



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

MISC. CIVIL APPLICATION NO.103 OF 2013

L G MAPPLICANT

VERSUS

A J N J G N K IRESPONDENT

R U L I N G

1. Before this Court is a Notice of Motion dated 28th May 2013 with a substantive prayer that:-

“3. THAT this honourable court be pleased to withdraw the said Busia C.M. Children’s Case No.36 of 2013 O J W and I D M suing through the mother, A J N G –vs- L G M from the Busia Chief Magistrate’s Court and thereafter hear and determine the same.”

2. That Motion is based on two grounds, which set out verbatim are:

a. There are very complex and weighty issues in Busia C.M Children’s Case No.36 of 2013 which can only be dealt with by this honourable court.

b. Part of the issues require the court handling the matter to lift the veil behind the said piece of litigation, an exercise in which the Chief Magistrate’s Court lacks jurisdiction and which jurisdiction is vested exclusively in this honourable court.

Also in support of the Application are two lengthy affidavits of the Applicant sworn on 28th May 2013 and 25th July 2013.

3. The Respondents reply to the Motion were 5 grounds of opposition dated 19th June 2013 and filed on 20th June 2013. Four of them were substantive:-

a. That the Application dated 28th May 2013 is made in bad faith, an abuse of the court process, incompetent and fatally defective.

b. The court has no jurisdiction to Order the Transfer of the children’s matter which is before a competent court duly gazzetted to deal with children matters.

c. The application has not given any sufficient ground that can warrant the withdrawal and transfer of children’s case no.36 of 2013 to this Honourable court.

d. The issues raised in the application does not affect the minors but is a wrangle (sic) between the Applicant and the minors' mother and is meant to affect the welfare of the minors if this application is granted.

4. From the evidence presented by the affidavits, this Court is able to reconstruct, in brief, the circumstances leading to the Notice of Motion. The Applicant and Respondent were Husband and Wife between 24th January 2003 when they got married and 28th November 2012 when the marriage was dissolved by Divorce. The picture drawn by the Applicant was that the union was difficult and suffered tumultuous moments. Eventually there was separation.

5. Vide pleadings dated 4th August 2011, the Applicant sought to divorce the Respondent. Those proceedings are Busia Principal Magistrates Court Divorce case NO.8 of 2011 **L G M -vs- A J N**. The Decree Nisi resulting from those proceedings show that the Petition proceeded on 1st November 2011 by way of formal proof in the presence of the Applicant and in the absence of the respondent. Judgment was delivered 7 days later on 8th November 2011 in which the Trial magistrate dissolved the marriage. The Decree Nisi was made absolute on 28th November 2012.

6. In paragraph 7 of the Divorce Petition, the Applicant stated that his union to the Respondent was blessed with two children namely:

a. O J W born on 15th October 2003.

b. I D M born on 28th February 2008

It is these two children who are said to be the Plaintiffs suing the Applicant herein though the Respondent Busia Children's case No.36 of 2013 (hereinafter also referred to as the **Children's matter**). This is the case that is the subject matter of the Motion before Court and which the Applicant seeks to have transferred and determined by the High Court. Initially filed on 20th March 2013, the Plaint was amended on 24th April 2013. From the pleadings the Plaintiffs seek that the Defendant be compelled to provide for maintenance and upkeep of the minors as set out in paragraph 7(a) of the Amended Plaint. Details of the demand are not necessary for the determination of the present Application. It is these proceedings that the Applicant urges raises very complex and weighty issues which can only be dealt with by the High Court.

7. Paragraph 46 of the Applicants affidavit of 28th May 2013 is an attempt by the Applicant to elaborate the complexity and weight of the issues raised in the Childrens matter. The argument by the Applicant is that the Childrens Court has no jurisdiction to entertain and determine those issues.

