



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 14 OF 2020

IN THE MATTER OF ARTICLE 53 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 4(2) & (3) OF THE CHILDREN ACT NO. 8 OF 2001

AND

IN THE MATTER OF SECTION 22 OF THE CHILDREN ACT NO. 8 OF 2001

AND

IN THE MATTER OF AN APPLICATION FOR AND ON BEHALF OF A. J. L. (MINOR)

BETWEEN

SC.....PETITIONER

AND

RL.....RESPONDENT

RULING

1. The Notice of Motion dated **7 February 2020** was filed herein by the Applicant, **SC**, pursuant to **Article 53(2)** of the **Constitution of Kenya** and **Sections 4 and 22** of the **Children Act, No. 8 of 2001**. The basic prayer sought therein is that the Court be pleased to order and/or compel the Respondent, **RL**, to execute application forms to enable the minor, **A.J.L.**, obtain a visa for the purpose an educational tour to France which is scheduled for **24 March 2020**. It was further prayed that, in the event of failure by the Respondent to comply within 7 days, that the Deputy Registrar of the High Court Eldoret, be authorized to execute the said forms on his behalf and in the best interest of the minor.

2. The application was supported by the affidavit of the Applicant, annexed thereto, wherein she deposed that whereas they (the parties hereto) are the biological parents of the subject minor, they parted ways in **2015** due to marital differences. She thereupon relocated to Australia with the minor and has been resident there to date. She annexed the minor's educational documents as **Annexure SC2 and SC3** to confirm that she is residing and attending school in Australia; and that her class is due to travel for an educational tour to France on **24 March 2020**.

3. It was further the averment of the Applicant that, as it is a mandatory requirement that both parents give their consent to the said trip before the minor can be offered a visa for the tour, she sent the pertinent forms to the Respondent for execution, but that the Respondent declined to give his consent. She was of the posturing that the educational trip is in the best interest of the minor as it is part of her school curriculum; and that the Respondent's refusal to give consent is not only unreasonable, but is also unjustified, granted that the Respondent has not been asked to meet any financial requirements for the said tour. The Applicant accordingly prayed for the intervention of the Court with a view of ensuring the best interest of the child. She attached several documents to demonstrate that indeed plans are underway for the educational tour and that the consent of the Respondent is a prerequisite.

4. The application was opposed by the Respondent. He relied on his Replying Affidavit sworn on **18 February 2020**. The Respondent conceded that he is the biological father of the subject minor; and that she is presently domiciled in Australia. He lamented that his consent was not sought or obtained by the Applicant before taking the child out of jurisdiction; and that the Applicant has since brazenly denied him

access to the minor by making such access impossible; taking into account the fact that the minor is in a different continent. Hence his position was that, for him to sign the visa forms as sought by the Applicant would be tantamount to furthering an illegality that was commenced by the Applicant when she unlawfully removed the subject minor from jurisdiction without his consent.

5. The Respondent also averred that since the Applicant was given full custody of the child and thereupon assumed full parental responsibility vide a Judgment of the Court in **Eldoret Children's Case No. 22 of 2015: Sarah Chepchirchir vs. Richard Kiprono Limo**, he was divested of any rights, duties or obligations in connection with the minor with effect from **15 May 2015**. He confirmed that they parted ways with the Applicant, but asserted that this happened in **2012**, and not **2015**, as deposed by the Applicant. Thus, according to the Respondent, it is the Applicant who has consistently acted against the best interest of the minor; and is therefore not deserving of the orders sought. The Respondent added that this application is nothing but an attempt at forum shopping on the part of the Applicant. He therefore prayed for the dismissal of the application.

6. The application was urged by **Mrs. Isiaho Sawe**, learned Counsel for the Applicant. She reiterated the grounds relied on by the Applicant and her averments in the Supporting Affidavit. She urged the Court to find that the orders sought are warranted and that the application has been made in the best interest of the minor. She likewise urged the Court to ignore the references by the Respondent to issues that are the preserve of the Children's Court in **Case No. 22 of 2015** and find that the application is competently before the Court.

7. **Mr. Sambu**, on the other hand, took the posturing that, since the orders sought are substantive in nature, the same ought to have been sought by way of a substantive suit to enable the parties adduce *viva voce* evidence in the normal manner. According to him, **Section 22** of the **Children Act** is limited to breaches of **Sections 4 to 19** of the **Act**, and therefore is inapplicable to the facts of this matter. He added that the Respondent is under no obligation to sign the forms in question and noted that he was not consulted when the minor's application for Australian citizenship was processed. Accordingly, **Mr. Sambu** prayed for the dismissal of the application dated **7 February 2020**.

