

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 122 OF 2001

IN THE MATTER OF DOM (MINOR)

LOW.....APPLICANT

VERSUS

TM.....RESPONDENT

RULING

1. The applicant and the respondent are the mother and father, respectively, of the minor child herein who is aged 4. The applicant instituted before the Children Court at Milimani a suit seeking the custody and maintenance of the minor. It was further sought that the respondent be granted supervised access. In a judgment delivered on 8th December 2016 the parties were granted joint legal custody of the child; the applicant was granted actual custody, care and control of the child; the respondent was granted supervised access; the respondent was to provide Kshs.55,000/= monthly towards the child's upkeep, and was to provide half of school fees and medical cover.

2. The respondent was aggrieved by the entire judgment and on 19th December 2016 appealed the decision. The appeal is pending.

3. Before this court is an application by the applicant seeking that the respondent be compelled to sign and return to her Consent Form 1229; to furnish the applicant with a certified copy of his passport's personal details page; and to sign and return to her the Declaration in the Application Form for Authority to Enroll the minor in a New South Wales Government recognized school. The applicant's case is that she has secured employment in Australia that offers her better terms and which will enable her to better take care of the child. She has obtained a work permit to reside and work in Australia. She has secured a school in Sydney for the minor. For the child's to get enrolled into the school both parents have to complete the application Form for Authority to Enroll, and sign the declaration therein. The respondent has refused to sign the Form and Declaration to allow the child to be relocated, hence the application.

4. The respondent is an Italian citizen but resides in Kenya. His case is that the applicant made arrangements to relocate the child to Australia without reference to him. All that was being sought was his signature to enable relocation. In his view, the child is better in Kenya where he is meeting all his immediate needs; and that the relocation will destroy his bond and relationship with the child. Lastly, and this is also the subject of preliminary objection, it was his case that the court with the original jurisdiction to deal with the matters in the application is the Children Court.

5. The court directed that both the application and the preliminary objection be taken together. Parties' counsel were directed to file written submissions on the same.

6. I agree with the applicant that the High Court under **Article 163(3)(a)** of the Constitution 2010 has unlimited original jurisdiction in both civil and criminal proceedings. However, under **section 73** of the **Children Act (No. 8 of 2010)** Children's Courts have been set up to hear all civil and criminal matters relating to children. The civil matters to be handled by such courts include parental responsibility, custody, and maintenance, guardianship, judicial orders for the protection of children, children in need of care and protection, foster care placement and child offenders. Under **section 80** of the **Act**:-

“Unless otherwise provided under this Act, in any civil or criminal proceedings in a children's court, an appeal shall lie to the High Court and a further appeal to the Court of appeal.”

7. It is obvious, therefore, that the court with the original jurisdiction to deal with the issues raised in the application is the Children's Court. It is that court that will decide whether or not to allow for the relocation of the child to Australia for education as it stays with the applicant. The court will deal with the consequence of such relocation in view of the orders that were issued on 8th December 2016. The court will also deal with the issue whether the applicant can unilaterally relocate the child, or choose for it a school, without reference to the respondent.

8. What is before this court is an appeal against the judgment that was delivered on 8th December 2016. The appellate power of this court is limited to the matters raised in the Memorandum of Appeal that was filed on 19th December 2016.

9. In conclusion, I determine that this court does not have the jurisdiction to hear and determine the chamber application dated 27th November 2018, and filed on the same date by the applicant. In other words, the preliminary objection dated 11th December 2018 and filed on 13th December 2018 is sustained. The application is dismissed with costs.

DATED and DELIVERED at NAIROBI this 24TH day of JANUARY 2019

A.O. MUCHELULE

JUDGE