



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 167 OF 2015**

**J A L.....APPLICANT**

**VERSUS**

**R T.....RESPONDENT**

**RULING**

1. The suit herein commenced on 10<sup>th</sup> November 2015 by way of an Originating Summons dated 6<sup>th</sup> November 2015. The originating summons seeks two principal orders, that the court do register the decree of divorce issued on 14<sup>th</sup> October 2010 by a French court where custody of the children of the parties was given to the applicant with the respondent getting access rights, and that the said order, upon registration, to be enforced as any other order of the court. The pleading also seeks interlocutory prayers that the respondent be restrained from removing the child, who is still a minor, from the jurisdiction of the court without consent of the applicant.

2. The suit is founded on the grounds set out on the face of the application and the affidavit sworn in support thereof by the applicant on 6<sup>th</sup> November 2015. The facts that emerge from that affidavit are that both parties are British nationals, but the applicant is domiciled in Kenya, while the respondent resides in France. The parties married in 1997 and the union produced two children. The marriage was subsequently dissolved by a French court in 2010, where further orders were made with respect to the children and matrimonial property. She seeks to have the decree of the French court registered in Kenya so as to enable enforcement of the order in Kenya. She expresses fear that the respondent might not comply with the decree the next time the child visits him in France and may prevent the applicant and the child from returning to Kenya. She has attached a copy of the decision of the French court the subject of the proceedings.

3. On 25<sup>th</sup> November 2015, a chamber summons dated 24<sup>th</sup> November 2015 was lodged in the cause, seeking the same two principal prayers as those sought in the Originating Summons dated 6<sup>th</sup> November 2015. The interlocutory prayers in the summons in chambers were similar to those sought in the main suit, to prevent the respondent from preventing the minor from coming back to Kenya upon his travelling to France to visit him and to prevent him from removing the child from Kenya.

4. The respondent filed his own chamber summons on 17<sup>th</sup> May 2016, of even date. The application seeks that the applicant be compelled to comply with the decree of the French court with regard to visitation and living rights. The grounds upon which the application is premised are set out on the face of the application, and the facts are deposed in his affidavit sworn on 4<sup>th</sup> May 2016. He complains that the applicant in the Originating Summons was not complying fully with the terms of the decree, detailing instances when there was non-compliance.

5. The response to the respondent's application takes the form of two affidavits sworn by the applicant and the adult child of the parties. Both were filed on 31<sup>st</sup> August 2016, although that of the child was sworn on 22<sup>nd</sup> August 2016 and that of the applicant sworn on 29<sup>th</sup> August 2016. The applicant contests the allegation that she was not fully complying with the decree, asserting that she was fully compliant. She however mentions some challenges attendant to complying with the order. The child on the other hand complains that the decree is inconvenient, and gives his own experience with regard to compliance therewith. He takes the position that the said decree was inconvenient and did not take the best interests of the child into account.

6. In response to the matters raised in the replying affidavits, the respondent swore a supplementary affidavit on 5<sup>th</sup> October 2016, which was filed herein on 1<sup>st</sup> November 2016. He responds to the specific accusations made about him in the adult child's affidavit, and accuses the applicant of brainwashing the child. He said he was unable to contribute more money for the minor child's upbringing. The applicant responded to that affidavit by swearing two affidavits own on 17<sup>th</sup> November 2016.

7. The applicant filed another interlocutory summons in chambers, dated 14<sup>th</sup> September 2016, on 15<sup>th</sup> September 2016. This time she seeks several orders pending hearing and determination of the suit – for extension of parental responsibility over the adult child beyond eighteen (18) years, provision of school fees and maintenance for both children and for variation of the order of the French court to the effect that the respondent has reasonable access to the minor child. There is also prayer that the respondent do access the minor child in Kenya. The applicant avers that she is the one who has been paying school fees and meeting other related expenses for the children, and her financial circumstances had changed and she was no longer able to provide for them. She accuses the respondent of neglecting his duties. She raises concern with having the minor child travel to France for access purposes and wonder why the respondent cannot himself travel to Kenya to see the child. She complains that the frequent travel is not healthy for the child, and it puts financial strain on her.

8. On 11<sup>th</sup> December 2015, this court adopted the decree of the French court made on 14<sup>th</sup> October 2010 as an order of the High Court of Kenya, but directed that the same be registered in compliance with sections 60 and 61 of the Marriage Act, 2014. That order, in my view, disposed of prayers 1 and 2 of the Originating Summons dated 6<sup>th</sup> November 2015 and of the Chamber Summons dated 24<sup>th</sup> November 2015.

9. There are two applications pending ruling, dated 17<sup>th</sup> May 2016 and 14<sup>th</sup> September 2016. They were argued orally on 24<sup>th</sup> November 2016. Counsel appearing gave breath to the various arguments set out in the numerous affidavits filed by the parties.

10. The instant suit commenced by an originating process for adoption of a foreign decree. Foreign decrees are adopted in Kenya for the purpose of enforcement under the infrastructure established under the Kenyan legal system. An order emanating from a foreign court cannot be enforced here for lack of jurisdiction, it has to be adopted to clothe it with that jurisdiction.

11. The adoption is for the sole purpose of enforcement. It only facilitates the registration of the decree, it does not confer jurisdiction on the Kenyan court on anything else apart from enforcement, for the Kenyan court is not seized of the matter. The Kenyan court only assumes jurisdiction for the limited purpose of enforcement or execution of the decree or order, nothing more. The primary jurisdiction remains with the court that made the order or decree. The Kenyan court cannot for that reason vary or alter or vacate the foreign order or decree. The reason for this is that the Kenyan court record would have no pleadings and the proceedings that provide the background to the making of the order or decree. There would therefore be no foundation upon which it can proceed to review or vary such order or decree.

12. Flowing from the above, the Kenyan court faced with a foreign decree that has been adopted by the Kenyan court can only conduct proceedings relating to the execution or enforcement of the order or decree as it is. Any party unhappy with the order or decree is obliged to move the foreign court for the review or setting aside thereof.

13. With respect to the instant proceedings, the principal purpose of the Originating Summons dated 6<sup>th</sup> November 2015 was the adoption of the foreign decree. The other prayers were interlocutory, the orders to be made founded on those prayers were meant to subsist during the pendency of the suit. The principal prayers in the Originating Summons were granted on 11<sup>th</sup> December 2015, when the decree of the French court was adopted as an order of the Kenyan court. That order effectively disposed of the Originating Summons dated 6<sup>th</sup> November 2015. The suit was spent. There was nothing pending thereafter to be determined by the court with respect to the suit or the Originating Summons dated 6<sup>th</sup> November 2015. There was therefore no room for the filing of interlocutory applications in the mould of the one dated 14<sup>th</sup> September 2016. The court could only deal with post adoption application limited to the enforcement or execution of the decree of the French court.

14. The application dated 16<sup>th</sup> May 2016 invites the court to compel the applicant to comply with the decree of the French court. The law governing execution of decrees is clearly set out in the Civil Procedure Act and Rules, as may have been modified by the law governing matrimonial causes. The respondent ought to move the court appropriately under those rules. The application before me is therefore not properly conceived.

15. For the reasons given above, it is my finding that the applications before me dated 17<sup>th</sup> May 2016 and 14<sup>th</sup> September 2016 are without foundation and I do hereby dismiss them. There shall be no order as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 16<sup>TH</sup> DAY OF DECEMBER, 2016.**

**W. MUSYOKA**

**JUDGE**