



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 73 OF 2014

IAN MBUGUA MIMANO.....APPELLANT

VERSUS

CHARLOTTE WAMUYU MUTISYA.....1ST RESPONDENT

ROSE MUMBI MIMANO.....2ND RESPONDENT

YVONNE MURUGI MIMANO.....3RD RESPONDENT

RULING

1. The application dated 15th May 2014, and amended on 20th May 2014, seeks in the main the adoption of an order or judgment made on 19th February 2013, and reviewed on 7th November 2013, by the Juvenile and Domestic Relations Court of the City of Alexandria in Virginia, United States of America (USA). There is also a prayer for the release of the child's passport which is deposited with the Children's Court.
2. Several affidavits have been filed both in support and opposition to the application.
3. The Motion is predicated on provisions drawn from several statutes, among them the Constitution of Kenya, the Children Act (Cap 244), the Foreign Judgments (Reciprocal Enforcement) Act (Cap 43), the Evidence Act (Cap 80) and the Civil Procedure Act (Cap 21).
4. What is sought in the application is the enforcement of a foreign judgment. Consequently, the primary law on the matter should be the Foreign Judgments (Reciprocal Enforcement) Act. The provisions in that law cited in the application are sections 4(1)(d), 5(1)(3), 6(1) and 18(1).
5. The object and scope of the Foreign Judgments (Reciprocal Enforcement) Act is stated in its preamble, which is in the following terms –

'An Act of Parliament to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith.'

6. Judgments given in countries outside Kenya can only be enforced if they are given in countries that have been declared by the Minister, in terms of section 13 of the Act, to be reciprocating countries for the purpose of the Foreign Judgments (Reciprocal Enforcement) Act.
7. The Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order was made under section 13 of the Foreign Judgments (Reciprocal Enforcement) Act. It lists countries that are

declared to be reciprocating countries for the purposes of the Act and in respect of which the provisions of the Act apply to judgments given by their superior courts. The countries listed in the schedule to the Order are Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Rwanda.

8. **Section 3** of the Act sets out the judgments to which the Foreign Judgments (Reciprocal Enforcement) Act applies. Under section 3(3)(e), the Act does not apply to judgments touching on custody or guardianship of children. For avoidance of doubt the said provision states as follows –

‘3(3) This Act does not apply to a judgment or order –

(e) in proceedings in connection with the custody or guardianship of children.’

9. The judgment sought to be adopted for enforcement purposes was made by a court in the USA. I note that the USA is not among the reciprocating countries listed in the Foreign Judgments (Reciprocal Enforcement)(Extension of Act) Order. When Ms. Nyang addressed me on 21st October 2014 on the Motion she made no effort at all to demonstrate that the decision in question was one that could be enforced in Kenya under the Foreign Judgments (Reciprocal Enforcement) Act. She did not cite any provision of the Foreign Judgments (Reciprocal Enforcement) Act or other law that would enable such enforcement.
10. Even if the Foreign Judgments (Reciprocal Enforcement) Act were to apply to judgments of the superior courts of the USA, the applicant would still have to contend with section 3(3)(e) of the Act. Mrs. Mbanya for the respondents addressed me on this point, Ms. Nyang did not. I agree with Mrs. Mbanya. There is no jurisdiction for me to deal with the matter of the enforcement of a foreign decree in proceedings in connection with the custody or guardianship of a child.
11. There is clearly no merit in the application dated 20th May 2014 so far as it relates to enforcement of a decree made by a USA court in proceedings in connection with the custody or guardianship of a child. I decline to grant it, and I hereby dismiss it with costs.
12. The issues around custody or guardianship of children are within the jurisdiction of the Children’s Court. I note that there are two suits pending before that court on the point. It is only right that the said court do continue to deal with the matter. To facilitate that I do hereby discharge the orders made herein on 17th April 2014 staying the proceedings before the Children’s Court.
13. There is prayer for release of the child’s passport that is being held by the Children’s Court. Counsel did not address me on the point. No justification was given for the release of the passport. It is matter that is within the jurisdiction of the court which made the order for the deposit of the passport, and I will leave it to that court.
14. Should I make orders on the custody or guardianship of the child? I think not. The matter is before the Children’s Court, it should be dealt with there. Mine was to decide on the narrow question as to whether the USA decree should be adopted by this court.
15. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th DAY OF November 2014.

W. MUSYOKA

JUDGE

In the presence of Ms. Nyang advocate for the applicant.

In the presence of Mrs. Mbanya advocate for the respondent.