



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO.143 OF 1994

S N S.....PETITIONER/RESPONDENT

VERSUS

F C T.....RESPONDENT/APPLICANT

JUDGMENT

1. The respondent via Notice of motion dated 8th December 2014 seeks variation of Justice Kimaru's order issued on 18th November 2010. The applicant seeks to be granted joint and physical custody of the minor A U T. That the applicant be granted physical custody of the minor for 15 days during all school holidays during which time he be at liberty to travel to the child to Italy or anywhere else provided the child is promptly returned to the physical custody of the respondent at the expiry of the said 15 days or sooner.

2. The application is based on grounds that on 18th November 2010 this honorable court made orders prohibiting removal of minor A U S T from the jurisdiction of this honorable court without leave. That the applicant is residing and working for gain in Italy and has given the substance of the order unable to travel with his son to Italy as he can only have access to the minor in Kenya where the Petitioner/ respondent who has actual physical custody of the minor resides. That the applicant is desirous of having the minor M A U S T visits and spend sufficient time with the parental side of his family who reside in Italy. That despite his attempts to procure this understanding amicably the respondent has declined to cooperate. The applicant argues that he is ready and willing to abide with such terms as maybe set by this honorable court.as a condition for the variation of the terms of the court order dated 18th November 2010 including having this order recorded and made enforceable by the High court in Italy. That is in the best interest of the child that the applicant be allowed to have periodic physical custody of the child during school holidays when he may take the minor to Italy.

3. In his affidavit in support of the said application the applicant reiterated the grounds of his application adding that the said orders were conservatory and temporary in nature and that the said child has spent school holidays Christmas holidays with the petitioner since 2010. He avers that he wishes A to travel to see him in Italy promising to return the child to the Petitioner at the expiry of the limited period. That efforts to have the child visit him in Italy have been declined by the respondent reasons he seeks the court's intervention. He avers that the respondent uses the issue of custody as leverage for him to cede to her funds held in his London account with her as a signatory which she has unreasonably withheld him from withdrawing from including money meant for upkeep of the child. That the respondent has in many occasions shown her desire to deny him an opportunity to have contact with her son. From the respondent's adverse attitude he fears that he will become estranged from the applicant and his paternal family and the same could inevitably affect his psychological growth. That this attitude is denying him an opportunity to his parental love and affection to the child. He avers that he is able to take care of A both

emotionally and financially adding that he has an older daughter and is well versed with parental responsibility. He urges the court to allow him 15 days of every school holiday to have physical custody of the child and may take him out of this court's jurisdiction to bond with his paternal grandparents and relatives in Italy.

4. In opposition to the said application, the respondent filed a replying affidavit dated 10th March 2010. She avers that the applicant petitioned for legal separation in Italy on 25th January 2011. The said court issued various ex-parte orders including temporary custody of the child to the respondent/applicant. Orders which she appealed against in the court of appeal of Perugia, Italy the judge refuted the respondent's claims that it was improper to place the child to reside in Kenya as the applicant had previously resided in Kenya before relocating back to Italy and in its ruling held that the placement of the child is with the mother with the father having access in Kenya or any other place of residence parent. 5 consecutive days per month and one week in Christmas period, 15 days during summer holidays with advance notice to the other parent. The applicant was also ordered to pay child maintenance of 800 Euros per month 50% of other expenses of the child and spousal maintenance of 1200 Euros. The respondent avers that she has complied with the said orders of the court but states that the respondent has refused to pay maintenance. She avers that the child in question suffers from Nephrotic Syndrome and is current constantly on expensive medication and consultation with his doctors in Nairobi and requires immediate medical attention should an emergency occur adding that it is paramount that the child is not exposed to different climate unnecessarily. She also stated that there is lack of clarity as to the respondent's residential address which raises grave concerns as to whether minor will be kept adding that the respondent had threatened to relocate with the child to Italy and she reported the same to Muthaiga Police Station.

5. The respondent in his supplementary affidavit dated 9th March 2015 though he admits that the minor suffered from Nephrotic Syndrome the same had been brought under control through medication by Doctor Bashir Admani who has since given the minor a clean bill of health. He avers that when the child was diagnosed with the said condition he attended to the minor while the respondent was away in London adding that he normally procures medication for the minor's treatment in Italy and is in a position to cater to the child's health if the need arises. He avers that he caters to the minor's school fees, medical expenses and maintenance. He denies of harboring any intentions to run away with the minor as the same would damage the minor's wellbeing as he also has a right to his mother's care and protection.

