REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Civil Appli 15 of 2009

SAJ ……..……..……..…… APPLICANT

VERSUS

AOG……..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ……..... 2ND RESPONDENT

IN THE MATTER OF AN APPLICATION FOR RETURN OF AN ABDUCTED MALE

MINOR Z (J) TO THE JURISDICTION OF THE HIGH COURT OF JUSTICE,

FAMILY DIVISION UNITED KINGDOM

JUDGMENT

There are some undisputed facts in this matter.

The applicants and 1st Respondent are husband and wife since 26th April, 2003 and they both profess Islamic faith. The Applicant is a British citizen and the 1st Respondent is a Kenyan citizen. The minor for the purposes of this proceedings shall be referred to as 'Z'. Z is a British citizen and was born on 5th May, 2005 in Bolton United Kingdom.

The marriage is not yet dissolved either under Islamic low or under any other law.

The parties herein jointly or otherwise visited Kenya but their matrimonial home was United Kingdom on 30th November, 2007 without prior knowledge of the applicant, the 1st Respondent with Z left United Kingdom and came to Kenya. Since that day she and Z are staying in Kenya.

The Applicant came to Kenya as averred and tried to bring back the 1st Respondent and their son back to United Kingdom but was not successful.

In the meantime the 1st Respondent as well as the Applicant filed the proceedings in the Children Court, Nairobi and Kiambu to seek order of custody. I must, however, place on record that the Applicant withdrew the proceedings filed by him in Kiambu. Thus, there is no enforceable order before me. The 1st Respondent's proceedings before the Children Court, Nairobi is pending and no order as regards the Child Z has been made.

It is on record that as far as the 1st Respondent is concerned, their marriage has no future and '***has***

ended' ,. As I have stated earlier a divorce proceeding to dissolve the marriage has been filed. However, so far as these proceedings are concerned, the parties are in law a married couple.

The Applicant thus filed proceedings before family division of the High Court of Justice in United Kingdom for return of the child Z. The 1st Respondent was duly served with these proceedings but no appearance was made and on 15th January, 2009. The court considering the facts before it made following orders:

1. The child Z be a ward of this court during his minority or until further order of this court.

2. The Defendant mother shall cause the return of the child forthwith to England and Wales and following his return shall not remove him from the jurisdiction without the permission of this court.

3. Liberty to the Defendant to apply to vary or discharge paragraph1 and 2 above on 48 hours notice to the Plaintiff's solicitors.

4. Permission to serve this order by facsimile transmission.

5. Permission to serve the orders herein, the Originating Summons and Affidavits out of the jurisdiction.

6. Penal Notice be attached to paragraph 2 of this order.

7. Costs reserved.

These orders are served to the 1st Respondent and no action to either vary or discharge the same is taken by the 1st Respondent. She has also not obeyed the said order.

Thus, the present Notice of Motion was filed by the applicant to enforce the said order under Section 4(1), (2) and (3); 6(1) and 6(3); 10(1) and (5); 13(1); 22; 76; 81; 87(1); 88, 114(f) and (g) and 115 of the Children Act and under several provisions of the Civil Procedure Act and inherent powers of the court.

The applicant seeks thus the return of the child to the jurisdiction of Family Division of the High Court of England and Wales which court has pronounced the child Z as its ward pending further orders; amongst other prayers.

At the initial ex-parte hearing, I issued restraining orders against the 1st Respondent from removing the child out of court's jurisdiction and also ordered her to deposit the passport of the child Z.

The Applicant has sworn an affidavit in support of the application on 2nd March, 2009.

The 1st Respondent opposes the application and has sworn a replying affidavit on 11th March, 2009. Mainly she averred that she did not abduct the child but it was the applicant who occasioned her exit from United Kingdom due to the brutality he used to mete on her. According to her the purpose of the present application is not for the interest of the child but for his selfish motive so that she could continue taking care of him. She has also placed on record the past conviction of the Applicant on the charge of fraud by the courts at Bolton. She has also enumerated that the Applicant, while in United Kingdom has never looked after the child. She averred that the Applicant is brutal and violent person and would justify his action by quoting passages from Quran. I may however note that the Applicant was arrested outside my chambers on the date of hearing of this application and I do note paragraph 41 of her affidavit, wherein she is averring his non-compliance of warrant of arrest. Of course, he was released immediately for obvious reasons.

She has obtained a Dependant Pass for the child without any consent of the Applicant and she averred that she was not obliged to obey the order made by Family Division of the High Court in England just by

stating that the order produced is not certified. She simply avoided to respond to the services of application and orders on hand. Without any document to support her averment of that, her advocate (no named) wrote to his solicitors.

