



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. E022 OF 2021

IN THE MATTER OF ARTICLES 10, 21, 27 AND 53 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 3, 4, 76, 81, 114 AND 119 OF THE CHILDREN ACT NO. 8 OF 2001

AND

IN THE MATTER OF SECTIONS 2, 28 AND 38 OF THE MENTAL HEALTH ACT, CAP 248

BETWEEN

MNK.....1ST PETITIONER

(A minor, suing through RTMK) RTNMK.....2ND PETITIONER

AND

AOK.....RESPONDENT

RULING

1. The 2nd Petitioner and the Respondent though not married, are parents to the 1st Petitioner who was born on 31.10.19. The Petitioners filed a Petition dated 17.8.21 seeking certain orders and declarations. Contemporaneously with the Petition, the Petitioners filed a Notice of Motion of even date seeking the following orders:

- 1. *Spent.*
- 2. ***THAT*** this honourable court be pleased to stay the proceedings of Children’s Cause No. E436 of 2021 AOK -versus- RTNMK.
- 3. ***THAT*** the court file in Children’s Cause No. E436 of 2021 be transmitted from the Children’s Court at Nairobi to this Honourable Court and that the same be consolidated with the instant Petition for hearing and determination.
- 4. ***THAT*** the Respondent be compelled to undertake a compulsory mental health assessment by an independent medical examiner to ascertain his mental disorders and produce a medical report to that effect before this Court, within such time and manner as will be prescribed by this Court.

5. ***THAT pending the hearing and determination of the application and the Petition, that the interim access orders granted in Children's Cause No. E436 of 2021 to the Respondent allowing him to visit the Child on Tuesdays and Thursdays every week between 2.00 pm to 4.00 pm be maintained.***

6. ***THAT the costs of this application be provided for.***

2. In her affidavit in support of the Application sworn on 17.8.21, the 2nd Petitioner set out her case as follows: She met the Respondent in 2018 and their relationship resulted in the conception of the 1st Petitioner. About 3 months to the birth of the child, the Respondent moved into the 2nd Petitioner's house which is next door to her mother's house. Shortly after, the 2nd Petitioner noticed that the Respondent would often disappear from home for long periods without communicating, and upon return he would not be able to explain satisfactorily where he had been. This bizarre behaviour caused the 2nd Petitioner distress as she would worry about the Respondent's safety. Further, the Respondent made no contribution towards the 2nd Petitioner's appointments with the doctor or household budget, leaving the 2nd Petitioner to solely cover the same. Since the birth of the 1st Petitioner, the Respondent has never made any contribution towards the child's upkeep and healthcare. He frequently fails to visit the 1st Petitioner and when he does, he barely spends time with the child. Between mid-November 2020 to 30.4.21, the Respondent did not visit the child at all. The visits resumed on 4.5.21. In spite of the 2nd Petitioner sharing with the Respondent job opportunities, he showed no interest in applying for the same despite his business failing. Further, the Respondent agreed that they relocate to Canada as a family but after the 2nd Petitioner went through the rigorous application process, the Respondent reneged and declined to grant his consent.

3. The 2nd Petitioner further stated that the Respondent suffers from various mental disorders preventing him from being a fit parent to the 1st Petitioner. The Respondent was admitted at the Chiromo Lane Medical Centre which specializes in the diagnosis, treatment and management of persons who suffer from a spectrum of mental health disorders. Due to his condition, the granting of shared, actual or legal custody of the child would result in serious harm to the child. According to the 2nd Petitioner, the Respondent lacks insight about his condition and has not understood, accepted the same and does not manage his mental disorders properly. The 2nd Petitioner further contended that the Children's Court has no jurisdiction to hear and determine issues pertaining to the Respondent's mental health and that is why she has moved to this Court.

4. The Respondent opposed the Application vide his replying affidavit sworn on 25.11.21. He denied the 2nd Petitioner's allegations as to his mental condition. He averred that he was granted access by the Children's Court and intends to continue seeing the child as permitted. He contended that the Application is an abuse of the Court process as the issues raised are *sub judice*, being subject to proceedings before the Children's Court. The Respondent contended that the Children's Court has the original jurisdiction, and to which the Petitioners have submitted, to deal with the issue that his alleged mental disorder makes him unfit as a father of the child while this Court has appellate jurisdiction.

