



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
DIVORCE CAUSE NO.85 OF 2008

S.R.L.....PETITIONER/
RESPONDENT

VERSUS

R.S.L.....RESPONDENT/APPLICANT

R U L I N G

1. On 12th July 2007, Kubo J. granted custody, care and control of minor, K. L to the Respondent, R.S link with the Petitioner, S.R, having supervised visitation rights.
2. On 17th June 2011, the Respondent brought a Notice of Motion under Sections 7(1), 22 and 86 of the Children Act seeking orders that;
 - (i) The child, K.L (“K”) be granted an opportunity to talk to the presiding Judge on his wishes as to which of his parents he wants to live with.
 - (ii) The Respondent be allowed to take the child to Denmark and to stay and go to school there.
3. Because no party opposed prayer (i) above, I allowed the child to talk to me in camera and in any event, I am convinced that such an opportunity could not be denied taking into account all the circumstances of this case.
4. What I am required to do at the present is to determine whether the child’s best interests would be served if I granted the prayer that he should be taken to school in Denmark.
5. In determining that question, I should begin by laying down the responses that I received from the child’s sister, K.K.L (“K”) and his mother, S.R.L (“the mother”).
6. K, by her Affidavit sworn on 23rd June 2011 stated that she is twenty (20) years old and an employee of the [particulars withheld]. Further, that her parents divorced when she was nine (9) years old and her brother, K was three (3) years old. That whereas her custody was granted to her mother, she made a conscious decision to move out and live with her father when she turned sixteen (16) years and she is convinced that her mother is *“incapable of providing [a] suitable home environment with family values for any child while [her] father provides a proper and disciplined family environment”*

7. It is her position that it would be in K's best interest that he should go to school in Denmark but he can be allowed to visit his mother once a year.

8. On her part, the mother by her Affidavit sworn on 28th June 2011 depones that she voluntarily allowed the child to move out and stay with his father in February, 2011 inspite of the allegation that the father has destabilized the child's well being over time. Further, that the father has influenced the child's decision and yet he cannot be trusted with his custody and care and moving him away from Kenya will perpetuate that mistrust.

9. Inspite of her fears however, she depones that should the child be taken to Denmark then certain conditions must be attached to such an order and I will return to that issue later.

10. Returning to my interview with K, I should state that I referred him to his letter dated 26th April 2011 headed "why I want to live with my dad." That letter heaps praise on the father as a great father while castigating his mother as a drunk, reckless, homeless and immoral. He was also categorical that he had no wish to live with his mother as he saw no future for himself if he was raised in an environment of uncertainty as his mother, he said, had no job or permanent residence.

11. I am not going to address the issue whether the child's mother is a drunk, reckless or immoral as alleged and therefore unfit to take custody, care and control of the child. I would rather approach the issue from K's own wishes and best interests. I note that he had previously made serious allegations of physical abuse by his father and all the allegations as against the mother and father were addressed in extenso by Kubo, J. in his ruling of 12th July 2007.

12. In AOG vs SAJ & anor [2011] Eklr (www.kenyalaw.org), it was held as follows;

"In our view, it was incumbent on the superior court, in the course of exercising its discretion to consider the best interests of the child, which is a duty imposed on the court under Section 4(3) of the Children Act"

13. I adopt the above holding and the issue before me portends no difficulty at all because K struck me as intelligent and quite sure of himself. He may have had difficulties adjusting to school life because of the differences between his parents but in his letter and in the private session with me, he had no difficulties at all in expressing his desire that he should go to school in Denmark.

14. I also have no doubt in my mind that his best interest would be served if he was allowed space to grow as his sister has done and not to be tied to the consequences of his parents divorce.

15. Since the Petitioner has no serious opposition in any event, what I should turn to is the condition attendant to the child's movement to Denmark. He will turn eighteen (18) years in five (5) years and thereafter he will be free from the decisions of his parents and so I will order as follows;

(i) Let the Respondent/father take K.L to Denmark to stay and attend a school of the same standard as B School, Nairobi.

(ii) The Petitioner/mother shall have access to K by email, phone and skype as frequently as possible.

(iii) The Respondent/father for the next five (5) years shall file annual Reports with this court on K's schooling and discipline including filing copies of his school reports.

(iv) The child shall visit Kenya and his mother once every year during the Summer Holidays at the Respondent's cost.

(v) Failure to comply with the above conditions may necessitate recalling and revocation of all the above orders and immediate return of K to Kenya.

(vi) Each party is granted liberty to apply.

16. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JULY., 2011

**I. LENAOLA
JUDGE**

CORAM:

I. LENAOLA – JUDGE

David – Court Clerk

Mr. Mwangi for the Petitioner/Respondent

Miss Manegene for Applicant/Respondent

ORDER

Ruling duly read.

**I. LENAOLA
JUDGE**