REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

MISCELLANEOUS CASE NO. 89 OF 2019

IN THE MATTER OF THE GUARDIANSHIP AND CUSTODY OF RJ – LD

MWM.....APPLICANT/GUARDIAN

V E R S U S

CAD.....RESPONDENT

RULING

1. Through an Originating Summons dated 27th May 2019, MWM a grandmother to the minor subject of these proceedings, moved to this Court under Rule 3 of the guardianship of children (Practice & Procedure Rules (2002) seeking orders that;

(1) This Honourable Court be pleased to appoint the applicant as guardian of RJ – LD.

(2) That this Honourable Court be pleased to order that the said RJ – LD be made a ward of this Honourable Court.

(3) That the costs be provided for.

2. Contemporaneously filed with the Originating Summons is a Chamber Summons dated 27th May 2019 pursuant to Rule 4 of the Guardianship Rules made under the Children Act, and Sections 113 and 114 of the Children Act, seeking orders as hereunder;

(1) That this Honourable Court be pleased to certify this application urgent.

(2) That service of this application be dispensed with owing to the urgency of the matter.

(3) That the applicant do have interim custody of the minor RJ – LD until further orders of this Honourable Court.

(4) That this Honourable Court be pleased to order that guardianship order do issue requiring that the minor, RJ – LD be placed under the protection and custody of this Honourable Court.

(5) That as an alternative to 3 above, a residence order do issue requiring the said RJ – LD do reside with the applicant until further orders of the court.

(6) That as an alternative to 3 above, a residence order do issue requiring the said RJ – LD do reside with the applicant pending the hearing and determination of this suit.

(7) That this Honourable Court be pleased to order that the service of the pleadings and the order herein be served through DHL or such other means as this Honourable Court deems fit.

3. The application is premised upon grounds stated on the face of it and an affidavit sworn on 27th May 2019 by the applicant. According to the applicant, the parents to the subject (minor) herein are one TMK her daughter and the respondent one CAD. That the minor by the time this suit was filed was 1 year and 6 months old and therefore in need of a guardian to provide for his welfare.

4. It is averred that the parents of the minor are no longer living together following their separation forcing the mother to the minor to relocate the minor from U.S.A to Kenya on 1st March 2019 for proper upkeep and financial support all of which were allegedly withdrawn

by the respondent while in America. That as a result of the withdrawal of the said support, the minor was exposed to great suffering and lack of basic provision which the unemployed mother could not afford.

5. It is the applicant's averment that her daughter and the respondent were living together as friends and that having severed their relationship after the respondent broke their arrangement to marry, the child will suffer in America given that the mother is not able to pay for their accommodation and basic provision. She further averred that, the return of the respondent to Kenya with the intention of taking away the child to America pursuant to an American Court's order directing the mother of the child to return the minor to America is prejudicial to the welfare of the child thus further necessitating guardianship and residence order of the child.

6. She deposed that she is capable of providing for the baby. As proof of her ability to provide, she attached copies of certificates of title deeds to assert that she was earning about Kshs. 600,000/- per month being rental income from her real estate properties. She claimed that her daughter T the mother to the minor is currently unable to support the baby hence her (applicant) application for an order of custody of the baby pending the outcome of the Originating Summons.

7. She contended that, the respondent is not loving nor caring to the minor as he had once shouted at him while on holiday in Kenya. That the behaviour of the respondent is so erratic that the minor's responsibility cannot be entrusted on him. She further claimed that the respondent is a rare person who is hardly available for the child as he works outside America for about 3-4 months per year as a Disaster Management Officer. She averred that, due to uncertainty as to when her daughter T will get a good job and given that the respondent has abandoned them, she will step in as a stop gap measure.

8. Upon filing the application, the court granted prayers 3 and 4 pending hearing and determination of the application.

9. In response, the respondent filed a replying affidavit sworn on 13th September 2019 admitting that he is the biological father to the minor herein. He attached a copy of a Newyork Court dated 10th April 2019 (Annexture AD.11) declaring him as the father to the minor. He averred that, he is employed with the Federal Emergency Management Agency (FTMA) America earning a steady and good monthly salary.

