



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 20 OF 2019**

**BOG.....RESPONDENT/APPLICANT/MOTHER**

**VERSUS**

**ENK.....APPELLANT/RESPONDENT/FATHER**

*(Being an appeal from the Order of Honorable M. W. Kibe delivered on 14<sup>th</sup> February 2019 in Children's Case No. 1566 of 2018.)*

**RULING**

1. By an application filed under certificate of urgency and dated 18<sup>th</sup> September, 2019 the Applicant sought for 9 orders as follows:

**i) That the application be certified as extremely urgent and the same be placed before the Hon. Judge for instant determination and the service of the same be dispensed with in the first instance.**

**ii) That pending the hearing and determination of this application and/or suit this honourable court be pleased to order that the Plaintiff/Mother shall have legal custody of the minor child namely: SSG**

**iii) That pending the hearing and determination of this application and/or suit this honourable court be pleased to order that the Plaintiff/mother shall remain with and have possession, actual custody, care and control of the minor child: S.S.G.**

**iv) That pending the hearing and determination of this application and/or suit this honourable court be pleased to order that there be and is hereby lifted by way of an order that the mother can travel out of the jurisdiction with the minor for holiday to the U.S.A. with the Plaintiff's/Mother's and the defendant father by way of injunction be restrained from interfering with the travel arrangements.**

**v) That pending the hearing and determination of this application and/or suit this honourable court be pleased to order that the Defendant/Father shall desist from denying the minor such opportunities and restrain himself from writing such demeaning letters to the Embassy of U.S.A.**

**vi) That pending the hearing and determination of this application and/or suit this honourable court be and is hereby pleased to order that the Defendant/Father shall continue paying school fees that the school the minor child is currently attending.**

**vii) That pending the hearing and determination of this application and/or suit this honourable court be and is hereby pleased to order that the Defendant/Father shall be at liberty to spend his holiday with the minor as he best wishes during his half holiday.**

**viii) That this honourable court be pleased to grant such other or further orders as it may deem fit to grant in the best interest of the minor child namely: S.S.G**

**ix) That the costs of this application be provided for.**

2. The application is based on grounds that the Applicant and Respondent are parents of the subject, they are now divorced, the Applicant/mother has all along lived with the child and is the primary care giver of the child, and that the mother is desirous of travelling with the minor for a visit to the U.S.A but the Respondent has interfered with the process of visa application, necessitating this application. Further the Applicant is resident in Kenya and has a permanent job.

3. In an affidavit in support of the application the Applicant explains her desire to take with her the Subject to visit their extended family but the said visit has been hampered by the Respondent's refusal to visit the USA Embassy in order to process their Subject's visa application which is a sign of bad faith on his part.

She argues further that the intended holiday is for their Subject's benefit.

4. The application is objected to by the Respondent in his replying affidavit dated 16<sup>th</sup> October, 2019. The Respondent contends that the application is *res judicata*, and orders sought would breed actual contempt (sic), that orders for custody, care and control are subject of the trial in the lower court, further the application is malicious, selfish, abuse of court process and intended to deny the Respondent his constitutional rights; the Applicant obtained a birth certificate without the Respondent's consent, the minor has other relatives in Kenya, and the intentions of Applicant is to circumvent court orders.

5. It should be remembered that this matter is pending hearing of an appeal arising from an interim order issued by the trial court granting interim custody, care and control of the minor herein **SSG** to the Applicant pending hearing of the suit.

6. An interlocutory application was filed by the Father in this court seeking to be allowed access and for orders barring the Applicant taking the minor out of jurisdiction of the court without consent of Respondent pending the decision of the court.

7. In a ruling by this court dated 9<sup>th</sup> May, 2019 this following orders were issued

**a) That both parents of the minor will share half of the school holidays pending further orders.**

**b) The Applicant will have access to the child the last weekend of the month. ....**

**c) None of the parties will remove the child from the jurisdiction of the court without the approval of the other or an order of court.**

**d) .....**

**e) .....**

**f) .....**

8. From the order cited in (7) above for either of the parties to remove the Subject from this courts jurisdiction, they would have to obtain consent of the other, or come to court to obtain orders.

9. The order did not otherwise entirely ban removal of the child from this jurisdiction. The said order was necessitated by the disagreement between the two and the pending appeal.

10. The application by the Applicant therefore cannot be said to be *resjudicata*, malicious nor contemptuous, it is in line with the orders referred to in paragraph 7 above.

11. I do not find the application selfish either, and do not see how it affects the Respondent's Constitutional right. The parties ought to appreciate that this matter is not about rights of the two but rights of the subject and his best interest.

12. The issue subject of this ruling is whether the Subject should be allowed to visit his relatives in the U.S.A. alongside his mother during the Christmas holidays.

13. The court's concern is whether the said visit would be to the subject's best interest. Since no ill will and malice have been proved against the Applicant's wish in her quest to treat her child for a trip to the U.S.A during the Christmas holiday, nor that the visit would harm the subject, or affect him in anyway, it can only mean that the intended trip will be to the best interest of the child.

14. Therefore, this court does permit the Applicant **EKN** to travel with her son **SSG** during the December Holidays to the U.S.A.

15. The Applicant is at liberty to apply and process the Subject's visa application with the U.S. Embassy either alone or jointly with the Respondent.

16. Costs in the cause.

**DATED, SIGNED and DELIVERED IN NAIROBI this 31<sup>ST</sup> day of OCTOBER, 2019.**

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**ALI-ARONI**

**JUDGE**