8. There can be no contest that the stated purpose of the childrens matter is for enforcement of Parental Responsibility. Whether they are phantom proceedings with other ulterior purposes other than this purpose as claimed by the Applicant is another issue. Parental Responsibility is defined in Section 23 of The Children Act as follows:

“23(1) In this Act, “parental responsibility” means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.

(2) The duties referred to in subsection (1) include in particular-

(a) the duty to maintain the child and in particular to provide him with-

I. adequate diet;

II. shelter;

III. **clothing;**

IV. **medical care including immunization; and**

(b) the duty to protect the child from neglect, discrimination and abuse;

(c) the right to-

I. give parental guidance in religious, moral, social, cultural and other values;

II. determine the name of the child;

III. appoint a guardian in respect of the child;

IV. receive, recover, administer and otherwise deal with the property of the child for the benefit and in the best interests of the child;

V. receive, recover, administer and otherwise deal with the property of the child for the benefit and in the best interests of the child;

VI. arrange or restrict the emigration of the child from Kenya;

VII. upon the death of the child, to arrange for the burial or cremation of the child.”

9. On the face of it, the Children’s matter which seeks to compel the Applicant to provide maintenance and upkeep of the Plaintiffs are proceedings for the enforcement of Parental Responsibility. Under Section 73 (a) of The Children Act, The Children’s Court is empowered to conduct civil proceedings on matters set out under parts 111,V,VII, VIII, IX, X, XI and XIII of The Act. Part 111 is on Parental Responsibility. It is therefore beyond argument that the Children’s Court has jurisdiction to hear and determine a contest in respect to Parental Responsibility.

10. It is conceded by the Applicant that the Court in which the Childrens matter is instituted at Busia is in fact a Childrens Court. What however the Applicant is arguing is that the matter raises certain issues which places it beyond the jurisdiction of that Court. It is to those issues that this Court must turn to.

11. Those issues, which are Twenty Six (26) in number are raised in paragraph 46 of the Applicants affidavit of 28th May 2013. To be fair to the Applicant this Court reproduces all the issues:-

a. Would the veil be lifted on Busia C.M. Children’s Case NO. 36 of 2013 to establish WHO the real Plaintiff is and whether the Respondent herein is merely masquerading?

b. What are the real intentions and motives behind the filing of the said Children’s matter viz Busia C.M. Children’s Case No. 36 of 2013?

c. Given that there was Busia C.M. Divorce cause No. 8 of 2011 to which the Respondent herein never filed any of the claims enumerated in Busia C. M Children’s Case No. 36 of 2013 is she estopped from filing the said suit and would the same be said to be resjudicata?

d. Given all the averments in this Affidavit does it present me as the type of person painted in Busia C.M. Children’s Case No. 36 of 2013 as irresponsible, uncaring and unmindful of the minors welfare?

e. Are the prayers and claims in C.M. Busia Children’s Case No. 36 of 2013 and its proposed amendment lawful and covered by the Children’s Act?

f. Would I be held liable to bear parental responsibility and cater for the minors welfare

while the parentage and paternity of the said are in dispute and who in any case have been totally bared from accessing and in dispute.

g. Would I be held liable to provide for the minors and the Respondent herein where the Respondent has engaged in multifarious immoral and promiscuous sexual exploits with numerous men in full public glare and in particular with a man namely Z O O who has performed all the requisite traditional rites in Kikuyu and Luo Customary Law and practice including paying dowry and being accepted by the Respondent and her family members as the Respondent's husband under Customary Law?

h. A divorced wife remarried (whether under Statute of otherwise) who should take parental responsibility? Would it be her former or her present husband?

i. Is Busia C.M. Children's Case No. 36 of 2013 a sham, frivolous, vexatious and an abuse of the court process?

j. should the answer to No. (i) above be yes, should the Respondent herein A J NJERI G n K be declared a vexatious litigant for the purposes of the Vexatious Proceedings Act?

k. Should Busia C.M. Children's Case No. 36 of 2013 be dismissed with costs?

l. Should the Respondent herein be condemned to pay the costs of this Application?

