/herself. Therefore, naturally there would be upcoming issues with regard to the child to safeguard the child's interest.



- c. Although it was not an appeal of the Children Court matter, one of the reasons for dismissal of the application to extend parental responsibility to the child who was over 18 years was that the Applicant to the application in the children’s Court ought to have been the child and not the mother and she should have sought leave of the Court as prescribed under section 91 of the .
 - d. The application for payment of school fees was inter-twinned with other related issues that the Court had jurisdiction to hear and determine, it would have been premature at that stage to expunge the application but rather hear and determine it on its merits. That was in line with article 165(3) of the that spelt out the jurisdiction of the court and article 159(2)(d) of , which mandated that justice should be administered without undue regard to technicalities.
3. Section 28(1) and (2) of the safeguarded the welfare of the child by permitting various parties to apply for extension of parental responsibility. The non-compliance of the process could not preclude another application being lodged. The provision did envisage the principle of *res judicata* instead it upheld the best interests of the child.

Preliminary objection overruled; application to be determined on its merits.

Citations

Cases

1. *Nyaga, John Njue v Attorney General & 6 others* (? 3 of 2014; [2015] KEHC 5210 (KLR) — Explained
2. *Willie, Judith Gathoni v George Kihara Muchuki & 2 others* Civil Appeal 277 of 2004; [2010] KECA 67 (KLR) — Explained

United Kingdom

Henderson v Henderson (1843-60) All ER 378 — Explained

Statutes

1. Children Act (cap 141) section 28(1); 91 — Interpreted
2. Civil Procedure Act (cap 21) section 7 — Interpreted
3. Constitution of Kenya, 2010 articles 40(1)(2); 53(3); 159(2)(d); 165(3); — Interpreted

Advocates

Mr Omboko h/b for Mr Juma

RULING

Introduction

1. The respondent filed notice of preliminary objection on April 12, 2016 in opposition to the application dated April 7, 2016 filed by the applicant, in which she sought the following orders:
 1. That this honourable court be pleased to grant an order compelling the respondent to pay school fees arrears for the issue herein and subsequent school fees as per current school fees structure.
 2. That the cost of this application be in the cause.
 3. That it is in the best interest of the issue that this honourable court be pleased to compel the respondent to provide for his daughter as hereunder:
 - i. Food – Kshs 5,000 monthly
 - ii. Shelter – Kshs 12, 000 monthly, (hostel)
 - iii. School fees including areas – as per the school fee structure



- iv. Pocket money – Kshs 4, 000, monthly
- v. Clothing – Kshs 5, 000, quarterly
- vi. A laptop which is essential for her BBIT course – Kshs 45, 000

Total monthly Kshs – 26, 000 (excluding school fees and arrears)

2. The respondent opposed the application and filed a notice of preliminary objection in which he contends that:
 1. The application is *res judicata*.
 2. The application is filed contrary to section 7 of the Civil Procedure Act and therefore the honourable court lacks jurisdiction to grant the orders prayed for.
 3. In any case, the application is bad in law, vexatious and an abuse of the court process.

The Respondent's Case

3. The respondent's case was that the matters raised in the application are *res judicata* and they have already been determined by a court of competent jurisdiction and hence the application is bad in law, vexatious and an abuse of the court process and as such, it ought to be dismissed with costs.
4. Learned counsel for the respondent stated that the matters raised in the instant application were canvassed in children's case 902 of 2015. The pleadings and ruling of the court are attached to the respondent's application filed on December 18, 2015. The issues are whether the respondent neglected his responsibility to take care of the child or that he is incapable of doing so. The ruling of the children court is that the application for the respondent to pay school- fees for the child over 18 years was denied and dismissed as the child did not lodge the application herself as required under section 91 of the *Children's Act* amongst other reasons. The respondent also demonstrated inability to support the child any further due to his medical situation and as a retiree lack of sufficient funds. Therefore, counsel stated that the present application is *res judicata* as provided for in section 7 of the *Civil Procedure Act* unless it is an appeal.
5. The respondent cited the following authorities;
 1. *Judith Gathoni Willy v George Kibara Muchuki & 2 others* Civil Appeal 277 of 2004 [2010] eKLR
6. The Court of Appeal upheld the High Court decision to uphold the preliminary objection as the matter raised in the new suit was canvassed in a succession cause where the grant was already confirmed. The applicant had no limited grant and therefore no locus standi to file suit for or against the estate. If he had a claim he ought to have lodged it in the existing succession cause.
7. *John Njue Nyaga v Attorney General & 6 others* Civil Appeal 46 of 2015 [2016] eKLR.
8. Relying on the doctrine of *res judicata* the earlier decisions of the High Court and provincial appeals committee had dealt conclusively with the issues raised in the instant application brought now as a constitutional matter under article 40(1) & (2) of the *Constitution 2010*. The same was dismissed.
9. The above 1st case is distinguished from the instant case as the application in court does not have issues regarding *locus standi* in a succession cause put in a children's matter. The 2nd case is distinguished on the basis that the preliminary objection was upheld as the applicant was filing the matter in the High Court for the 3rd time on the same issues. In this case the application is filed regarding parental



