



**In re CBM (Child) (Miscellaneous Civil Application E047 of 2023)  
[2024] KEHC 853 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 853 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION E047 OF 2023**

**RE ABURILI, J**

**JANUARY 30, 2024**

**IN THE MATTER OF A FEMALE CHILD CBM**

**AND**

**IN THE MATTER OF AN APPLICATION**

**BY**

**MN.....APPLICANT**

**VERSUS**

**EMN.....1ST RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2ND RESPONDENT**

**AND**

**DIRECTOR OF IMMIGRATION SERVICES.....1ST PROPOSED INTERESTED PARTY**

**KLM ROYAL DUTCH AIRLINES.....2ND PROPOSED INTERSTED PARTY**

**RULING**

1. The applicant herein KMN filed an application dated 17<sup>th</sup> April 2023 seeking orders that the subject minor CBM be returned to Kenya within three days, that the Hon Attorney General who is the 2<sup>nd</sup> respondent liaises with the Children Protection Department to the intent that the child is placed under the care and protection of the Children’s Department and that the 2<sup>nd</sup> respondent produces before this court a certificate of compliance.
2. The applicant’s case is that he is the biological father to the child CBM while the 1<sup>st</sup> respondent is her biological mother and that both are separated, each living their own different livelihoods. That since their separation, the 1<sup>st</sup> respondent had denied the applicant access to the said child who is aged nine years which prompted the applicant to report the issue to the Children’s Department in Kisii but the 1<sup>st</sup> respondent never availed the child, only for the applicant to learn that the child who had initially



- been left in the custody of the 1<sup>st</sup> respondent's parents in Kisii had been taken out of the country to Canada where the 1<sup>st</sup> respondent had relocated. The applicant lives in the USA.
3. That despite the applicant reporting the matter to the DCI, the child was secretly and procedurally taken out of the country using forged documents and without the applicant's consent. That currently, the child's mother is facing charges of giving false document (false declaration to the immigration officer for the purposes of assisting the minor to obtain a passport leading to issuance of Kenyan passport number 035.....07 (redacted) to the said minor CBM, which case is still pending.
  4. Subsequent to the above main application, the applicant filed an application dated 12<sup>th</sup> June 2023 seeking to enjoin other parties to this case namely, the Immigration Department and KLM Royal Dutch Airlines as interested parties. That is the application whose ruling is for delivery today.
  5. Having perused the application and all the responses and documents annexed, I observe that this matter is initiated as a Miscellaneous application. What that means is that this matter can only be considered by way of affidavits and or written submissions on the merits and demerits of the main application.
  6. The court notes that there are already proceedings pending before the Children's Court at Kisii and that it is in that court wherein the 1<sup>st</sup> respondent sought for custody of the minor and was granted such full custody thereof vide the order of 8<sup>th</sup> November, 2021 pending the hearing and determination of that case.
  7. In my view, the applicant herein ought to have applied for the orders herein in that suit which is a children's case and which court has the jurisdiction to hear and determine the issues raised herein which border on contempt of court, as to whether the child who was taken out of the country should be brought back to Kenya, the jurisdiction of the court that granted the 1<sup>st</sup> respondent custody of the said child. However, in the event that the Children's Court would lack jurisdiction owing to matters extra territorial, then the High Court at Kisii can hear and determine the matter, on application under section 18 of the [Civil Procedure Act](#) on transfer of cases.
  8. In addition, this court does not understand why the applicant filed this case herein Kisumu High Court when there is a court of competent jurisdiction in Kisii being Kisii High Court, the place where the minor was domiciled prior to being taken out of the country. The fact that the criminal case is at Kisumu where the child is alleged to have been processed by the Immigration Department prior to being taken out of the country does not in itself give the applicant herein the right to sue in this Court vide Miscellaneous proceedings which proceedings are in essence temporary in nature as no oral evidence can be called to prosecute the case.
  9. The issues being raised by the applicant will be better ventilated before the Children's Court which granted custody of the child to the mother or the High Court at Kisii and not this Court.
  10. For the above reasons, I decline to hear and determine the merits of this matter and direct that this file shall be transferred to Kisii Children's Court for consolidation with Kisii Children's Case No 932 of 2021 where evidence can be taken on the circumstances that led to the child being taken out of the country and whether the interested parties herein should be enjoined to the children's case at Kisii.
  11. Where there are any extra territorial jurisdictional issues involved, the parties can apply to have the matter transferred to the High Court at Kisii for hearing and final determination.
  12. Accordingly, this file is hereby transferred to Kisii Children's Court for consideration alongside the pending child custody proceedings.
  13. File closed.



14. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF JANUARY, 2024**

**R.E ABURILI**

**JUDGE**