6. In her further affidavit dated 24th March 2015 she avers that though she appreciates the child's best interest require the participation of the father in his life it is important that such participation is regulated so as not to prejudice the child's delicate health situation. That though the respondent had given his address he did so before travelling to United Kingdom and hence claims not to know whether the respondent went back to the same address. She avers that the claims of maintenance by the respondent don't amount to much as the child's school fees is well over 500,000. That the respondent has sufficient funds to cater to the child and his refusal to provide for him is a demonstration of his unwillingness to meet the child's best interest.

7. The matter was canvassed in court by way of oral evidence. Francescomaria Tuccilo testified that he was married to the petitioner but the said marriage was dissolved in Italy. There is one issue of the marriage A U S T born on 1st January 2008. He seeks the court to grant him custody and access to the child for 5 years now. He stated that his whole family lives Italy and wishes the son to be part of his family and spend time with them. That during the subsistence of the marriage the child was half in Kenya and half time in Italy. His family has made efforts to visit the child in issue severally from his mother, brother and sisters. He personally visits the child once every month or at least once in 2 months. The petitioner lives in Kenya with her parents and this forces the child to rely on the mother's side of the family. That though the child was diagnosed with Nephrotic Syndrome in Italy sometime in 2010 the child has been undergoing treatment with Dr. Bahir with the last treatment being August 2013. The condition requires the child to be constantly monitored but the same does not necessarily mean that the child has to be within 10 minutes of a hospital adding that in Rome where he stays is only a 3 minutes-walk to the hospital. That the said condition appears to have disappeared for over 2 years as per the

doctors records as at 2010 adding that the child has not been banned from travelling and hence there was no reason for the child not to visit him adding that the petitioners actions are just a way of revenge and blackmailing him. He denied the petitioners allegations that he did not care for the child stating that he stayed with the child for 15 days when he was unwell while the petitioner was travelling. He stated that the child need both parents and families and indicated he had no intentions of denying the petitioner custody of the child. He refuted allegations of refusing to pay the child's school fees blaming the same on a problem with the mode of paying. He stated that he opened a joint business account with the petitioner in 2008 where he put savings from his business but when they separated the petitioner wrote a fax to the said bank and he was unable to make any payments using that account. He claims that the petitioner claims 50% of the amount held in the said account in order for her to allow the child visit him. Though he stated that when he is in Kenya he pays directly and had receipts to show the same. He stated that he has an older daughter he pays maintenance and college fees for and she loves and spends time with the child. He argued that the petitioner nullified the marriage because he was unable to contract the marriage but refused to be heard in the said proceedings as she was in Kenya at the time. He stated he was ready for the Court in Italy to enforce the order.

8. On cross-examination he stated that joint legal custody will ensure that both parents will have the responsibility for the child. He stated that he filed proceedings in Italy and the court in Italy issued temporary orders for him to pay 800 euros a month and the child was to be resident in Kenya and he lodged an appeal against the said order. That he paid the 800 euros and 1200 euros but stopped when the said order was cancelled. He stated that the syndrome attack on the child was in Italy in 2010. He added that the issue of the child is exaggerated due to the parties acrimony. He denied allegations of his mental status raised in the divorce proceedings adding that he was ready to be visited by a doctor to confirm if at all he was insane. At one time the child was admitted for a surgery by Dr. Kambuni but he was unable to travel as he could not get time off work but visited the child thereafter. He stated that he used to see the child at the beginning of every month but this changed when he was threatened he reported to his lawyer who reported to the court but soon after he resumed. He stated that he currently earns 3000 Euros and pays the 800 Euros in Rome and uses 700 Euros to maintain himself adding that it cost a lot for him to travel to Kenya as he also has to pay for a hotel. He also pays her daughter's rent which is 300 euros as she lives in a different city and pays her university fee of 1000 or 1200 euros per year. He stated that he was trying to do the best for his children and had put aside 300000 for his daughter and 40 million for A. He added that the petitioner has refused to receive any funds from him and he proposes to be allowed to pay 50% of the school fees and the petitioner to pay 50% from the joint account. He states that the petitioner does not allow him communicate with the child and she is hindering his relationship with the child hurting him in the process. He argued that he wants to be loved as a father adding that the child can be covered under his medical insurance adding that the petitioner could have gotten money from the joint account if she so wished. He urges the court to grant joint custody as that is in the best interest of the child.

