



**KWK v JMW (Civil Case 2173 of 1999)
[2001] KEHC 810 (KLR) (Civ) (30 November 2001) (Ruling)**

K W K v J M W [2001] eKLR

Neutral citation: [2001] KEHC 810 (KLR)

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

CIVIL

CIVIL CASE 2173 OF 1999

JM KHAMONI, J

NOVEMBER 30, 2001

BETWEEN

KWK APPLICANT

AND

JMW RESPONDENT

Where exceptional circumstances existed a court could allow a child subject of proceedings to be taken out of the court's jurisdiction.

The court was asked to determine whether in exceptional circumstances a court could allow a child subject of proceedings to be taken out of the court's jurisdiction. While in answering in the affirmative, the court held that such a request could be allowed where the court was sure that the party concerned would comply with conditions in the relevant court order allowing that taking of the child outside the jurisdiction. The court further held that an advocate who convinced the court to make such an order would not be allowed to cease acting in the matter until the child was brought back into the court's jurisdiction.

Reported by Moses Rotich

Children Law – custody of a child – requirement that a child should not be taken out of the jurisdiction of the court – whether where exceptional circumstances existed a court could allow a child subject of proceedings to be taken out of the court's jurisdiction

Legal Practice – advocate and client relationship – where advocate acted in a custody case and convinced the court to grant an order allowing the child to be taken outside the court's jurisdiction – whether the advocate – client relationship had broken down when the court's order was violated by the client – whether an advocate who convinced the court to allow a child subject of proceedings to be taken outside the court's jurisdiction could be allowed to cease acting in the matter before that child was brought back into the court's jurisdiction.



Brief facts

The defendant in the instant case was given liberty to take a child who was the subject of a custody dispute out of the court's jurisdiction for a holiday period. That was by consent order which was pushed by the defendant's advocates. The defendant and child did not return into the court's jurisdiction thereby violating the order.

The defendant's advocates then applied for a court order to allow them to cease acting for the defendant alleging, *inter alia*, that the lawyer-client relationship had broken down.

Issues

- i. Whether where exceptional circumstances existed a court could allow a child subject of proceedings to be taken out of the court's jurisdiction.
- ii. Whether an advocate who convinced the court to allow a child subject of proceedings to be taken outside the court's jurisdiction could be allowed to cease acting in the matter before that child was brought back into the court's jurisdiction.

Held

1. Ordinarily, where there was a dispute over the custody of a child, just like a dispute over ownership or parenthood of a child and also where an adopting order was yet to be made, no party should be allowed to take the infant or child affected outside the jurisdiction of the court.
2. A child could, however, be taken outside the jurisdiction of the court in very exceptional circumstances and when the court was sure that the party concerned would comply with conditions in the relevant court order allowing that taking of the child outside the jurisdiction.
3. An advocate who participated in convincing the court to make such an order should remain on record to assist the court, when need arose, to trace his client who was not complying with that order.
4. The advocate should not be allowed to cease acting until his client had either come back and surrendered to the jurisdiction of the court or had been arrested and brought back to the jurisdiction of the court.
5. In those circumstances, the question of the court unfairly forcing an advocate to act for a client who had not given the advocate instructions could not arise.

Application dismissed.

Citations

Statutes

None referred to

Advocates

Miss Odongo for Plaintiff

M/s Martha Koome & Company for Respondent

RULING

1. This morning I heard and dismissed chamber summons dated July 17, 2001, filed by M/s Martha Koome & Company, as advocates for the defendant herein JMW, praying for orders that the said advocates be granted leave to cease from acting for the defendant in this matter. I said I will give my reasons for dismissing that chamber summons and I do hereby give those reasons.
2. I should first point out that counsel for the plaintiff has not been as useful as is expected in an application like this one. Filed on July 17, 2001 and served upon them on July 18, 2001, to-date Miss Odongo who appeared for the plaintiff from the firm of M/s Robson Harris & Co Advocates was still telling me that they intended to file their papers to oppose this application. She did not bother to explain why to-date they have not filed their papers. But from what Mr Mungata, from the law firm of



M/s Martha Koome & Co, told me earlier, it would appear that the reason why counsel for the plaintiff have not filed their papers to-date is that they were not really keen in opposing the application. They have reasons which they have not told me.

