

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

PETITION NO.1 OF 2012

S.JPETITIONER

VERSUS

M.S.Y.....RESPONDENT

RULING

On 30/6/07 the respondent married A. M under muslim law. The marriage was conducted by the Kadhi in Kisumu. They have a daughter called S.S.M who was born on 23/7/08. The petitioner is the elder sister of A.M. She filed this petition on 13/6/12 claiming that the respondent had confined his wife by not allowing her to be visited by, or to visit, her relatives; she is living in an abusive environment to the extend that she fears for her life and that of her daughter; she is not allowed to socialise, to seek employment or to leave the house; and she is not allowed to move around. In the prayers it was sought that the respondent and his family members and friends be ordered to cease the detention of his wife and child; they be ordered to release her travel documents; be ordered not to come within one hundred metres of her; and that the OCPD Kilimani do effect her release and that of the child, and the documents.

With the petition was filed a motion which was heard *ex-parte* on 14/6/12 following which orders were given asking, among other things, that the respondent, his family members, relatives, agents, friends, etc, do cease the detention and confinement of A and the child and to allow them to leave house [particulars withheld], State House Road, Nairobi. The order was served. A took the child and they came to stay in Kisumu with her (A) parents. The child was enrolled in [particular withheld] Nursery School. In Nairobi, the child had been enrolled in Nairobi[particulars withheld] Academy.

On 28/8/13 the respondent came to Kisumu and took the child on the written undertaking that he would return it to the mother on 8/3/13. He has not returned the child to date.

When the respondent answered the petition, he indicated that the matter was *res judicata* in view of Nairobi Children case No.519 of 2012. Further, that the petitioner had gone to the wrong forum now that this was a case regarding the custody and welfare of a child. He denied the allegations in the petition.

The proceedings in Nairobi Children Case No.519 of 2012 have been annexed. The case was certainly filed earlier than the petition. The respondent went to the court to complain that his wife (A) had taken the child out of [particular withheld] Academy and moved away with her to Kisumu; that the child was consequently out of school. An interim order was made on 27/4/12 that the child be immediately returned to school. In the meantime, the matter was to be heard *inter-parties* on 2/5/12. On 2/5/12 the parties went to the court and it was reported that the child had gone back to school and that there was outstanding issue. By consent, the matter was marked as settled. It is clear that when the petition was filed the Nairobi case was not outstanding between the parties

On the allegation by the respondent that the present petition is *res judicata*, in view of the Nairobi case, or that this court lacks jurisdiction to hear the matter, my view is as follows. The petition alleges breach of the fundamental rights and freedoms of the respondent's wife and child. The petitioner was intervening on their behalf

“in the public spirit to defend the constitutional rights of a citizen...”

It is only the High Court that can under Article 165(3)(b) of the Constitution determine the question

whether a right or fundamental freedom has been denied, violated, infringed or threatened. The issues in the petition were not the issues before the Children's Court. Secondly, the Children's court was not even dealing with the issue of who between respondent and his wife had the right to the custody of the child. The complaint was merely that the child had been taken out of school by the mother and it was sought that it be returned to the school.

The other complaint by the respondent was that the *ex-parte* orders obtained by the petitioner that compelled him to release his wife and child had expired. That is not true. They were to remain in place until the hearing and determination of the petition and application *inter-parties*. Such hearing and determination has not been done. The respondent complained that the petitioner ought not to have obtained such permanent orders, at *ex-parte* stage. What was open to the respondent was to seek to discharge or vary the orders, if they were offensive.

On 17/4/13 the petitioner filed a motion seeking that the respondent, and all those acting under him, do return the child to the custody of her mother in Kisumu as had been ordered on 14/6/12. The application was defended, but it is merited. The respondent's wife was enjoying the orders granted on 14/6/12 when the child was taken from her with the written promise to be returned on a specific date. The promise was not honoured. The order still subsists and has to be obeyed.

In any case, the court is dealing with a child, a girl, aged about five. Under section 4 of the Children's Act 2001 this court is enjoined to safeguard and promote the rights and the welfare of the child who, under section 2, is of tender age. The Act provides that in all actions concerning children their best interests should be considered to be paramount. I have not seen in the affidavits and annexures, and the evidence so far tendered, any demonstration of exceptional circumstances that would make the court order that the girl child should be taken away from the mother (*GITHUNGURI .V. GITHUNGURI* Civil Appeal No.30 of 1978 at Nairobi).

I allow the application dated 17/4/13 with costs.

Dated, signed and delivered this 30th day of September,2013

A. O, MUCHELULE

J U D G E