5. The Respondent denied that he suffers from acute psychiatric disorders and stated that he is mentally fit to care for the 1st Petitioner and has no intention of harming the child. He admits that after losing his father in 2017 he suffered depression for which he received treatment in 2020. The Respondent stated that the mental assessment sought by the 2nd Petitioner is not necessary and that he filed a medical report in the Children's Court. Additionally, the Respondent stated that loves his son and wishes to express that love and be involved in his upbringing. However, the current terms of access are not sufficient to spend quality time with his son. The Respondent urged the Court to dismiss the Application as the issues raised are pending before the Children's Court.

6. Parties filed their respective written submissions which I have duly considered. The issues that fall for determination are:

- i) The jurisdiction of the Children's Court under the Mental Health Act.
- ii) Whether the Court should stay the proceedings in the Children's Court.
- iii) Whether the Application and Petition are *sub judice*.
- iv) Whether the Respondent should be compelled to undergo a mental health assessment

The jurisdiction of the Children's Court under the Mental Health Act.

7. It was submitted for the Petitioners that the Children's Court lacks jurisdiction to compel the Respondent to undergo a mental

health assessment. The basis of this contention is that Section 2 of the Mental Health Act defines “Court” as the High Court.

8. It is trite law that jurisdiction is everything and a Court cannot deal with a matter in respect of which it has no jurisdiction. The *locus classicus* in this regard is the celebrated Court of Appeal case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR where Nyarangi, JA stated:

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

9. Jurisdiction is conferred by law and a Court cannot assume jurisdiction it does not have. The Supreme Court case of In the Matter of Interim Independent Electoral Commission [2011] eKLR bears this passage:

Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent... The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.

10. Section 28(1) of the Mental Health Act provides:

The court may, upon application made to it by petition concerning any matter connected with a person suffering from mental disorder or with his estate, make such order, subject to this Part, regarding such application as, in the circumstance’s (sic) of the case, the court may think fit.

11. Section 28 falls under Part XII of the Act which provides for judicial power over persons and estates of persons suffering from mental disorder. This provision envisages a situation where it is necessary for a Court to make orders regarding the person or estate of a person who is unable to manage himself or his own affairs on account of a mental disorder. In such a situation, the Court mandated to make such orders is the High Court. To this extent therefore, the Magistrate’s Court lacks jurisdiction.

12. From the plaint filed in the lower Court which is exhibited herein, it is noted that the Respondent seeks joint legal and physical custody of the child as well as access. He also seeks joint contribution by both parents to the maintenance of the child. Further, the Respondent seeks that the 2nd Petitioner be restrained from traveling outside the country with the 1st Petitioner without his consent, or that of the Court. The prayers sought are under the Children Act and not under the Mental Health Act. The subject matter before the lower Court is not a matter connected with a person suffering from mental disorder or with his estate as contemplated under Section 28 of the Mental Health Act.

13. The long title of the Mental Health Act indicates that its intention is *inter alia, to amend and consolidate the law relating to the care of persons who are suffering from mental disorder or mental subnormality with mental disorder; for the custody of their persons and the management of their estates*. The High Court has been empowered to make orders in line with the intention of the Act.

14. In any matter relating to custody of a child, the Court with jurisdiction in the first instance, is the Children’s Court. In a bid to safeguard the best interests of the child as required by Article 53(2) of the Constitution of Kenya, 2010 and Sections 3 and 4 of the Children Act, the Court has jurisdiction to look into all circumstances of the case including the mental capacity of the parents of the child. Section 76 of the Children Act stipulates the general principles with regard to proceedings in Children’s Court as follows:

(1) Subject to [section 4](#) where a court is considering whether or not to make one or more orders under this Act with respect to a child it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all.

(4) The court may, if it considers it imperative for the proper determination of any matter in issue before it, of its own motion or upon application, call any expert witness it shall deem appropriate to provide assistance to the court, and the expenses of any such witness shall be determined by the court and shall be defrayed out of moneys provided by Parliament.

15. A reading of Section 76 reveals that the Children's Court has wide powers to make any orders, provided that they are in the best interests of the child. Under Subsection (4), the Children's Court may call any expert witness it shall deem appropriate to provide assistance to the Court for the proper determination of any matter before it. If such matter raises a question as to the mental illness of a parent, as in Children's Case No. E436 of 2021, the Children's Court may call a mental health expert to assist the Court. This being the case, the proceedings before the Children's Court are clearly in the right forum. The orders sought in the Application and the Petition are well within the ambit of the Children's Court and can be competently dealt with, in that Court.

