FB v ZCN (Miscellaneous Case E109 of 2025)
[2025] KEHC 16376 (KLR) (Family) (13 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16376 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

MISCELLANEOUS CASE E109 OF 2025

HK CHEMITEI, J

NOVEMBER 13, 2025

BETWEEN

FB ..... APPLICANT

AND

ZCN ..... RESPONDENT

RULING

1. This ruling relates to the application dated 28th April, 2025 filed by the Applicant, FB, seeking for orders that:-

    1. Spent.

    2. Pending the hearing and determination of this application, this honourable court be pleased to exercise and withdraw the suit Children's Case No. 266 of 2019 and thereafter try and dispose of the same for hearing and final determination.

    3. In the exercise of this court's supervisory jurisdiction, this honourable court be pleased to call for the lower court file Children's Case Number 266 of 2019 to examine the legality and constitutionality of the proceedings of the virtual court of 21st March, 2025.

    4. This honourable court issue further orders as may be just and expedient in the circumstances.

    5. Costs of this application be provided for.

2. The application is based on the grounds thereof and supported by affidavit sworn by FB on 28th April, 2025 who avers inter alia that in a ruling delivered on 9th July, 2024, the Magistrate's Court issued the following orders on custody and access:

> " That the children shall remain in the United States under the care of the Plaintiff/Mother, for the time being; that the Defendant/Father shall have unlimited but reasonable access to the children while in the United States; and that he shall further enjoy unlimited but reasonable audio-visual contact with them, subject to U.S. time zones."

3. Subsequently, on 8th November, 2024, counsel for the Defendant/Father made an oral application for access, seeking that the minors be allowed to visit Kenya for three weeks during the December/ Christmas holiday, and be returned to their mother no later than 3rd January, 2025. The court granted this request. However, by a ruling dated 28th November, 2024, the High Court varied the access order, holding that the same was inconsistent with the earlier orders of 9th July, 2024, and remitted the matter back to the trial court for further directions.

4. Despite this, the trial court has declined to deliver a ruling on the Defendant/Applicant's pending application, asserting that the matter remains before the High Court. Consequently, the Applicant's advocates filed an application under certificate of urgency dated 6th December, 2024 before the Magistrate's Court, seeking orders that the minors be availed in Kenya, and that the Defendant/ Applicant be granted access and custody during the Easter break and for half of the summer holiday in 2025.

5. When the matter came up for ruling on 21st March, 2024 via virtual proceedings, the trial magistrate expressly stated that she would not deliver a ruling on the said application. The court further remarked that "the more she read the file, the more confused she became," and explained that a transitional counselling report and co-parenting plan ought to be filed in compliance with the orders issued in the ruling of 9th July, 2024, before access to the minors could be facilitated.

6. Counsel for the Applicant submitted that the appeal filed by the Respondent was limited only to the order requiring the parties to undergo transitional counselling within 30 days, and did not challenge the entire ruling of 9th July, 2024.

7. Moreover, the stay orders obtained by the Plaintiff/Respondent related specifically to the counselling order, and not to the issue of access. The Applicant contends that the transitional counselling process has been frustrated solely because the Plaintiff/Respondent has refused to participate, thereby rendering compliance impossible.

8. The trial court's refusal to deliver a ruling on the pending application thus amounts to a denial of the Applicant's constitutional right to be heard, contrary to Article 50 (1) of *the Constitution* of Kenya, 2010. The Plaintiff/Respondent had previously sought the recusal of the trial magistrate in High Court Appeal No. 107 of 2023, but the same was dismissed.

9. The Magistrate's conduct in this matter has since been publicized on social media, leading to a loss of confidence in her ability to act impartially and expeditiously. It is unreasonable for the Applicant to be denied access to his children on the basis of a transitional counselling report or co-parenting plan, especially where the Plaintiff/Respondent herself obtained a stay of that specific order. The continued delay in rendering a ruling has deprived the minors of their right to bond with their father, in violation of their best interests under Article 53 (2) of *the Constitution*.

10. The trial court's inaction continues to prejudice the Applicant and his children, who have been denied contact for over two years, causing them emotional distress and uncertainty. The magistrate's failure to determine the application demonstrates inability or unwillingness to hear the matter expeditiously, thus eroding the Applicant's confidence in the impartiality of the lower court.

11. In the circumstances, the Applicant prays that this Honourable Court exercises its supervisory jurisdiction under Article 165 (6) and (7) of *the Constitution* and Section 18 of the *Civil Procedure Act*, by calling up the subordinate court file, withdrawing the matter from the Magistrate's Court and transferring it to the High Court for hearing and determination, in the interest of justice and the welfare of the minors.

12. The application is opposed vide notice of preliminary objection dated 14th May, 2025 which is based on the GROUNDS THAT:-

    1. The matters raised in the application are sub – judice as the same issues are pending hearing and determination at the high court in Nairobi High Court Family Appeal E077 of 2024 between ZCN vs FB as an appeal arising from the court's ruling in Children Case No. 266 of 2018.

