



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 62 of 2006

MATHEW CHEPKWONY 1ST APPELLANT

EZEKIEL CHEPKWONY 2ND APPELLANT

VERSUS

PAUL KEMEI KIPRONO RESPONDENT

RULING

C. K. K. [*particulars withheld pursuant to section 76 of the Children Act no. 8 of 2001*] , who I shall henceforth refer to as (“the minor”) was born on [*particulars withheld pursuant to section 76 of the Children Act no. 8 of 2001*] in the United States of America (‘USA’). His mother [*particulars withheld pursuant to section 76 of the Children Act no. 8 of 2001*]is a daughter of Mathew Chepkwony, who appears as the 1st appellant in this mater. She is currently based in the USA. According to Paul Kimeto Kiprono, a Kenyan citizen who is resident in Columbia in the USA, Lydia removed the minor from the USA on the pretext that she was bringing him to visit his grandparents; that the minor has never been returned back and therefore that he has been denied access to him. The minor who is now aged 4 years and 4 months has been in the custody of the 1st appellant since he was 6 months old.

Kiprono who feels aggrieved by the said denial initially instituted a civil suit against the 1st appellant and Ezekiel Chepkwony who I shall refer to as the 2nd appellant in the Children’s court at Eldoret on 15/8/2006, and he sought an order for the custody of a minor from the 1st appellant. He also sought an order to compel the 2nd appellant to hand over to him the passport and all other documents of the minor. He simultaneously moved the court under certificate of urgency and sought an interim order for the custody of the minor pending the hearing and final determination of the suit.

Though the application was opposed, the learned trial Magistrate found that though Lydia and the respondent were not married, he was however the biological father of minor. She also found that he was best placed to have the custody of the minor as he was the father and she proceeded to grant him an order in line with the aforementioned prayer.

These two who were aggrieved by the said ruling, preferred an appeal against it. They filed their Memorandum of Appeal on 19/5/2006.

They have now moved this court and seek orders to stay the execution of the aforementioned order pending the hearing and determination of their appeal. They rely on the several grounds that:

“1. That the verifying affidavit and the supporting affidavit sworn on 20th March 2005 offend the oaths and statutory declaration act in a most fundamental way.

2. That the application dated 20th March 2005 and the entire suit thereof offends order 1 rule 3 of the civil procedure rules as to joining of Defendants.

3. That in the obtaining circumstances and for the reasons stated herein above the suit and application cannot stand and should be struck out with costs to the defendants.”

It was the submission of their counsel Mr. Gicheru, which fact was not denied, that the respondent who is already married and who currently lives with the said wife intends to take the minor to his place of residence, outside the jurisdiction of this court. It was however his view, that since the suit in lower court is yet to be finalized there would be no guarantee that the minor would be returned within this jurisdiction if required, more so because the respondent has admitted that he finds the travel too expensive, and that in the circumstances he might not be able to bring the minor back if required to do so. He urged the court to find that the respondent stands to suffer no prejudice if he waits for the suit to be heard and determined, and therefore urged the court to maintain the status quo.

The application is however opposed on various grounds, but mainly that there is no provision in the Children’s Act (‘the Act’), which bars a minor from being taken out of this country. Mrs. Chumba who appeared for the respondent, urged the court to allow the minor, who is of school going age, be released to his father who intends to take him to USA, where he can get benefits.

She also urged the court to dismiss the application for want of compliance with Order L rule 15 (2), of the Civil Procedure Rules (CPR) which stipulates that “*every motion and summons shall bear at the foot the words-*

“*If any party served does not appear at the time and place above-mentioned such order will be made and proceedings taken as the court may think just and expedient.*”

She urged the court to find that the omission of the aforementioned notice was fatal to the application and to dismiss it.

It is in my mind clear what that the respondent makes reference to is a mere want of form. Courts should be reluctant to dismiss applications on matters of procedure especially where no prejudice is occasioned to the other party. Courts should instead seek to deal with the applications on the merits. I find that the respondent replied to the application in a very able manner and I am not convinced that such an omission has occasioned him any prejudice, and on that ground alone the objection is bound to fail.

It was also her submission that the respondents have not satisfied conditions in Order XLI rule 4 (2) (a) & (b), as they had not demonstrated that they stand to suffer loss if stay is not granted. She urged the court to find that the interest of the minor is paramount, and that no loss can occur to a grandfather, but that the minor stands to gain that if he is taken by his parent, and that he should not be denied a right to live with his father. She pointed out that it is the respondent who stands to suffer loss, if the stay is granted, as he has traveled all the way from the USA and has had to incur expenses and therefore he should be allowed to take the minor with him and that the two would be located easily as they have social security numbers.

