



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTION AND HUMAN RIGHTS DIVISION**  
**PETITION NO.236 OF 2011**

**IN THE MATTER OF ARTICLES 2(1)&(3), 3(1), 10(2)(a)&(b), 27(1)(2)&(4), 28, 29(d)&(f), 35(1)(b), 39(1)&(2), 43(1)(a), 45(1), 53(1)(d)&(e), 53(2), 165, 258, 259,260, AND IN THE ALLEGED OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 4, 6, 9, 13, 18, 22(1)&(2),23(2)(c) 91,93, 114, 115 OF THE CHILDREN ACT 2011**

BETWEEN

P.K.A.....APPLICANT

AND

M.S.A.....RESPONDENT

**R U L I N G**

1. The Notice of Motion dated 4<sup>th</sup> November 2011 is premised on the following provisions of Law;
  - “i) *Constitution of Kenya 2010 [at] Articles 2(1)&(3), 3(1), 10(2)(a)& (b), 27(1), (2) (4), 28, 29(d)&(f), 39(1)&(2), 43(1)(a), 53(1)(d)&(e), 53(2), 165, 258 2 (a), 259, 260*
  - ii) *The Children Act 2001 [at] Sections 4, 6, 9, 13, 18, 22(1), (2), 23(2)(c), 91,93, 114(g), 115”*
2. In it, the Petitioner/Applicant seeks the following Orders;
  - “1) *That this matter be certified as urgent and be heard ex-parte in the first instance.*
  - 2) *That there be a Production Order against the Respondent to immediately produce the minor A. S. A. to this Honourable Court.*
  - 3) *That the Honourable Court be pleased to attach the power of arrest of the Respondent to Prayer 2 as is the Court’s prerogative under the Children Act 2001.*
  - 4) *That once produced in Court the Minor A. S. A. be immediately handed over to his mother, the*

***Petitioner for a period of exactly two (2) months and two (2) weeks in line with the decree of the Court of Appeal dated 10<sup>th</sup> June 2011.***

**5) *That the Petitioner be immediately provided with all of A. S. A.'s medical reports as they pertain to his knee injury; which now allegedly requires him to undergo a third surgical procedure on the same knee.***

**6) *That the Petitioner be at liberty to seek a second medical opinion in the United Kingdom in respect to the said knee injury, before any decision is made pertaining to A. S. A.'s health.***

**7) *That the Petitioner be allowed to travel with her Son A. S. A. to the United Kingdom for his December holidays to return to Kenya for the commencement of the January 2010 term to allow for further examination of his injured knee.***

**8) *That the Respondent be ordered to pay for all travel and related expenses for A. S. A. in respect to Prayers 6 & 7.***

**9) *That an Order be issued that all passports of the Minor A. S. A. be handed over to the Petitioner to facilitate his travel to the United Kingdom.***

**10) *That the Honourable Court be pleased to order that the Respondent pay to the Petitioner a preliminary amount of Kenya Shillings Two Hundred and Seventy Six thousand (Kshs.276,000/-), a driver and a vehicle for the period requested in Prayer 4 as maintenance for his Son A. S. A. immediately upon handing him over.***

**11) *That a restraining order be issued against the Respondent, his agents, servants and his entire family from interfering in any way with the Petitioner's peaceful enjoyment of physical custody of her son A. S. A.***

**12) *That the Honourable Court be pleased to made an interim order for maintenance pending hearing and determination of the Petition.***

**13) *That the cost of this entire Application be fully borne by the Respondent.***

3. Reading the grounds on the face of the Application and the detailed Supporting Affidavit sworn on 4<sup>th</sup> November 2011 by the Applicant, and noting the Submissions by Ms. Nyamathwe, Advocate on her behalf, I can summarise the Applicant's case as follows;

4. That the Petitioner and the Respondent are an estranged husband and wife whose divorce proceedings are ongoing and the issue of the custody, care and control of their Child, A.S.A., has become a very contested issue. In a judgment delivered on 10<sup>th</sup> June 2011, the Court of Appeal in C.A. No.20/2010 and on that issue, ordered as follows;