10. He further stated that he and T mother to his son started courting sometime 2016 while in America. That as a consequence, they, within two years of their courtship brought forth a handsome boy now the subject of these proceedings.

11. That six (6) months preceding T's delivery, she quit her job in preparation for the baby. He further averred that, he solely took care of the baby and T by providing them shelter, medical care, food, clothing, hospital bills and insurance cover for the minor.

12. That months subsequent to the child's birth, T and her mother the applicant herein engaged him in the most extreme, atrocious and emotionally distressful episodes of fraud, extortion and manipulation. He further stated that, despite having gotten a part time job as an Estate Agent after delivery to supplement on family expenses, she decided to quit her job thus burdening the respondent in meeting the entire financial responsibility.

13. He contended that when he was deployed to Saipan where his assignment was prolonged beyond the normal period, he informed T who got agitated and certainly decided to leave for Nairobi without any reasonable cause. That when he followed them to Nairobi in January 2019, he was pressurized by T and her family to solemnize their marriage a fact he was not comfortable with due to the prevailing differences between the two.

14. That despite these challenges, they went back to America and continued with their live. He averred that on 22nd February 2019, T struck him on the face multiple times in front of their son a fact that forced him to pick his belongings and left for his mother's house. He contended that his movement out of the house was meant to protect the interest of the child not to witness violence in the house.

15. He expressed disgust that on 1st March 2019, without his knowledge and permission, T relocated the baby to Nairobi and left him with the grandmother the applicant herein. That having been frustrated, he sought intervention from the family court at Newyork by seeking a custody and visitation order. As a consequence, the referee of the Family Court ordered M/s TK to return their son back to the USA. He attached a copy of the said court order marked CAD 5. That subsequently, M/s TK filed a claim for custody in the same court but the claim was dismissed for want of attendance of T or her lawyers.

16. He claimed that according to the American Court, he is the one who has custody of the baby. He contended that, the applicant is forum shopping after having lost the custody battle in the family court at New York and that this suit is intended to deprive him the opportunity to exercise his parental responsibility rights over the child hence interfering with his dignity as a person.

17. He denied mistreating the baby or shouting at him and that there was no evidence to that effect. That T has always sworn to punish him for refusing to marry her. He averred that he and T are capable of taking care of their child while in the US and if any one of them defaults, the courts in the USA and Children Department will intervene.

18. It was further contended that, since T and himself are already in the US, the child will be rendered destitute, living like an orphan in Nairobi while the parents are in the US capable and fit of taking care of him.

19. He averred that, T being a Graduate in Business Administration and having a Bachelors and Masters Degree in finance is capable of getting a job any time and that she does not want to look for a job. It was further stated that this court has the discretion to enforce a foreign Judgment and avoid abuse of court process through forum shopping. He further contended that the child is an American citizen just as his parents hence the right forum should be the American court.

20. That the mother having submitted to the American Court, she cannot run away from its orders. He further stated that, the parents rank

higher in terms of parental responsibility hence should be given an opportunity to take care of their baby.

Submissions by the Applicant

21. Appearing for the applicant, S.C. Dr. Kamau Kuria filed his submissions on 31st October 2019. Learned Counsel submitted that under International Private Law, this court has jurisdiction to entertain the application for purposes of entertaining the minor who is resident in Kenya in compliance with Section 102(2) of the Children's Act. That under Section 119 of the Children's Act, this court has jurisdiction to protect a child who is in need of protection and care. He contended that the applicant is a proper substitute for the respondent's meanness and unavailability for the child due to the nature of his employment and temperament.

22. Counsel submitted that the existence of custody and child support proceedings in a New York Court does not bar this court from exercising its jurisdiction. That under Section 6(3) of the Children's Act, a child has a right to live with the parents. However, S.C. contended that where the best interest of a minor dictates, he or she may be separated from the parents and be placed under an alternative care.

