REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 87 OF 2015

F F M……...……APPELLANT/APPLICANT

VERSUS

DR. A O A...…….RESPONDENT

R U L I N G

1. On 17th August 2015 the Appellant/Applicant filed an appeal dated 14thAugust 2015. Contemporaneously with the appeal she filed a Chamber Summons dated 17th August, 2015 and taken out under **Article 53** of the **Constitution of Kenya, Sections 4, 6, 13(1), 24, 25, 73, 76, 81, 82, 83, 85, 88, 90, 91** and **114** of the **Children Act 2001,** and **Rule 4** of the **Children Practice** and **Procedure Parental Responsibility) Regulations, 2002** and all other enabling Provisions of the Law. The application seeks that pending the hearing and determination of the application the court do make wardship orders for children of the marriage namely A.M.O and A.O.O and order the Respondent to forthwith produce the children in court.

2. That in the alternative and pending the hearing and determination of the application the court do order that the children of the marriage be returned to Kenya, the Respondent be restrained from removing the children from Kenya and Appellant/Applicant be granted interim custody care and control of the children.

3. The Appellant/Applicant also prayed that the court be pleased to grant the above prayers pending the hearing and determination of the Appeal.

4. The application is premised on grounds that the parties are husband and wife and are the parents of the minors herein. They lived in Kenya with the children who went to [particulars withheld] School, until the Respondent relocated to Malawi to work and the children joined him there. The Applicant alleges that she discovered from the Respondent's mail in the computer that the Respondent had been granted divorced and had also obtained full custody of the children, as well as orders barring the Applicant from going to the Respondent's place of abode and work, or otherwise interfering with the Respondent in any way. The court subsequently set aside the said judgment and all consequential orders on 31st July 2015. The children are said to be of tender years and in need of the Applicant's care as she has always been the primary care giver, and unless the court intervenes the childrens' interests will continue to be jeopardized.

5. The application is supported by the affidavit of FFM, the Appellant/Applicant herein, sworn on 17thAugust 2015 in which she deposes that the Respondent is her husband and that they solemnized their marriage on 8th December 2007 in Nairobi, but that divorce proceedings are ongoing in the Chief Magistrate's Court being Divorce Cause No. 567 of 2014.

6. The Applicant asserts that the children are currently in Malawi as a result of the Respondent's misrepresentation, material non-disclosure and deceit to both the Applicant and the court. That both she and the Respondent lived with the children in Kenya until January 2015 when the Respondent left to work in Malawi, and was joined by the Applicant and the children in April 2015. That she only learnt that she had been divorced when she came upon e-mail correspondence between the Respondent and his female friends in his computer.

7. The Applicant subsequently applied successfully for stay of execution and for the setting aside of that judgment that was entered on 10th April 2015.

8. The Applicant contends that the Respondent knowing that the Applicant had been granted stay of execution of the judgment, filed yet another suit in Malawi being Lilongwe Civil Cause No. 285 of 2015, in which he sought custody orders pending the inter-parties hearing of the Applicant's application. The Applicant further avers that when the custody orders came up for hearing inter-partes in Malawi on 13th July 2015, her Advocate was not able to attend court and consequently, her application was dismissed and the custody orders in favour of the Respondent were reinstated. She did not appeal against the dismissal of her application citing the slowness of the legal system in Malawi, hence the present application.

9. The Applicant contends that she travelled to Malawi to see the children but the Respondent denied her access to the said children causing distress to the children who were very anxious to meet her. She urgues that she is concerned about their wellbeing because they are of tender years, and are suffering psychologically due to the unfair circumstances that forced the parties to be away from each other. The Applicant states that she is ready and willing to continue caring for the children once the court orders for their return.

10. Opposing the application, the Respondent filed a lengthy Replying Affidavit dated 11th September 2015 that included averments that spoke more to the application for setting aside the initial proceedings in the lower court than the instant application. He averred that the Applicant's application amounts to an abuse of court process for being defective, incompetent, bad in law and lacking in merit. The application is said to contain blatant lies, untruths and misrepresentations, and is an afterthought made purely for selfish and malicious reasons and material gain and it is not in the best interest of the children.