    2. The application is incompetent and a gross abuse of the court process and thus ought to be struck out with costs.

13. The applicant has filed written submissions dated 14th October, 2025, in support of the application dated 28th April, 2025, 2025; and 17th July, 2025 in opposition to the notice of preliminary objection dated 14th May, 2025. He places reliance on the following:-

    1. Director of Public Prosecution vs Perry Mansukh Kansangara & 8 others (2020) where it was provided as follows: "i. A balance has to be struck in the exercise of constitutional supervisory jurisdiction to ensure there is no appearance that its object as to micro manage the trial court's independence in the conduct and management of its proceedings; ii. Ideally, constitutional supervisory jurisdiction should be exercised only after the parties are heard on the subject matter in question. iii. Supervisory jurisdiction should not be used where the option or revision is appropriate or applicable. iv. Supervisory jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate; v. Supervisory jurisdiction should be exercised to achieve th promotion of the public interest and public confidence in the administration of justice."

    2. Republic vs Chief Magistrates Court at Milimani Law Courts; Director of Public Prosecutions & 2 Others (Interested parties) 2020 eKLR where it was provided as follows: "... 59. There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs. 60. This power of superintendence conferred by Article 165 (6) of *the Constitution*, as pointed out by Harries, C. J. in Dalmia Jain Airways Ltd. V Sukumar Mukherjee AIR 1951 Cal. 193 is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the high court with any unlimited prerogative to correct all species of hardship or wrong decisions made within

the limits of the jurisdiction of the court or tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the high court under Article 165 (6) of *the Constitution* to interfere."

14. The respondent has filed written submissions dated 3rd July, 2025, in support of the notice of preliminary objection dated 14th May, 2025; and placing reliance on the following:

    1. Republic vs Paul Kihara Kariuki, Attorney General & 2 Others Ex Parte Law Society of Kenya [2020] eKLR where it was stated as follows: "The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res judicata in the subsequent suit."

    2. Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2020] eKLR) where it was stated as follows: "The term 'sub – judice' is defined in Black's Law Dictionary 9th Edition as: "Before the court or judge for determination." The purpose of the sub – judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res subjudice must therefore establish that: there is more that one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before the courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

Analysis And Determination

15. I have carefully considered the application before the court, responses thereto and the rival submissions.

16. The issue for determination, as crafted by the parties; is whether the matters raised in the applicant's application is sub judice, incompetent and an abuse of the court process.

17. The law on notices of preliminary objection was well discussed In The East African Court Of Justice At Arusha First Instance Division: Reference No. 8 Of 2017: Pontrilas Investments Limited Versus Central Bank Of Kenya & The Attorney General Of The Republic Of Kenya where it was stated as follows:

> " 23. Having carefully considered the parties' submissions, it is the considered view of the court that prior to a substantive consideration of the said submissions at this stage, it is imperative that the court confirms that what is before it, is indeed a preliminary objection point of law that would be properly determined as a preliminary objection.
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> 24. whereas the matter under consideration was raised and argued by all the parties as a preliminary objection, the court is alive to the importance of proper procedure in the judicial process.

25. In Attorney General of the Republic of Kenya vs Independent Medical Legal Unit (supra), the Appellate Division of this Court held:

> "The improper raising of points by way of preliminary objections does nothing on occasion confuse the issues. The court must therefore, insist on the adoption of the proper procedure for entertaining applications for Preliminary Objections. In that way, it will avoid treating, as preliminary objections, those points that are only disguised as such; and will instead, treat as preliminary objections, only those points that are pure law; which are unstained by facts or evidence, especially disputed points of facts or evidence or such like."

26. This point was underscored in The Secretary General of the East African Community vs. Rt. Hon. Margaret Zziwa, Appeal No. 7 of 2015 where the court cited with approval the following exposition in Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited (1969) EA 696 (per Newbold), P):

> "A Preliminary Objection is in the nature of what used to be demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion."

27. The question of what would constitute a proper preliminary objection was further addressed in Attorney General of Tanzania vs African Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011, where the Appellate Division of this court held that a Preliminary Objection could only be properly taken where what was involved was a pure point of law, but that where there was any issue involving the clash of facts, the production of evidence and facts, the production of evidence and assessment of testimony it 'should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross – examined, and a finding of fact then made by the Court."

18. There is an application dated 28th April, 2025 filed by FB, the applicant herein, in Nairobi High Court Family Appeal No. E077 of 2025 before Hon. Lady Justice P. Nyaundi. This application seeks for the same exact orders as those in the instant Miscelleanous application. It is yet to be determined before Hon. Lady Justice P. Nyaundi.

19. There is a memorandum of appeal dated 11th July, 2024 filed by ZCN in Nairobi High Court Family Appeal No. E077 of 2025 before Hon. Lady Justice P. Nyaundi. It is based on the grounds that the learned Magistrate erred both in law and in fact by directing the appellant and respondent to attend mandatory co-parenting coaching and therapy within 30 days from the date of the ruling, despite the fact that such an order was neither pleaded nor sought by either party; by ordering that the minors undergo transitional counselling within 30 days from the date of the ruling, yet no such relief had been prayed for or raised by any of the parties; and by assuming and exercising jurisdiction over minors who are currently resident and domiciled in the United States of America (USA), notwithstanding that no

reciprocity or enforcement agreement exists between Kenya and the USA in matters of custody or child welfare. The record of appeal is dated 2nd July, 2025. The appellant has filed written submissions dated 4th August, 2025 and the respondent has filed written submissions dated 27th September, 2025. This appeal is coming up for judgment on 30th January, 2026 before Hon. Lady Justice P. Nyaundi.