23. Further, learned counsel opined that the respondent is not able to exercise parental responsibility given that he is always out of U.S.A for 3 to 4 months per year executing his duties in harsh areas like New Jersey and Saipan. It was further submitted that the applicant assumed parental responsibility with the authority of the minor's mother as provided under Section 102 of the Children's Act. That in any event, having stayed with the minor three months preceding the making of the application, she is entitled to custody of the minor under Section 82(3) of the Children's Act.

24. Concerning abandonment of the minor, S. C. Kuria argued that the orders of the New York Court issued on 12th August 2019 directing child support of the minor by the respondent at 1000USD is not enough to sustain the child in New York. That the mother to the minor is currently residing in Kenya while looking for employment in the U.S. According to Kamau Kuria, the happiness of the child and provision of good accommodation is assured while in the hands of the applicant. In support of this position, counsel referred the court to the decision in the case of **MSA v PKA (2009)eKLR**.

25. Counsel contended that the respondent has not explained where the child will be accommodated in New York and stay with who. That the applicant having proved her financial capability and provision of good accommodation, that ground alone is sufficient to grant the prayers sought. To fortify this argument, counsel placed reliance on the holding in the case of **K.M.M. v J.I.L (2016)eKLR** quoted with approval in the case of **M. O v R.O.O High Court Civil Appeal No. 21/09** where the court held that:-

> **"In the circumstances of this case application, this court has determined that the best interest of the child constitute in the child not to be destabilised from the place he is currently living in. This environment includes where the child is sheltered and is educated."**

26. Learned counsel argued that the facts of this case raise exceptional circumstances that dictate the child to stay with the applicant. To galvanize this proposition, counsel sought refuge in the holding in the case of **J.O v. S.A.O (2018)eKLR** where the court held that exceptional circumstances include; the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.

27. In his view, the minor should be returned to America as soon as the mother Secures a job in America. Further, S.C. argued that even foster parents can be given care and control over a minor whose parents are unable to discharge their parental responsibility. To justify this argument, counsel made reference to the holding in the House of Lords in the case of **J and Another v C and Others (1969)1 ALL R 788.**

28. Concerning jurisdiction of the New York Court, counsel submitted that the minor has dual citizenship of USA and UK and that no country can claim to be supervisor over the other. That despite the pendency of suits and orders made before the American Court, the same is not enforceable in Kenya as a foreign judgment considering that America is not one of the reciprocating countries under the foreign judgments (Reciprocal Enforcement Act).

29. Further, that Section 33 of the said Act does not apply to a Judgment or order in proceedings in connection with the custody or guardianship of children. In support of this argument counsel referred to the decision in the case of **Ian Mbugua Mimano v Charlotte Wamuyu Mutisya and 2 Others (2014)eKLR.**

Submissions by the Respondent

30. Through the firm of A and M Advocates, the Respondent filed his submissions on 29th October 2020. Counsel submitted that, sometime on 1st March 2019, the applicant in collusion with the minor's mother removed the minor from U.S.A to Kenya for no apparent reason. That there is already a case over custody and child support over the same subject pending before Newyork Court. Learned counsel submitted that on 10th April, 2019 the child's mother filed in the same Newyork Court a Petition seeking child support payment from the respondent and which case was decided in her favour on 10th April 2019.

31. According to counsel, the respondent is fully aware of his parental responsibility and is ready and able to discharge the same. That the best interest of the child will best be served when the child is under the custody and guardianship of the respondent. Counsel submitted that the applicant is forum shopping as similar proceedings are pending before a Newyork Family Court. That under Article 53(1)(e) of the Constitution of Kenya a child has a right to parental care and protection from both the mother and the father hence equal responsibility from both parents.

32. Counsel made reference to Sections 23 and 25 of the Children's Act which binds parents to a child to make provision for basic needs of a child e.g clothing, adequate diet, education, guidance and appoint a guardian in respect of a child etc.

