



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
H.C.C 1 OF 2016
IN THE MATTER OF F K A - MINOR

M A K.....APPLICANT

VS

R M A A.....RESPONDENT

RULING

1. The application for consideration is the application dated 30th August 2016. The application is brought under section 6, 22, 26, 76(1)(3)(4), 90(a), 113 and 118 of the Children’s Act, Section 3A and 63 of the Civil Procedure Act and all enabling provisions of the law. The applicant seeks the following orders.

- i. The applicant seeks the true whereabouts or physical location of the minor be revealed by the respondent herein.**
- ii. That the respondent do furnish the applicant with a permanent phone number for the purpose of direct communication between the applicant and the minor pending the outcome of this application and the determination of the main suit.**
- iii. That the minor be produced in the honorable court and the respondent be required to deposit his passport and that of the minor with the court for custody as a security to comply with the court orders.**
- iv. Any other orders that the court may deem fit to grant in the circumstances**
- v. The cost of this application.**

2. The application is grounded on grounds that the respondent is the father of the minor and has parental responsibility of the said child equal to the applicant who is the mother and she does not get updates on the welfare of the child. That the applicant has equal parental responsibility towards the child jointly with the respondent and she has direct communication with the said child. That the applicant secured an order from the High Court of Tanzania Civil application number 494 of 2016 but the respondent has disobeyed it and fled with the minor contrary to the said court order and has become a consistent and persistent fugitive of justice notorious for disobeying court orders with impunity. That it is in the best interest of the child that the respondent be compelled to provide reasonable information about the whereabouts of the minor and produce him within the jurisdiction of this honorable court.

3. In her affidavit in support of the application dated 30th August 2016 the applicant gives a background of the events culminating to the current application as follows; The applicant was married to the respondent and on 2nd February 2002 the marriage turned sour and this culminated to the parties signing a parental responsibility agreement dated 15th May 2008 which provided that parties would have joint legal custody of the minor. The parties later divorced and the parental responsibility was adopted by the court on 22nd December 2015 and it ordered a decree absolute. In August 2016 she applied to the High court of Tanzania in Civil Application no. 494 of 2016 for the adoption of the order dated 22nd December 2015 and on 3rd August 2016 the said court granted her orders directing that the respondent releases the custody of the minor to the applicant who was in his possession. However, the respondent on 8th August 2016 removed the minor from Tanzania despite the said court order. That currently the respondent works in Tanzania while she is based in Kenya and the minor is in United Kingdom alone hence vulnerable to irreparable harm. That the child has been denied the right to motherly love, care and attention as guaranteed under the law of Kenya and the international laws which Kenya is a signatory. She avers that she has not had any direct communication with the child which is contrary to the parental responsibility agreement and urges the court to take judicial notice that the respondent does not recognize the orders granted by the African Courts and continues to disobey them with impunity. That unless the minor is produced in court its normal evolving capacity will be highly prejudiced and that it is in the best interest of the child that the court do allow the orders as prayed.

4. The respondent in opposition to the said application filed his replying affidavit on 16/09/2016. He denies fleeing from Tanzania with the minor contrary to any Tanzanian Court order adding that the said application was never served on him and proceeded ex-parte and he had filed an application to set aside the said order on 3rd August 2016 and the same was set down for hearing on 31/August/2016. He added that no order was made regarding the custody of the minor as alleged by the applicant. He avers that the minor is in school in United Kingdom at [Particulars withheld] and had been with him on 5th September 2016 before he resumed school. He denied allegations that he was a fugitive notorious for disobeying court orders. He referred the court to the court order issued by The United Kingdom which gave him full custody whilst the respondent faces charges of child abuse in the said court and a warrant of arrest issued against her for breaching bail and she is hence a fugitive of justice herself. He avers that on 4th August 2016 at around 7.35 to 8 p.m. 2 gentlemen approached him claiming they needed to serve him some court documents and whilst arguing over the legitimacy of the manner the same was being served at the said time the applicant dressed in a buibui came from the crowd screaming F my baby and charging at them. The minor fled into the restaurant with couple of them followed chasing him he went to the first floor where their apartment was and locked himself in and refused to come out. At the time the applicant was causing a scene. Upon calling his lawyer he was informed that was not how to effect a court order and the same was against the set guidelines of service as the order did not give the applicant permission to take away the child. He avers that the said incidence was a clear indication that the applicant is unstable and unable to control herself to the extent of behaving violently in situations she is faced with. He adds that the child's best interest are of paramount consideration by the court and the minor does not want contact with the mother adding that his affection can be won back by overtures of kindness like sending letters and cards and he may be persuaded to talk to her on phone. He avers that the applicant has all the phone numbers of the schools adding that the minor has had nightmares after the 4th of August 2016 incidence and wakes up petrified saying he does not want his mother to take him away adding that at the moment it is not in the best interest of the child to be forced to speak with the mother as it is causing him unnecessary stress and mental torture. That the applicant filed the application first the United Kingdom invoking the UK jurisdiction and inviting a judgment. He urges the court to dismiss the applicant's application.

