



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 72 OF 2015
(FORMERLY HOMA BAY HCCA NO. 49 OF 2015)

BETWEEN

A D NAPPELLANT

AND

R M A.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon.I. A. Tulo, Kadhi at the Senior Principal's Magistrates Court in Migori in Divorce Cause No. 5 of 2013 dated 13th March 2015)

RULING

1. The appeal upon which this matter is based arises from a refusal by the Kadhi to grant a temporary stay of execution pending the hearing and determination of an application dated 12th March 2015 which sought an order seeking to set aside a decree issued on 19th January 2015 directing the appellant to pay maintenance.
2. Although several issues have been raised regarding the conduct of the proceedings, I directed the parties to address me only on the issue of prior and existing suits between the same parties in regard to the child as this was sufficient to not only dispose of the interim application but also the appeal bearing in mind that the best interests of the child involved required the matter to be dealt with expeditiously.
3. It is common ground that the respondent filed a divorce cause in Kisumu being ***Kisumu Divorce Cause No. 17A of 2010 (R M A v A N D)***. On 21st October 2011 the Kadhi at Kisumu ruled as follows;

Therefore I disqualify myself since the defendant claimed he doesn't expect justice from the court and the court also regarded the respondent as a hostile litigant. As such the plaintiff shall proceed to any other court for redress.
4. The respondent then filed another cause at the Nairobi namely ***Divorce Cause No. 335 of 2012 (R M A v A N D)***. The matter was marked as withdrawn on 19th March 2015. Thereafter the respondent filed the suit at the Migori Kadhis Court that gave rise to the orders that are sought to be stayed.
5. It is clear that the first suit was not terminated but the Kadhi declined to proceed with it and directed the respondent to file a fresh suit elsewhere. This is what led to the multiplicity of suit. In law, the subsequent suit could not proceed as long as the first suit was in existence or had not been terminated. The respondent assumed that the Kadhi had given her liberty to file her case elsewhere which he had no

power to order. Accordingly, I do not find any fault in her filing the subsequent cases as she was merely seeking justice.

6. The question now is what directions and orders should I give in order to remedy the situation. As this matter concerns a child, I take the view that this court must be guided by the best interests of the child and be unshackled by procedural technicalities.

7. In order to ensure that the matter is now dealt with expeditiously I order as follows;

(a) *Kisumu Divorce Cause No. 17A of 2010 (R M A v A N D)* shall be deemed to be terminated.

(b) The orders and decree of the Kadhi in *Migori Divorce Cause No. 5 of 2013* be and are hereby set aside.

(c) The matter is remitted back to the Kadhi Court, Migori for re-hearing and the parties shall appear before him forthwith to take directions for a hearing that shall proceed without delay.

(d) There shall be no order as to costs.

DATED and DELIVERED at MIGORI this 8th day of May 2015.

D.S. MAJANJA

JUDGE

Mr Ombui instructed by Kabaka Ombui and Company Advocates for the appellant.

Mr Odero instructed by Agure Odero and Company Advocates for the respondent.