***"1) The Appeal is allowed.***

**2) *The order granting custody of the Child to the Respondent is set aside and in lieu therefore grant and vest the custody care and control of the Child jointly to Respondent and the Appellant.***

**3) *The Child shall reside with each parent for two weeks alternately starting with the mother one week from the date hereof with liberty to both parents by parental responsibility agreement or otherwise mutually to adjust the period that the child may reside with each parent.***

**4) *The mother shall continue occupying the matrimonial home at Riverside Drive where the Child will reside whenever he is with the mother.***

- 5) ***The Respondent shall pay to the Appellant such some of money as maintenance for the Child while residing with the mother as the parties shall agree and in the absence of such agreement as shall be determined by the High Court.***
- 6) ***Neither parent shall remove the Child from the jurisdiction of the Court without the leave of the High Court.***
- 7) ***The Respondent to pay half of the costs of this Appeal to the Appellant.”***

5. That inspite of the clarity of the above orders, the Respondent who was also the Respondent in C.A No.20/2010 has refused to comply with any and all of them and has instead blatantly and with contempt continued to flout them; the Applicant adds that one such instance of breach is when he attempted to take the Child to Dubai for knee surgery without letting the Applicant have access to him. That is the reason why she prefers that she should be granted authority to take the Child to the United Kingdom for a second opinion on the real condition of his knee.

6. The Applicant has also made the point that she is a citizen of the United Kingdom, has no employment or property in Kenya and so the Child is the only ***“family and solace”*** she has in the Country and that the Respondent is deliberately depriving her of her son’s company to effect maximum pain and hurt in her.

7. It is the Applicant’s further case that the rights of the Child are also being violated and that he has had previous operations on his knee without his mother being with him and was thus treated unconstitutionally. That when the Respondent treats the Child to high impact sports like polo and squash, his already injured knee would be subjected to a flare up and more pain. His best interests would then be hampered and his health and education affected negatively.

8. Riding on the Court of Appeal order for custody, the Applicant claims Kshs.138,000/- a month for maintenance and upkeep of the Child when he is in her custody.

9. She also claims travel and related expenses of an unspecified amount in the event that she is granted authority to take the Child to the United Kingdom.

10. The Respondent’s case is contained in his Replying Affidavit sworn on 14<sup>th</sup> November 2011 and in Submissions by Mr. Ochieng-Oduol, his Advocate. It can be summarized as follows;

That the parties have been litigating over the custody of the Child for a long time and that the decision of the Court of Appeal in C.A. No.20/2010 was not satisfying to him and he was intent on filing an Appeal in the Supreme Court. Further, that the present proceedings are an abuse of the Court process as the issues raised are not Constitutional in nature.

He denies breaching the Orders of the Court of Appeal in any event and it is his contention that the Applicant has frustrated the enforcement of the Orders in that;

***“i) The Petitioner has frustrated the Court Order by failing to agree on reasonable maintenance for the subject for the two week period by insisting on a astronomical figure of about Kshs.500,000/- for every two weeks.***

***ii) The Petitioner has on diverse dates when the subject has gone to the Petitioner with a view to agreeing on the two weeks residence programme and school arrangement disagreed with [the child] and abused [the child]. This conduct has alienated [the child] to a point where [the child] detests the company of the Petitioner.***

***iii) His efforts to seek and negotiate a working arrangement has been frustrated by the Petitioner through her conduct of being abusive to him and making demands to hand over of the subject, outright condemnation and rejection of any proposals.***

- iv) *The Petitioner is hardly at home and leaves early and comes back late at night.*
- v) *Consequent upon the extraction of the Order of 7<sup>th</sup> July 2011, my Advocates and the Advocates for the Petitioner exchanged correspondence with a view to agree on the issue of maintenance.”*
- vi) *Petitioner through her advocates frustrated the process by demanding an astronomical sum of about Kshs.500,000/- for every fortnight.”*

11. Further, that the Respondent is only intent on taking the Child to the United Kingdom and all the allegations made against him are untrue.

