



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Misc Appli 346 of 2005

IRENE AKINYIAPPLICANT

VERSUS

CHILDREN'S DEPARTMENT.....1ST RESPONDENT

JOSEPHINE ATIENO GOWA2ND RESPONDENT

R U L I N G

Irene Akinyi, the applicant herein took out the motion dated 26th May 2005 pursuant to the provisions of Sections 3,4,6,13,22,76 and 114 of the Children's Act of 2001.

In that Motion she sought for inter alia an order of declaration that the minor child herein, Sharon Babbie has a right to live with and be cared for by her biological mother and/or parents, and the continued detention and/or holding of the child by the Respondent is a violation of the child's right and the court do give direction that custody be reverted back to the applicant. The applicant filed a supporting and a further affidavit to sustain the motion.

When served, the Children's Department, the 1st Respondent herein, opposed the motion by filing grounds of opposition dated 5th August 2005 signed by Mrs. J.A. Umara, a Senior Litigation Counsel on behalf of the Attorney General.

The gist of the objection raised by the Attorney General is that the Motion is incompetently before this court because the child was placed in the care and custody of Josephine Atieno Gowa, the 2nd Respondent herein, by an order issued by the Children's Court which order has not been reviewed, vacated or set aside.

On her part the 2nd Respondent resisted the Motion by filing a preliminary objection dated 11th July 2005, grounds of opposition and a replying affidavit. It is the 2nd Respondent's submission that she got an order placing the child, Sharon Babbie under the her care and custody issued by the children's court via P & C Case No. 147 of 2004. It is her argument that the applicant has not attempted to have the order vacated or set aside hence the motion is res-subjudice because a similar application is pending before the children's court.

The applicant and the 2nd Respondent gave different accounts of the facts leading to the motion. According to the 2nd Respondent, Sharon Babbie was abandoned by the applicant when she deserted duty as the Respondent's house help in the year 2004.

She claimed that she was told by the applicant that Sharon Babbie was her late sister's daughter, hence an

orphan. The 2nd Respondent said she reported the matter to the police then to the children's department before obtaining a court order on the 8th day of October 2004.

On her part, the applicant claims that she came with her child, Sharon Babbie to stay with her while working as a house help to the 2nd Respondent who ran a children's home financed by donors from Europe. She claimed that she surrendered her child to the children's home ran by the 2nd Respondent with the intention of her benefiting from financial assistance given to those homes. She claimed that she was sacked and kicked out of the matrimonial home of the 2nd Respondent on suspicion of infidelity. She averred that the 2nd Respondent started to hide the minor from her with the intention of revenge. The applicant accused the 2nd Respondent of colluding with the children's department in obtaining an ex parte order for the custody and care of Sharon Babbie without giving her a right of hearing. She exhibited in her affidavit in support of the motion an application with a supporting affidavit she filed before the children's court vide P & C case No. 147 of 2004 seeking to challenge the ex parte orders.

The applicant further annexed to her affidavit sworn on 28th May 2005 a copy of the proceedings of 25th May 2005 in which the trial court adjourned the motion generally because the proceedings giving rise to the order of 8th October 2004 were missing from the children's court. The applicant's case appears to have hit a snag at this stage and being frustrated she filed a near similar application before this court.

The issue which must be determined by this court at this juncture is whether the motion is competently before this court?

The parties to this dispute agree on the following aspects:

First, that the 2nd Respondent obtained an ex parte order for the custody and care of Sharon Babbie before the children's court vide P & C Case No. 147 of 2004.

Secondly, that the motion dated 15th March 2005 was adjourned generally on 25th May 2005 and is still pending up to date. The motion dated 15.3.05 seeks for inter alia the setting aside of the order of 8th October 2004 and for other orders similar to those prayed in this motion. It is not claimed that the children's court did not have jurisdiction to make the orders if any, it made on 8th October 2004. Any party who is aggrieved by such orders may either apply for the orders to be reviewed, set aside or appeal to this court. There is no short cut about it. It has been submitted by Mr. Jengo for the applicant that the matter will delay if it is sent back to the children's court thus going against the spirit of the law that child matters be dealt with expeditiously. I entirely agree that child disputes must be heard on priority basis. But does it mean that courts should ignore rules of procedure at the alter of expediency? My answer is No. Procedures are there to guide everybody. They cannot be ignored. A person who is aggrieved by a decision of a children's court has a right to appeal to this court pursuant to Section 50 of the Children's Act 2001. The motion before this court does not amount to an appeal as we all know.

In the end, I am convinced that this matter is incompetently before this court because it is res-subjudice Mombasa P & C Case No. 147 of 2004. It is ordered struck out with costs to the 2nd Respondent. This court is of the view that the parties should vigorously pursue the matter before the children's court to avoid further procrastination of the matter.

Dated and delivered at Mombasa this 24th day of February 2006.

J.K. SERGON

J U D G E

In the presence of Mr. Jengo for the applicant

Mr. Yalwala for the 2nd Respondent

Mrs. Umara for the 1st Respondent