REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1323 OF 1998

WYCLIFFE MARTIN SHIBERENJE.....PLAINTIFF

versus

ANTONIUS JACOBUS VAN HAM & ANOTHER.....DEFENDANT

R U L I N G

The applicant moved the Court by way of originating Summons under Sections 17 and 18 of the Guardianship of Infants Act Cap. 144 Laws of Kenya for two basic orders, namely:

> ***1 THAT the respondents by themselves, their servants and or agents be restrained from removing HUDSON LUBULELLAH ALUSA (a minor) from the jurisdiction of this court; and***
>
> ***2 THAT the custody, care and control of the minor herein namely HUDSON LUBULELLAH ALUSA be granted to the applicant WYCLIFFE MARTIN SHIBERENJE.***

The Originating Summons is supported by an affidavit sworn by the applicant. As an interim measure, the applicant filed an application by way of Chamber Summons for injunctory orders. However, both learned counsel agreed that the said Chamber Summons be dispensed with and instead proceed with the Originating Summons.

The respondents have filed a joint replying affidavit. There are also other affidavits sworn by close relatives and friends of the applicant, all in opposition of the applicant's application.

Some brief facts leading to these proceedings are necessary. The applicant is the biological father of the minor HUDSON LUBULELLAH ALUSA. The applicant was employed by the respondents. He asked the respondents if he could bring the minor from his rural home to Nairobi. The respondents agreed.

When the applicant left employment with the respondents he requested the respondents to take care of the minor. Except for a period of about one and a half years between 1994 and 1996, the minor has, since 1991 continuously lived with the respondents in Nairobi. He was enlisted into and has been attending the Netherlands School in Nairobi. The respondents have been responsible for the minors Educational and related expenses. They have also said they are committed to continue doing so.

It is the applicant's case that the respondents are about to leave the country for good and intend to take the minor with them. This case then followed.

Both learned counsel have addressed the court on the matter. I also have had occasion to talk with the minor alone in my chambers.

The relevant law relating to the matters now before me is to be found in section 14 and 17 of the Guardianship of Infants Act aforesaid. Section 14 provides:

> ***" 14. where the parent has- (a) abandoned or deserted his child; or (b) allowed his child to be brought up by another person at that person's expense for such a length of time and under such circumstances as to satisfy the court that the parent was unmindful of his parental duties, the court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the court that, having regard to the welfare of the child, he is a fit person to have the custody of the child."***

Section 17 aforesaid lays down the principle on which questions relating to custody upbringing etc. of infants are to be decided. The court shall regard the welfare for the infant as the first and paramount consideration.

The applicant does not live with the mother of the minor who is the subject of this application. He does not say from what source he shall educate the minor and pay for related expenses. There is evidence from the applicant himself that he surrendered the minor to the respondents himself voluntarily and gave the respondents full mandate to look after him. He also said he was fully aware that the respondents were not Kenya citizens and might be required to leave anytime. He had no objection whatsoever in whatever decision they made regarding the minor the local administration through the senior chief in his location gave his approval. The children's Department Headquarters raised no objection and above all his (the applicants') own brother, father, cousin and close relatives and friend gave their approval to the respondent's custody and guardianship of the minor.

The evidence talks of itself. The respondents have two minor children. They have accepted Hudson as their Brother, Hudson has told the court that he is already like a member of that family. He has expressed his wish to remain with the respondents so that he can continue with his education. He speaks Dutch fluently, some English and Kiswahili. He understands his mother tongue (Luhya) but speaks little of it. He has been to the Netherlands severally with the respondents and on all occasions the applicant did not raise any objection.

I am aware of and recognise the applicant's anxiety and wish to have the minor in his custody. However, with respect, it will not be in the best interest and welfare of the minor to make orders in favour of the applicant. His belated move to say the least, is mean and misplaced and cannot override the welfare of the minor which is of paramount consideration.

I have weighed one thing against the other and doing the best that I can find that, the status quo prevailing before these proceedings were filed shall prevail. This means that the application is hereby dismissed the respondents shall continue to have the custody care and control of the minor HUDSON LUBULELLAH ALUSA and the interim orders are accordingly vacated. The respondents shall have the costs of the suit. Orders accordingly

Dated and delivered at Nairobi this 21st day of July, 1998.

A. MBOGHOLI MSAGHA

JUDGE