33. Counsel submitted that, the respondent having provided accommodation, food, medical care, love and upkeep, he has discharged his parental responsibility hence the same cannot be an abrogation in favour of the applicant.

34. Touching on whether the orders sought are in the best interest of the child, learned counsel made reference to Section 4(3) and 76 of the Children's Act which provides for the court or any administrative body making decisions affecting the welfare of a child to take into account the best interests of a child. In support of this proposition, counsel referred to the decision in an Australian court case between **U v. U (2002-2003) CLR 238** at page 257 a persuasive decision that was adopted in the case of **MSA v PKA (2009)eKLR** where the court outlined what constitutes the best interest of a child among them as, the likely effect of any changes in the child's circumstances including, the likely effects on the child of any separation from the parents or either of them or any siblings of the child or any other person with whom the child has been living with; the practical difficulty and entailed practical possible expenses of the child to have contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relationships and contact with both parents on a regular basis.

35. Regarding whether custody should be given to the applicant, counsel made reference to Section 82 of the Children's Act which provides that custody may be granted to a parent, guardian or any other person whom under Section 83 of the said Act would convince the court why he or she deserves the custody order. According to the learned counsel, the applicant does not fall under any of the categories under Section 82 above.

36. It was submitted that the mother to the minor had admitted at paragraph 72 of the applicant's affidavit in support of the application that the respondent had paid rent for the Newyork house untill she relocated to Kenya. That the mother to the baby and the respondent are both residing and working in America hence their child who is an American citizen too should join them

37. Referring to the argument by the applicant that she is financially stable to be able to support the baby, counsel referred the court to the holding in the case **of M.S.A v K.A (2009)eKLR** where the court held that:-

> **"The ability of the parent to provide and care for the child is among other factors to be considered in the issue as to who should be given custody. However, it is my understanding that the fact that one of the two parents is in a better financial or material position to grant the child a better start in life from the other, does not give the first one a prior claim for custody. It is more the happiness of the child, not the material prospects which this court would be concerned with."**

38. As to the financial capability of the applicant, counsel submitted that there was no evidence of such stability *against* that of the respondent who has a stable job with a steady monthly income. That all the title deeds attached by the applicant as proof of financial stability do not bear her name as the owner. That an order of custody to the applicant will amount to separation of the minor from the parents.

39. Counsel submitted that guardianship cannot apply in favour of the minor while the parents are alive and capable of taking care of their child and that it would in the best interest of the child for the father to have access to the baby during this formative stage of the child. To support this argument the court was referred to the decision in the case of **N. K. v. A.W. K (2015)eKLR**.

40. Finally, counsel submitted that although this court has jurisdiction to make necessary orders for the ends of justice to be met, the applicant has not shown why the pending cases in Newyork should not be left to conclusively determine the matter to avoid abuse of court process.

Analysis and Determination

41. I have considered the application herein, response thereto and detailed submissions by both counsel. The applicant is seeking interim custody of the minor herein, wardship order requiring the minor to be placed under the custody of the court and a residence order to issue directing that the minor to reside with the applicant (grand-mother) pending the hearing and determination of the suit. Issues for determination are;

> **(a) whether the applicant is entitled to custody of the minor.**
>
> **(b) whether the applicant has met the criteria for grant of wardship orders in protection of the minor.**
>
> **(c) whether the applicant is entitled to a residence oreder in respect of the minor.**
>
> **(d) whether the orders sought are in the best interest of the minor.**

42. According to the Originating Summons filed together with the application, the applicant is seeking orders to be a guardian of the minor as well as the minor herein be made a ward of the court.