There are thus attacks and counter attacks on the character and inability of the parties before me. There are incidents of violence meted to both parties and I do not at this stage intend to go deeper into their respective merits, and shall deal first with legal issues raised and to determine them also taking the best interest of the child as my paramount consideration.

I also take into account that Kenya has not ratified the 1980 Hague Convention on the Civil Aspects of International Child Abduction while the United Kingdom is a signatory thereto.

The questions of issues, in view of the facts on record which I have carefully perused and considered, to be determined are:

1. Whether the 1st Respondent abducted the child from the U.K. and has unlawfully continue to retain the child in Kenya.

2. Whether the child should be returned to the wardship of the U.K. High Court of Justice, Family Division and whether that order is in the best interest of the child.

As per the Law of Domicile Act (Cap 37) a child before me acquired a domicile of his father on his birth. If the 1st Respondent, as she alleges, has changed her domicile as per Section 8 of the said Act, that will not automatically change the domicile of the child. As per Section 9, and the father is still alive, the child's domicile shall only be changed by the change of the father's domicile. The 1st Respondent as stated hereinbefore, has acquired a dependent visa for the child without consent of the Applicant and thus, in my view that fact would not change his domicile. Once again as at to-date the parties have not been lawfully divorced.

In short, I do find that the child still retains his domicile of the United Kingdom.

I further agree with the Applicant's counsel that an after-acquired domicile by the 1st Respondent who acquired United Kingdom domicile on marriage, cannot be used to establish jurisdiction or choice of law. I therefore, find that the courts in United Kingdom thus had jurisdiction, to hear the application made by the Applicant and to make order as it deemed fit and just.

The Family Division Judge has found that the act of 1st Respondent removing the child out of jurisdiction was wrongful.

I further note that when1st Respondent removed the child out of the jurisdiction of the United Kingdom courts, the child was obviously an infant but who has been living with both the parents. He is now living without one of the parents presumably as alleged by the 1st Respondent due to irreconcilable differences and abuses from the Applicant. She has not explained why, if he was treating her and the child of the marriage with cruelty, she did not take legal actions against him, as it is apparent that the family laws in the United Kingdom broadly are similar to those laws of Kenya. Even being in United Kingdom she could have easily filed actions to obtain custody of the child but she chose not to do so and even in Kenya she did not initiate proceedings immediately. She waited till the Applicant started exerting pressure on her for their return.

Her counsel relied heavily on the issue that Kenya is not a party to Hague Convention on the Child Abduction, and relied on the Judgment of the case in **Re J (a child) (Custody rights: Jurisdiction) {2005} B WLR 14**, where the United Kingdom court refused to return the child to Saudi Arabia where the father was, and before the said case was filed, mother and child were also residents.

The facts of the said case are very relevant. The mother and child came to United Kingdom with the

consent of the father and while in United Kingdom the mother changed her mind and decided not to return the child. The father in a proceeding filed by him made accusations against the mother which, if raised before Shariah Court in Saudi Arabia, could have disastrous consequences to the matter and would thereby seriously damage the child's interest.

This was the issue i.e. interest of the child which weighed heavily in the minds of judges of House of Lords and I have only to quote some passages:

"**The court cannot be satisfied that it is in the interests of the child to return it to the court of habitual residence in order that court may resolve the disputed question, unless this court is satisfied that the welfare test will apply in that foreign court."**

I may pause here and can unhesitantly find that the courts in United Kingdom would, without any reservation take into account the welfare of the child as a paramount factor.

I shall also note that there is no averment made by the 1st Respondent that if the dispute between the parties would be decided before the courts of United Kingdom, she would be seriously prejudiced. Her refusal and/or failure to make an application to vary or set aside the orders passed also go against her as no court should sympathize with a party who had propensity to defy an order of a competent court.

In the circumstances, the reliance on the holding of Re J' s case to show that the non-convention country's judicial system should not give respect to the orders of a court which is a conventional country so far as the Hague Convention on the abduction is concerned, is not justified. On the contrary, the said case fortifies the statutory duty of the courts to protect the best interest of the child and on the other hand an expectation that the foreign system of law are broadly comparable to our own.

The observation in the Re J's case (supra) namely wherein it was reiterated that the court is bound in every case, without exception to treat the welfare of its ward as being the first and paramount consideration which I do expect with certainty that the courts in United Kingdom would follow. I say so, because the United Kingdom court has made the child its ward and I have no such similar order from the Kenyan courts.

Having considered all the cases cited before me by both parties, including Re L (minors) 1974) WLR 250, ReR (minor) 1981 1 FLR 416. I shall quote the following passage from the last referred case to show, how I have and shall deal with this case.