12. On my part, I should say this from the outset; the proceedings before me relate to the enforcement of Orders issued in C.A. No.20/2010, a matter concluded by the Court of Appeal. In spite of the Respondent’s contention that he intends to appeal to the Supreme Court, that issue is neither here nor there as no such Appeal has in fact been filed. The decision of the Court of Appeal arose from an Appeal by the Applicant when she appealed against the earlier decision of Onyancha J. in H.C.C.C. No.6/2009 where the learned Judge had granted sole custody and care of the Child to the Respondent and the decision was not satisfactory to her. The Court of Appeal agreed with her and made Orders elsewhere reproduced above. All other issues raised in the Notice of Motion before me are corollary to that issue. Is this Court the right one to enforce the Orders of the Court of Appeal and if there is breach, is this the right Court to deal with the matter? **And prior to that, is there a Constitutional issue to be addressed?**

13. **Article 165(3) of the Constitution** provides as follows;

“1) ...

a) ...

b) ...

(2) ....

**3) Subject to clause (5), the High Court shall have—**

a) *unlimited original jurisdiction in criminal and civil matters;*

b) *jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*

c) *jurisdiction to hear an Appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*

d) *jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

i) *the question whether any law is inconsistent with or in contravention of this Constitution;*

ii) *the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

iii) *any matter relating to the constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

iv) *a question relating to conflict of laws under Article 191; and*

e) *any other jurisdiction, original or appellate, conferred on it by legislation.*”

14. Section 23(1) of the Constitution also provides as follows;

***“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. ...”***

The Applicant in this case is ***“alleging”*** and/or ***“apprehending”*** that certain fundamental rights and freedoms have or may be breached.

15. I have carefully read the Notice of Motion and all documents accompanying it and I have perused the recorded Submissions by M/s. Nyamathwe. The nearest I have seen to a right that has been breached is, Ms. Nyamathwe’s Submission that ***“the Applicant has been denied her Constitutional right to be with her Son.”*** That would seem to be a matter within **Article 45** of the Constitution which recognizes and enjoins the State to protect the family as a ***“natural and fundamental unit of Society.”*** Similarly, **Article 53** of the Constitution provides that every Child has the right to ***“parental care and protection, which includes equal responsibility of the mother and father to provide for the Child, whether they are married or not.”***

16. Although she has not expressly stated so, the Applicant is acting on her behalf and that of the Child which is lawful within the meaning of **Article 22(2)** of the Constitution which provides as follows;

***“1) ...***

***2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—***

- a) a person acting on behalf of another person who cannot act in their own name;***
- b) a person acting as a member of, or in the interest of a group or class of persons;***
- c) a person acting in the public interest; or***
- d) an association acting in the interest of one or more of its members.”***

17. With the above background in mind, it follows that the Applicant is perfectly within her rights to approach this Court for a determination of the question whether any fundamental right and freedom as enshrined in the Constitution has been violated.

18. Having so said however, i must juxtapose the above holding with the prayers as set out elsewhere above. I am quite certain that the manner in which the Applicant has framed her Prayers is less than elegant because in fact it is unclear what correlation these Prayers have with any particular right breached. It is also my view that a party claiming a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights may seek to be guided by **Article 23(3)** of the Constitution which provides as follows;

***“1)...***

***2)...***

***3)In any proceedings brought under Article 22, a court may grant appropriate relief, including—***

- a) a declaration of rights;***

- b) *an injunction;*
- c) *a conservatory order;*
- d) *a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*
- e) *an order for compensation; and*
- f) *an order of judicial review.”*

19. Even with the inelegance of pleadings I am quite prepared to find that once I have found that the Applicant is properly before this Court, then she is entitled to be heard and to be granted an **“appropriate relief”**, on meeting the standard required by Law. I say so because once a Court can glean what a party wants from it, then it shall administer justice without undue regard to technicalities (see **Article 159(2) (d) of the Constitution**).

