



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CIVIL APPEAL NO. 112 OF 2016

IN THE MATER OF CHILDREN'S ACT

&

IN THE MATTER OF Z. J. A. AND T. A. (CHILDREN)

H O O.....APPELLANT/RESPONDENT

VERSUS

C S F.....RESPONDENT/APPLICANT

RULING

1. This ruling relates to a chamber summons application dated 5th June 2018 but filed on 6th June 2018 pursuant to Article 53 (2) of the Constitution, Section 4, 76, 113 and 114 of the Children's Act and Sections 1A (1) and 1B (a, e) of the Civil Procedure Act seeking orders as follows:

(1) Spent.

(2) That the honourable court be pleased to grant leave so as to enable T A to travel outside the jurisdiction of this court to Hashemite Kingdom of Jordan during school holiday of the months of July and August 2018.

(3) That this honourable court be pleased to order the appellant/ respondent to release the original Passport and two recent passport size photos for the minor T A by 1st June 2018 to the office of Jenniffer Shamalla and Company Advocates for purposes of securing a visa for T A to travel to Hashemite Kingdom of Jordan during the school holiday for the months of July 2018 and August 2018.

(4) That in addition to holding the appellant/respondent in contempt of court, this honourable court be pleased to compel the appellant/respondent to reimburse any future costs that the respondent/appellant will incur for T A's travel arrangements and inconveniences should the appellant/respondent blatantly disobey any orders issued by this honourable court.

(5) That should need arise this honourable court be pleased at its own convenience to allow the respondent/applicant to give evidence or any information required in this matter through a voice over internet protocol, as the respondent/appellant is currently working and residing in Hashemite Kingdom of Jordan.

2. Application is predicated upon grounds on the face of it to the effect that the respondent/appellant and the appellant/respondent have joint legal custody of the minor vide an order issued by the Resident Magistrate's Court on 21st October 2016: that the court had also authorized physical access to the baby by the appellant/respondent even outside the jurisdiction of this court. In support of the application is a notarized affidavit sworn by the applicant on the 21st May 2018 at the state of New Mexico in which the applicant averred that she is a resident of the state of Jordan working for [particulars withheld] as a technical advisor to maternal and child health.

3. She further stated that despite having joint legal custody over the subject herein, the appellant/respondent has blatantly refused to allow her access the baby even when in Kenya thus denying the baby an opportunity to interact with her step-sister Z JA the applicant's biological baby whom she is staying with in Jordan. That having lost access to the minor during the December 2016, April 2017, July 2017, December 2017 and April 2018 holidays, she deserves access to the baby for the whole of July – August 2018 holiday hence the need to grant leave to travel to Jordan.

4. In response to the application, the respondent filed 5 grounds of opposition dated 24th July 2018 but filed on 25th July 2018 in which he alleged that the application was defective, lacks merit and is based on a misconception of the law. That the application seeking committal of the respondent to civil jail for contempt of court offends the provisions of Section 10 (3) of the Magistrate's Act No. 26/15. Reference was made to the case of **H.O. vs PLS (2017 eKLR)** in which J. Musyoka held that Magistrates' courts were clothed with the jurisdiction to punish for contempt of court committed with respect to proceedings conducted by those courts. The court was urged not to grant the said prayer considering the fact that the alleged contempt was not committed before this court and that this court lacks original jurisdiction to punish contempt committed before another court.

5. Lastly, the respondent contended that the application is seeking to determine the appeal at an interlocutory stage and therefore not in the best interest of the baby hence should be dismissed.

6. During the hearing, M/S Shamalla for the appellant basically reiterated the content and averments contained on the grounds on the face of the application and affidavit in support. She urged the court to grant leave for the baby to travel to Jordan to stay with the applicant during the August holiday. Counsel contended that the orders of the lower court having not been stayed pending appeal are still operational hence the leave sought which is in consonance with the orders of the court.