9. S N stated that A U S T was born to her and the respondent on 1st January 2008 in Nairobi and is currently a 3rd years student at [Particulars withheld] School. She met and married the respondent in Italy in 2004 but they later relocated to Nairobi where they intended to settle long term. She stated that their son A suffers from Nephrotic Syndrome a form of kidney failure whose cause is unknown and has no cure. The condition is managed by steroids and transfusions. A got sick when they went to visit the respondent's parents in August 2010 and since then he has been treated by Kenyan doctors a Dr. Bashir and Dr. Kambuni. On 28/9/2011 while she was travelling to Italy her son started swelling and after a few hours from time of admission his appendicitis turned life threatening and he had to undergo a surgery. That though Ascanio has not had a relapse in nearly 2 years and though his immune system is growing stronger, he is still not out of danger. She stated that there were orders made in Italy and the father had full access e children in Kenya anytime he wanted but failed to respect the 2 weeks notices. She is opposed to the respondent removing A from Kenya adding that since he got sick he has not bothered to care for him and never visited him in hospital and does not understand the extent of the child's illness. She states that the respondent is abusive and does not know where the respondent lives adding that he comes from a family with acts of violence and that there is some schizophrenia in his family and she fears that the child will not be returned. She stated she is not opposed to the respondent having access to the child but insists that she be given sole custody of the child whom she had had control over for the past 6

years. She stated that she barely talks to the respondent but they rarely exchange emails which are mostly abusive. She seeks maintenance for A adding that she pays his school fees of 435 increased by 10% per years, transport, medical bills and nanny adding that the respondent only buys the child a few t-shirts when he visits. She seeks the respondent's assistance in paying school fees and proposes they share medical. She stated that she filed for divorce in 2010 and by then the respondent had emptied all the bank accounts but only managed to freeze the joint account. She stated that the said account was opened by her father and he deposited money for a house gift when they got married adding that the money belongs to his father and the same cannot be used to pay maintenance. She added that the respondent never once provided what the Italian Court provided and did not reimburse the amount charged for the surgery.

10. On cross examination she sought to clarify that she did not mean that all the respondent's family members were psychosomatic and she did not see any medical reports confirming the same. She also sought to clarify that the respondent did not physically abusive her . She added that the respondent's mental status makes him in appropriate person to take care of the child. She stated that the respondents visits the child twice a years and longest he stays is 5 days. That after spending time with the father the child always ends up getting detained in school for doing things. Though she is not opposed to the respondent having access to the child she minds the trouble he creates adding that he has not provided love and care to A for the past 6 years. She reaffirms that she is opposed to the respondent having custody of the child in Italy as she fears that the child will get sick and the father cannot take proper care of him and he has not appointed any doctor who is conversant with the child's condition.

11. Parties filed written submissions which I have read and considered. The applicant referred the court to orders made by the court on 18th November 2010 issued an order that A U S T should not be removed from the jurisdiction of the court by either party this is what prompted the applicant to file the current application in aim to set aside the said orders. The matter was canvassed by way of viva voce evidence. The applicant raises 2 issues for determination. Whether the subsistence of the orders issued on 18th November 2010 are in the best interest of the child. He referred the court to Article 53 (c) of the Constitution of Kenya which provides that, *"(2) A child's best interests are of paramount importance in every matter concerning the child."* The child's interest is the guiding principle applied by section 4 of the Children Act which provides that ,

"(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.

(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.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest."

Convention on the Rights of Children which Kenya is a party state under Article 9(3) provides that, State parties shall respect the rights of the child who is separated from one or both parents to maintain personal relationship and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest."

12. It is submitted that the said orders hindered the applicant access to the child and hence deprived the

child opportunity to live with and be cared for by the father. The applicant was of the view that he should be afforded reasonable opportunity to bond and live with the father. *He relied on the case of N –v- K (2008) KLR 518 where it was held that, “the paramount consideration in this type of the case is the welfare of the children. To deprive a parent access is to deprive a child of an important contribution to his emotional and material growing up in the long run... the children were boys and were big enough. It was not for long term wellbeing that they should be alienated from their father.”*

13. The applicant expressed despite constrains he had efforts to spend time with his son despite the respondent’s strenuous attempts to depict the applicant as a lunatic and his family as unsuitable company to the child all which he claimed was cultivated to achieve a common goal. He submitted that the Constitution of Kenya especially Article 53(1)(e) provides that, *“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;”*

The law under section 82(1) of the children’s Act, *“empowers the court to grant custody of a child to its parent”*.

