



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 25 OF 2000 (O.S)

JANE NJERI KLORIESAPPLICANT

VERSUS

GHISLOTTI LUIGIRESPONDENT

R U L I N G:

Although this matter was argued at length after the parties were given an opportunity to reach some accommodation which they failed to, the main issue to determine is whether the Applicant (father) should have an opportunity to contest an order granted ex-parte by this court on 23.12.00. The order which has neither been extracted nor served, granted the care, control and custody of the minor involved in this matter to the mother.

Dr. Khaminwa who appeared for the mother with Mr. Gathuku submitted, and I must therefore decide *in limine*, that I cannot begin to consider the application because I have no jurisdiction to set aside or vary an ex-parte order granted by another Judge. I think with respect that the proposition is not made with seriousness. That is because Order 9B r 8 Civil Procedure Rules which is invoked makes no mention of “the Judge” but to “the Court” which by definition in S.2 Civil Procedure Act is “the High Court”. There is only one High Court in this country. It is only in matters of Review under O 44 Civil Procedure Rules where the Rules refer to “the Judge who made the order”. The ex-parte order in issue was made by this court and this same court has the power under O 9B r 8 Civil Procedure Rules, to set aside or vary it for sufficient cause. At any rate the High Court is currently on vacation and there is only one Judge on duty. In the nature of it the matter is urgent as it involves a child. I am seized of it, and I am bound to make a decision thereon. For those reasons I overrule the objection made.

The point raised by Counsel for the father Mr. Ole Kina is simply this: This court, although it could have proceeded under the Proviso to Rule 3 of the Guardianship of infants Rules, nevertheless exercised its discretion and found it necessary to make an order that the father be served with the application and that the application be heard inter-partes on 23.12.00. When the matter came up however, there was no evidence that the father had been served although oral representations were made through the mother, that service had been effected. But the mother did not disclose to the court, as Dr. Khaminwa confirmed before me, that an Affidavit of Service had already been drawn and handed over to her with instructions to deliver it to the court! It is apparent now that the non-disclosure had something to do with the fact that Service was effected after the time allowed under O49 r 8 Civil Procedure Rules. The Affidavit of service now exhibited does not state the time and Dr. Khaminwa does not recall it, but in his vague recollection it was “late evening”. The Applicant swears it was 7 p.m. in the evening. The Affidavit of Service admits that the Applicant is not literate in the English language but does not identify who interpreted the documents served. The Applicant swears he had to seek the Italian Counsel to decode the documents for him but only succeeded in doing so at 9 a.m. the following morning. By the time he instructed an

Advocate to appear for him, it was not possible to reach Mombasa Law Courts in time. He arrived in Court on the first working day after service of the application, that is 27.12.00 when he filed the application under consideration. That appearance was in accordance with the Rules, hence his desire to be heard.

The right to be heard is not only constitutional but also a natural one. A party can only be deprived of it on the strongest of grounds. This court could well have made different orders if the Affidavit of Service was disclosed. The matter of Custody appears to have been decided without hearing out the father whom the court had decided would be heard. *The matter is scheduled "for mention on 26.2.01 for the court to hear the mother on the rest of her prayers"*.

I agree with Mr. Ole Kina, whatever the merits of his case or lack of them, that the father should have the opportunity to contest the interim custody sought before the rest of the mother's prayers are heard and determined.

For those reasons, I allow the application on these terms:

- 1) I set aside this court's order granted on 23.12.00.**
- 2) The Chamber Summons dated 21.12.00 shall be set down for hearing and be disposed of within the next 14 days.**
- 3) The Originating Summons dated 21.12.00 shall be heard soon after disposal of the interlocutory application after compliance with all procedures, at any rate not later than 26.02.01.**
- 4) Both parties shall deposit their passports with the Deputy Registrar of this court within 48 hours of this Ruling.**
- 5) The mother shall have unlimited access to the child at all reasonable times during daytime (the hours of 7 a.m. to 6 p.m.) provided that she is accompanied by a Children's Officer from the relevant Government Ministry in Malindi until further orders of this court.**

Costs in the Cause.

Dated at Mombasa this 10th day of January, 2001.

P.N. WAKI

J U D G E