



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL NO. 1 OF 2020

BAW.....APPLICANT

VERSUS

ENW.....RESPONDENT

RULING

1. Before me for consideration is an application dated 10.1.2020 in which BAW, the Applicant seeks the following orders against ENW, the Respondent:

- i. Stay of the orders and directions of the Children's Court in Tononoka Children's Case No. 486 of 2019 ("the TCC Case").
- ii. That the Court be pleased to call for the file in the TCC.
- iii. That the Court be pleased to uphold the preliminary objection and grounds of opposition filed by the Applicant in the TCC Case and dismiss the suit or in the alternative, transfer the case to Nairobi Children's Court for hearing and determination.

2. The Application is premised on grounds set out therein and in the affidavit sworn on 10.1.2020 by Elvis Begi Nyachieo Abenga, advocate, who has conduct of the matter on behalf of the Applicant. Counsel averred that the lower Court granted actual custody of a 7-year-old female child, who was previously with the Applicant, to the Respondent; that this is contrary to the best interests of the child as the Respondent is an irresponsible alcoholic, does not have a fixed abode and has never paid the child's school fees; that the orders will result in interruption of the child's schooling; that before granting the orders, the learned Magistrate denied the Applicant an opportunity to argue her preliminary objection and application, both dated 13.12.19 and grounds of opposition dated 3.1.2020, in response to the Respondent's application dated 21.11.19; that there is evidence of tampering with the Court record and hence the need to call for the file; that the minor is resident in Nairobi and thus the children's Court in Tononoka has no territorial jurisdiction; that the Applicant is commencing guardianship proceedings at the Nairobi Children's Court.

3. In his replying affidavit sworn on 24.1.2020, the Respondent averred that he had been living with the child from birth until the demise of her mother; that he sent the child to stay with the Appellant during the burial preparations for his wife; that after the burial however, the Appellant and the family refused to give the child back to him and enrolled her in a school in Nairobi without his consent; that this prompted him to move to Court and custody was granted to him on 21.11.19; that the Appellant then filed the appeal herein; that he has an amazing relationship with his daughter and the allegations attacking his character are false; the Appellant's actions amount to curtailing the child's access to parental love and care, which will hinder proper early childhood development; that the trial Court has the requisite jurisdiction as the child is in Mombasa; that the Court granted him, as the father, custody of the child, in her best interests; that the appeal and Application are frivolous, vexatious and an abuse of the Court process and should struck out with costs.

4. Directions were taken that parties file submissions and timelines set. However, only the Respondent complied with the directions. The Applicant failed to file her submissions and never attended Court to give reasons for her failure to do so and to date has not done so. The Applicant is therefore deemed to have waived the right to file submissions.

5. As stated elsewhere in this ruling, the application is supported by an affidavit sworn, not by the Applicant, but by her advocate who has conduct of this matter. The advocate deponed that the Respondent '*is an unstable man with an alcoholic problem and with no fixed abode.*' He further averred that the orders are contrary to the best interests of the child as they will interrupt her schooling. He further stated that his client had '*learnt of tampering of the court records*' and hence the prayer that the file be called by the High Court. All these matters are contentious matters. Moreover, a cardinal rule of affidavit evidence is that affidavits shall be confined to such facts as the deponent is able of

his own knowledge to prove. Were the Applicant's counsel to take the stand, he would be hard pressed to substantiate the averments in his affidavit.

6. It has been held in a long line of authorities that an advocate should not swear an affidavit on contentious or unauthenticated the matters, in any proceedings in respect of which he has conduct. In the case of Yussuf Abdulgani vs. Fazal Garage (1953) 28 LRK 17, it was held that an advocate should not swear a belief affidavit on information supplied by his client, if his client is available to swear of his own. In the present case, it has not been stated that the Appellant was unavailable to swear the affidavit herself. No reason has been stated as to why the advocate chose swear the affidavit in support of his client's application.

7. It has also been held that an affidavit sworn by an advocate on contentious matters, in support of a client's application, is worthless. In this regard, I agree with Odunga, J who in the case of Republic v Attorney General [Sued for and on behalf of the ministry of lands] & 2 others ex parte South and Central [Thika] Investments Limited [2015] eKLR, stated:

On the issue of the competency of the supporting affidavit sworn by Anthony Muriithi Kireria, the law, as I understand it, is that an advocate is not competent to swear an affidavit on disputed facts. An advocate, as an officer of the court, should avoid as much as possible situations which may place him in the embarrassing circumstances of having to go into the witness box in a matter in which he is acting as an advocate and to swear an affidavit on issues of fact is one of the ways in which to invite such exposure.

8. Odunga, J went on to state:

In this case, deponent of the supporting affidavit, Anthony Muriithi Kireria, did not even pretend to be acting on information obtained from the client. Similarly, in Small Enterprises Finance Co. Ltd. vs. George Gikubu Mbuthia Nairobi HCCC No. 3088 of 1994 it was held that advocates should not depose to contested matters of facts.

It has been held and it is the law that an affidavit based on information and belief without disclosing the source of information and the grounds for holding the belief are worthless.

This rule was eloquently propounded by the East African Court of Appeal in Life Insurance Corporation of India vs. Panesar [1967] EA 614 (Sir Charles Newbold, P) as hereunder:

“Affidavits are intended to be probative of the facts which the party filing the affidavit seeks to prove before the court in the particular proceedings in which the affidavits are filed. The accumulated wisdom of the courts over the ages has laid it down that any attempt to prove facts save in accordance with such rules as the experience of the courts has shown to be essential is worthless.

9. The conclusion I draw is that the Applicant's advocate is not competent to swear the affidavit in support of the Application herein. As such, the affidavit having been sworn by the Applicant's advocate on contentious matters, is worthless. Accordingly, the Application dated 10.1.2020 being premised on the depositions in a worthless affidavit is itself incompetent. The same is hereby struck out with costs to the Respondent.

DATED, SIGNED and DELIVERED in MOMBASA this 22nd day of May 2020

M. THANDE

JUDGE

In the presence of: -

..... for the Applicant

..... for the Respondent

..... Court Assistant