14. When determining competing interests of the parties to parental rights to custody the constitution establishes general equality rights as between spouses during the pendance of a marriage and after dissolution of marriage. Article 45(3) provides that, *“(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”*

Further, that Section 24 (1) of the Children’s Act, *“(1) Where a child’s father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.”*

15. It was submitted that the applicant is entitled to joint custody of the child. He submits that allegations that he is not capable to cater to the child he argues that the child was 1st diagnosed with Nephrotic Syndrome in Italy and medicine use is sourced in Italy further that the hospitals are well equipped with state of the art equipment to cater to the child’s condition which has not recurred for the past 2 years. He attributes negative views of the respondent on her animosity towards him.

16. He urges the court to be guided by guidelines set out under Section 83 of the Children’s Act which provides that, *“(a) the conduct and wishes of the parent or guardian of the child;*

(b) the ascertainable wishes of the relatives of the child;

(c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;

(d) the ascertainable wishes of the child;

(e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(f) the customs of the community to which the child belongs;

(g) the religious persuasion of the child;

(h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;

(i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

(j) *the best interest of the child.*”

He submits that the same should be used together with, “Article 10 of the Convention on the Rights of the Children which provides that, “

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of Family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child who parents resides in different states shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, states parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present convention.

It was his submissions that he has not done anything to render him undeserving of the orders sought.

17. He submitted that he is aware of the child’s needs and has consistently provided for the child despite the respondent’s constant frustrations. Claiming that the respondent has unreasonably withheld the applicant from making any withdrawals from the joint account although he claims that 50% of the said money is hers. He submitted that the parents of a child are bestowed with parental responsibilities in equal amount as provided for under Section 24(1) of the children’s Act. He relied on the case of **JMM v JM Civil Appeal 114 of 2008**, where it was held, and “where the responsibility to provide for a child is financial, the income of each parent has to be considered... Having said so, it was necessary for the trial court to have made a finding on the monthly financial requirement of the two children, and then split the total requirements into two portions, as the father and mother of the children are all P1 teachers. Whatever costs or expenses are of the spouse was already incurring for the children that should have been taken into account in the division of parental responsibility”.

18. The applicant urged this court not to be misguided by the applicant’s false allegations as he was entitled to a Constitutional and legal right to the joint custody of the child adding that no evidence has been advanced that he cannot adequately take care of the child’s needs and health whilst in Italy. T

19. The respondent on her part stated that 5 issues were coming up for determination.

1. Whether legal custody should be sole in favour of the Petitioner or jointly in favour of the respondent.

2. Whether respondent should be allowed to take the child to Italy.

3. Whether the care and control of the child should be given to the petitioner or whether it should be equal.

4. How much maintenance should the respondent pay for the child.

20. The petitioner seeks sole custody of the issue of the marriage. She submitted that communication between her and the respondent is so septic that they have not spoken for the last 1 year adding that any attempts to communicate with him is met with threats and the same makes decision making very hard and hence subjecting decision making on both parents will result in jeopardy of the child’s interests. That in 2011 the respondent refused to consent to the child’s surgery which was crucial in saving his life going to as far as threaten the surgeons with criminal proceedings. Section 81 of the children’s Act defines “care

and control” to means actual possession of a child, whether or not that possession is shared with one or more persons. It was submitted that the petitioner has been the child’s primary care giver since he was born and has been with the child alone in Kenya for the past 4 years since the respondent left the country. The child is 8 years and is still of tender age and requires mother’s nature and care. She pointed out that the respondent lives in Italy and it was not practical to ask for equal care and control as the child needs to have continuity in the home and country noting that the child in question is in school in Kenya and he will greatly affected if she and the respondent are to have equal care and control. She added that the respondent has never understood the extent of the child’s illness as she is the one who has been taking care of him since he was diagnosed.