43. It is therefore clear that in the instant Chamber application, there is no prayer for guardianship orders. Although parties have extensively argued and submitted on the issue of guardianship, there is no such prayer. It is trite that parties are bound by their pleadings hence this court will not endeavour to delve on the subject which is specifically pleaded in the Originating Summons which is still pending. See **Independent Electoral and Boundaries Commission and Leonard Okemwa (Returning Officer) v Stephen Mutinda Mule and Others Civil Appeal No. 219/2013 which was quoted with approval in the case Jones v National Coal Board (1957)2 QB55** where Lord Denning stated that;

> **"In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign**

countries."

44. Our system being an adversarial system, court's role is to arbitrate on what is being sought or pleaded and not to venture into the arena of litigation to inquire and make a determination on what has not been prayed for. Since the main suit is pending and the issue of guardianship is specifically pleaded, it will be prejudicial for this court to make a finding on the subject under this application as it would automatically dispose of the main suit. I will therefore not make any finding on that issue.

45. Regarding custody, certain facts remain unchallenged. These are; that the applicant is a maternal grandmother to the minor; that the respondent is the biological father; that the mother to the minor is T who is alive; that both parents and the minor are American citizens while the minor and the mother have Kenyan citizenship as well; that there is a suit over custody of the minor between the two parents in a Newyork Court;that the respondent has already been ordered to pay child upkeep expenses following the minor's mother petitioning the court; that there is another suit where the respondent has sought custody of the minor and, that there are orders issued by the Newyork court directing that the child now residing with the grandmother in Kenya be returned to U.S.A.

46. Once again, parties have extensively submitted on the issue of custody citing several local authorities as well as persuasive decisions from other jurisdictions.

47. The applicant herein being a grandmother is seeking custody of the minor on grounds that the minor's father is harsh to the minor, not available for the minor as his employment assignments entails travelling outside America most of the time hence has no time for the baby. Further, that the mother to the minor is currently unemployed hence cannot afford to support the baby.

48. The law governing custody of a baby is provided under Section 82 of the children's Act which states that;

"(1) A court may, on the application of one or more persons qualified under sub-section (3) of this section, make an order vesting the custody of a child in the applicant or, as the case may be, in one or more of the applicants.

(2) An order under sub-section (1) may be referred to as a custody order, and the person to whom custody of the child is awarded is referred to as the custodian of the child;

(3) Custody of a child may be granted to the following persons-

(a) a parent

(b) a guardian

(c) any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for three months preceding the making of the application;

(d) any person who while not falling within paragraph (a), (b) or (c), can show cause, having regard to section 83, why an order should be made awarding that person custody of the child."

49. From the wording of Section 82(3) (a) (b) and (c), the applicant does not fall under the listed category of people as she is not a parent, nor a guardian nor has she applied with the consent of a parent having had custody of the child for three months preceding the filing of the suit. The instant suit was filed in less than three months prior to unofficially assuming custody of the child.

50. However, Section 82(3) (d) provides room for any person to so apply for custody orders of a child under Section 83 of the Children's Act which provides that;

"In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to –

a) the conduct and wishes of the parent or guardian of the child;

b) the ascertainable wishes of the relatives of the child;

c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;

d) the ascertainable wishes of the child;

e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

f) the customs of the community to which the child belongs;

g) The religious persuasion of the child;

h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in

relation to the child concerned and whether those orders remain in force;

i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

j) The best interest of the child."

51. In the instant case, both parents are alive. One of the parents has decided to give custody of the child to her mother without the consent of the other parent. Adverse allegations have been made against each other some of which are matters of fact which can only be proved by way of evidence orally or by affidavit and from cross examination where necessary.

52. Before a court would make an order for custody to any person other than the parents, the court must be satisfied that such order is in the best interests of the child as underpinned under Article 53(2) of the Constitution and Section 4(3) and (2) of the Children's Act. (See **Civil Appeal No. 30 of 2016 NMM v JOW (2016)eKLR** where the court held that:-

"Accordingly, the principle of the best interests of the child is the supreme parameter in matters concerning the welfare of a child such as the question of the custody of the subject child/children."