3. That scenario surprises me as it straight away raises a question in my mind as to why, then, should these parties be in this court wasting the court's time? They should, by consent or without consent, withdraw the case and go away from this court.
4. As they are still here, this is the position as I see it. It was on November 12, 1999 when the plaintiff, apparently, filed in this court two originating summons, both dated November 12, 1999. While one of those originating summons prayed for a permanent injunction, the other one prayed for a temporary injunction and in both originating summons the injunction was to bar the defendant from taking the child, the subject mater of these proceedings, from the jurisdiction of this court without the consent of the plaintiff and that the defendant do deposit the passport of the child in court and for an order that the custody of the child be entrusted to the plaintiff.
5. On November 12, 1999 the plaintiff obtained a certificate of urgency but it is not clear whether that certificate applied to both originating summons or to only one of them. Assuming that certificate of urgency related to the originating summons for a temporary injunction or temporary orders, and further assuming that, that is the application the parties have been referring to as a chamber summons, that application on being certified urgent was given an interpartes hearing date of November 18, 1999.
6. However, somehow before that date reached, the defendant was in court alone on November 17, 1999 complaining that the plaintiff had taken the child from the custody of the defendant. Bearing in mind that there were already two applications filed and pending in this matter, the prevalent habit of recording court proceedings without specifically and clearly referring to and identifying the particular application before the court at that particular time creates a problem to persons reading those proceedings latter and I would wish that my learned colleagues changed the present trend; let me assume that the defendant was in court on November 17, 1999 having filed and was prosecuting ex-parte her application by chamber summons dated November 16, 1999 praying that the plaintiff produces the child in court and that the plaintiff be restrained by an injunction from taking the child away from the jurisdiction of this court and further that custody of the child be given to the defendant.
7. That application was also brought under a certificate of urgency.
8. The chamber summons was certified urgent and the plaintiff ordered exparte to produce the child in court the following day November 18, 1999 at the hearing of the plaintiff's originating summons for temporary orders when the defendant's chamber summons was also to be mentioned in respect of prayers three and four therein.
9. On November 18, 1999 the parties were before the court with the child for the hearing of the plaintiff's originating summons for temporary orders.
10. But hearing was, on the application of the plaintiff's counsel, adjourned and interim orders made giving custody of the children to the defendant until hearing and determination of the plaintiff's originating summons for temporary orders. Defendant was also ordered to deposit the child's passport into the court and that was subsequently done.
11. At that stage all the three applications, two by the plaintiff and one by the defendant all aforementioned were pending. The defendant had added another chamber summons dated December 3, 1999 and filed on December 6, 1999.



12. Despite the court's order on December 8, 1999 to the effect that the originating summons dated November 12, 1999 be heard in lieu of the application dated December 3, 1999, it is not clear which one of the four pending applications was before my learned brother Kuloba J on December 15, 1999 as here also no specific and clear reference was made to the application the learned judge was hearing at that time and the previous record is of no assistance. Once again I wish my learned sisters and brothers stopped continuation of this practice of not specifically and clearly referring to the applications they handle at the time they are handling the applications – for ease of reference and clarity for those reading the record later.
13. As I pointed out earlier, the plaintiff had filed two originating summons on the same date and both dated November 12, 1999. One for temporary orders and the other for permanent orders. Perhaps I should assume that the one for temporary orders was the one which was being heard on December 15, 1999. In any case, on that date at an inter partes hearing consent was recorded making the child award of court before the main application is heard and determined unless earlier varied.
14. Secondly the parties were to have joint custody of the child until determination of the main application unless earlier varied or set aside.
15. Thirdly the respondent, meaning the defendant, was to be at liberty to take the child out of the court's jurisdiction for a holiday period up to January 25, 2000 when she was to return to Kenya.
16. Fourthly, the child's passport was to be released for the purpose of that travel and be re-deposited in court after return to Kenya on January 25, 2000.
17. The defendant with the child went outside the court's jurisdiction and have not returned into the jurisdiction to-date. There is non-compliance with the court order made on December 15, 1999. The defendant has not complied. The firm of advocates who participated in pushing the court into recording that consent order has now applied in their chamber summons dated July 17, 2001 for a court order allowing them to cease acting for the defendant on the ground that
 - (a) The defendant has neglected to respond to communication from her advocates
 - (b) The defendant has failed to contact her advocates and give them instructions
 - (c) The lawyer-client relationship has broken down.”
18. I have listened to the submissions in support of those grounds and read the supporting affidavit. With all due respect, I hold the humble view that where there is a dispute over custody of a child, just like a dispute over ownership or parenthood of a child and also where an adoption order is yet to be made, no party should be allowed to take the infant or child affected outside the jurisdiction of the court unless in very exceptional circumstances and the court is sure that the party concerned will comply with conditions in the relevant court order allowing the taking of the child outside the jurisdiction. Unless such a restriction is imposed Kenya risks the danger of foreign based applicants coming to this country to easily run away with our children before all the requirements of the law are satisfactorily fulfilled. Already there are a number of such run away cases in the country and the growth of that number should be curtailed.
19. An advocate who participates into convincing the court to make such an order should remain on record to assist the court, when need arises, to trace his client who is not complying with that order and should not be allowed to cease acting until his client has either come back and surrendered to the jurisdiction of the court or has been arrested and brought back to the jurisdiction of the court. The advocate knew his client better than the court and was in a better position to foresee what could happen in the event



of his client being allowed to leave the jurisdiction and should have reasonably taken all the useful particulars of his client abroad to enable him trace the client.

20. In those circumstances the question of the court unfairly forcing an advocate to act for a client who has not given the advocate instructions does not arise. Moreover I do not see in this particular case any credible and satisfactory evidence to show that the applicant before me does not have instructions from the defendant who went out of the jurisdiction under a court order obtained with the leading participation and persuasion of the applicant who has been the defendant's advocate since the time these proceedings started in 1999.
21. The applicant should be there to assist in tracing the defendant to bring her back to this jurisdiction. He is entitled to apply to cease from acting for a client. But he makes such an application with the knowledge that it may either be granted or be dismissed. For the above reasons, I decided to dismiss the applicant's application by chamber summons dated July 17, 2001 and I think I am entitled to do that. From the way the plaintiff's advocates have conducted themselves in this chamber summons, I award no costs of the application to them.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2001.

J. M. KHAMONI

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JUDGE