20. There is an application dated 11th November, 2024 filed by ZCN in Nairobi High Court Family Appeal No. E077 of 2025 before Hon. Lady Justice P. Nyaundi. It sought for orders inter alia that pending the hearing and determination of the application, the court be pleased to temporarily stay its order issued on 8th November, 2024 requiring the minors to visit Kenya during the December, 2024 holiday; and the court to set aside and/or review its order issued on 8th November, 2024 requiring the minors to visit Kenya during the December, 2024 holiday.

21. A ruling on this application was delivered on 28th November, 2024 to wit, "... 3. The orders of 8th November, 2024 were granted on the basis that there are existing court orders on access. It was my intention to actuate those orders. Following the current impasse, I have had to look at the orders of the court that were granted on 9th July, 2024 as granted by the trial court on access. The court directed that: a) the children will remain domiciled in the United States with the plaintiff/ mother for now. b) the defendant/father is granted unlimited but reasonable access in the United States. c) the defendant/father is granted unlimited but reasonable audio-visual contact (at US time). 4. The orders of 8th November, 2024 issued by this court have to be varied as they are clearly at variance with those issued by the trial court and no basis had been laid to vary the orders of the lower court. In the circumstances, I will vary the orders and direct that the applicant facilitate access to the minors in line with the orders of the trial court issued on 9th July, 2024. 5. The matter will be mentioned before the trial court on 6th January, 2025 to confirm compliance and take further directions as necessary."

22. The ruling that forms the genesis of the instant application and the applications and appeal in Nairobi High Court Family Appeal No. E077 of 2025 before Hon. Lady Justice P. Nyaundi; is as a result of the application dated 26th January, 2024 in Milimani Law Courts Case No. MCCC/266/2019: ZCN vs FB.

23. The application aforementioned sought for orders inter alia that pending the hearing and determination of the application: the Defendant be granted unlimited access to the minors; the honourable court be pleased to grant interim custody, care and control of the children to the Defendant; the honourable court be pleased to authorize the Defendant to take the minors to school pending further orders of the court; the honourable court be pleased to cite the Plaintiff for contempt of court for willfully disobeying lawful court orders issued on 26th July, 2022 and 11th October, 2023 by Honourable Jackie Kibosia, Children's Court at Nairobi, specifically concerning the Defendant's access to the minors; the Court be pleased to issue a warrant of arrest against the Plaintiff and order her committal to civil jail for contempt of court, for such period as the Court may deem fit and just; this matter be referred to the Directorate of Criminal Investigations (DCI), Headquarters – Nairobi Central Bureau (Interpol Section) to facilitate the arrest and presentation of the Plaintiff before this Honourable Court; the court to issue any other orders it deems just, fair and appropriate in the circumstances; and the costs of this application be provided for.

24. The ruling was delivered on 9th July, 2024 by Hon. Jackie Kibosia (PM) wherein she ordered as follows:

    1. That the objection based on res judicata fails.

    2. That the children shall remain domiciled in the United States with the Plaintiff/mother for now.

3. That the Defendant/father is granted unlimited but reasonable access in the United States.

4. That the Defendant/father is granted unlimited but reasonable audio-visual contact (at US time).

5. That the parties to enroll in co – parenting coaching (virtually) within 30 days from today's date. This is to enable proper co – parenting plan. Parties to agree on choice of therapist and in the event they fail to agree, to contact the court for appointment.

6. That the children to undergo transition counselling as earlier ordered by the court within 30 days from today's date.

7. That the Defendant/father to file a current affidavit of means and file proof of 50,000/= monthly deposits (from the day judgment was rendered to date).

8. That summons to issue to the in-charge DCI child protection unit to update the court on the status of the expunging order, content on the minors herein is still circulating on social media, despite expunge and gag orders.

9. That mention on 6th August, 2024 (for DCI follow up).

10. That this being a family matter, I make no order as to costs.

25. In light of the foregoing, I find that the application dated 28th April, 2025 in Nairobi High Court Family Miscelleanous Application No. E109 of 2025: FB vs ZCN – subject of this ruling - is sub judice because the same application has been filed under Nairobi High Court Family Appeal No. E077 of 2025 before Hon. Lady Justice P. Nyaundi; and is pending determination before her court.

26. In the premises and based on the facts stated above I decline the Applicant's request and strike out the same with no order as to costs.

27. Further and going by the history of this matter and the emotions it has evoked it is my view that the parties ought to determine the appeals before this court (Nyaundi J) and let the chips fall whenever.

28. The preliminary objection is otherwise allowed, the application disallowed.

29. Costs in the cause.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 13TH DAY OF NOVEMBER 2025.

H K CHEMITEI

JUDGE