16. It is noted that the Respondent seeks custody of and access to the child as well as an order restraining the 2nd Petitioner from travelling with the child out of the Country without his or the Court's consent. A careful look at the 2nd Petitioner prayer in this Application and Petition against the background of what is sought by the Respondent, reveals that her concern is not for the Respondent on account of his mental health status. She does not seek an order for the custody of the Respondent's person and management of his estate. Could it be that the 2nd Petitioner's intention is to keep the Respondent from the child and to pave the way for her relocating with her child to Canada? This is a question that can only be answered in the Children's Court. To say that the Children's Court lacks jurisdiction to consider the mental health status of the Respondent is to clearly misapprehend the powers of that Court as provided by law.

Whether the Court should stay proceedings of the Children's Court Case No. E436 of 2021

17. It was submitted for the Petitioners that this Court has jurisdiction over children's matters. Reliance was placed on the following passage in the case of M S A v P K A [2009] eKLR:

By a considered ruling of this court delivered and dated the 15th January, 2009, this court ruled that it has jurisdiction to hear and determine matters under the Children Act aforementioned. The court accordingly, on the grounds shown in the ruling transferred the Nairobi Children Court Civil Case Number 278 of 2006 to this court for speeded hearing in the best interests of the child and the parties.

18. It must be noted that in the cited case, the parties had agreed to sign a consent to have the matter in the Children's Court transferred to this Court. Shortly after, the plaintiff therein reneged claiming that matters under the Children Act cannot be heard by this Court. After considering submissions by the parties, the Court ruled that it has jurisdiction to hear and determine matters under the Children Act.

19. The jurisdiction of this Court over children's matters has never been in doubt. Indeed, under Article 165(3)(a) this Court has unlimited original jurisdiction in both criminal and civil matters. The only limitation to this jurisdiction is as provided under Article 165(5) of the Constitution. Children matters are not among those in respect of which this Court shall not have jurisdiction.

20. Article 165 has further clothed this Court with the jurisdiction to supervise subordinate Courts as follows:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

21. In the exercise of its supervisory jurisdiction, the High Court may call for the record of any proceedings before a subordinate Court, as is sought herein, and make any order or give any directions as it deems appropriate. In so doing, the Court must always be guided by the overriding objective, which is to ensure the fair administration of justice.

22. The supervisory jurisdiction of this Court should not be used as a tool for unduly interfering with the exercise of a Court of competent jurisdiction, of its mandate. The High Court must also be careful not to be used to curtail the expeditious disposal of suits in subordinate Courts, in the name of exercising its supervisory jurisdiction.

23. In the case of Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others [2020] eKLR, Mwangi, J. listed the following safeguards to be observed by the High Court in the exercise of its supervisory jurisdiction, and I concur:

i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is 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 of 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 the promotion of the public interest and public confidence in the administration of justice;

24. As indicated herein, under 76 of the Children Act, the Children's Court has powers to call any expert witness it deems necessary, to assist in making a determination of the issues raised in any proceedings before it, in the best interest of the child. It is noted that the Petitioners stated that parties have complied with the pre-trial directions in the Children's Court. That Court therefore has not even had the opportunity of hearing the parties on the issues in dispute and should be given the chance to do so. Accordingly, this Court must resist the temptation and decline the invitation to usurp the jurisdiction of a Court of competent jurisdiction, by staying the proceedings therein and transmitting the same to this Court for hearing and disposal.

Whether the Application and Petition are *sub judice*

25. It is the Petitioners' case that the Application and Petition are arguable, not frivolous or vexatious and that they disclose a cause of action. They contended that the Respondent exhibited symptoms of mental illness and was admitted to a psychiatric hospital in 2020 as per a report by psychologist Lambert Oigara. Accordingly, it was necessary for an order to be issued to compel him to undergo a mental health assessment to ascertain the extent of his condition, in line with Section 2 of the Mental Health Act. According to the Petitioners, dismissing the Application and Petition as urged by the Respondent, would be draconian as the Court has jurisdiction to grant the orders sought. Dismissal would also be antithetical to the overriding principle of a just, expeditious proportionate and affordable dispute resolution.