20. **Is the Applicant now entitled to the reliefs sought in the Motion?** I am prepared to hold as follows in that regard;

21. Firstly, there is existing and in force, an Order of the Court of Appeal granting custody of the Child, jointly, to the parties. It cannot therefore be said that the Applicant has in fact been denied custody of the Child and in my view, the correct procedure to enforce the Order is by contempt proceedings and not a reference under the Constitution. I say so, with respect, because in Re Bahadur, [1986] LRC (Const.) 298, Collymore J. held as follows;

***“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive Law, the proper course is to bring the claim under such Law and not under the Constitution. This case highlights the unwisdom of ignoring that advice. ...”***

22. The reasoning above will resonate with the thinking of Georges C. J. in Minister of Home Affairs vs. Bickle & Others (1985) LRC Const. 755 where he said;

***“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The Court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22)”***

He went on to add that;

***“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”***

In Wafula vs. Republic, H.C. Misc. Application No.343/2000, it was stated thus;

***“Our Constitution is a serious and solemn document. We think that invoking it ... be reserved for appropriate and really serious occasions. (Attorney General vs. S. K. Dutambala Cr. Appeal No. 37 of 1991 Tanzania court of Appeal.)”***

23. The point was driven home in Harrikison vs. AG (1979) & WLR 63 where the Privy Council stated as follows;

***“the notion that wherever there is a failure by an organ of the Government or a public authority or public officer to comply with the Law [then] this necessarily entails the contravention of some human right to fundamental freedom guaranteed to individuals by chapter 6 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, under Section 6(1) the mere allegation that a human right or fundamental freedom of the Applicant has been or is likely to be contravened is not of itself sufficient to entitle the Applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity or applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom”***

24. All the authorities above would point to the fact that the **Constitution** is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true.

25. Returning to the case at hand, the issues raised in Prayers 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 are all issues that have no constitutional significance and could have been addressed in the Civil Court as opposed to their being couched as issues relating to fundamental rights because they are not. They are matters that were determined by the Court of Appeal when it made its Orders above and the remedy is in contempt proceedings against the Respondent, if at all he had breached them. Breach of Court Orders, I must state, is not akin to breach of the Bill of Rights under the Constitution. But suppose I am completely wrong and in fact there is something to be said about the Notice of Motion before me. Should the Orders sought be issued?

26. In that regard, I still hold the view that all the matters raised should be addressed by way of enforcement proceedings and/or execution proceedings of the decision in C.A. No.230/2010. The orders of the Court of Appeal in that case were meant to bring to an end the long-running dispute about the custody, care and control of the Child in this matter. The Court of Appeal’s decision is still subsisting and the Applicant should have returned to H.C.C.C. No.6/2009 and enforce the orders in that file. That is the proper forum to do so and without that file being placed before this Court; all Orders in the present proceeding may turn out to merely convolute matters and not assist the parties in any meaningful way.

27. I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.

Having ruled that this is the wrong forum to address the issues in contest, I see no reason to say anything on all the other issues raised.

28. I should conclude by saying that the parties ought to realize the pain that the proceedings in all the Courts since 2009 are causing themselves and their Child. The Court of Appeal ordered them to reach an agreement on maintenance but they have failed to do so. The Child will be eighteen (18) years in three (3) and as they wrangle in Court, he will soon be a man of his own, irrespective of their professed care and concern for him. The earlier they sit down and agree on outstanding issues the better for them. I have digressed.

29. I am convinced that although the Applicant has a right of audience before this Court as a matter of right, her Notice of Motion is wanting and ought not to be here.

30. It is dismissed but noting the acrimony between the parties and noting that the Applicant has no known income, let each bear his/her costs thereof.

31. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI 16<sup>TH</sup> DAY OF DECEMBER, 2011**

**ISAAC LENAOLA  
JUDGE**

**16/12/2011**

**CORAM**

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Ms. Nyamathwe, for Applicant

Mr. Oduol for Respondent

**ORDER**

Ruling duly delivered.

**ISAAC LENAOLA  
JUDGE**