



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Civil Appeal 62 of 2006**

**MATHEW CHEPKWONY.....1<sup>ST</sup> PLAINTIFF**

**EZEKIEL CHEPKWONY.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**PAUL KEMEI KIPRONO.....DEFENDANT**

**JUDGMENT**

This is an appeal against the ruling and order made by the Honourable B.N. Mosiria in Eldoret Chief Magistrate's Court No. 45 of 2006 – in the matter of COLLINS KIPCHUMBA KEMEI THRO' PAUL KEMEI KIPRONO =VERSUS= MATHEW CHEPKWONY AND EZEKIEL CHEPKWONY delivered on 9<sup>th</sup> May 2006.

In the Complaint dated 20<sup>th</sup> March, 2005, the Respondent as the father of the Minor, sought the following orders against the Appellants:-

- (a) Custody of Collins Kipchumba Kemei from the 1<sup>st</sup> Defendant.
- (b) An Order requiring the 2<sup>nd</sup> Defendant to hand over the passport of Collins and other documents to the Plaintiff.

The Plaintiff is the biological father of the minor who was born on 13<sup>th</sup> February, 2002 at Forest General Hospital, Hattiesburg Mississippi, United States of America. It was alleged in the Complaint that the minor by virtue of birth became an American citizen and hence is entitled to all the rights and privileges of an American citizen provided by the Laws of United States of America. That the Minor was brought by the mother in the pretext that the Minor was visiting his grandparents and would be taken back to U.S.A. The Minor is currently living with the 1<sup>st</sup> Defendant his maternal grand father in Uasin Gishu District in Kenya within the Court's Jurisdiction.

The Minor's mother, Lydia Chepchirchir Chepkwony was not sued or joined as a Defendant in the suit. It is said that she resides and works for gain in the United States.

The Defendants filed a Defence and raised various grounds of Defences. At the same time and before setting down the suit for trial, the Plaintiff filed an application under Certificate of urgency that the Court

grants the Plaintiff/Applicant an Interim Order of Custody of the Minor then 3 years and 3 months old pending the hearing and determination of this suit.

From the Application and the proceedings, it became clear that the Applicant resides and works for gain in Columbia, United States of America and intends to take the child Minor to the United States of America once he obtained Interim Custody before the trial.

The Defendants opposed the application. After hearing the application, the Court granted Interim Orders of Custody pending the hearing of the suit.

The said decision has given rise to this appeal and the Appellant presented 5 issues for determination:-

- 1). Whether the Court had jurisdiction to order custody of a Minor in favour of a party who is outside the Jurisdiction at the Interlocutory Stage and while the main suit is pending.
- 2). If there is such a jurisdiction how it should be exercised and what are the parameters.
- 3). Whether this is a proper case for the grant of custody that would result in the child being taken outside jurisdiction.
- 4). Whether the Court had jurisdiction to grant Interim Custody for a period of over 1 year (section 88 of the Children's Act).
- 5). Whether the Court was entitled to give adverse comments on the Minor's mother when she was not a party to the proceedings.

The Counsel for the Parties submitted on the application and cited authorities which are all on record.

From the facts of the case, the Minor was born in the United States of America. Somehow the Minor was brought to Kenya and left in the custody of his grandparents. His mother went back to the United States. The Plaintiff also resides in the United States of America. It is alleged that the Plaintiff is married to one Elizeba Chepatip in the United States of America.

From the Plaintiff's supporting affidavit and the proceedings, this Court understands and finds that he intends to take the Minor to the United States of America pending the trial of this suit. In Paragraphs 10, 17 and 19, he states as follows:-

“ .....

(10) That it is also in the interest of my son Collins to live according to my standard of living but not to the standard of his grandparents.

.....

(17) That it is only just and fair that the child be put in my custody so that he can benefit from my insurance since I am now a permanent resident of America.