53. I have taken note that the child herein is a child of tender age as he was born the year 2017 hence should be treated specially. In **Civil Appeal No. 54/2020 D. K. v J. K. N. (2011)eKLR** the court held that:-

"The general rule is that, where the custody of a child of tender years as defined by section 2 of the Children Act is in issue, the mother of the child should have the custody unless special circumstances are established to disqualify the mother from having the custody of such a child. The child that is the subject of these proceedings is a child of young and tender age. She is a girl of nine (9) years of age."

See also **Midwa vs. Midwa (2002)2 EA 453** at page 455 where the Court of Appeal emphasized that children of tender age should be left with the mothers.

54. In this case, the applicant is arguing that the mother to the baby has no job hence the reason why the child has been given to the grandmother. This is not an exceptional factor. The minor's father is saying that he is capable of taking care of the baby. I wish to state that, failure to have a steady job by one parent while the other parent is able and willing to provide for the baby while in the custody of either parent is no ground to run away from parental responsibility which is underscored under Article 53(1)(e) which bestows equal parental care and protection on a child from the parents on equal footing.

55. Nobody claims that the respondent is incapacitated financially to meet his parental obligations in favour of the basic needs of a child. Already, he has been ordered by the Newyork Court to provide for the child's upkeep monthly at USA Dollars 1000. The argument by the applicant that the amount is not enough is a matter for the court issuing the orders to determine either by way of an application or review. This cannot be circumvented by filing another suit in a different jurisdiction.

56. The applicant must demonstrate on a prima facie basis that custody of the minor in the mother's hands is detrimental to the child's best interest. In her affidavit in support of the Originating Summons sworn on 27th May 2019 at paragraph 20, the applicant stated that, since her daughter returned to America, she has received offers of employment which she is considering. It then follows that both parents to the minor live in America and that jobs are available for the mother to the minor to do only that she has not decided on which one to take. I find it unusual for a jobless person with several offers to choose on which job to take.

57. With the averment that the mother to the minor is in America and the father is also there, and further considering that the baby is about three years now and that there are two suits pending before the Newyork Court regarding custody and upkeep of the minor, it is this court's view that the issues of custody before the Newyork Court should be canvassed to conclusion. Unfortunately, there are valid orders issued by a competent court in Newyork directing that the child be returned to Newyork for purposes of completing the case.

58. For this court to issue contrary custody orders when there are already orders over the same subject issued by a competent court duly prompted by both parties will to say the least amount to undermining or usurping the authority of the Newyork Court as well as sitting as an Appellate Court over its orders. It will also amount to abuse of the judicial system by extension abuse of the court process. The mother to the minor cannot obtain contrary orders to those of Newyork Court through the mother. Having submitted to the jurisdiction of Newyork court, both parents are bound by its orders and this court has no legal power in my view to overturn that court's orders.

59. As to whether the Newyork Court's order are enforceable under the foreign judgment and Reciprocal Act is upto the respondent or whoever desires to have such judgment enforced to move and persuade the court for its enforcement. Nobody has moved the court for enforcement of any of the orders or judgment of the Newyork Court. That court has its own legal mechanism for enforcement of its own orders and hence it is not an issue before this court.

60. In any event, Dr. Gibson Kamau Kuria did contradict himself by praying for custody order and at the same time submitted that they were not seeking for custody orders (see paragraph 20 of the Applicant's submissions). If the applicant is not seeking for custody orders as submitted by her counsel, I do not find it prudent to further dwell on the issue which in any event I have found that it is properly seized with another court with competent jurisdiction and the same ought to be exhausted there to avoid embarrassment of the judicial system considering that the minor and his parents are all American citizens.

Whether the applicant has met the criteria for grant of wardship and residence orders

61. I have chosen to combine the two issues as they are interlinked. Under Section 114 of the Children's Act, a court seized of a matter affecting a child may make a residence order requiring that a child resides with a person named in the order and/or determine the arrangements to be made to facilitate the residence of the child with the person named in the order or issue "a wardship order" requiring that a child be placed under the protection and custody of the court.