responsibility in relation to the matter in the 2nd court that is related to other issues for this court to determine.

The Applicant's Case

10. While opposing the preliminary objection, the applicant filed grounds of opposition on June 14, 2016 in which she asserted that the application is not *res judicata* as alleged as the issues for determination therein have never been previously conclusively determined by a court of competent jurisdiction. Accordingly, that section 7 of the [Civil Procedure Act](#) applies to cases where the issue in dispute is similar to an issue that was previously in dispute between the same parties when they were litigating under the same title and which was conclusively determined on merit by a court of competent jurisdiction.
11. Additionally, it was her contention that article 159(2)(d) of the [Constitution](#) mandates this court to regard any technicalities and as such, this court is well seized with the jurisdiction to hear and determine the application.
12. In her response dated May 31, 2016, the applicant rebutted the assertions that the application is *res judicata* and argued that on November 6, 2015, this court delivered a ruling and granted orders whose effect were that she files an application to plead for the issue's school fees and maintenance. She argued that she, her daughter and the respondent no longer stay together and the latter has since married and established another family. In that regard therefore, it was her contention that she and her daughters are entitled to a share of the matrimonial property.
13. Additionally, it was her case that the application does not in any way contravene section 7 of the [Civil Procedure Act](#) and this court has the jurisdiction to grant the orders sought in regard to the matrimonial property, in that the issue is also entitled to a share of the same so as to afford her school fees. Accordingly, that the application is not in any way vexatious and as such, this court ought to allow the same and overrule the preliminary objection.

Issue

14. Is the application dated April 7, 2016 *res judicata* as alleged in the present preliminary objection?

Determination

15. In that regard, the doctrine of *res judicata* is set out in the [Civil Procedure Act](#) at section 7 as follows:

“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 can 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.”
16. The [Civil Procedure Act](#) also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:
 - i. “Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.
 - ii. Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.



- iii. Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”
17. In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of Henderson v Henderson (1843-60) All ER 378, observed thus:
- “...where a given matter becomes the subject of litigation in, and of 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 litigation in respect of a 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 plea of *res judicata* applies, except in special case, 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.”
18. It therefore follows that a court will as well invoke the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties.
19. Applying the foregoing to the present case, I note that the gist of the application dated April 7, 2016 revolves around the question of parental responsibility and parental care. Can it then be said that the matters in the application have already been heard and determined by a court of competent jurisdiction?
20. This court rendered a judgment on an application that had been filed on March 19, 2015 by the applicant, and among the issues for determination was whether the respondent was responsible for the children of the marriage between him and the applicant. In my decision, at page 5, I partly held thus:

“The applicant also sought maintenance for herself and the school fees and school expenses for the children of the marriage. The applicant intimated to the court that the eldest daughter was in [particulars withheld] university and sent away due to lack of fees as the respondent refused to pay the fees.

The court finds that the respondent and applicant contracted a marriage under the African Christian Marriage and Divorce Act, cap 150, now repealed. The said marriage is recognized under section 98(1) of the Marriage Act, 2014 which provides in part xii for maintenance of spouses and other reliefs. The applicant is entitled to maintenance under section 77(1) a-d of the Marriage Act. Although she is employed, her pay slip reflects a meagre sum to cater for the expenses she shoulders single handily as listed above. This is coupled by the fact that she has a medical condition that requires medical expenses. On the other hand the respondent is retired and may not have a steady income. to balance the two situations, the court finds that the respondent ought to cater for his family. He shall pay to the respondent Kshs 15, 000/= amonth.

