REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISC 1609B OF 2003

MARIE ELIZABETH

CHRISTIAN ADELAIDE DE BROUWEN…….. APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL …….. RESPONDENT

JUDGMENT

Before me is a suit by way of Originating Summons dated 19th December, 2003 filed under the provisions of The Children Act (No.8 of 2001).

It seeks orders inter alia

(1) that injunction do issue restraining the Defendant (who is the Hon. the Attorney General) by himself, servants or otherwise howsoever from executing the contents of the Deportation order issued by the Minister of state in the office of the President on or about the 11th September 2001 for the deportation of Samuel Pipo Limet and

(2) That a declaration do issue that the Deportation order issued by the Minister of State in the office of the President on or about the 11th September, 2001 during the subsistence of a wardship order in respect of, among others Samuel Pipo Limet granted by this Honourable court on 12th August, 1998, was illegal, is a threat to the rights of the said child to the protection of the law and was an act in violation of the best interest of the said children.

(3) Costs of the Origination Summons.

This matter is filed by the mother of the said Samuel Pipo Limet (hereinafter called '***Samuel***'), who is at present living with Samuel and looking after his care, control and welfare.

It may be appropriate to give a brief history of this case. The applicant herein, a Kenyan national was married to one Oliver Pablo Limet, a Belgium national, on 16th September, 1983. The couple had three issues out of the said marriage, Samuel being one of them. Their marriage was dissolved by the Belgium court of Tlivelters on 23rd September, 1997. The custody of the three children were granted to the father with access to the applicant/mother herein. The father at the time of the award of order of custody was getting a sum of 16,735/- Belgian Francs per month for child support and domestic servants, driver and children nanny plus subsidized housing which he paid little rent for.

The applicant mother when the children came to her in Kenya decided to keep the children and went to the High Court of Kenya by filing an Originating Summons (Misc. H.C.C.S. No.910/98) seeking custody of the three children and seeking injunction orders restraining either of the parents from removing any of the children out of jurisdiction of the court and that the children be placed under protection of the court. These orders were granted and were not interfered with by the Court of Appeal vide its ruling delivered on 6th August, 1999. The orders restraining the removal of the three children out of the jurisdiction of the court and making them wards of the court still remain. However, I am informed that the father, despite the existence of the said orders, managed to remove two other children out of the jurisdiction of this court through the deportation order in question. I need not go into details as to how it happened as it is amply put forth in ruling of Ojwang J of 23rd April, 2004. Suffice it is, to note that the orders of the court were defied, violated and two children were taken away from the school on or about 11th September, 2001 by Immigration Officers.

The said suit is still pending hearing interpartes of the application and thus the ex partes orders, as aforesaid, are still in force.

This originating summons was thereafter filed and a temporary injunction restraining the Respondent from executing the contents of the Deportation order in question was issued after the issue was heard inter partes.

With this background the originating summons was heard substantively before me.

The applicant has filed three affidavits in support of the originating summons namely supporting affidavit sworn on 19th December 2003, an affidavit sworn on 16th November 2006 and further affidavit sworn on 19th February, 2007.

The originating summons initially commenced hearing ex parte before me, but after adjourning the matter to get more information as to the financial and factual status of Samuel and the applicant, the Respondent appeared and was allowed to file grounds of opposition dated 14th March, 2007. The Respondent has until to date not filed any response by way of any affidavit. I do note from the record that during inter parte hearing of interlocutory application, the Respondent had withdrawn its chamber summons dated 16th January, 2004.

In short I can thus unhesitantly accept the facts deponed by the applicant as unchallenged.

Thus I shall firstly accept and find that there is in existence a deportation order issued on or about 11th September, 2001.

Samuel now lives at Mombasa with the mother applicant. He attends Braeburn Mombasa International School and the affidavit sworn on 16th November, 2006 does show that Samuel is doing well in his education and that the applicant has satisfactorily catered for his financial, physical, educational and emotional needs. As per Ex. MECAD B1 – The St. Andrew Trust Co. Ltd, Royal Scandia Trust Co. Ltd. has confirmed that a sum of $100,000 is kept for education of Samuel. It is also shown to my satisfaction that the applicant is financially stable to look after the needs and welfare of Samuel. I would reiterate that there is no contrary evidence before me and the Respondent has failed to show that the welfare of Samuel shall be better looked after by the father to whom the Respondent is endeavoring to take Samuel.

It is not shown to me that the father is either in communication with or contributing to the welfare of Samuel.

It is indelible that since 12th August, 1998 the three children of the applicant were made wards of the court with restraining order to take them out of the jurisdiction of the court. Simple meaning and effect of the order of making the children wards of the court was that they were placed under the protection of the court and their status; physical and/or legal; was not to be disturbed, interfered with or altered in any manner except with the prior permission of the court. This court, therefore, had absolute control on the movement of those three children.

Despite the said order, and its continued existence, the Respondent ought to be aware, of the State officials, (immigration officials in this case), forcibly removed the three children from their respective schools and managed to deport the two namely Caroline Sheila Limet and Jim Paco Limet. This act was, to say the least, in contempt of the order of this court. The executive arm of this government had unabashedly committed a fragrant violation of rule of law and still maintains its position as is it still opposing this application.

