



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI FAMILY DIVISION

CIVIL APPEAL NO. 9 OF 2019

HM.....APPELLANT

AND

LWM.....RESPONDENT

[Being an Appeal from the Judgment of the Honourable Resident Magistrate R. O. Mbogo in Children's Case No. 800 of 2012 (In the Children's Court at Nairobi) delivered on 21st December, 2018]

BETWEEN

LWM.....RESPONDENT

VERSUS

HM.....APPELLANT

RULING

1. By the Notice of Motion filed on 25th February, 2019 brought under **Section 3A** and **Order 1, 2 and 3** of the **Civil Procedure Rules** and all other enabling provisions of the law, the Appellant sought from this Court the following orders:

a) THAT the Application be certified as urgent to be heard *ex-parte* in the first instance,

b) THAT this Honourable Court be pleased to issue an order in favour of the Applicant directed to the Respondent to avail the subject minor children to this Honourable Court forthwith pending the hearing and determination of this appeal.

c) THAT this Honourable Court be pleased to issue an order in favour of the Applicant directed to the Respondent to restore the two children to [Particulars Withheld] Education School in Nairobi forthwith to continue their schooling and also to prevent the Respondent from removing the minors from the jurisdiction of this Honourable Court.

d) THAT the costs of this Application be provided for.

2. The application is predicated upon grounds set out on the face thereof and in a Supporting Affidavit sworn by the Applicant wherein he deponed that he got married to the Respondent on or about the 9th of October, 2001 under the provisions of the Marriage Act. The marriage has since been dissolved and the Respondent has moved out of the matrimonial home with their two minor children.

3. The Applicant asserted that the Honourable Court granted orders giving him unlimited but reasonable access to his children on 4th February, 2013, however, the Respondent withdrew the children from [Particulars Withheld] Educational Centre without his knowledge or consent sometime in January, 2019. He deponed that he made a report at Embakasi Police Station and Imara Daima Police Station through OB No [xxxx] in an attempt to know the whereabouts of the minors, however, the children could not be traced. He alleges that the Respondent has taken the children out of the country without his knowledge through the use of unknown and forged documents and has urged the Court to allow his application as he stands to suffer irreparable loss because he may never see his children again.

4. The Respondent did not participate in the proceedings herein. Accordingly, I have carefully considered the application and the grounds in support thereof. The issue arising for determination is whether the applicant has laid sufficient grounds to warrant issuance of the orders sought. The Applicant is seeking orders directing the Respondent to avail the subject minor children before this Court pending the hearing

and determination of this appeal; and orders preventing the Respondent from removing the minor children from the jurisdiction of this Court.

5. The Applicant in his Supporting Affidavit has however alleged that the Respondent has already taken the children out of the country without his knowledge through the use of unknown and forged documents. There is however no evidence on record that indicates that the children travelled on fraudulent passports. Annexed to the Applicants Supporting Affidavit is a letter from the Ministry of Interior and Coordination of National Government dated 20th January, 2019 which merely indicates that the children departed from Kenya on 6th of December, 2018 aboard KQ Flight 100 destined for London.

6. **Section 85(1)** of the **Children Act** provides as follows:

“A court may, on the application of a person from whom a child has been removed in breach of section 84, order the person who has so removed the child to return the child to the applicant and where the child has been removed from the jurisdiction of the court or the Republic of Kenya, make a wardship order or a production order on such conditions as the court may deem appropriate in the circumstances.”

7. **Section 85** however only comes into play where there is breach of the provisions of **Section 84**, which place a requirement on the Applicant herein to have made an application for custody orders in respect of the minors. It would also require that the Respondent then removed the subject minors from the Applicant’s custody against his will. The Applicant has placed reliance on a Court Order issued on 4th February, 2013 which he alleges granted him unlimited but reasonable access to the children, however, the said Court Order has not been produced as evidence.

8. I am persuaded by the reasoning of Romer L. J. in **Hadkinson vs Hadkinson 1952 All E.R.**, which was cited with approval by Ibrahim J as he then was, in **Mathew Chepkwony and Ezekiel Chepkwony vs Paul Kemei Kiprono [2007] eKLR**. Romer J 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.”

There is indeed no satisfactory means by which this Court can enforce the orders it has been called upon to issue. Orders of court should not be issued in vain, especially in the instant case where the Applicant cannot state with certainty where the children were taken.

9. More so, the orders sought by the Applicant relate to children. **Article 53(2)** of the **Constitution of Kenya (2010)**, **Article 3(1)** of the **Convention on the Rights of the Child** and **Article 4(1)** of the **African Charter on the Rights and Welfare of the Child**, all provide that in actions concerning the child, the best interest of the child shall be the primary consideration. The **Children Act No. 8 of 2001** and in particular **Section 4(3)** thereof, provides as follows:

“(3) All judicial institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that is consistent with adopting a course of action calculated to -

- a) safeguard and promote the rights and welfare of the child;**
- b) conserve and promote the welfare of the child...”**

10. The orders made by this Court, must therefore serve the interests of the Children in question more than those of the litigants. I am doubtful that it would be in the best interests of the children for the orders sought to issue at this interlocutory stage. Considering that the children have just recently been uprooted from their school and familiar surroundings and relocated elsewhere, it cannot be in their best interest to be subjected to such an upheaval a second time and be uprooted again, when it is not certain which way the final outcome of the intended appeal may go.

11. In view of the foregoing, this Court holds that the circumstances of this case are such that it cannot exercise its jurisdiction to grant the orders sought at this interlocutory stage, for to do so would not serve the best interest of the children.

12. The Application is accordingly declined.

SIGNED DATED and DELIVERED in open Court this 26th day of **September, 2019**

L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Applicant