62. The minor herein was brought to Kenya by his mother and left under the care of his grandmother. The mother to the minor then went back to America. The father to the minor is a native American who is always travelling out of his country owing to the nature of his job. As it stands now, the child's closest relative he can stay with in the absence of both parents is the applicant pending further orders either from this court where the main issue on guardianship comes top for hearing or the Newyork Court regarding final orders on custody. This court cannot therefore ignore the pride of the child. I cannot order for the return of the child to America. This is because I am not properly seized of the issue regarding custody of the baby which I have already stated is a matter before Newyork Court and should be handled as such.

63. Further, I cannot direct that the father takes custody of the child given the tender age of the child and the nature of the respondent's job which entails travelling out of America quite often. In any event, there is no prayer by way of counter claim seeking return of the child to America. It is upon the Newyork Court to enforce its orders through whatever legal method at its disposal.

64. Considering the exceptional and prevailing circumstances where the mother to the child has deserted the child by going back to America, the child must have a place to reside and with a responsible person. The person therefore in close proximity in order of consanquinity is the applicant. For those reasons, I will grant prayer 5 to the extent that the child shall reside with the applicant pending further orders from this court or determination of the Originating Summons.

65. Having granted a residence order and considering that the welfare of the child will be taken care of pending any orders that may arise either from this court or the New York court, this court should assume custody of the child through awardship order. As already stated, a residence order should not be mistaken to be a custody order in the strict sense of the word. Equally, this court cannot force the child into the custody of his mother as she is not willing to take the child. In the same vein, I cannot grant custody to the father as there are similar prayers in a Newyork court.

66. Further, If the court were to make orders directing custody of the child to the respondent who then takes the child to America, this court will have no way of enforcing its orders in America in case of breach of any of the terms imposed. See **Mathew Chepkwony v Paul Kemei Kiprono (2007)eKLR** in which the Court stated as follows:-

> **"The Court cannot exercise its quasi-parental powers in relation to a child unless effect can be given to its orders and it cannot enforce its orders if the child is taken abroad. Once a child is removed from the jurisdiction no satisfactory means have ever been devised of ensuring or enforcing its return."**

67. In view of the fact that the substantive suit is pending and taking into account that none of the parents is residing in Kenya, a residence order will suffice to protect the welfare and interest of the child. To that extent, prayer 4 of the application regarding wardship orders shall issue pending hearing and determination of the Originating Summons.

Whether the orders sought are in the best interest of the minor

68. As stated above, in every matter concerning a child, the best interest of a child shall be the paramount consideration. This is underscored under Article 53 (2) of the Constitution and Section 4(2) and (3) of the Children's Act. Also see **M A v MOO (2013)eKLR** where the court stated that:-

> ***"... The child is also entitled to parental guidance. This guidance shall where possible, be provided by both parents. The child is further entitled to be given a suitable, conducive and loving environment in which to grow up in. This court agrees with the Respondent that his right as the biological father of the child should not in the circumstances be ignored"***

67. Having held that the child is in Kenya without his biological parents and taking into account that the minor born on 2nd November 2017 is extremely of tender age, he cannot be left without somebody taking care of him. It is in the best interests of this minor whose parents have decided to use him as a shield in their own differences, that this court has an obligation and enjoined to make residence and wardship orders as stated above. Accordingly, the application herein is allowed with orders;

> **(a) That a Residence order in respect of baby RJ - LD be and is hereby granted pending hearing and determination of the main suit herein.**
>
> **(b) That the said child shall reside with the applicant subject to any other directions the court may give at any one time during the pendency of this suit.**
>
> **(c) That awardship order shall issue in respect of the minor pending hearing and determination of the Originating Summons or further orders from the court.**
>
> **(d) Regarding costs each party shall bear own costs.**
>
> **(e) That hearing of the main suit be fast tracked by fixing hearing date immediately after delivery of this Ruling.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2020.

J. N. ONYIEGO

JUDGE