

UGANDA / JUDGMENT

Kavuma v Kavuma (Miscellaneous Application 702 of 2024) [2024]

UGHCFD 34 (15 July 2024)

[2024] UGHCFD 34

COURT

HC: Family Division (Uganda)

BEFORE

Nagawa, J

CASE / FILE NUMBER

Miscellaneous Application 702 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA [FAMILY DIVISION]

MISCELLANEOUS APPLICATION NO.702 OF 2024

(ARISING OUT OF DIVORCE CAUSE NO.149 OF 2023)

MICHAEL GEOFFREY KAVUMA ::::::::::::::::::::::::::: APPLICANT

VERSUS

MONICA NANKYA KAVUMA ::::::::::::::::::::::::::: RESPONDENT

RULING BEFORE: HON. LADY JUSTICE CELIA NAGAWA

1.0 Introduction.

- 1.1 This Ruling relates to a Notice of Motion brought by the Applicant under **Section 117 of the Children Act, Cap. 62 and Order 52 Rules 1 and 2 of the Civil Procedure Rules S. I. 71-1** seeking orders that;
 - i) The Applicant be granted interim custody of the issues of the marriage; Nathan Joseph Kavuma, Michelle Antonia Nanono, and Melinda Alicia Nabulya.
 - ii) Costs of the Application be provided for.

- 1.2 The grounds of the application are summarized in the Notice of Motion and also set out in the Affidavit sworn in support of the application by the Applicant, Michael Geoffrey Kavuma. Briefly, the grounds are that;
- 1. The Applicant is the biological father of Nathan Joseph Kavuma, Michelle Antonia Nanono, and Melinda Alicia Nabulya.

- 2. The Respondent filed for Divorce against the Applicant under Divorce Cause No. 149 of 2023 before this Honorable Court in which she prayed for custody of the issues of the marriage.
- 3. The Applicant and the Respondent have failed to agree on the custody of the issues of the marriage pending determination of Divorce Cause No.149 of 2023 to the detriment of the children.
- 4. That on several occasions, the Respondent has denied the Applicant accessibility to the children.
- 5. The Respondent travels frequently because of her nature of work and leaves the children in the care of relatives which has caused the children discomfort.
- 6. The children are likely to suffer from harm if this Application is not granted.
- 1.3 On the other hand, the Respondent filed an affidavit in reply opposing the Application wherein she stated that;
- 1. The Applicant has not disclosed sufficient cause for the grant of an interim order of custody pending the disposal of Divorce Cause No. 149 of 2023 currently pending before this Honorable Court.
- 2. The Respondent filed a petition for divorce against the Applicant on grounds of cruelty and irretrievable breakdown of marriage.
- 3. The Applicant's cruelty, dishonesty, violence and abusive behavior started when they were staying in Switzerland to the extent that he was sanctioned by the Department of Security, Population, and Health Policy.

- 4. The Applicant has had access to the children on all occasions he visited Uganda from Switzerland, for instance in October 2023, the Applicant had custody of the two older children who fell sick and he was unable to provide appropriate medical attention to them.

- 5. On 12th April, 2024, the Applicant went to the Applicant's home unannounced and requested to take the children to his home for a visit and promised to return the two younger girls on 16th April, 2024 but did not return them. When the Respondent went to visit the children in Kitende following reports that one of children, Michelle missed exams and was sick, the Respondent was locked outside the house and only talked to the children through the window.
- 6. The Applicant is employed with Global Fund and stays in Switzerland whereas the Respondent and the children who are enrolled in schools in Uganda stay in Uganda.
- 7. The Respondent has had primary custody of all the children since the separation in January, 2023 and they were all in school with minimal support from the Applicant, besides school fees for two children that the Applicant pays.
- 8. The Applicant has on several occasions frustrated all efforts to have joint custody not until the Respondent got frustrated and was forced to raise the matter with the District Probation Officer after the Applicant refused to respond to summons over the matter by Kajjansi Police OC- Family and Children Division for over a week.
- 9. Having failed to agree, the Probation Officer advised that the status quo be maintained and that in the event that the

Applicant was dissatisfied, the Applicant should apply for interim custody in court.