8. The application was brought pursuant to **Article 53(2)** of the Constitution as well as **Sections 4 and 22** of the **Children Act**. While **Article 53(2)** of the Constitution is explicit that a child's best interests are of paramount importance in every matter concerning the child, **Section 22** of the **Children Act** stipulates that:

(1) Subject to subsection (2), if any person alleges that any of the provisions of sections 4 to 19 (inclusive) has been, is being or is likely to be contravened in relation to a child, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress on behalf of the child.

(2) The High Court shall hear and determine an application made by a person in pursuance of subsection (1) and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 19 (inclusive).

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it or under this section including rules with respect to the time within which applications may be brought and references shall be made to the High Court.

9. Having given due consideration to the application, the grounds in support and the averments set out in the rival affidavits filed herein, there is no dispute that the disputants are the parents of the minor, **A.J.L**. The minor is presently under the care and custody of the Applicant, a resident of Australia. The Respondent annexed to his Replying Affidavit a copy of the Judgment in **Eldoret Children's Case No. 22 of 2015**; and it confirms that the Applicant was given custody of the minor as well as full parental responsibility for the child with effect from **15 May 2015**. Thus, there is no controversy that the Applicant has since been living with the minor in Australia and taking care of all her needs, including her education.

10. The Applicant averred that the minor's class is scheduled to travel for an educational tour to France on the **24 March 2020**; and that it is a mandatory requirement that both parents give their consent to the said trip before the minor can be offered a visa. The Applicant averred that she sent the visa application documents to the Respondent for execution; and that the Respondent declined to execute the documents; hence the instant application. Annexed to the Supporting Affidavit are the minor's educational documents as well as copies of the correspondence exchanged between the parties in connection with the proposed trip. The documents include the Itinerary for the trip and the ticket numbers for the 15 pupils involved. Thus, the subject minor's ticket number is shown as [...]. It is noteworthy that the trip is for 14 days only, and therefore that the minor would be back to base by **6 April 2020**.

11. Needless to say that Education of minors is safeguarded by **Section 7** of the **Children Act**, and therefore falls within the ambit of **Section 22(2)** of the Act. Accordingly, the matter is one that is well within the jurisdiction of this Court; and there is therefore no question of forum shopping as was alleged by the Respondent. Moreover, the averments by the Applicant that the tour is a mandatory part of the minor's educational syllabus were not refuted and I therefore find no basis for holding otherwise. In the premises, the only question to pose is whether the Respondent has demonstrated justifiable cause for withholding his consent.

12. I have given careful thought to the Respondent's averments. His only cause for complaint appears to be that the Applicant removed the minor from jurisdiction without his consent; and, therefore, that he would be compounding the Applicant's illegal conduct if he were to sign the visa documents. However, as has been pointed out herein above, the Applicant was given custody of the minor by a court order and therefore cannot be said to have taken the minor to Australia illegally. Secondly, if he is aggrieved by the said order, as appears to be the case, then that is a matter that can only be challenged before the trial court; and unless and until it is set aside or varied, the order remains valid. The Respondent's contention that he would be ratifying an illegality is therefore implausible and is for rejection. It is noteworthy too that the Applicant made it clear that the Respondent is not being asked to make any financial contribution towards the trip.

13. Consequently, I find no valid reason to justify the Respondent's stance in the matter. To the contrary, the Applicant has demonstrated that the trip is in the best interest of the minor for purposes of **Article 53(2)** of the **Constitution** and **Section 22** of the **Children Act**. Accordingly, I find merit in the application dated **7 February 2020**. The same is hereby allowed and orders given as hereunder:

[a] That the Respondent be and is hereby ordered to execute the minor's visa application forms within 7 days from the date hereof to enable her take part in an educational tour to France, which is scheduled for **24 March 2020**;

[b] In the event of failure by the Respondent to comply with the order as per **[a]** above, the Deputy Registrar, Eldoret High Court be and is hereby authorized to execute the said forms on his behalf in the best interest of the minor.

[c] Each party to bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF FEBRUARY 2020

OLGA SEWE

JUDGE