

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO.127 OF 2010

R.B.K..... APPLICANT

VERSUS

T. I.....RESPONDENT

R U L I N G

On 17th December 2010, the applicant filed an originating summons pursuant to the provisions of **Sections 4 & 118** of the **Children Act** seeking orders of the court to allow her to relocate from the country with A.I (the child) that is the subject of these proceedings. From the originating summons, it emerged that the applicant and the respondent, had, after divorcing on 14th April 2008, entered into a consent whereby the custody of the only child of the marriage was granted to the applicant while the respondent was granted access and visitation rights to the child on every alternate weekend and during half of the school holidays. This consent was made before the Kadhi's Court. The applicant wishes to vary the terms of this consent on account of the fact that on 23rd October 2010, she was married by one Mohammed Anwar Mughal, a British citizen. She wishes to relocate to the United Kingdom to reside with her husband together with the child of the marriage.

Meanwhile, upon becoming aware that the applicant intended to relocate to the United Kingdom with the child upon her remarriage, the respondent filed an originating summons before the Children's Court vide Miscellaneous Children's **Case No.134 of 2010 (O.S)**. This case was filed on 20th December 2010. The respondent essentially sought orders seeking sole custody of the child. That case is pending hearing and determination before the Children's Court. It was the filing of that case by the respondent that prompted the applicant to file the notice of motion dated 20th January 2011. In the application, which is purportedly brought under **Sections 3A and 18** of the **Civil Procedure Act**, the applicant sought the transfer of the said suit filed before the Children's Court to the High Court for hearing and determination. She further sought orders of the court for the consolidation of the said suit together with the present one. It is the applicant's contention that the matters in dispute in the case fell within the jurisdiction of the High Court and therefore this court should exercise its discretion and transfer the suit from the Children's Court to the High Court. The respondent opposed the application and has filed grounds in opposition to the application. It is the respondent's case that the Children's Court has jurisdiction in the first instance to hear any matter concerning the custody of children. The respondent urged the court to dismiss the application.

At the hearing of the application, this court heard oral submissions made by Mrs. Kalsi for the applicant and by Mr. Orina for the respondent. The issue for determination by this court is rather simple: which court, between the High Court and the Children's Court has jurisdiction in the first instance to deal with the matters in dispute between the applicant and the respondent relating to the custody of child? **Section 73** of the **Children Act** is clear. The Children's Court shall have jurisdiction to conduct civil proceedings in relation to matters set in out in **Part VII** of the **Children Act**. **Part VII** of the **Children Act** sets out issues regarding custody and maintenance of children. It includes the prayer being sought by the applicant in this case regarding the variation of the terms of custody of the child. It is this court's considered view that the court which has jurisdiction in the first instance to deal with the dispute regarding custody is the Children's Court.

In the premises therefore, and for the best interest of the child, this court will direct that the suit herein be transferred to the Children's Court, Nairobi for hearing and determination. For the avoidance of doubt,

this suit shall be consolidated with Miscellaneous Children's Case No.134 of 2010 (O.S) which relate to the same dispute. The Children's Court shall hear and determine all the matters in issue between the applicant and the respondent. Costs shall be in the cause.

DATED AT NAIROBI THIS 1ST DAY OF APRIL, 2011

L. KIMARU
JUDGE