

REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

DIVORCE CAUSE NO. 6 OF 2012

H. T. H.....PETITIONER

VERSUS

F. S.....RESPONDENT

RULING

The application dated 3rd November, 2014 seeks an order of stay of execution against the decree issued herein, review or setting aside or varying the judgment issued on 29th September, 2014 as well as directions on the access of the minor child by the Applicant. The application is supported by the Applicant's affidavit sworn on the same date. The Respondent filed a replying affidavit sworn on 11th November, 2014.

Parties agreed to determine the application by way of written submissions. It is the Applicant's submissions that the Respondent has deposited an air ticket for the Applicant to travel to India. If that part of the judgment is effected, the Applicant will be denied access of her son. The Applicant was given unlimited access of her son in Malindi Children Case UMBER 53 of 2010. The Applicant is likely to be deported to India. The Applicant only sought custody of his son and Kshs. 1 million being the equivalent of gold given to the Respondent's family during the marriage.

According to Counsel for the Applicant, the error apparent on the face of the judgment which the Applicant is seeking to have reviewed is the fact that the court failed to give a mechanism through which the Applicant would access her son while in India. This error can be rectified by the court directing that the Applicant be given custody of the child whenever she wishes so that she can leave the country with her child. The Respondent will not be prejudiced as he is a man of means.

Counsel for the Respondent filed written submissions indicating that the depositing of the air ticket was as a result of the Applicant's request. The child has already indicated that he does not wish to go to India.

I have gone through the judgment of Justice Meoli delivered on 29th September, 2014, I have also gone through the submissions by Counsel for both parties, the application dated 3rd November, 2014 as well as all the pleadings and documents related to this dispute. The background of the matter shows that the parties were granted a divorce.

The judgment of Justice Meoli was preceded by a consent of the parties before their religious community. Parties agreed to the effect that the Respondent deposits an air ticket in favour of the Applicant to travel to India as well as a sum of 3000 U.S. Dollars. By complying with that consent, the Respondent cannot be held to be intending to deport the Applicant. Further it does not mean that once the Applicant travels to India she cannot come back to Kenya to visit her child.

The issue of custody of the child was dealt with by the Malindi Children's Court. There is an appeal which is pending. The Applicant has not been allowed to take the child out of the country and should not urge the court to vary the judgment therein by allowing her to travel with the child.

I do find that the current application is an abuse of the court process. There is no error apparent on the face of the record. For the short time I have been here at the Malindi Law Courts, I have dealt with the

same dispute by the parties brought in different forms. The Applicant and her advocate should understand that making frivolous applications like the current one to the court will not help them. If the Applicant is dissatisfied with the judgment of Justice Meoli, she can proceed to appeal. The judgment in real sense adopted the consent before the parties' religious community. The judgment noted that none of the parties faulted the consent. The application is simply an outright abuse of the court process. The judgment of Justice Meoli did not dwell on the issue of custody. How can it be varied or set aside so that custody can be granted to the Applicant.

The Applicant is entitled to pursue her rights in court. However, she should exercise that right prudently as opposed to throwing unnecessary applications to the court. Counsel for the Applicant should be bold enough and advice his client on the proper way forward. If the Applicant was granted unlimited access of the child by the Lower Court as per the Applicant's written submissions, why then would the party come to the court and raise custody issues. Has access been denied by the Respondent?

In the end, I do find that the application dated 3rd November, 2014 lacks merit and the same is dismissed with costs.

Dated and delivered at Malindi this **26th** day of **February, 2015**.

Said J. Chitembwe

JUDGE