



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

Civil Suit 14 of 2007

**IN THE MATTER OF AN APPLICATION UNDER SECTION 22 OF THE
CHILDREN ACT, CAP.586 FOR THE SAFEGUARDING OF THE RIGHTS AND
WELFARE OF CHILDREN**

AND

IN THE MATTER OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD (UNCRC)

AND

IN THE MATTER OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (ACRWC)

THE CHAMBERS OF JUSTICE.....1ST APPLICANT

GOSPEL BIBLE BAPTIST MISSION (GBBM).....2ND APPLICANT

VERSUS

ALFRED ROBERT LACKEY1ST RESPONDENT

KIDS ALIVE INTERNATIONAL.....2ND RESPONDENT

KIDS ALIVE KENYA REGISTERED TRUSTEES.....3RD RESPONDENT

RULING

On 08.11.07 counsel for the parties herein started addressing this court on a preliminary objection of which notice had been filed on 19.10.07 by the respondents and served on the applicants.

In the course of submissions by applicants’ counsel in response to respondents’ counsel’s submissions on the preliminary objection, applicants’ counsel sought to refer to further affidavit of the 2nd applicant. Respondents’ counsel objected to any reference being made to the subject further affidavit on the ground that it was filed out of time. Applicants’ counsel countered that the further affidavit had been left at the respondents’ counsels’ offices within time and that he (applicants’ counsel) could file an affidavit of service to that effect. As service of the further affidavit had become an issue, this court directed that applicants’ counsel should file an affidavit of service. The affidavit of service was filed by Harrison Ogolla, process server on 13.11.07 – the same day it had been sworn by him.

Harrison Ogolla’s affidavit of service is to the effect that on 25.10.07 at 10.00 a.m. he went to the High Court Central Registry in Nairobi, filed the requisite further affidavits and had them duly stamped. From there he immediately proceeded to the firm of Lutta and Co. Advocates located within Jameson Court along Ngong Road, Block A, 3rd Floor with intention of serving the affidavits. According to the said Harrison Ogolla, he got to respondents’ counsels’ offices around mid-day on 25.10.07. He met a lady called Florence at the reception and after telling Florence what his mission was. Florence declined to acknowledge service but told him he could leave the affidavits there for acknowledgement either by Mr Lutta, respondents’ counsel himself or by his court clerk. Ogolla left the affidavits with Florence after informing her that 25.10.07 was the last day of service. Ogolla returned to respondents’ counsel’s offices at around 4.30 p.m. the same day and Florence told him that that the affidavits had not been acknowledged. He waited until 5.00 p.m. when neither of the two persons who were supposed to acknowledge service arrived. As the offices had to be locked, Ogolla left while Florence advised him to leave the documents and collect them next day. Ogolla returned to respondents’ counsel’s offices next day, i.e. 26.11.07, at around 4.00 p.m. Florence handled over to him his copies of the affidavits duly acknowledged but under protest. Ogolla annexed a photocopy of the joint affidavit of John Bovard and Wendy Bovard sworn on 25.10.07. The affidavit bears the rubber stamp of Lutta and Co. Advocates showing

that the affidavit was received there on 26.10.07 'Under Protest as they are served out of time'.

Respondents' advocates filed an affidavit of receipt service sworn by their clerk, Elijah Moki John on 14.11.07. His affidavit is to the effect that the firms secretary/receptionist, Florence told him that the affidavit in question had been left in the offices of Lutta and Company Advocates on 26.10.07 at around 3.00 p.m. and not on 25.10.07 as deponed by Harrison Ogolla.

For the record, this court had on Tuesday 23.10.07 granted applicants 2 days to file and serve their further affidavit or affidavits. That meant service had to be effected by Thursday 25.10.07.

I have given due consideration to the affidavits of Harrison Ogolla and Elijah Moki John. Harrison Ogolla's affidavit of service constitutes direct evidence by him as the person who actually served the affidavit in question. Elijah Moki John's affidavit of receipt service reports what he says he was told by Florence of the same firm. Why Florence was not made to swear the affidavit herself and give direct evidence on the matter in question is not clear to this court.

As between the affidavit of service by Harrison Ogolla and the affidavit of receipt service by Elijah Moki John, the former constitutes first-hand and direct evidence while the latter contains hearsay evidence. I accept the affidavit evidence of Harrison Ogolla to the effect that the affidavit or affidavits in question was or were served on 25.10.07 and I so find.

At the subsequent court session of 14.11.07, respondents' counsel made an issue of the fact that Harrison Ogolla's affidavit of service was filed on 13.11.07. Respondents' counsel drew attention to the fact that on Thursday 08.11.07, the court had given applicants 3 days to file and serve their affidavit of service. Respondents' counsel submitted that the 3 days expired on Sunday 11.11.07 but since Order XLIX rule 3 authorises Sundays to be discounted, the last day for applicants to have filed their affidavit of service was Monday 12.11.07 and that their affidavit of service file on 13.11.07 was out of time. Respondents' counsel, therefore, urged the court to disregard the applicants' affidavit of service filed on 13.11.07. On the other hand, applicants' counsel urged that if the court found the filing of applicants' affidavit of service on 13.11.07 to have been out of time, the court should enlarge time for the filing of the said affidavit. I upheld respondents' counsels' submission that applicants' affidavit of service should have been filed by 12.11.07 and that the filing of that affidavit on 13.11.07 was out of time but I enlarged the time for filing of the said affidavit and deemed it to have been filed in time.

The upshot is that I find the further affidavit of the 2nd respondent through John Bovard and Wendy Bovard sworn on 25.10.07 to have been filed within time, that the same is properly on record and that applicants may make reference to and use it. Orders accordingly.

Delivered at Nairobi this 16th day of November, 2007.

B.P. KUBO

JUDGE