- 10. While at the Probation Office, the Applicant was asked to prove whether he had the capacity to pay school fees for the children in international schools until university but he could not explain.
- 11. The Respondent has paid school fees for the two issues of the marriage for two terms of 2023 and continues to pay school fees for the elder daughter in 2024 in addition to solely catering for all their school requirements, transport to school as well as feeding.
- 12. The Applicant has on various occasions struggled to pay school fees for the two children he currently supports. In addition, he has failed to provide contribution to the transportation of the children to school, school requirements, as well as feeding needs for the children since September, 2023.
- 13. It is in the best interest of the older daughter to continue with the current school in which she is enrolled which follows a national and affordable curriculum for purposes of academic and mental stability considering that she has changed school thrice in the past three years.
- 14. The Applicant has no capacity to offer a homely environment for the children as his known place of work and residence is in Switzerland.

- 15. 80% of the Respondent's job is remote work while in Uganda and the Respondent has only travelled on rare occasions for work in the past.

- 16. The children are of young and tender age and need motherly love which the Applicant has been providing. The eldest child Nathan Joseph Kavuma is only nine years old while the other children who are female are only six and three years old respectively.
- 17. The Applicant has on various occasions shouted and threatened the Respondent in front of the children thus traumatizing them and the Respondent. For example, on 28th May, 2024 at Taibah School, the Applicant assaulted the Respondent in front of Michelle plus the whole school on the account that he wanted to forcefully go with the child who had totally rejected the Applicant. The matter was reported to Kajjansi Police Station and investigations are ongoing.
- 18. The Applicant intends to punish the children for his disagreements with the Respondent.
- 19. There is a likelihood of damage of the children, specifically the two young girls if they are removed from their familiar environment and placed in the custody of the Applicant.
- 1.4 In rejoinder, the Respondent averred that;
- 1. He had never been violent or cruel towards the Respondent in their marriage nor has he ever been adjudged guilty in respect to the complaint raised in Switzerland.
- 2. It is true that the Respondent contributed to the maintenance of the children whilst in her custody and the Applicant equally contributed to the children's school fees and other bills.
- 3. The Respondent has been uncooperative to the extent that the Applicant cannot have uninterrupted interaction with the

children which had inadvertently affected the psychological state of the children.

- 4. The uncouth way in which the Applicant's home was raided by police officers with the Respondent on 26th April, 2024 and unnecessary aggressive action by the police and probation officials left extensive emotional trauma on the children.
- 5. The Applicant is currently residing in Uganda at the matrimonial home in Kitende and has left Switzerland and therefore readily available both financially and emotionally to offer his children a homely environment.
- 6. The Respondent admits that her work involves substantial travelling and it is for that reason that the children should be placed in the custody of the Applicant for the time the Respondent is absent from home as opposed to being in the care of relatives.

- 7. The Applicant is much entitled to the custody of his children as the Respondent and has been and is still willing to cater for their school fees, medical bills and maintenance.
- 8. The Applicant does not wish to get sole custody but rather joint custody of the children where both parents can be involved in the lives of the children.
- 9. It is in the best interest of the children that both parents are involved in their upbringing.

2.0 Representation and Hearing.

2.1 When the matter came up for hearing on 26th June, 2024, the Applicant was represented by Mr. Herbert Kiggundu Mugerwa of Kabayiza, Kavuma, Mugerwa & Ali (KMA) Advocates and the Respondent was represented by Mr. Kevin Ayebare of TASLAF

Advocates. The parties agreed to proceed by way of written submissions. Both parties filed written submissions and their pleadings have equally been taken consideration thereof in determination of this Application.

3.0 ISSUE FOR COURT'S DETERMINATION

3.1 Whether the Application raises sufficient ground to warrant the grant of an interim custody order?

4.0 DETERMINATION BY COURT

- 4.1 The law on interim custody orders.
- 4.2.1 Article 31 (4) of the 1995 Constitution of the Republic of Uganda provides that; "it is the right and duty of parents to care for and bring up their children".
- 4.2.2 Article 34 (1) of the 1995 Constitution of the Republic of Uganda further provides that; "Subject to laws enacted in their best interests, children shall have a right to know and be cared for by their parents or those entitled by law to bring them up".