11. The Respondent asserts that the Applicant was duly served with the certified copy of the petition for divorce but did not file her Memorandum of Appearance nor Answer to the Petition within the stipulated period. That the cause therefore proceeded as undefended and judgment delivered on 10th April 2015 granted him the divorce awarding the Respondent custody, care and control of the children.

12. The Respondent further avers that the Applicant filed a Notice of Motion challenging the judgment of 10th April 2015 where she sought inter alia, a stay of execution and setting aside of the judgment and decree entered thereto. That the Applicant later on filed a chamber summons Application dated 15th May 2015 seeking, inter alia, wardship orders with respect to the children of the marriage, production of the children in court and interim custody, care and control of the children. That the Notice of Motion, Chamber Summons and the Respondent's Preliminary Objection were canvassed together.

13. In the subsequent ruling delivered on 31st July 2015, the Respondent's Preliminary Objection was upheld, Chamber Summons dismissed and the Notice of Motion seeking the setting aside of the judgment that granted Divorce was allowed.

14. According to the Respondent this application is therefore Res Judicata since the orders sought and the grounds relied upon in the instant application are exactly similar to those in the Applicant's Chamber Summons filed before the subordinate court dated 15th May 2015. The Respondent also contends that should the orders sought in the instant application be granted, the Appeal will be rendered nugatory as it is. Further that the fair and conclusive determination of the Appeal will be impeded by the instant application which creates an unnecessary main trial.

15. The Respondent also depones that the two issues of the marriage were born in the United States of America and are American citizens with all their personal documents having been issued by the government of America. That in any case, the children being no longer within the jurisdiction of this country are not subject to the jurisdiction of the Kenyan courts and this court cannot grant the orders sought as it has no means of enforcing them.

16. It is the Respondent's assertion that he is the biological father of the children having equal rights and responsibility towards them and is well able to live with and care for the children as he has done even when they were in Kenya because the Appellant/Applicant was **"busy gallivanting, globetrotting and enjoying herself without due regard to the well fare of the children."**

17. The parties filed written submissions in which they essentially recapped the contents of their respective affidavits. At the hearing they addressed the court on the twin issues of the jurisdiction and the prayers sought in the application.

18. I have therefore considered the application together with the affidavits in support and in reply and the submissions to determine the question of jurisdiction and the best interests of the subject minors in the circumstances.

19. On the issue of jurisdiction Mrs. Thongori submitted for the Appellant/Applicant that the Respondent has stated that he was aggrieved by the decision of the lower court to stay the orders of divorce and custody the said court had granted him earlier, but he had decided to let the matter proceed as a defended cause. That it is therefore contradictory for the Respondent, to at once say that he will have the divorce and custody claims determined by the lower court in Kenya but the High Court of Kenya has no jurisdiction to entertain this matter. Secondly, that the Respondent sought orders of interim protection against the Applicant in the Malawi Court in which he prayed that the orders be preserved pending the decision in the Kenyan court. Thirdly, that he based his prayers on a decree Nisi that has now been set aside. It was M/s. Thongori's view that this court has jurisdiction under **Section 85 Children Act** and **Article 165** of the **Constitution**.

20. M/s Njuguna learned counsel for the Respondent, broached the issue of jurisdiction on two fronts. First, she submitted that the issue is Res Judicata since the orders sought and the grounds relied upon in the instant application, are exactly similar to those raised by way of Preliminary Objection in the Applicant's Chamber Summons dated 15th May 2015 filed before the subordinate court. That in the ruling of that court dated 31st July 2015 the Respondent's Preliminary Objection was upheld.

21. Secondly, M/s Njuguna submitted that the Applicant is a Tanzanian National whose Alien certificate expires in 2017. That she is a foreigner who has never acquired Kenyan citizen. The Respondent on the other hand is a Kenyan who now works and lives in Malawi. That the two issues of the marriage were born in the United States of America and are American citizens with all their personal documents having been issued by the government of America. That the children being no longer within the jurisdiction of this country, are not subject to the jurisdiction of the Kenyan courts and this court cannot grant the orders sought as it has no means of enforcing them.