26. For the Respondent, it was submitted that the question as to whether he is a fit parent to the child on account of his mental disorders, is pending before the in Children's Case No. E436 of 2021 between him and the 2nd Petitioner, having been raised by the 2nd Petitioner in her defence. The Respondent further argued that having stated that he is not fit to care for the child, the 2nd Petitioner invoked the jurisdiction of the Children's Court. In its decision, the Children's Court will make a determination as to the mental fitness of the Respondent. In view of this therefore, the Respondent argued that the issues raised in the Application and the Petition are *sub judice* as they are the subject of the proceedings in the Children's Court which are still pending. Further, the determination of the issues in the Children's Court will render any ruling by this Court invalid due to the principle of *res judicata*.

27. Section 6 of the Civil Procedure Act provides:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

28. In Children's Case No. E436 of 2021, the Respondent seeks orders of custody of and access to the child herein and also of restraining the 2nd Petitioner from leaving the jurisdiction of the Court with the child without the consent of the Respondent or the Court. The 2nd Petitioner has challenged the Respondent's case by contending that he is an unfit parent on account of his mental illness. The main reason why the Petitioners filed the Application and the Petition in this Court is so that an order be made, compelling the Respondent to undertake a mental health assessment to ascertain his mental disorders and that a medical report be filed.

29. While considering the issues before it, the Children's Court will consider the fitness of the Respondent as a parent to be granted

custody and access to the child. Among the factors to be considered is the ability of the Respondent to provide for and care for the child. This ability includes the mental fitness or capacity of the Respondent. It has also been seen that under Section 76 of the Act, the Children's Court may, for the proper determination of any matter in issue before it, call such expert witness as it shall deem appropriate, to provide assistance to the Court.

30. In the case of JKN v HWN [2019] eKLR, relied upon by both parties, Ngugi, J. had this to say:

What about the Respondent's own evidence that at some point she suffered from an episode of Schizophrenia" Was this sufficient to disentitle her from an award of the custody of the children" With respect, I do not think so. It is not every whiff of mental illness which leads to a determination that a parent is unfit for custody. A Court faced with the question of mental illness of a parent will have to assess whether the mental illness in question is a continuing one and whether it impacts the parent's fitness as a parent. It is only if the mental illness interferes with the parent's ability to parent or provide a safe home environment for the child that a Court is entitled to conclude that it is not in the child's best interests to award custody to that child.

31. The Children's Court which has been faced with the question of the mental illness of the Respondent will consider the medical report filed by the Respondent. The Court may also call an expert witness who will assist the Court to assess whether the Respondent's mental illness is a continuing condition and if and how it affects his fitness as a parent to the 1st Petitioner.

32. To my mind, this is the very issue the Petitioners are seeking from this Court viz that this Court compels the Respondent to undergo a mental health assessment to ascertain his mental disorders and that a report be filed in this Court. The Children's Case No. E436 of 2021 was instituted before the present matter. The matter in issue therein is also directly and substantially in issue herein. The parties in both suits are the same. The Children's Court seized of Children's Case No. E436 of 2021 is a Court of competent jurisdiction and the suit before it is still pending.

33. The test for *sub judice* was set out in the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR, where Mativo, J stated:

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.

34. My view is that once the Children's Court makes its determination on the fitness or otherwise of the Respondent on account of the mental disorders, the matter before this Court which is the subsequent suit, will become *res judicata*. Accordingly, this Court is barred under Section 6 of the Civil Procedure Act from proceeding with the Application and Petition because as demonstrated, the issues raised therein are substantially the same as those raised in the pending suit in the Children's Court, which was previously instituted.

35. Whether the Respondent should be compelled to undergo a mental health assessment

Having found as I have, that the Children's Court has the power to deal with the question of the Respondent's mental fitness, and that proceedings in the Children's Court should not be stayed and transmitted to this Court for hearing and determination and having further found that the matter herein is *sub judice*, it is unnecessary to delve into the question as to whether the Respondent should be compelled to undergo a mental health assessment.

36. In the end, and in view of the foregoing, I find that the Application and the Petition both dated 17.8.21 lack merit and the same are hereby dismissed. This being a matter concerning the parties' child, I direct that each party bears own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF MARCH 2022

M. THANDE

JUDGE

In the presence of: -

.....**for the Petitioners**

.....**for the Respondent**

.....**Court Assistant**



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