4.2.3 Section 116 (1) of the Children Act, Cap. 68 provides that;

"The court may, on application by a sole applicant or joint applicants, grant custody of a child on such conditions as may be determined by the court."

4.2.4 Section 116 (3) of the Children Act *(supra)* provides that;

"In reaching its decision under subsection (1) or (2) the court shall primarily consider the welfare of the child."

- 4.2.5 **Section 117 of the Children Act** **(supra)** allows particular categories of persons including a mother or father to apply to the family and children court for an interim custody order pending the determination of custody of the child by the court.
- 4.2.6 The Applicant attached to his affidavit in support of the Application as annexure 'A1, A2 and A3', the birth certificates for Nathan Joseph Kavuma, Nanono Michelle Antonia, and Nabulya Melinda Alicia issued by National Identification and Registration Authority (NIRA) which all indicate that the Applicant, Kavuma Michael Geoffrey is the father of the above said children and Kavuma Monica Nankya is their mother. This is also admitted by the Respondent under paragraph 5 of her Affidavit in Reply.
- 4.2.7 The Applicant being the biological father of the abovementioned minor children, he is therefore a right and proper person to apply for custody of his children under the law.

5.0 Reasonable grounds warranting the grant of a custody order.

5.1 **Section 28 of the Divorce Act, Cap. 144** provides that; "In suits for dissolution of marriage, or for nullity of marriage or for judicial separation, the court may at any stage of the proceedings, or after a decree absolute has been pronounced, make such order as it thinks fit, and may from time to time vary or discharge the orders, with respect to the custody, maintenance and education of the minor children of the marriage, or for placing them under the protection of the court".

5.2 **Section 117 (3) of the Children Act** **(supra)** enjoins the court to issue an interim order where it is satisfied that –

- (a) The child is suffering or likely to suffer harm if the order for interim custody is not issued; or
- (b) The order is in the best interests of the child.

5.3 **Section 117 (4) (supra)** further provides that;

"An interim custody order may, where appropriate, contain any direction, prohibition or award."

This means that the court may give directions in the orders sought.

5.4 In the case of **Namukasa Joweria Versus Kakondere Livingstone Divorce Cause No. 30 of 2010**, Hon. Lady Justice Eva K. Luswata (**as she then was**) observed that;

"Custody concerns essentially the control and preservation of the child's person, physically, mentally, and morally."

- 5.5 The Applicant averred in paragraphs 5 and 6 of his affidavit in support of the Application that the Respondent has since left the matrimonial home in Kitende with the issues of the marriage and has on several occasions denied the Applicant accessibility to the said children. He also stated that the Respondent travels frequently because of the nature of her work and leaves the children in the care of relatives which has caused the children discomfort and anxiety.
- 5.6 On the other hand, the Respondent averred under paragraphs 9 and 10 of her Affidavit in Reply that the Applicant has had

access to the children on all occasions he visited Uganda from Switzerland, for instance in October 2023, the Applicant had custody of the two older children who fell sick and he was unable to provide appropriate medical attention to them. Also recently, on 12th April, 2024 the Applicant went to the Respondent's home unannounced, requested to take the children to his home for a visit and promised that he would return the two younger girls on Tuesday 16th April, 2024 but did not return them. When the Respondent went to visit the children in Kitende following reports that one of the children, Michelle, had missed exams and was sick, the Respondent was locked outside the house and only spoke to the children through the window.

- 5.7 In rejoinder, the Applicant stated under paragraph 19 of his affidavit in rejoinder that he does not wish to get sole custody of the children but rather joint custody where both parents can be involved in the lives of the children.
- 5.8 **Section 4 (1) (a) and (2) of the Children Act** **(supra)** provides for a child's right to live with his or her parent or guardian except for situations where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interest of the child to separate him or her from his or her parents or parent.

5.9 Section 3 of the Children Act **(supra) provides that;**

(1) The welfare of the child shall be of paramount consideration whenever the state, a court, a tribunal, a local authority or any person determines any question in respect to the upbringing of a child, the administration of a

child's property, or the application of any income arising from that administration.

(2) In all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the matter is likely to be prejudicial to the welfare of the child.

