



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CONSTITUTIONAL PETITION NO. 11 of 2018

IN THE MATTER OF: AMK (MINOR) HEREINAFTER REFERRED TO AS “AMK” (MINOR)

IN THE MATTER OF: THE CHILDREN’S ACT 2001 LAWS OF KENYA

IN THE MATTER OF: FOREIGN JUDGMENT (RECIPROCAL ENFORCEMENT) ACT CAP 43 LAWS OF KENYA

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

BETWEEN

MAK.....PETITIONER

VERSUS

1. SNMM

2. THE HONOURABLE ATTORNEY GENERAL.....RESPONDENTS

JUDGMENT

1. MAK the Petitioner herein, filed a Petition dated 4.12.18 against SNMM, the 1st Respondent and The Honourable Attorney General, the 2nd Respondent seeking the following:

(a) Immediate, unconditional enforcement of the orders issued by the High court sitting in Canada; in case Number FC-13-043656-00.

(b) Permanent custody and access to the minor AMYK.

(c) Any such further relief as this Honourable Court may deem fit to grant.

(d) Costs of this petition.

2. The Petitioner states that he and the 1st Respondent were married under Islamic law and were on 12.11.12 blessed with a child, AMK, who is the subject of this petition. The family did emigrate to Canada and resided there. The Petitioner and the child are both citizens of Canada. The Petitioner further states that the 1st Respondent visited her parents in Kenya with the child and failed to return to Canada. She then cut off all communication with the Petitioner and has kept the child away from him thus traumatizing him. The Petitioner then moved to the High Court in Canada and obtained orders of permanent custody and immediate return of the child to the jurisdiction of that Court. He has now moved to this Court seeking enforcement of those orders. He also prayed for permanent custody and access to the child.

3. In her Replying affidavit sworn on 17.12.18, the 1st Respondent confirms that she and the Petitioner were married and blessed with the child. She accuses the Petitioner of dishonesty and avers that the Petitioner, the child and herself came to Mombasa on 19.1.15 for a family reunion. The Petitioner left after 4 days and returned to Canada. She denied that she has kept the child from the Petitioner and stated that she always ensures that the child communicates with the Petitioner. She further grants the Petitioner’s parents access to the child. On the Order from the Court in Canada, the Petitioner contends that the same cannot be enforced as the Foreign Judgment (Reciprocal Enforcement) Act does not apply to proceedings of custody of children. Further the child is of tender years and should, in her best interests, remain with the Respondent.

4. Directions were taken that parties file written submissions. The Respondent filed her submissions on 31.5.19. The Petitioner failed to file his submissions notwithstanding that the time to do so was extended. I have considered the submissions filed by the Respondent and I find that the following 2 issues fall for determination.

- i) Whether the order issued by the High Court in Canada in case Number FC-13-043656-00 is enforceable by this Court.
- ii) Whether custody and access should be granted to the Petitioner.

Whether the order issued by the High Court in Canada in case Number FC-13-043656-00 is enforceable by this Court.

5. The law relating to enforcement of foreign judgments is found in the Foreign Judgment (Reciprocal Enforcement) Act, Chapter 43 of the Laws of Kenya. The objective of the Act is to make provision for the enforcement in Kenya of judgments given in other countries which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith. The order that the Petitioner seeks to have enforced by this Court was issued by the High Court in Canada. In order for the said order to be enforceable, it must meet 2 criteria. First, the order must be made by a Court in a reciprocating country as provided in Section 13 of the Act and further it must be an order or judgment to which the Act applies.

6. Under Section 13 of the Act, the country giving the judgment must be a reciprocating country as declared by the line Minister by an order, to be a reciprocating country for the purposes of the Act. The Foreign Judgments (Reciprocal Enforcement) (Extension of Act) Order, 1984 lists in a schedule the reciprocating countries. Paragraph 2 of the Order provides:

The countries specified in the Schedule are declared to be reciprocating countries for the purposes of the Act and the Act shall apply with respect to judgments given by superior courts of those countries.

SCHEDULE

- 1. Australia,**
- 2. Malawi,**
- 3. Seychelles,**
- 4. Tanzania,**
- 5. Uganda,**
- 6. Zambia,**
- 7. the United Kingdom,**
- 8. Republic of Rwanda.**

7. It is clear from the above schedule that Canada has not by an order of the Minister been declared to be a reciprocating country. In the case of Jayesh Hasmukh Shah v Navin Haria & another [2016] eKLR the Court of Appeal dismissed an appeal where the appellant sought to enforce and execute in Kenya a judgment from Ethiopia which like Canada, is not a reciprocating country under the provisions of the Act.