Before going any further, I must consider those grounds of opposition. They are:

1. **That the orders sought cannot be granted**

2. **That the applicant has not come to (*sic*) with clean hands**

3. **That the application is otherwise an abuse of the process of this Honourable court.**

Elaborating on the said grounds, it was submitted by Mr. Kamau, the Learned counsel for the Respondent, that orders cannot be granted under section 16 of the Government Proceedings Act. (Cap 40, Laws of Kenya). The relief sought is specifically against the government and thus relied on the case of **Matalinga and Others vs. A.G**. **(1972) E.A.K. 518** wherein it was held by Simpson J (as then he was) that a mandatory injunction cannot issue to a Government Official.

I must confess that I am unable to appreciate or comprehend the said submissions in view of specific observations made by the court on page 521 of the said case namely:

"**S.16 of the Government Proceedings Act (Cap. 40) restricts the court to making declarations only in proceedings against the Government where it might otherwise grant injunctions and prohibits the court from granting any injunction or making any order against any officer of the Government the effect of which would be to give any relief against the government which could not have been obtained in proceedings against the Government."** *(emphasis mine)*

I also state that the application seeks declaration against the Government.

It also has to be noted that the application is made under the provisions of the Children Act, (No.8 of 2001). The said Act was legislated to give effect to the principles of the convention on Rights of the child and African Charter on the Rights and welfare of the Child and thereupon to make provisions for various aspects of the care, welfare and protection of children

In part II of the said Act the provisions are made to enact safeguards for the Rights and Welfare of the child and the first section of the said Part II (sec.3) stipulates:

"**3. The Government shall take steps to the maximum of its available resource with a view to achieving progressively the full realization of the rights of the child set out in this part."**

In short the state has been imposed with an onnus to provide, preserve and protect the rights of the Child. In my view the rights enumerated in the said part is *pari materia* with the fundamental rights enshrined in our constitution for all the persons and nationals of this country. It will be an understatement if I find that the Act gives special rights to the children and jurisdiction to the High Court to preserve and protect the same. I am fortified in my observation by the provisions of Sec.4(2) and (3) of the Act which mandates all concerned authorities including the courts of law to take best interests of the child into primary consideration.

The child's right to live with and to be cared for by his parents is also granted under Sec. 6(1) of the Act.

Section 22 of the Act, once again, is speaking the similar language to that of Section 84 of the constitution and the High Court is given jurisdiction to entertain any application, where any allegation that any of the provisions of sections 4 to 19 (inclusive) has been, or is being or likely to be contravened in relation to a child. When such an application is made then without prejudice to any other action with respect to the same matter which is lawfully available the same may be heard in the High Court for redress on behalf of the child.

The applicant has made this application as per the said provisions of Section 22 (1).

Then Section 22 (2) gives powers to the High Court to make such orders, issue such writs and give such directions as it may consider appropriate.

The Act which is a special legislation is also a subsequent or later legislation to the Government Proceedings Act and gives specific and special powers similar to those given under the Constitution. The court in preservation and protection of the rights of the children is empowered in appropriate case, as the constitutional court is so empowered, to grant injunctive orders against the government. Thus I shall reject that ground of opposition.

Second ground was that the applicant has not come before the court with clean hands as she has not disclosed the existence of an order from the court at Belgium.

This submission begs a question. The Respondent knowing very well that there is an order of the court since 1998 and ratified by the Court of Appeal in 1999 making Samuel a ward of the court, has proceeded to issue a deportation order. Should I say anything more?

I agree completely with the submissions made by the learned counsel for the Applicant that the order of the Belgium court has been taken over by our High Court and the Highest Court of Kenya. I also entirely agree with sentiments expressed by Hon. Ojwang J in his ruling delivered after the inter partes hearing of the interlocutory application for temporary injunction. It does not lie in the mouth of the Respondent to suggest that the welfare of the child is to live with his father. True, Court of Appeal did mention the financial circumstances of the father, but despite that it went ahead and denied to interfere with the order of wardship of the court in respect of the three children.

Does it also lie with the Government, to cry about lack of cleanness on the part of the Applicant, when it, despite being the provider, preserver and protector, of the child's rights and also the protector of rule of law, defies the orders of two courts of this country and tries from backdoor to defy the same and commit contempt of those orders? It definitely does not. This court in all humility will never allow any breach of laws and violation of Rule of law by any person or authority of this Republic.

Besides, I have already considered the present position of the applicant and Samuel. I have not been shown any complaint by any one concerned that the child's care and welfare is not taken care of. The two courts, while giving orders to restrain the child to be removed out of jurisdiction and making them the wards of the High Court, must have taken into consideration those facts. I have in any event, made additional efforts to look into the same and has given primary consideration to the welfare of the child. I

have no reason to disturb the status quo even considering the best interest and welfare of the child. The father to whom he is sought to be returned is, as per the facts on record, a stranger to him. He is well taken care of by the mother's love, warmth and finance. To uproot him from this sound footing will be against the interest of the child.

I thus also reject grounds (2) and (3) of the opposition.

I also support the findings and observations made by Ojwang J in his ruling of 23rd April, 2004 and add the same to my own observations and findings.

In respect of Originating summons dated 19th December, 2003, I make the following orders:

1. The Respondent be and is hereby restrained by himself, servants or otherwise howsoever from executing the contents of the Deportation order issued by the Minister of State in the office of the President on or about 11th September, 2001 for the deportation of Samuel Pipo Limet.

2. A declaration be and is hereby issued that the Deportation order issued by the Minister of State in the office of the President on or about 11th September, 2001 during the subsistence of a wardship order in respect of Samuel Pipo Limet among others granted by this court on 12th August, 1998 is illegal and null and void.

3.The Respondent to pay the costs of these proceedings.

K.H. RAWAL

JUDGE

14.5.07