



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

**Divorce Cause 86 of 2005**

**JE..... PETITIONER**

**VERSUS**

**AEE..... RESPONDENT**

**RULING**

This petition for divorce has been filed on 1<sup>st</sup> July, 2005 and three years down, the same is gathering cobwebs from several applications.

The application dated 1<sup>st</sup> July, 2008 before me is one more addition, which is filed under certificate of urgency.

At the time of hearing of this application, only prayers numbers 3 and 4 were contended on and others were asked to be kept pending further hearing, which are:

**“(3). That this honourable court be pleased to review the orders made on 17<sup>th</sup> August, 2005 and order that the passport for the child NTE deposited in court be released to the Respondent/Applicant herein.**

**(4). That further this honourable court be pleased to allow the child, NTE to travel to Egypt and Germany on holiday in the month of August, 2008”.**

Without amending the aforesaid prayer, in the further affidavit sworn by the Applicant/Respondent on 21<sup>st</sup> July, 2008, it is averred that due to short time left for vacation, they have decided to take short visits to South Africa, Germany and Egypt as per the itinerary annexed to the said affidavit. Even though it was mentioned that her son M is looking at various Universities including South Africa, Egypt etc. the itinerary does not mention his name.

Be that as it may, the application is supported on the grounds set forth on its face and two affidavits sworn by the Respondent/Applicant on 1<sup>st</sup> July, 2008 and 21<sup>st</sup> July 2008 respectively.

Most of the averments made in the first affidavit is in respect of prayer for maintenance which is not to be determined at this juncture.

The main reason for the prayers asked at this juncture is that the child has not traveled out of the country since March, 2005 and that fact would contribute to her trauma. Once again despite the fact that she has averred that her son M wanted to look at South Africa Universities, the itinerary does not include

his name. So the court is not shown that he also is accompanying the Respondent and the child.

She avers that she has an entry permit for further two years and also her second son is attending German school in Nairobi who will not sit for exams until 2009, and thus she would not be able to leave Kenya.

She has denied the averments made by the Petitioner/Respondent that she had taken or abducted her sons from previous marriage without consent of their father. She has annexed a declaration made by her previous husband dated 16<sup>th</sup> July, 2008, which controverts the averments made by the Petitioner.

She has also annexed an undertaking from her to the Egyptian Embassy at Nairobi to the effect that she would bring the child back to Kenya as per the order of the court. She has annexed her acceptance to the renewal of the tenancy agreement for one year from 1<sup>st</sup> June, 2008.

Mrs. Thongori the learned counsel for the Respondent/ Applicant brought to my attention a judgment made by a superior court of California in the matter which was pending before the Kenyan court and one of the party took away the child to America. She further relied on this judgment to show to the court that despite the fact that Kenya may not be a signatory to the treaty on child abduction, the foreign court would respect the orders made by courts in Kenya.

I have perused the said judgment (annexed to the further affidavit). On page 4 thereof the court really considered the issue, to wit, **“which court was better posited to decide the merits of the case and thus serve the best interest of the child which could be served when the forum has optimum access to relevant evidence about the child and family”**. Thus in my view I cannot anticipate that the same or similar approach will be taken by the courts either of Egypt or Germany. The said case is not an authority on any treaty or convention. It just happened that the laws in California are at tandem with ours as far as best interest of the child is concerned.

On the other hand the Petitioner/Respondent has strenuously opposed the application mainly on the grounds that the application is aimed at conjuring to continue to deny him access to the child and remove her from the jurisdiction of this court. He further emphasized that the Respondent/Applicant has numerously disobeyed or disrespected and/or frustrated the compliance of the court orders.

Section 3(3) (e) of the Foreign Judgments (Reciprocal Enforcement) Act (Cap 43) was relied upon which exempts the reciprocal enforcement of the judgment or order in proceedings in connection with custody or guardianship of children.

It was stressed that in absence of proof of ratification of International treaty on Child Abduction (though no details are given), by either of the three countries, it will be difficult for him to enforce the order of the court made as regards the custody and access to the child.

I can pause here, and can unhesitantly state that the Petitioner/Respondent has been unable for various reason, to have access to the child as ordered by the court.

As recent as on 10<sup>th</sup> July, 2008 the parties were before me with psychiatrists from both the sides and I had directed both the experts to evolve a joint therapy programmes for the child. I am not told what progress is made in that direction and the Applicant has conveniently not talked about it and to state whether her taking the child out of Kenya would affect or hamper the work of the two experts, at least in her further affidavits.

It is also stated by the Petitioner/Respondent that he has no relatives in Germany and Egypt but the Respondent/Applicant has stated that she has her mother and siblings in Egypt and which fact I do not think could or is denied, she being an Egyptian.

Now I would like to consider the circumstances under which the passport of the child was ordered to be deposited with the Registrar of this court.

The order was granted on 17<sup>th</sup> August, 2005 when the Petitioner/Respondent complained about his inability to have an access of the child. The court granted immediate access on condition that her passport be deposited.

The issue of the access of the child is very seriously contested which has been resisted by the Respondent/Applicant on psychological grounds. I have alluded hereinbefore my orders made on 10<sup>th</sup> July, 2008 as regards the said issue.

In view of the background of this case, it is really difficult for this court to make an easy decision. The child is undergoing therapy, consultation and interviews and it is not denied that since 2005, she has not been out of the country – the country of her mother or country of her father where she was born. A part of me would like to allow her to get that exposure and other part of me is a bit hesitant due to the facts of the hearings done before me.

However, I shall take a chance in order to give a bit of free air and exposure to the child by giving following orders:

- 1. The Respondent/Applicant be allowed to take the child out of Kenya to travel to Egypt and Germany only from 26<sup>th</sup> July, 2008 to 10<sup>th</sup> August, 2008.**
- 2. The Petitioner/Applicant to furnish and deposit with court security bond in the sum of KShs.750,000 with two sureties from Kenyan citizens.**
- 3. The passport of NTE deposited with the Registrar of the High court be released to the Respondent/Applicant which shall be returned to the court on or before 11<sup>th</sup> August, 2008.**
- 4. This order be served on the Egyptian Embassy at Nairobi.**

Orders accordingly.

Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of July, 2008.

**K.H. RAWAL**

**JUDGE**

**25.7.08**