22. I have considered this issue at length in light of all the pertinent averments and submissions thereto. First, I find that the issue of the jurisdiction of this court is not *Res judicata* because the court that considered the issue earlier, was subordinate and not one of concurrent jurisdiction to the court currently seized of the matter. The findings and decision of that court are not binding on this court. The trial magistrate also lacked jurisdiction because she had not therefore been gazetted by the Chief Justice to preside over children's matters in Nairobi. There is no such requirement for a judge of the High Court.

23. Secondly, I am persuaded by the reasoning of Romer L. J. in **Hadkinson vs Hadkinson 1952 All E.R.** which was cited with approval by Ibrahim J as he then was, in **Mathew Chepkwony** and **Ezekiel Chepkwony vs Paul Kemei Kiprono [2007] eKLR** to which M/s Njuguna referred this court. Romer J stated as follows:

> **"The court cannot exercise its quasi-parental powers in relation to a child unless effect can be given to its orders and it cannot enforce its orders if the child is taken abroad. Once a child is removed from the jurisdiction no satisfactory means have ever been devised of ensuring or enforcing its return."**

There is indeed no satisfactory means by which this court can enforce the orders it has been called upon to issue. Orders of court should not be issued in vain.

24. The relevant part of **Section 85** of the **Children Act** to which M/s. Thongori referred this court is **section 85(1)** and it provides as follows:

> **"A court may, on the application of a person from whom a child has been removed in breach of section 84, order the person who has so removed the child to return the child to the applicant and where the child has been removed from the jurisdiction of the court or the Republic of Kenya, make a wardship order or a production order on such conditions as the court may deem appropriate in the circumstances."**

Section 85 therefore comes into play where there is breach of the provisions of Section 84. The provisions of **Section 84 Children Act** would require that the Applicant herein, had made an application for custody orders in respect of the minors. It also would require that the Respondent then removed those minors from the Applicant's custody against her will. In the instance case it is the Respondent who had applied and been granted custody of the minors by the lower court, although those orders were subsequently set aside. Both parties lived together with the minors before that application was made. Section 85 is therefore not applicable in those circumstances.

25 On the second issue for determination the orders sought by the Applicant relate to children. In law, in any matter concerning children, the best interest of the children is paramount. **Article 53(2)** of the **Constitution** provides the guiding principle on this question as follows:

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

The other pertinent law is the **Children Act No. 8 of 2001** and in particular **Section 4(3)** thereof, which provides that:

> ***"(3) All judicial 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 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..."***

The orders made by this Court, must therefore serve the interests of the Children in question more than those of the litigants.

26. In the matrix of this matter, I am doubtful that it would be in the best interests of the children for the orders sought to issue at this interlocutory stage. Considering that the children have just recently been uprooted from their school and familiar surroundings and relocate to Malawi, it cannot be in their best interest to be subjected to such an upheaval a second time and be uprooted again from a school and environment just as they have settled in, when it is not certain which way the final outcome of the matter may go. In any case, the trial court has since set aside its judgment and all consequential orders flowing therefrom, which were the bar to the applicant approaching the court in Malawi.

27. It is noteworthy that when the Applicant moved the court in Kenya for the divorce and custody orders, the two litigants and the minor subjects resided in Kenya within the jurisdiction of the court. The

jurisdiction of the court was therefore not in question. Circumstance have since changed and the minors being not of Kenyan citizenry are no longer resident within the territorial jurisdiction of this court. In view of the foregoing, this court holds that the circumstances of this case are such that it cannot exercise its jurisdiction to grant the orders sought at this interlocutory stage, for to do so would not serve the best interest of the children herein.

The court accordingly declines to grant the orders sought.

SIGNED DATED and **DELIVERED** in open court this **6th day** of **November 2015**.

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L. A. ACHODE

JUDGE