



**HAN v HMS (Civil Appeal E005 of 2023)
[2024] KEHC 8781 (KLR) (Family) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E005 OF 2023
HK CHEMITEI, J
JULY 18, 2024**

BETWEEN

HAN APPLICANT

AND

HMS RESPONDENT

RULING

1. This ruling relates to the application dated 24th May, 2024 filed by the Appellant/Applicant Dr. HAN, seeking Orders That:-
 - (a) Spent.
 - (b) Pending the hearing and determination of this Application, there be an order that the Respondent be compelled to avail the British Passport of the minors KHN and ZHN to the Applicant.
 - (c) Pending the hearing and determination of the originating summons application or until further orders, this Honourable Court be pleased to grant leave to the Applicant to travel with the minors KHN and ZHN (twins) to United Kingdom where they are citizens and to issue an order that the children to accompany their biological father to the United Kingdom on 3rd July, 2024 for further medical checkup and education.
 - (d) Pending the hearing and determination of the originating summons application or until further order, this Honourable Court be pleased to grant leave and order allowing the minors to continue with education in London while undergoing treatment and be flown back to Kenya during the holidays owing to the fact that they are British citizens and attempts of having them get a school and settle with the special need in them seems challenging in Kenya.



- (e) Pending the hearing and determination of the Originating Summons application or until further order, this Honourable Court be pleased to compel the Respondent to surrender documents that are in her custody for the 3rd minors (SHN) to enable the minors' British passport be processed by the Applicant. The Applicant has personally given the Respondent all the necessary documents for the minor (SHN) to produce the British passport to no avail.
 - (f) This Honourable Court may be pleased to give such further directions it may deem necessary.
 - (g) Costs of the application be in the cause.
2. The application is supported by affidavit sworn by HAN on 24th May, 2024. He avers *inter alia* that the Respondent has been transferring the children to different school frequently and without consulting him and has become an expensive exercise for him and it is also affecting the minors' settlement and concentration at school.
 3. He states that he has been paying the school fees and school related bills in line with the Kadhi's court judgment of 29th April, 2024. The twins, KHN has a special condition whose remedy is not available in Kenya but the same can be treated in the United Kingdom where he is a doctor and resident and ZHN, his twin, is likely to develop the same condition later in life
 4. He would therefore like the children to study in the United Kingdom where education is free because he is a tax payer there and there are schools that are well equipped to handle children with special needs like the twins who are British citizens.
 5. He has accused the Respondent of refusal to release the documents relating to SHN to enable the processing of her British passport.
 6. The application is opposed vide replying affidavit sworn by HMS on 4th June, 2024. She avers *inter alia* that the Applicant's application is premature and attempt at arm twisting her to let the children go to the United Kingdom. She accused the Applicant of leaving the children while in his custody unkempt and unwell and they do not attend madrasa classes.
 7. That the allegation that ZHN is likely to develop autism like her twin KHN is unfounded, speculative and not backed by evidence and that this was the first time she was hearing that the children have been treated or been to Kenyatta National Hospital.
 8. As regards schooling she deponed that the minors did not attend [particulars withheld] Academy because the school was not equipped to handle children with special needs and that they have been attending [particulars withheld] Academy to date because the special needs children have been moved to the pre – unit class leaving the minors unattended and compelling her to look for an alternative school. She then found Al Ameen Centre and she sent the school requirements to the Applicant which he has not paid including the school fees and school related bills for the second term at [particulars withheld] Academy.

Background

9. The genesis of this application is the Judgment in Nairobi Kadhi's Court Divorce Suit No. 105 of 2021: *HAN vs HMS*, delivered by Hon. Sukyan Hassan Omar (Deputy Chief Kadhi) on 5th August, 2022 where judgment was entered in the following terms:
 - (a) The physical custody of the minors here is hereby granted to the defendant.
 - (b) The parties shall have shared legal custody of the minors.



- (c) The plaintiff shall have unlimited access to the minors upon reasonable notice.
- (d) The plaintiff shall provide monthly upkeep of Kshs. 85,000/= payable by 5th of every month.
- (e) The plaintiff shall cater for the education, healthcare and clothing of the minors separately.
- (f) The defendant to hand over to the plaintiff British passports of the minors.
- (g) The plaintiff to pay the defendant her dowry of 50 grams of pure and new gold or its market value forthwith.
- (h) The divorce be registered and divorce certificate issued.
- (i) Permanent injunction to issue restraining the plaintiff from harassing and intimidating the defendant and forcefully taking the minors from the jurisdiction of this court.
- (j) Each party to bear its own costs.

Analysis and Determination

- 10. I have carefully considered the application before the court and the reply filed in response thereto. This court on 29th April 2024 gave some further interim orders varying the lower courts judgment. The same granted access to both parents to the minors albeit on different days.
- 11. The application before me is essentially arguing the main appeal through the backdoor. The issue of the special needs for the children is one of the grounds contained in the memorandum of appeal.
- 12. The same goes with their medical health as well as the issue of whether they should stay with the Respondent or travel with the Applicant to Britain. It is not in dispute that the said children have a British passport but in my view the question of leaving the jurisdiction of the court is so weighty that it cannot be determined by way of an application but through an appeal.
- 13. In view of the interim orders granted on 29th April 2024 it is my considered view that this appeal ought to be heard and determined fully. Granting any prayer in the manner proposed in the application is akin to determining the appeal piecemeal.
- 14. In any event if there is any issue concerning the education and health of the minors there are adequate for now sufficient medical and educational facilities to deal with within Kenya. Nothing as well prohibits the parties from making any special application for specific orders.
- 15. The application is otherwise dismissed. Let the appeal be fixed for hearing on priority basis.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 18TH DAY OF JULY 2024.

H K CHEMITEI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