21. That Section 4(2) of the Children’s Act gives guiding principles in determining the child’s welfare. The same 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.*”

22. This she states mean that all facts, relationships, claims and wishes of the parents are taken into account and weighed. She relied on the case of **A.M.K. –vs- J.N.M divorce cause no 64 of 2009** where in reference to the case of **Midwa –v- Midwa where** it was held that, “*it is trite law prima facie other things being equal, children of tender age should be with their mother and where a court gives custody of a child to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the prima facie rule.*”

23. The petitioner argues that the respondent should not be allowed to take the child out of the country during his visitation to Kenya as there is no guarantee by the respondent that he will return the child to Kenya. She added that the weather in Italy is harsh and infections spread easily. She referred the court to the Order by the Italian Court stating that the child be placed with the mother residing in Kenya with the father having rights to see the child and keep him always in Kenya or other place of residence of the parent for 5 consecutive days per month including alternative years Christmas and new year’s eve and for 15 days during summer holiday with advance notice to the other parent by the 31st of May of every year. Further that there is no satisfactory way of returning a child who has been taken out of one country to another. She relied on the case of **Hadkinson vs Hadkinson ALL ER Vol. 2 P.5 & 7**, “where a child is removed from the jurisdiction no satisfactory means have been

24. In regards to maintenance to the child the petitioner submits that she is the one who has catering to the child’s expenses, food, accommodation. Medical bills and nanny to the exclusion of the respondent forcing her to stay with parents and she could not afford to move out. She broke down maintenance as follows;

Food 50,000

Rent 160,000

Utilities 11,000

Nanny 12,000

Driver 20,000

Fuel 24,000

Car service 8,000

Entertainment 100,000

Clothing 30,000

School uniform 20,000

Total 415,000

School fees 1,770,850

She submitted that the person with her capacity to maintain the child to provide maintenance and accruing arrears.

Determination

25. There appears to be a lot of acrimony between the parties and the two are said not to see eye to eye on anything. In regards to custody of the child the court has to ensure that the best interest of the child is paramount as enshrined in Article 53(2) of the Constitution which provides that, *“A child’s best interests are of paramount importance in every matter concerning the child.”*

Section 4 of the Children’s Act in conformity with the Constitution, 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.”*

26. In deciding issues of custody the same involves balancing of interests as *Section 83 of the Children’s Act which provides that,*

“(1) In determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to—

(a) the conduct and wishes of the parent or guardian of the child;

(b) the ascertainable wishes of the relatives of the child;

(c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;

(d) the ascertainable wishes of the child;

(e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(f) the customs of the community to which the child belongs;

(g) the religious persuasion of the child;

(h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;

(i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

(j) the best interest of the child.”

27. The child has a right to companionship with his father who is Italian and his whole family lives in Italy. I find that it would be unfair to restrict the child to Kenya as he needs also to bond with his paternal extended family. The applicant has demonstrated interest in being involved in the child’s life by travelling to Kenya now and then to spend time with him. I find that both parties have a part to play in raising the

child in issue and should put aside their difference to make decisions in the best interest of the child. I find that it is in the best interest of the child for both parties to have joint custody of the minor in question. The child will be mainly based with the mother and will continue schooling in Kenya. The applicant will have the child on during half of the school holidays with the parents having the child on alternate Christmas and half of the new year holidays. To avoid inconveniences the applicant will have the child back with his mother at least a week before school reopens to facilitate planning. The mother will accompany the child to Italy when the child visits but cater for her flight and accommodation for the period she is in Italy .

28. Section 98 provides that: - *“A Court shall have power to make an order and to give directions regarding any aspect of the maintenance of a child, including but not limited to, matters relating to the provision of education, medical care, housing and clothing for the child; and in this behalf may make an order for financial provisions for the child.”*

29. The court in dealing with the issue of custody of a child has power under section 98 of the Children Act to give directions regarding the child’s maintenance and housing. It is the responsibility of both parents to ensure that they provide adequate, shelter, clothing, and medical care including immunization and education and guidance. It is the responsibilities of both parties to provide for a child. Article 53 of the Constitution provides the rights of a child. Part (e) 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”*.

Section 24 of the children’s Act rests responsibility of taking care of a child on both parents, it provides that, *“(1) Where a child’s father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.”*

30. The child in question has a sensitive condition which is known to both parties and as such requires critical care and attention which can be achieved with the contribution of both parents. Going as per the breakdown given by the respondent the amount totals to 1,770,850. This includes the basics needs accommodation, food, nanny and entertainment. Both parties are earning an income and none of the parties has fronted an affidavit of means or lack thereof I find that it is only fair that the parties share equally towards the maintenance of the issue of the marriage. The child in question was born to the parties during the period they were married.

It is so ordered. Costs in the cause.

Signed, dated and delivered this **7th** Day of **December** 2016.

R. E. OUGO

JUDGE

In the presence of:

.....**For the Petitioner/respondent**

.....**For the Respondent/Applicant**

Ms. Charity

Court Clerk