m Should the Respondent's parents, J M K and B D G as well as her surviving siblings B M K and T W K be summoned to appear before this Honourable Court to shed light on my above allegations and generally in this matter?

n. Should the Respondent's current customary husband Z O O be summoned by this Honourable Court to shed light in this matter and to answer as to my allegations herein.

o. What is the exact connection of one Y N O the registered renter of Busia P.O. Box 502, which address the Respondent uses and provides as her address for service?

p. Should a DNA test be performed to determine the disputed parentage and paternity of the minors and if so should the Respondent herein bear the costs for the same?

q. Should this honourable court view and interview the minors so as to establish the real truth behind the Respondent's allegations and mine?

r. Should the Respondent be arrested and charged with the offence of sending me abusive message by SMS?

s. Would it be in order for the Respondent to seek interim relief in a manner and procedure expressly outlawed by express statutory provisions?

t. Is Busia C.M. Children's Case No. 36 of 2013 the subject matter of this application an attempt by the Respondent herein to obtain Judgment by deceit and fraud contrary to express provisions of the Evidence Act, Cap 80, among other statutory provisions?

u. Is it me or the Respondent herein subjecting the minors to stress, deprivations psychological and other disorders?

12. Some of the issues are related, while others overlap. Others still, for instance whether the Respondent should be arrested and charged with the offence of sending an abusive message to the Applicant, may have little relevance to the Children's matter. With due respect to the Applicant, the issues raised by him challenging the jurisdiction of The Children's Court can be collapsed into two broad issues:

1. Does the Children's Court have jurisdiction to determine the true nature of the proceedings before it.

2. Does the Children's Court have jurisdiction to determine whether or not the Applicant should bear parental responsibility over the 2 children?

13. The assertion by the Applicant is that the true Plaintiff in the matter is the Respondent and not the children and that the proceedings are driven by other motives other than the questions surrounding parental responsibility. Does the setting up of this contention remove the matter from the Jurisdiction of the Children's Court? I think not. That Court will hear evidence and determine the merits or demerits of the Plaintiffs case and further whether the issues raised by the Applicant are merited. Whether or not the proceedings are motivated by malice or otherwise is not a jurisdictional question.

14. Does the Children's Court have jurisdiction to determine whether or not the Applicant should bear Parental Responsibility over the 2 children? The Applicants argument is that the Children's Court has no jurisdiction to determine the following:

a. Whether or not to order a DNA Test to determine the parentage of the children.

b. Whether or not to make an order for Parental Responsibility where paternity is in dispute.

c. Who should bear Parental Responsibility where a divorced wife is remarried?

In determining whether or not a person bears Parental Responsibility, a Children's Court must give regard to the provisions of Part 111 of the Children Act. The provisions are elaborate on the Definition of Parental Responsibility and who bears it. The issues raised by the Applicant herein, in my view, can be answered by testing them against the provisions of Part 111 of the Children's Act.

15. By way of illustration, let me pick the DNA issue. Would the Children's Court have power to order for a DNA Test if the outcome of such a test would be necessary to help it resolve the dispute before it? That is answered by Section 78 of The Act which provides:-

1. A Court while considering any question with respect to a child under this Act, may require to have presented to it a report, either oral or written as the Court may direct, on such matters relating to the child as the Court may consider necessary; and the Court may direct that such report be prepared by such person or persons as the Court may designate.

2. Regardless of any enactment or rule or law which would otherwise prevent it from doing so, the Court may take into account:-

(a). any statement contained in the report; or

(b). any evidence given in respect of the matters referred to in the report, in so far as the statement or evidence is, in the opinion of the Court, relevant to the question which it is considering.

16. This Court sees no reason at all to allow the Application. The Application dated 28th May 2013 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 4TH DAY OF MARCH, 2015

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

KADENYI.....COURT CLERK

.....FOR THE APPLICANT

.....FOR THE RESPONDENT