



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
H.C. MISC. APPLICATION 78 OF 2001
IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT
CHAPTER 144 OF THE LAWS OF KENYA
AND

IN THE MATTER OF F – AN INFANT

P K..... APPLICANT

AND

C KRESPONDENT

DRAFT RULING

The applicant who is a maternal aunt to the infant F has filed the Chamber Summons under Sections 17 and 18 of the Guardianship of infants Act (Cap 144). (Hereinafter referred to as “the Act”).

The prayers sought in the said application are that the pending hearing & determination of the originating summons the infant be made a ward of court and that the applicant be allowed to take charge & control of him, that the Respondent be directed to produce the infant to this court and of course the costs also as asked.

The undisputed facts of the matter are in short as under. The applicant is a sister to one Beatrice Ongewe who died on 18th November, 2001. The infant was born to her on 4th October, 2001. The Respondent was a boy friend of the deceased and that they were not married. The infant has been taken to New Guinea by the Respondent and that he is ready and willing to bring him back if there is no threat of him being taken out of the jurisdiction of this court. It is also not in dispute that The Respondent is a Citizen of Republic of New Guinea.

According to the applicant who is married having two children of 6 years & 4 years of age and that she is a school teacher at [Particulars Withheld] Primary School and between her and her husband they have a monthly income of Kshs.150,000/= which can comfortably take care of the whole family including the infant. She has averred that the deceased before her admission to the hospital gave her the control and charge of the infant and requested her to look after him. She did as requested till 17th November, 2001 when the Respondent created a scene with abuse and threat. Under the duress and threat the applicant and her Respondent have the infant. However, she asked her house girl to accompany the infant so that the infant can be properly taken care of. The said house girl telephoned her of the sickness of the child on 21st November, 2001 and that she telephoned on 29th November, 2001 that the infant keeps on crying whole day and night. She has specifically averred that her husband has consented her to look after and take charge of the infant. She denies the averments made by the Respondent that she and that on 17th November, 2001. She dumped the infant with him. The housemaid Philomena has also supported the

averments of the applicant. I must also hasten to state that even Respondent has not denied that she was sent with the infant when he received him. Philomena also avers that as at 30th November, 2001 when the Respondent was served with the papers of this matter. The infant was with her at the Respondent's place but that she was told by him to tell others that the infant was taken to New Guinea on 29th November, 2001. She also narrated how on 2nd December, 2001 the Respondent took away the infant without her and told her that the infant was now in his country. Respondent on the other hand does not state when and how he has taken the infant to New Guinea and placed him in charge of his sister. He has also deliberately avoided to state his occupation and income derived from such occupation. He boasts of a good income but no detail of its source is brought forth. His averments that the grandmother had threatened to take infant to Germany have been traversed.

The above in any event is the facts on record leading to this application.

At present I have to decide in interim period whether the infant should be made a ward of court and in whose charge & control the infant should be placed pending hearing & determination of the originating summons to decide on the Guardianship of the infant.

The Respondent claims to be a biological father of the infant. It may be so, however, the Act specifically includes him from the definition of father. (See Section 2 of the Act). I am persuaded to uphold that he can be covered under the definition of a parent. I am not told how he is liable at law to maintain the infant or entitled to its custody. I am not aware of any provisions of law (Children Act having not been effective as of to-date) which can clearly place him in the status of a parent as per our laws.

Be that as it may, under the Act what I am primarily directed to focus is the welfare of the infant. The circumstances of the matter, and I shall not comment finally thereon for obvious reasons, I am satisfied that the infant should be made a ward of court pending the final determination as to who shall be best suited to be his Guardian.

Looking to the facts deponed by way of affidavits before me, I am also inclined to grant the interim charge of the Infant to the Applicant, simply because I am prima facie satisfied that she shall afford the infant environment conducive to his welfare and well being. However, I shall encourage the parties to agree on some access to the Respondent. I shall also like the position of the infant being constantly monitored by a Children Officer.

In the premises I order that:-

- (1) The infant Fode be made a ward of Court.
- (2) The infant be placed in interim charge & control of the applicant P K pending hearing and determination of the Originating Summons which shall be filed, if not already filed, within seven days from the date hereof.
- (3) The Originating Summons be heard on priority basis.
- (4) The Children Officer from the Children Department shall visit the infant every week and report to the Court if found necessary.
- (5) No order as to costs.

Dated and delivered at Nairobi this 7th February, 2002.

K. H. RAWAL

J U D G E