The aforementioned rule of Order XLI stipulates that:

“2. No order for stay of execution shall be made under subrule (1) unless-

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and

that the application has been made without unreasonable delay; and

b) such security as the court orders for the

due performance of such decree or order as may ultimately be binding on him has been given by the applicant”

Mr. Gicheru's submission was that the withdrawal of the custody from the 1st appellant, who has had the custody of the minor since he was six months old, would occasion the former emotional and hence substantial loss. He was also of the view that the minor who he has lived with the applicants for a period of over 3 years would be traumatized by the relocation, and further that his welfare cannot be guaranteed where there is a 3rd party involved, and that in any event, a mere social security number cannot avail the minor, should the need arise, and that it would be difficult for this court to enforce an order.

The appellants cited *Hadkinson v Hadkinson* [1952] 2 AER 567 where save for the fact that the learned Judges reiterated the fact that in cases of this nature the welfare of the child should be of utmost importance, the case otherwise dealt with the issues of contempt of court following the removal of the minor from the jurisdiction of the court, and it can be easily distinguished from the case before me.

They also relied on the case of *Re Hofmann v. Hofmann* [1972] EA 100 where the court held that “*the father's superior financial position was irrelevant since it merely meant that he could support the child while he was with the mother*”. Though I support that holding entirely, I am however of the view that the case which involved the ‘kidnapping’ of a minor by one of his parents in disobedience of a court order, is clearly distinguishable from the case before me.

Section 88 of the Act stipulates that:

“(1) The court shall have power to make interim custody orders and may from time to time review, suspend or vary such orders.

(2) An interim custody order shall not be made in respect of a period exceeding twelve months.”

Though it is clear for the above provision of the law that sub section (2) thereof clearly limits the time for interim custody to twelve months, it would appear that the subordinate court granted an order for custody of a minor without setting a time limit within which the suit should be heard and finalized, or within which the court would either review, suspend or even vary its said order. In my view that was not proper, as the respondent was granted orders which would appear to be final orders especially in view of the fact that it was clear that the respondent lived outside the jurisdiction of the court. Though the Act does not discriminate against a non resident, it is however left to the discretion of the Magistrate to ensure that she complied with section 88 of the Act, so as to ensure due compliance with her orders, which was not the case. Such discretion must be exercised judiciously. It is important to note that the respondent did not offer any guarantee, supported by security on the availability of the minor whenever he would be required.

Be that as it may, section 6 (1) of the Act clearly stipulates that “*a child shall have a right to live with and to be cared for by his parents.*” It is in my humble opinion, imperative that the court takes into account several issues in determining whether this application is meritorious; the most important being that the interest of the minor is paramount and that that of his parents or for that matter third parties is secondary. That being the case then such issues would be; the desirability of disturbing the minor's life by allowing the respondent to take him away from his grandfather, with whom he has lived for the last forty six months. It is important to note that the respondent has not been involved with the minor since the latter was six months old, and that at fifty two months, the only adult whom the minor knows well and with whom, he relates is the 1st appellant. It can therefore be safely assumed that that is the person whom he currently regards as his ‘parent’, and to remove him from people whom he has lived with for the said period of his life, which period, is the most important of his formative years, would not in my view be beneficial to the minor. Needless to say, I am convinced that a party who has shared life with his grandson

would suffer emotional stress were he to be separated for such a child especially, where he disputes the fact that the respondent is his son in law.

I am convinced that the appellants have established that they deserve the order which they seek. Admittedly, this court cannot suspend or review orders of a subordinate court but it can issue an order of stay of execution pending appeal.

I do in the circumstances grant them an order in line with their prayer (c). It is my humble opinion that a court would find it very difficult to order the appellants who have tended and cared for the minor to provide security for the due performance of such decree or order as may ultimately be binding on them, and I will not in the circumstances make no such orders.

I have noted that the Record of Appeal has already been filed and it is possible for the appeal to be heard as soon as possible, and I do therefore also order that the appeal be processed immediately for hearing and that it be heard within the next 45 days.

Costs of this application shall however be in the cause.

Dated and delivered at Eldoret this 28th day of June 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mrs. Chumba for the respondent

Mr. Were for the appellants