



**MNB v ANB & another (Miscellaneous Civil Case E135 of 2024)
[2025] KEHC 6057 (KLR) (Civ) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL CASE E135 OF 2024**

**SN RIECHI, J
MAY 15, 2025**

BETWEEN

MNB APPLICANT

AND

ANB 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The applicant Mody Nouhou Barry and 1st Respondent Assia Niyibampa Barry are Rwandese natives. They are married and have 3 children. AOB AQB and IB.
2. AQB and IB are minors. The applicant is a Rwandese Diplomat on assignment to Nairobi. They both were staying in the same house in Kileleshwa with the minors.
3. On 27.2.2024 the 1st Respondent Assia Niyibampa Barry filed a suit in the Children’s Court being Nairobi MCHCC E 372/2024 seeking for maintenance of Children by the applicant for provision of food, leasing of a 3 bedroomed house and to be granted custody of the minors. The matter in the children Court was heard and finalized. The 1st respondent removed the children from the house where they were residing on 21.3.2024 to unknown place. The children’s Court on 22.5.2024 issued the following orders:
 1. THAT pending the hearing and determination of this suit the Plaintiff to ensure A.O.B and A.Q.B, all minors, report and attend school at St. Austin’s Academy Lavington with immediate effect.
 2. THAT the Officer Commanding Station, Kilimani Police Station, to enforce and ensure compliance with this court’s orders.



3. THAT parties directed to attempt settlement.
4. THAT mention to record consent on 15th July, 2024.
4. The orders were not complied with and the applicant filed Notice of Motion seeking the following orders:
 1. THAT this Application be certified urgent for hearing ex-parte and service in the first instance dispensed with.
 2. THAT pending the hearing, determination and further directions, this Honourable Court be pleased to grant leave and order service of this Application to be effected by way of substituted service upon the 1st Respondent's by way of her Telephone Number (Whatsapp) Telephone Number +250788351998/+254718272484 and or email address nniyibamp@gmail.com.
 3. THAT Pending the hearing and determination of this Application the 2nd Respondent liaises with the Children Protection Department, to ensure that, AOB and AQB, all minors, report and continue to attend school at St. Austins Academy Lavington, with immediate effect.
 4. THAT Pending the hearing and determination of this Application the 2nd Respondent liaises with the Children Protection Department, to ensure that, the minors AOB, AQB AND IB be returned to Kenya and further produced before this Court
 5. THAT the 2nd Respondent liaises with the Children Protection Department, to ensure that, AOB and AQB, all minors, report and continue to attend school at St. Austins Academy Lavington, with immediate effect.
 6. THAT the minors AOB, AQB AND IB be returned to Kenya and further produced before this Court.
 7. THAT an order do issue directing the INTERPOL, to enforce and ensure compliance with this Court's orders.
 8. THAT the Respondents do meet the costs of this Application.
5. The first Respondent Assia Barry was served by way of substituted service. She did not file any response. The second Respondent the Hon. Attorney General filed a Notice of Preliminary Objection dated 12.11.2024 on the following grounds:
 1. The Motion seeks substantive orders likely to affect the rights of the parties herein but is not premised on any suit or cause and therefore lacks limbs to stand on.
 2. For the reason that a miscellaneous application is not an originating process, this Motion is fatally defective.
 3. The Director of Children's Services lacks legal capacity and jurisdiction to enforce orders where the children, the subject matter of this Motion are admittedly beyond the borders of Kenya and jurisdiction of this Honourable Court.
 4. Accordingly, prayers 3, 4, and 5 if successful will be granted in vain.
 5. In so far as this Motion relates to the 2nd Respondent, the jurisdiction of this Honourable Court has been improperly invoked
6. By Consent the application was canvassed by way of Written Submissions.



7. The applicant did not file submissions. The 2nd Respondent the Hon. Attorney General filed Submissions dated 18.2.2025 by Zipporah Komu State Counsel. The 2nd Respondent submitted that the orders sought cannot be obtained in a Miscellaneous Application but by filing of a Plaint or Originating Summons. Counsel therefore submits that's the prayers set out cannot be granted unless they are premised on a Plaint on Originating Summons. Counsel further submitted that the Director of Children Services Kenya cannot enforce orders in respect to Children of foreign Countries who are beyond the territorial Jurisdiction of this Court:
8. The main prayer by the applicant is that this court to order the minors to be released to him and attend school. This is the order that the magistrate issued on 22.5.2021. The learned trial magistrate directed the officer commanding station Kilimani Police Station to enforce the order. The OCS Kilimani Police station conducted enquires in order to enforce the order. By letter dated 3rd June 2024 after conducting inquiries the OCS reported to court.

This office was in receipt of a court order issued on 23rd day of May 2024 whereby the OCS Kilimani was to enforce and ensure compliance with the issued court orders. The OCS Kilimani verified the same vide letter referenced C/GEN/5/4/VOL.X/88 dated 29th May, 2024 and IP Trizah Kiptoo the OC Gender Kilimani in company of the Defendant MODY NOUHOIJ BARRY tried locating the premises where the Plaintiff ASSIA NIYIBAMPA BARRY stayed with the kids (minors) but they could not trace it since the Defendant did not know as well.

They proceeded to the Rwandese Embassy to inquire the same where they were given a contact of a relative whereby upon calling, they were informed that the Plaintiff in company of the kids (minors) had flown out of the country therefore police could not do anything.

9. From the report by Police, it is confirmed that the 1st Respondent Assia travelled with the children to Rwanda their home country. The applicant confirmed that he too has the same information. He is requiring the 2nd Respondent – the Hon. A.G on behalf of the Republic to produce the minors. Public officers can only be liable and be ordered to produce a person if it is established that the subject is in their custody or care. In this case it has been established that the minors and the 1st Respondent flew back to their country Rwanda which is the home country of the applicant. They are therefore not in the care or custody of Kenyan authorities for the court to direct to produce them. This court cannot order a Public Officer to produce persons who are nationalities of another country to be brought to Kenya as the applicant seeks.
10. I therefore find the application without merit and same is dismissed with costs.

DATED AT NAIROBI THIS 15TH DAY OF MAY, 2025

S. N. RIECHI

JUDGE

