REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC CIVL APPLICATIO NO 53 OF 2015

IN THE MATTER OF S N (MINOR)

M N N.....APPLICANT

versus

M N N (Sued on behalf of SN.....RESPONDENT

RULING

On 7th May 2015 **M N N**(hereinafter referred to as the Respondent) sued **M N N** (hereinafter referred to as the applicant) at the Chief Magistrates Court being at Nyeri in Children's Case number **28** of **2015** seeking judgement for orders for:-

a. *The legal and actual custody for Baby **SN N** (hereinafter referred to as the minor) be granted to her.*

b. *That the applicant herein be ordered to take parental responsibility over the said child and be ordered to pay monthly sum of **Ksh. 68,000/=** to cater for the up keep of the said child.*

c. *Costs of the said case.*

On 29th June 2015, the Respondent herein filed an application in the said case expressed under the provisions of Sections **3, 4, 5, 6, 24 (2), 25 (2)** and **76** of the Children's Act, 2001[1]seeking orders that the Applicant herein undergoes a "Deoxyribonucleic Acid" (DNA) test with the minor to determine the paternity and if he refuses, the court proceed to hear and decide the case. For avoidance of doubt, the above Sections are contained in Part II which contains provisions relating to *"Safeguards for the Rights And Welfare Of the Child," and "Parental Responsibility,"* and the specific provisions are as follows; ***(s. 3)** Realization of the rights of the child; **(s 4)** Best interests of the child; **(s. 5)** Non-discrimination; **(s.6)** Right to parental care; **(s. 24)** Who has parental responsibility* while Section ***76** provides for General principles with regard to proceedings in Children's Court.*

The grounds relied upon by the Respondent in the application in the lower were that the applicant herein had denied paternity in his defence in the said case and had informed the court on 23.6.2015 that he was not agreeable to undergo a DNA test voluntarily. Indeed a look at paragraph **4** of the said defence confirms that indeed the applicant had denied paternity.

The applicant opposed the said application in the lower court. Even though the applicant in the present

application annexed copies of the above application and the supporting affidavit of the Respondent herein and annextures thereto, he did not deem it fit to annex his replying affidavit in opposition to the said application which he filed in the lower court. However, from the ruling delivered by the Magistrate in lower court annexed to the application before me, the applicant vehemently opposed the said application, thereby making it clear that he was not ready to undergo the DNA voluntarily. He raised constitutional issues in the said affidavit and argued that unless the parties herein consented, the orders sought by the Respondent in the said application could only be issued by the high court. The court agreed with the said position and dismissed the said application on 11th September 2015. What is important here is not the outcome of the said application, *but the fact that the applicant herein clearly stated that he would not voluntarily undergo the DNA test*. In contrast, in the present application, the applicant now seeks orders from this court *asking the court order what he refused to do and categorically stated he would not do voluntarily.* Had the applicant consented at that point in time, then, the issue would have been resolved then. So, why the change of heart" What has changed"

On 21st October 2015, after about one month and 10 days or thereabouts, the applicant herein filed the present application this time seeking the same orders he was opposing. It's not clear why the applicant suddenly changed to seek for the same orders he was vehemently opposed to and this raises a genuine question as to whether or not the application before me is brought in good faith. Other reliefs sought by the applicant in this application are a stay of the proceedings in the lower court and an order that the Respondent pays the costs of the DNA.

The Respondent filed a Replying affidavit on 12th February 2016 in which she raised pertinent issues. First, she stated that the application is an after-thought brought after it became clear judgement would be delivered in the above cited case and indeed the Respondent annexed a copy of the said judgement confirming that it was delivered on 20th November 2015. It is not clear why the applicant did not bring the attention of the said judgement to the court immediately it was delivered or on 25.1.2016 when this matter came up in court or thereafter. It took the Respondent to bring it to the court's attention in her replying affidavit. The judgement clearly shows that the case has been determined, thus the position has changed.

Prayer one of the application seeking to stay the said suit has been overtaken by events. Possibly that is why counsel for the applicant at the hearing said he was not pursuing the said prayer. Counsel also said that the applicant was willing to pay for the DNA thereby dropping prayer 4 of the application and leaving only payer 3 seeking to the DNA.