With regard to school fees, it is conceded the daughters of the respondent are adults, 28 and 21 years respectively. It is also on record that the 1st born daughter, GWM was studying at [particulars withheld] University and stopped due to lack of school fees. Ideally, the issue



of children is within the purview of the Children's Court as the court of first instance but in light of the special circumstances of this case, this issue is intertwined with other issues before this court. Therefore under article 165(3) of the Constitution and section 28(1) of the Children Act, 2001, the children shall present the school fees structures in court and serve the respondent for payment..." (emphasis added)

The court granted the following orders;

- (6) The respondent to pay maintenance of Kshs 15, 000/= a month to the applicant and children of the marriage.
 - (7) The payment of school fees for the children shall be determined upon presentation and service of the official fees structures to the respondent and application in court."
21. Thereafter, the original court file was misplaced and or lost and on the basis of a skeleton file, the respondent /applicant filed the application on December 18, 2015. The gist being that this court sets aside *ex parte* orders of November 6, 2015. The application was heard on March 10, 2016 and before completion the preliminary objection was filed.
 22. This court finds that the application that gave rise to *ex parte* orders of November 6, 2015 was the application filed on March 19, 2015 where the applicant sought restraining orders to preserve matrimonial property, division of matrimonial properties, restraining orders against the respondent from accessing the matrimonial home to prevent the applicant and 2 children from harm, provision of maintenance of applicant and school-fees of the younger child of the marriage.
 23. Clearly the matter involved various issues and the court ordered that a specific application on payment of school fees for the 21 year old daughter studying in [particulars withheld] university be served to the respondent and the same be heard *inter partes*. This is the application upon service, counsel submitted the matter is *res judicata* having been heard and determined in the Children Court.
 24. The application is not *res judicata* because;
 - a) Matters relating to children are determined on the basis of the best interests of the child which are paramount as espoused in article 53(3) of the Constitution 2010
 - b) *Res judicata* is not applicable to children matters as it is not expressly provided for in Children's Act 2001. Practically, it behoves, parents, family community and society to support the child in growth and development up to the stage the child or young adult has ability to fend for himself/herself. Therefore, naturally there will be upcoming issues with regard to the child to safeguard the child's interest.
 - c) Although this is not an appeal of the children court matter, one of the reasons for dismissal of the application to extend parental responsibility to the child who was over 18 years was that the applicant to the application in the children's court ought to have been the child and not the mother and she should have sought leave of the court as prescribed under section 91 of the Children Act 2001. With respect section 28(1) & (2) of Children's Act 2001 prescribes;

"parental responsibility in respect of a child maybe extended by the court beyond the date of the child's 18th birthday, if the court is satisfied upon application or of its own motion, that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made; provided that the order maybe applied for after the child's 18th birthday.
 25. An application under this section maybe made by;



- a) the parent or relative of the child;
 - b) any person who has parental responsibility for the child;
 - c) the Director;
 - d) the child.”
26. This provision presupposes that to safeguard the welfare of the child parental responsibility maybe extended on application by various parties. Therefore, the non con-compliance of process in one case cannot preclude another application being lodged. The provision does envisage the principle of *res judicata* instead it upholds the best interests of the child.
- d) As stated elsewhere in these proceedings, the application for payment of school fees is intertwined with other related issues that this court has jurisdiction to hear and determine, it would be premature at this stage to expunge the application but rather hear and determine it on its merits. This is in line with article 165(3) Constitution that spells out the jurisdiction of the court and article 159(2)(d) of Constitution 2010 which mandates that justice shall be administered without undue regard to technicalities.

Disposition

27. Based on my findings above, I am inclined to overrule the preliminary objection dated April 12, 2016. The application shall be determined on its merits.

DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI ON THIS 5TH DAY OF SEPTEMBER, 2016

M.W.MUIGAI

JUDGE

In the presence of;

Mr. Omboko holding brief for Mr. Juma