(3) In determining any question under subsection (1), court or any other person shall have regard to –

(a) the ascertainable wishes and feelings of the child concerned, with due regard to his or her age and understanding;

(b) the child's physical, emotional and educational needs;

(c) the likely effects of any change in the child's circumstances;

d) the child's sex, age, background and any other circumstances relevant in the matter;

(e) any harm that the child has suffered or is at the risk of suffering; and

(f) where relevant, the capacity of the child's parents, guardian or any other person involved in the care of the child, and in meeting the needs of the child."

- 5.10 The welfare of the child is the paramount consideration in most court adjudicated disputes. This means that rights and interests of others are relevant only in so far as they bear upon the child's interest.
- 5.11 The meaning of "Paramount" has been interpreted by the House of Lords in **J Versus C [1970] AC 668, 710-11** by Lord MacDermott who gave the clearest judgement as to the meaning to be attributed to the term. He stated that;

""Reading these words in their ordinary significance...It seems to me that they must mean more than that the child's welfare is to"

be treated as the top item in list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed".

- 5.12 Evaluating a child's best interests involves a welfare appraisal in the widest sense taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional, and welfare considerations. Everything that conduces to a child's welfare and happiness relates to the child's familial, educational, and social environment, and the child's social, cultural, ethnic, and religious community is potentially relevant and has, where appropriate, to be taken into account, therefore the court must adopt a holistic approach.
- 5.13 The function of the Judge in a case like this is to act as the 'judicial reasonable parent', judging the child's welfare by the standards of reasonable men and women, having regard to the ever changing nature of our world including, crucially for present purposes, changes in social attitudes, and always remembering that the reasonable man or woman is receptive to change, broadminded, tolerant, easy-going, and slow to condemn since we live, or strive to live, in a tolerant society. We live in a democratic society subject to the rule of law. We live in a society whose law requires people to be treated equally and

where their human rights are respected. We live in a plural society, in which the family takes many forms, some which would have been thought inconceivable well within living memory.

- 5.14 In the matter of **Twesiga (Infant) (Miscellaneous Application 4 of 2008) [2008] UGHCFD 1 (16 September 2008)**, Court stated that while the primary right of the child is to grow up under the tutelage of his or her parents, or parent, for the obvious reason of emotional attachment, if it is shown to the satisfaction of a competent authority, and in this case the Court, that it would serve the best interest of the child, then it would be proper for this Court to make an order removing such child from the parent.
- 5.15 In all child custody cases, the court is required to determine whether both parents are capable of caring for the child. This evaluation comprises financial, emotional, and physical considerations.
- 5.16 I am mindful to the "general principle" that delay in determining cases about children's upbringing "is likely to prejudice the welfare of the child", and the court is alive to the fact that it should not make any order in relation to children "unless it considers that doing so would be better for the child than making no order at all". When a court is considering making custody order and that order is opposed by any party, the court must also consider the welfare checklist in Section 3 of the children Act.

5.17 Since, as a matter of fact, these children were brought into the world by both parents and they both seem very interested to have custody and raise their children despite the challenges they face as individual parents. I therefore find that there are reasonable grounds warranting grant an interim custody order.

6.0 The best interest of the children

6.1 Article 31 of the 1995 Constitution of the Republic of Uganda provides that;

(4) It is the right and duty of parents to care for and bring up their children.

(5) Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law."

6.2 In the case of **Otto Methodius Pacific Versus Edyline Sabrina Pacific, Civil Appeal No. 88 of 2013, Hon. Justice A. S. Nshimye- JA**) held while citing the case of **CX V CY [2006] 4 LRC** that; *"... in any custody proceedings, it is crucial that the courts recognise and promote joint parenting so that both parents can continue to have a direct involvement in the child's life. It has laid down the following principles on joint custody. After noting that; parental responsibility is for life; that the courts should endorse the concept of joint custody, and should not assume that sole custody orders should be made simply because parents displace animosity towards each other, the court in that case observed that;*