5. Having considered the affidavits by both parties and from a perusal of the documents on record there is a chamber summons dated 6th August and filed on 9th August 2016 seeking to set aside the orders issued by the said court on 3rd August 2016. There is a copy of court proceedings from Family division sitting at York in the United Kingdom dated 7th August 2015. The said court in its final judgment ordered that;

i. The child F K A lives with the father R A.

ii. That the child shall not have direct contact with the mother M A K unless it is agreed by

the father in writing or as ordered by the court that the father is permitted to decide where the child shall be educated including in which country and at which school, the father having indicated that the child shall remain at [Particulars withheld] school in York.

iii. **The mother's contact with the child shall be via phone or any form of social media and as accord to the child's own wishes and feelings and the same shall be initiated by the child and not the mother by way of letters cards or gifts via her sister E N to the paternal aunt N J.**

iv. **That the father shall provide the mother with details of any school attended by F and shall request the school to provide her with a written term report in respect of F**

v. **The child's passport shall be held by the father or to the extent that is necessary to do so the father may release the passport to the school for safekeeping during the term time. The father is to obtain a transcript of the judgment of today's date and may disclose that judgment to any school attended by F.**

From the proceedings, it emerges that the applicant had been charged with the offence of child abuse/neglect and had been bailed to attend York Magistrates Court on 18th June but failed to attend court on 2nd July 2016 which led the said court to issue warrants of arrest against her. The applicant has not opposed the said proceedings and there is no appeal against the said orders by the applicant.

6. Although Kenya recognizes and is bound by the judgments issued by the United Kingdom under the Foreign Judgments and reciprocal Act Section 3(2) provides that; *"the Act does not apply to judgments or order-*

(e) In proceedings in connection with custody or guardianship of children."

This then shows that the court is not bound by the judgment so delivered in the Family Court at York. The respondent avers that the child is currently said to be schooling in United Kingdom at Terrington Hall and that the applicant has telephone numbers and could communicate with the child when she wishes though the child has refused to communicate with her.

Article 53(e) of the Constitution provides that, *"a child is entitled 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;"*

7. I note that the Family Court in York dealt extensively with the issue of jurisdiction. The order issued pertains to the minor and dealt extensively on him being a habitual resident. The court in pronouncing its said judgment clearly indicated that the minor would not be allowed to leave its jurisdiction without an order from the said court as such I find that the applicant should apply to the said court for a review or setting aside of the said orders for any order issued by this court might be issued in futility as it may be difficult to implement whilst the order in the said court is subsisting. It is important to note that the said court factored in the fact that the applicant was facing charges of abuse and neglect in regards to the minor in question. This I believe could have contributed to the court in ordering no contact between the applicant and minor in question **until an assessment is done.**

8. The best interest of the child is paramount as provided under Section 4 of the Children's Act which provides that, ***"(2) In all actions 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."*** In this case and this court cannot be blind to the allegations of abuse and neglect faced by the applicant in the UK Court. Section 13 of the Children's Act provides that, *"(1) a child shall be entitled to protection from physical and psychological abuse, neglect and any other form of exploitation including sale, trafficking or abduction by any person."* I find that the said allegation of abuse and neglect had been raised in United Kingdom although the same have not been resolved as the applicant herein did not attend court when the matter came up for hearing leading the said court to issue an arrest warrant against the applicant herein. This court is apprehensive as the said

allegations of child abuse and neglect are yet to be cleared before the UK Court. The court in making any orders needs to ensure safety and protection of the minor from abuse and neglect. I find that it is only prudent for the applicant to pursue the matter in the said Court at York. However, I find that the applicant being the mother of the child is entitled to know the whereabouts of the child. The respondent shall reveal the current whereabouts of the child within 7 days from the date of this ruling. Meanwhile the applicant will comply with the orders issued by the UK Court on communication with the child. Prayer 4 is not granted in light of the orders issued by the UK Court. Costs in the cause. It is so ordered.

Dated, signed and delivered this **11th** day of **April** 2017.

R. E. OUGO

JUDGE

In the presence of;

Miss Muhoro **holding brief for Dr. Kuria For the Applicant**

Mrs Darl **For the Respondent**

MS. Charity **Court Clerk**