(18) That I have already organized for the child's traveling once an order is made

..... ”

With regard to the first question or issue, I am of the view that the Minor is really the “Subject – matter” of the suit in the case before the Children's Court. Before setting the suit for trial the Plaintiff filed the application for Interim Custody. The father claims that the Child is an American Citizen. He himself is a permanent resident over there. He does not state when he shall return the Minor to the Jurisdiction of the Kenyan Courts. He has not indicated that he would avail the Child, if the Court so

directed. The Children's court did not set any conditions or order the deposit of any securities or provision for sureties to ensure the return of the child in the event the Plaintiff was unsuccessful in the suit.

In my view, if the Minor is removed from the Court's jurisdiction, in such circumstances, there is no guarantee that the Child would be available to the Court upon final orders in the event the Defendants were successful and the Minor was to be returned to them. The Court's Orders for the return of the Child will not be enforceable in the United States of America. Such a situation would lead to a total miscarriage of justice.

In the English case of HADKINSON =VRS= HADKINSON 1952 All E.R. Vol.2 P. 567 at 568, Romer L.J. observed:-

“ .....

**It appears to me that this is the very kind of case in which the ordinary rule should be applied in all its strictness. Disregard of an order of the Court is a matter of sufficient gravity whatever the order may be. Where, however, the order relates to a Child the Court is (or should be ) adamant on its observance ..... such an order is made in the interest of the welfare of the Child and the Court will not tolerate any interference with or disregard of its decision on these matters. Least of all will the Court permit disobedience of an order that a Child shall not be removed outside its jurisdiction. The reason for this is obvious. The Court cannot exercise its quasi-parental powers in relation to a child unless effect can be given to its orders and it cannot enforce its orders if the child is taken abroad. Once a child is removed from the jurisdiction no satisfactory means have ever been devised of ensuring or enforcing its return. It is because of this that applications for leave to take an infant even temporarily out of the Country are jealously scrutinized and are only granted subject to every guarantee that is reasonable possible being exacted for the return of the Child at the end of the authorized period. There is always the danger that a parent will be able, by wrongfully taking a child abroad or by keeping him there after the sanctioned period has expired, to present the Court with a fait accompli, and argue that the child having become firmly established outside the jurisdiction, it would be against his interests to bring him back within it”**

I am persuaded by the said sound principles and reasonings. I am of the view that the Children's Court has jurisdiction to order Interim Custody of a Minor in favour of a Party who is within the jurisdiction of this Court and to allow the Minor to be taken outside of the jurisdiction /pending the hearing of the suit in strictly exceptional circumstances and on strict terms and conditions that will ensure that the minor will be returned to the jurisdiction of the Court within a specified period. For instance if a Minor needs specialized treatment abroad and which is not available in the Country, it would be in the best interest of the child to receive such medical treatment . The issue of legal custody cannot override the life and limb of a minor. The Court must set and exact such terms that will effectively and truly secure and guarantee that the minor will be returned to its jurisdiction. The first assurance in this case is that the Applicant is ordinarily resident in Kenya and has no intention of leaving the jurisdiction of the Kenyan Courts without returning.

In the present case, the Plaintiff is not ordinarily a resident of this Country and he has acquired permanent residence in the United States of America. He claims the Minor is an American citizen. From the foregoing and his declared intention to take out the child, I find that there is no guarantee that the Applicant will return the child. To make matters worse, the Children's Court did not set any condition for the return of the Minor.

Upon consideration, I do hereby; hold that the Children's Court has no jurisdiction to grant an Interim Order of Custody of a minor to a party who is outside the jurisdiction of the Kenyan Courts pending the hearing of a suit relating to the guardianship and/or Custody of a Minor.

The Court will have no means to enforce an order for the return of the minor to its jurisdiction.

In the present case, I also find that the Order of Interim Custody was illegal as it violated the express and mandatory provisions of section 38 (2), Children's Act that an Interim Order shall not be made in respect of a period exceeding twelve months.

Since I have answered the first issue in the affirmative and found the order to have been in breach of statutory provisions; I do not think it is necessary to delve into the other issues presented for determination.

I hereby allow the Appeal in terms of Prayers (a) and (b) of the Memorandum of Appeal. The Minor shall remain in Kenya with the Defendant as a ward of the Court until the determination of the suit in the Children's Court.

**DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF NOVEMBER 2007.**

**M.K. IBRAHIM,**

**JUDGE.**