



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO.4 OF 2011

SUSAN CHEPCHUMBA

KAITTANY.....APPLICANT

VERSUS

**TIMOTHY ALALA.....1ST
RESPONDENT**

**DOMINIC WALUBENGO.....2ND
RESPONDENT**

**PROFESSOR LENA NAKHONE.....3RD
RESPONDENT**

**STEVEN ALALA.....4TH
RESPONDENT**

RULING

The dispute between the applicant and the respondent revolve around the custody of a child – the child is one (1) year and three (3) months old. According to the applicant, the child was kidnapped on 11th January 2011 from her custody by the 1st respondent with the assistance of the 2nd, 3rd and 4th

respondent. As to whether the child was indeed kidnapped is not an issue that this court can determine or rule on at this stage of the proceedings. What is without question, and it has indeed been conceded by the respondents, is that the 1st respondent currently has the custody of the child. The child was taken from the custody of the applicant on 11th January 2011. The 1st respondent appeared before the Children's court at Eldoret (In Eldoret Children's Court Case No.18 of 2011) on 18th January 2011. He obtained an order granting him custody of the child for a period of one (1) month. Meanwhile, on the 17th January 2011, the applicant filed suit before the Children's Court in Nairobi (Children's Court Case No. 56 of 2011). She obtained an order restoring the child to her custody. Criminal charges have also been lodged with the police.

On 26th January 2011, the applicant appeared before this court seeking various orders from the court. The court directed that the respondents be served for hearing today, 28th January 2011. All the parties, through counsel, appeared in court. The 2nd and 3rd respondents were present in court. This court, with a view to resolving the dispute, ordered the respondent to produce in court the child that is the subject of these proceedings. The child was however not produced in court. Mr. Njuguna learned counsel for the 1st respondent informed the court that the 1st respondent took the child out of the jurisdiction of this court and will avail her on 17th February 2011. The question that this court asks itself is this; was the 1st applicant aware that once he submitted himself to the jurisdiction of the Children's court he was required to seek the leave of the court before he deemed it appropriate to take the child out of the jurisdiction of the court? How did he obtain the travel documents of the child? It is known fact that a child of such an age can only be issued with a travel document that is endorsed with that of the mother. The applicant's skepticism that the 1st applicant has not indeed travelled out of the country has basis in the circumstances. This court is required under **Section 4(3)** of the **Children Act** to, in all circumstances, when considering any decision concerning the welfare of a child to take the best interest of such child into account.

In the present case, it is clear that this court cannot be able to do justice and uphold the best interest of the child if the child is not availed or brought before the jurisdiction of this court. Before this court can consider the merits or otherwise relating to who shall be given custody of the child, the child must be surrendered to this court by the respondents.

I therefore direct that the respondents, both jointly and severally, produce the child before this court by 9.00 a.m. on 1st February 2011. So that the respondents are made aware of the seriousness of the likely legal consequence that they will face if they do not produce the child before this court, this court hereby orders that they should be present in court on that day (1st February 2011). Matter shall be mentioned on 1st February 2011 to confirmed compliance. So as to ensure that the orders of this court are complied with, all proceedings before the Children's court at Eldoret (Children's Court Case No. 18 of 2011) and at Nairobi (Children's Court Case No.56 of 2011) are stayed pending further orders of the court. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JANUARY, 2011

L. KIMARU

JUDGE