"**but the weight to be given to either of them must be measured in terms of the interest of the child not in terms of penalizing the 'kidnapper' or of comity, or any other obstruction "kidnapping" like other kinds of unilateral action in relation to children, is to be strongly discouraged, but the disagreement must take form of a swift, realistic and unsentimental assessment of the best interests of the child leading, in proper cases, to the prompt return of the child of his or her own country, but not the sacrifice of the child's welfare to some other principle of law."**

This principle is also provided in Section 4(3) of the Children Act, 2001.

With this principle as my guiding light I observe that the child is a British citizen and has spent half of his infancy in the United Kingdom till he was brought here by the 1st Respondent. It is no doubt that even as per provisions of the Children Act {Section 6(1)}, the child shall have a right to live with and to be cared for by his parents and Section 13(1) of the Act provides protection from any form of exploitation including abduction by any person. The 1st Respondent has removed the child from his home country to Kenya under the circumstances which could be frowned upon. A child of such a tender age had no choice but to be carried by his mother wherever she would take him. It is also not disputed that the 1st Respondent had a good job and also saving and has established her domicile in the United Kingdom. The averments by her that she brought the child with the consent of the applicant is questionable specially

when the efforts of the Applicant to take them back home have not been denied. The child was domiciled and still is so in United Kingdom which is not a country where his welfare, and cultural as well as religious rights would not be protected. She has not shown how her return with the child in United Kingdom shall be injurious either to her or to the child. Once again, I must make it clear that the United Kingdom court has not yet decided upon the custody of the child and that issue shall be more justifiably heard and determined by the United Kingdom Court. In my opinion, the United Kingdom court is better placed to determine the issue and welfare of the child. The refusal by the 1st Defendant to take back the child shall tantamount to refuse him forever the protection or care of a father. Depriving him of his right, without proper consideration shall not be in the interest of the child and his future could be jeopardized.

Only because the child was brought in by the 1st Respondent and is in Kenya since November, 2007 he has not acquired a habitual residency in Kenya. He is domiciled in United Kingdom and is a British subject, and the order of his wardship by the United Kingdom Family Court is properly made in all the aspects of justice and fairness.

It has been contended that this court should not take cognizance of a foreign judgment which pertains to family matters as provided by Section 3 (3) (e) of Foreign Judgment (Reciprocal enforcement) Act (cap.43), and designated court does not include the United Kingdom court which issued the order. Moreover, I am not asked by the applicant to enforce the order by recognizing the orders as binding. I am simply asked to give deference to the order of a competent court of law. I may also note that Section 24 of the Children Act recognizes that both parents have parental responsibility and no one has a superior right or claim against the other in exercise of such parental responsibility. The 1st Defendant, according to the Applicant is violating or hindering in exercises of his parental rights.

Having concluded that this court will be hampered to decide the issue of welfare of the child appropriately under the circumstances of the case, specially as regards the accusations of criminal cases and conviction, as well as financial incapacity, and also this court's conviction, as well as financial incapability, and also this court's conviction that the Family Division of High Court of Justice and other courts shall also consider the best interest and welfare of the child as its paramount consideration, as well as no averments by the 1st Respondent that she will face prejudice or any serious risk by presenting her case before those courts, I do tend to give my deference to the orders of the United Kingdom court. I also do thereby uphold the dignity and sanctity of a court order duly made be that of a foreign court so that any person even if a parent cannot play with the life of a minor.

I am also unable to persuade myself that returning the child accompanied by the 1st Respondent shall uproot the child or cause psychological trauma to him.

Because of the serious issues raised, I had taken liberty (with the acquiesces of both counsel) to contact relevant British Authorities which have expressed their willingness to assist the court in due compliance of its orders.

The upshot of all the above is that I make the following orders:

1. **The male minor Z. A. J. be returned to the High Court of Justice, Family Division as a ward of the said Honourable Court.**

2. **The child Z.A.J. be accompanied by the 1st Respondent A.O.G. and the Applicant shall bear the costs of their Air-travel.**

3. **The Passport of the child Z.A.J. in the custody of this court be released to the representative of the 2nd Respondent jointly with a representative of the British High Commission, Nairobi, Kenya.**

4. **An officer of the Foreign or Home Ministry at U.K. shall receive the child and 1st Respondent at London Airport and produce them before the High Court of Justice, Family Division,**

5. **England within 24 hours of their arrival.**

6. **The Applicant SAJ shall provide adequate living facility to the 1st Respondent and the child.**

7. **No order as to costs with these orders.**

I shall make a special request to the High Court of Justice, Family Division to hear and determine with utmost urgency the issue of custody of the child.

Orders accordingly.

Dated and signed at Nairobi this 18th day of March, 2009.

K.H. RAWAL

JUDGE

18.3.09