In my view, the lower court's judgment cannot be ignored and its findings are clear among them the court found that *"the Applicant herein has acquired parental responsibility as provided by Section 25 of the Act.* The learned Magistrate who had the benefit of hearing the parties made pertinent observations such as *"the applicants position changed during the hearing from 'the child was not his, he was not sure, he did not know' and further the court referred to a parental agreement which was executed by the applicant."* This unexplained habit of changing positions is also evident in the present application. The applicant refused to consent to a similar application in the lower court. Now he wants the court to make the same orders he refused to consent to. Unfortunately, it's rather too late in that the ground has since shifted and this court finds it unwise to make orders that may erode a competent judgement of the lower court yet this court is not sitting on an appeal against the said judgement.

As matters stand now, there is a court judgement rendered by the lower court. This fundamental information was bought to the courts attention by the Respondent not the applicant. Worse still, the applicant has appealed against the said judgement. A memorandum of appeal was filed on 18th December 2015 and again, this was brought to the courts attention by the Respondent who is acting in

person. The failure to disclose such crucial and relevant information raises questions whether the applicant has been withholding crucial information which he perceived is not to his advantage.

Having appealed against the said judgement, the applicant cannot pursue two processes at the same time touching on the same issue without being guilty of abuse of court processes. **Abuse of process** arises when a party makes a malicious and deliberate misuse or perversion of regularly issued court process (civil or criminal) not justified by the underlying legal action.

The elements of abuse of process in most common law jurisdictions are as follows: ***(1)*** *the existence of an ulterior purpose or motive underlying the use of process, and* ***(2)*** *some act in the use of the legal process not proper in the regular prosecution of the proceedings.*[2]

It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*

(b) *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*

(c) *Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.*

(d) *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*

(e) *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.*[3]

(f) *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*

(g) *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*

(h) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.*[4]

The concept of abuse of court/judicial process involves circumstances and situations of infinite variety and conditions. It has one common feature which is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is recognized that the abuse of judicial process may lie in both a proper or improper use of the process in litigation. In the words of **Oputa J.SC**

(as he then was) in the Nigerian case of *Amaefule & other Vs The State***[5]** he defined abuse of judicial process as:

"A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process."

In yet another Nigerian case of *Agwusin vs Ojichie*. Justice Niki Tobi JSC observed:-

"that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process....."

Also in the case of *Saraki Vs Kotoye*[6] the court dealt exhaustively with what constitutes abuse of process of court. In his lead Judgment it was observed:-

"That the abuse of process may lie in both a proper or improper use of the judicial process in litigation. But the employment of a judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It can also arise by instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues".

Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.

As mentioned earlier, some crucial details like the applicant has already appealed against the lower court judgement were not disclosed. In my view, a party is under a duty to disclose to the court all relevant information even if it is not to his or her advantage. In *Brinks-Mat Ltd vs Elcombe*,[7] discussing what constitutes material non-disclosure had this to say:-

*"**(i)** The duty of the applicant is to make a full and fair disclosure of the material facts. **(ii)** The material facts are those which it is material for the judge to know in dealing with the application made; materially is to be decided by the court and not by the assessment of the applicant or his legal advisers. **(iii)** The duty of disclosure therefore applied not only to material facts known to the applicant but also to any additional facts which would he would have known if he had made inquiries, **(iv)** The extent of inquiries which will be held proper, and therefore necessary, must depend o all the circumstances of the case including (a) The nature of the case which the applicant is making when he makes the application, (b) The order for which application is made and probable effect of the order on the defendant, and (c) .....The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. ...."*

I have carefully considered the application before me and the issues discussed above, namely, the applicants evident shifting from one position to another without any explanation, failure by the applicant to disclose that there was a court judgement rendered against him in the lower court, failure to disclose that he had actually appealed against the said judgement. I have also considered that the orders sought may have an impact on the said appeal or affect its enforcement yet this court is not sitting on appeal

against the same.

I take the view that the application before me is not brought in good faith, that the same is an after-thought and that the orders sought are aimed at defeating the lower courts judgement. I find that the applicant has no merits and the same is dismissed with costs to the Respondent.

Orders accordingly

Dated at **Nyeri** this **11th** day of **March** 2016

John M. Mativo

Judge

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[1] Act No. 8 of 2001

[2]Cartwright v. Wexler, Wexler & Heller, Ltd., 369 N.E.2d 185, 187 (Ill. App. Ct. 1977).

[3] Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264

[4] (2007) 16 NWLR (319) 335.

[5] (1998) 4SCNJ 69 at 87.

[6] (1992) 9nwlr (Pt 264) 256

[7] {1988} 3 ALL ER 188