8. The order the enforcement of which the Petitioner seeks gave permanent custody of the child to the Petitioner. Even if Canada were a reciprocating country the Petitioner would still run into headwinds as he would have to contend with the provisions of Section 3(3)(e) of the Act which provides:

(3) This Act does not apply to a judgment or order—

(e) in proceedings in connection with the custody or guardianship of children;

9. As Musyoka, J. found in Ian Mbugua Mimano v Charlotte Wamuyu Mutisya & 2 others [2014] eKLR, this Court has no jurisdiction enforce a foreign judgment in proceedings in connection with the custody or guardianship of a child.

Whether custody and access should be granted to the Petitioner

10. The matter herein concerns a child. This Court has both a constitutional and statutory obligation to ensure that the best interests of the child are of paramount consideration. Article 53(2) of the Constitution of Kenya, 2010 provides:

A child's best interests are of paramount importance in every matter concerning the child.

Section 4(2) of the he Children Act is couched in similar terms as follows:

In all actisons concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

11. As the Court considers the matter herein, it must bear in mind that the best interest of the child must be the first and paramount consideration. All other interests take a back seat. The child herein was born in 2012. She is thus 7 years old. Being a child below 10 years old, she is by dint of Section 2 of the Children Act, a child of tender years. Our Courts have consistently upheld the general rule that custody of children of tender years should be vested in their mother because mothers are best suited to exercise care and control of such children. As with all general rules, this rule has an exception. A court will however only depart from this *prima facie* rule if there are sufficient reasons or exceptional circumstances to do so. In the case of J.O. v S.A.O. [2016] eKLR, the Court of Appeal stated:

There is a plethora of decisions by this Court as well as the High Court that in determining matters of custody of children, and especially of tender age, except where exceptional circumstances exist, the custody of such children should be awarded to the mother, because mothers are best suited to exercise care and control of the children.

The Court went on to define exceptional circumstances thus:

Exceptional circumstances include: the mother being unsettled; where the mother has taken a new husband; where she is living in quarters that are in deplorable state; or where her conduct is disgraceful and/or immoral.

12. The Petitioner has not stated that there exists any exceptional circumstances to warrant the departure by this Court from the general rule. The best interests of the child herein shall be best served if she remains in the actual physical custody of the Respondent.

13. Should the Petitioner have access to the child? Article 53 of the Constitution recognizes and guarantees to the child parental care by both parents. Clause (1)(e) provides:

(1) Every child has the right—

(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;

14. It is now generally understood that children who grow up with father absence or father deficit often end up with social problems. Martin Glynn, a lecturer in Criminology at the Centre for Applied Criminology, Birmingham City University and Adduction in a 2011 study ***“Dad and Me Research into the problems caused by absent fathers”*** found *inter alia* that the young men and women interviewed gave detailed examples of how they struggled with complex emotions because of their fathers’ absence. Such young people subjected to ‘father deficit’ lack a positive image of themselves, causing problems that can manifest themselves differently according to gender. They also have a daily struggle with their emotions and a frustration at not having the opportunity to resolve negative feelings.

15. Closer home, in an article in the Daily Nation of 18.6.19 titled ***“Missing in Action: Why Kenya is in the grip of a fatherhood crisis”*** Simon Mbevi, the founder of Transform Nations, a non-profit organization whose mandate includes training on parenting was quoted saying:

In very specific ways, fathers affirm femininity in girls and masculinity in boys. Psychology says from eight to around 11 years, children begin to push away from their mothers — it is a period of individuation, becoming their own individual. A father’s role is very crucial at this stage because he affirms his children, so his voice is very important. A father plays an important role in calling out the man in the boy and woman in the girl. If the boy doesn’t separate from his mother, he becomes mama’s boy, and if the girl does not separate from her mum, she finds it difficult to discover who she is. If children don’t get validation from their father at this stage, they look for it elsewhere, and may end up being taken advantage of.

16. The child herein is 7 years old. It is absolutely necessary that her father plays an active role in her life notwithstanding the fact that he lives in another country. The effect of his absence in her life may not be manifest at this stage. However in order for the child to have a well-balanced life and to grow up without father deficit and its attendant social problems, it is imperative that the Petitioner has unlimited access to the child.

17. In the end and for the reasons stated, my finding is that Petition herein lacks merit and the same is dismissed. However, in the the best interests of the child, the Petitioner shall have unlimited access to the child

18. This being a matter concerning a child, there shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 20th day of September 2019

M. THANDE

JUDGE

In the presence of: -

.....**for the Petitioner**

.....for the Respondent

.....Court Assistant