



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
CONSTITUTIONAL PETITION NO. 63 OF 2016

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013 ARTICLE 22, 23, 159, 165 AND 53 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE SEXUAL OFFENCES ACTS AS REVISED 2007 LAWS OF KENYA

AND

IN THE MATTER OF: DEFILEMENT CAP 92 AT NO. 8 (3) OF 2001 LAWS OF KENYA

AND

IN THE MATTER OF Z C.....MINOR

C L. S (Suing as Guardian/Father and next

Friend of the Minor).....PETITIONER

VERSUS

G M.....RESPONDENT

RULING

1. The application before the court is a Notice of Motion dated 12th January, 2017 where the Applicant prays for the following orders:

(1) That the application be certified urgent and service of the same be dispensed with ex-parte at the first instance.

(2) That the honourable court be pleased to give a temporary injunction order restraining the Respondent by himself, his family people and friends and or servants and or agents from further staying or living with the minor herein and treating the minor as his wife pending further orders

from this court.

(3) The Honourable court be pleased to order and direct the OCS Inuka Police Station in Likoni to track the Respondent's phone number 0714 ***** for the purpose of causing his immediate arrest and be brought to court and be detained by the court until further orders.

(4) The Honourable court be pleased to order the minor to be taken and be kept in a Children's Home for protection until further orders.

(5) Costs of this application be in the cause.

2. The application is premised on the ground on the face thereof and is supported by affidavit of **C L. S.**, the Applicant herein, dated 12th January, 2016.

3. The application was served upon the Respondent by way of substituted service through the Standard Newspaper pursuant to leave granted by this court on 23rd February, 2017. There is an affidavit of service filed herein on 28th March, 2017 confirming the aforesaid service. However, the Respondent did not attend court on 28th March, 2017 when this matter came up for hearing, and after the court being satisfied that the matter, together with the hearing notice was served, this court allowed the Applicant to proceed in the absence of the Respondent.

4. The Applicant's case is that the Respondent has unlawfully taken, and sexually abused his daughter **Z C S** who was born on 14th February, 2006 at the Coast General Hospital.

5. The mother of the minor, who was married to the Applicant, died on 19th June, 2014 while the minor was in class 8 at [particulars withheld] Primary School in Kwale County. The Applicant's case is that he and his wife were all living in their Likoni rented house as a family of 6 members. The minor was attending the same school with her brother in the same class at [particulars withheld] PRIMARY SCHOOL, and is now in form II in [particulars withheld] Secondary School in Kwale County. The Respondent was the Applicant's neighbor in the Likoni rented house and he works for gain as a long distance transport driver in Mombasa. The Applicants case is that the Respondent secretly eloped and escaped with the minor herein immediately after the death of the minor's mother and rented another house where they started staying together as wife and husband in a hide out. The Respondent knew very well that the minor is a girl who is under age and decided to convince the minor that he is the man to marry her and make her future life better by using false pretenses which act has damaged the minor's future and her right to education which is paramount under the Children's Act and the Constitution. The Applicant's efforts to talk to the minor and to give her parental guidance hit a deadlock but the Applicant was able to convince her to sit for her class 8 examination in 2014 which she did and obtained 243 marks. The Applicant annexed the school leaving certificate marked "C.L.S. 2" and a certificate marked "C.L.S. 3" and the schools which were willing to admit the minor collectively marked "C.L.S. 4". However, the Applicant's efforts to convince the minor to join form 1 did not yield any fruits due to the influence of the Respondent, who eloped with the minor and denied the minor the right to quality education. The Applicant reported the matter to INUKA POLICE STATION on 8th March, 2015 and was booked as OB NO. [particulars withheld]. However, the Respondent, on learning that he was being sought by police officers, shifted to Nairobi area of Dandora and their phone numbers are 0704 ***** (which the minor is using) and 0714 ***** (for the Respondent). The minor is now 15 years and due to the illegal acts of the Respondent, she is having a baby girl, and she is in need of protection. The Applicant's case is that the Respondent has committed an offence under the Sexual Offences Act Laws of Kenya and has used the advantage of the minor's under age to do the same and therefore is liable for prosecution. The Applicant urges this court to uphold the minor's right to education, and to have the Respondent face legal charges necessary under the laws of Kenya.

6. The Applicant states that many times he has talked to the Respondent to release the minor but the Respondent has treated the Applicant with contempt, hence this application.

The Determination

7. I have carefully considered this application. The same is not defended. Even then this court is obligated to establish its merit. From the documents in support of application it is clear that the said **Z C** is a minor and was at one time admitted to [particulars withheld] School in Mombasa in the year 2011. It is also clear that the Applicant is the father and the only surviving parent of the minor Z. So the issue for the determination of this court is whether or not the said Z is a minor as alleged, and if so whether the minor's right is being abrogated by the Respondent as alleged.

9. This court has considered the application and the documents in support thereof and has come to the conclusion that indeed the said Z is a minor. There is no controversy as to where she is. She is currently allegedly the wife of the Respondent. I have seen the conversation between the Applicant and the Respondent at paragraph 15 of the supporting affidavit. That conversation, which is not challenged, reveals that the Respondent does not care about his conduct, is arrogant and has taken the minor as his wife. That is a position which is contrary to the law. The Respondent cannot purport to marry a minor or to have sex with a minor. The said Respondent shall be arrested and brought to this court for doing illegal acts with the minor.

10. In the upshot, the application is allowed as prayed. The Respondent shall pay the costs of the application.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 5th day of April, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Applicant in person

Mr. Kaunda Court Assistant