7. M/S Wanjiku for the respondent also adopted the grounds of opposition aforesaid and urged the court not to grant the orders sought as that would amount to determining the pending appeal which is challenging the same orders they are seeking to implement by seeking leave for the baby to travel out of this court's jurisdiction.

8. I have considered the application herein, supporting affidavit and oral submissions by both counsels. There is no dispute that joint legal custody of the minor herein was granted before the trial magistrate's court on 21st October 2016 which authorized that the appellant was to have actual custody over the minor. Second, the applicant and respondent were to have joint legal custody over the baby and that the respondent to have access to T A during half of the school holidays and over weekends when she is in Kenya and unlimited daily access through phone or skype. The court further ordered that the applicant shall during access to the baby be allowed to travel with her out of the jurisdiction of the court with leave of the court.

9. Although the applicant herein has prayed for various orders including prayers to cite the respondent/applicant for contempt, I will not deal with contempt issues in this application as a substantive application on contempt is still pending determination. I will restrain myself and reserve my comments on the issue of contempt in this application.

10. Does the applicant/respondent deserve leave for the minor to travel to

Jordan whether accompanied by the father/appellant or the respondent/applicant? Indeed there is a valid court order made by the trial Magistrate granting joint legal custody of the baby to the applicant and respondent. The order also grants the applicant an opportunity to seek leave to travel with the baby outside the jurisdiction of the court. There is no stay order vacating the lower court's orders which are the subject of the appeal now pending.

11. I do agree with M/s Shamalla that courts' orders must be obeyed. On the other hand, the court must balance the best interests of the baby in accordance with Article 53 (2) of the Constitution before making any orders. Leave is a discretionary order of the court which must be exercised judicially taking into account all circumstances surrounding the particular case. There is an appeal challenging the orders of the lower court on grounds that the applicant/respondent having been his girl friend had no right to have legal custody to a child born by another woman who is alive and also entitled to access the baby as per their parental responsibility agreement tabled before the trial magistrate.

12. Having gone through the application and the affidavit in support and without delving into the merits of the appeal, it is not clear from the record or even known for how long the applicant is going to stay in Jordan after she relocated from Kenya. Just as the trial magistrate had difficulties in answering some questions she posed to herself yet remained unanswered, I will also ask, what will happen to the baby if the applicant's contract with save the children expired while with the baby in Jordan and she decides to switch off communication as she returns back to Jamaica her motherland? How will the court implement its wardship over the baby? Some of these questions will be answered and determined adequately on appeal which should be fixed for hearing within 30 days after delivery of this ruling.

13. What is the consequence of granting leave for the baby to travel outside the country? The biggest challenge would be tracing the baby in case of change of residence without notice hence the reason why the court should be able to know the duration of her contract with the employer. From the applicant's own perspective, she has not been able to access the child since 2016 because she could not travel to Kenya due to tender age of her young baby Z J A with whom she is staying. That does not mean that she has been denied physical access while in Kenya as directed by the court. Why would somebody who has been granted access fail to visit the baby while in Kenya but only decides to access the same while in Jordan?

14. Since there is an appeal pending with prayers challenging an order for the baby to leave the jurisdiction of this court and considering the animosity that has been demonstrated in the pleadings between the appellant and respondent who were boyfriend and girlfriend before the applicant left the country, I do not find it appropriate to grant leave at this moment for the child to travel to Jordan until the appeal is heard and determined. This will safeguard the best interest of the baby in case of any eventuality and also give the court an opportunity to get a report from the children officer on the viability and safety of the child travelling outside the country more so to Jordan which according to the appellant is a security risk and transit work station for UN employees. The best interest of a child is a delicate balancing act more especially this era of child trafficking. The applicant is at liberty to visit the baby in Kenya any time she wishes until the court makes further orders.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF AUGUST 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

M/S Wanjiku Nduati.....Counsel for applicant

N/A.....Counsel for respondent

Edwin.....Court Assistant