- *i. The making of a joint or no custody order encouraged the parent who did not reside with the child to continue to play his or her role in joint parenthood and that joint custody could still be ordered even if there was apprehension that the parties might be unable to agree. A joint custody order only gave the parent the residual right to decide on long term matters affecting the child's welfare.*
- *ii. The fact that the parties cannot agree during divorce proceedings did not necessarily mean that they would be unable to agree on the future long term interests of the child, particularly where the allegations against each other arose from being unhappy with each other.*
- *iii. Where a parent has care and control over the child, and the other parent has access to the child, and is also obliged to pay or contribute towards his or her maintenance, it is appropriate for the child to be placed in their joint custody. It is only when it is evident that joint custody will not work that an alternative order should be made.*
- *iv. Courts are no longer inclined to assume that sole custody orders should be made simply because parents display animosity towards each other in the midst of litigation."*
- 6.3 Further, in the case of **CX Vs CY** *(supra)*, the court relied on the decision in the case of **Chan Teck Hock David Versus Leong Mei Chuan [2002] 1 SLR 177 at pg. 12** which provided that; *"It is our opinion that the interest of the children demands that both parents should be involved in determining what is best for them in that regard. While as between the parties there is*

bitterness, it does not necessarily follow that this would spill over in determining the educational needs of the children, the court should not decree an arrangement which gives an impression to a child that either the father or mother does not care about his welfare. As we have no doubt that both parents have and will continue to have the children's interest at heart. We do not think that there would be any insurmountable difficulties. In the unlikely event that an impasse should arise, the assistance of the court could always be sought".

- 6.4 I am therefore mindful of the fact that children need to relate with both their parents. Despite the challenges in the relationship between the Applicant and the Respondent, parenthood and parental responsibility does not stop. A parent can and should only be denied the right to care for and raise his/her children when it is clear and it has been determined by a competent authority, in accordance with law, that it is in the best interest of the child that the child be separated from the parent.
- 6.5 I therefore find that, it is in the best interests of the children that the Applicant and the Respondent share joint custody of the children as the children have a right to be raised by both their parents with as much stability as possible.

- 6.6 In the instant case, the parties have failed to agree on the terms of the custody by themselves inclining this Honorable Court to intervene and give direction in accordance with **Section 117 (4) of the Children Act, Cap. 62.**

- 6.7 The Applicant stated in his affidavit in reply that he does not wish to get sole custody of the children but rather joint custody where both parents can be involved in the lives of the children. The Respondent on the other hand stated that the parties failed to agree on the terms of the custody which she regarded as unreasonable and not in the best interest of the children. The Respondent also stated that the older daughter has changed school thrice in the past three years and it is therefore in her best interest to continue with the current school in which she is enrolled for purposes of academic and mental stability. The Respondent also stated that the children are of young and tender age, aged 9, 6 and 3 years respectively of which the youngest two children are both girls.
- 6.8 Mindful of the above contentions, I therefore accordingly grant this application in the following terms;
- 1. The Applicant and the Respondent are granted interim joint custody order of their minor children, Nathan Joseph Kavuma aged 9 years, Michelle Antonia Nanono aged 6 years and Melinda Alicia Nabulya aged 3 years until the determination of the Divorce Petition before this Honorable Court.
- 2. The said interim joint custody of the minor children shall be in the following terms;
- a) The Respondent shall have the primary custody to stay with the minor children on all week days that is; from Monday to Friday irrespective of whether there are public holidays on those week days or whether the children are on holiday.

- b) The Applicant is granted secondary custody to stay with the minor children as follows;
- i) The Applicant shall stay with the minor children over the weekend that is; on Saturday from 8:00a.m. and have them returned back to the Respondent on Sunday by 7:00 p.m. to enable the Applicant prepare the children for school on Monday.
- ii) The Applicant shall stay with the minor children whenever the Respondent is out of the country or out of town for work or any other business and shall be responsible for ensuring that the children attend school during that period.
- iii) Equally, the Respondent shall stay with the minor children whenever the Applicant is out of the country or out of town for work or any other business.
- c) Each party shall pay for food, health, utility bills and other necessities for the period the children are in their custody.

- d) The children shall be maintained in the schools in which they are currently enrolled.
- e) The Applicant shall continue to pay the children's school fees in the schools in which they are currently enrolled and also cater for the children's school requirements.
- f) The Respondent shall cater for the children's school transportation.

Dated, Signed, and delivered via email this 15th day of July, 2024.

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