

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION**

HOLDEN AT HIGH COURT MAITAMA –ABUJA

BEFORE: HIS LORDSHIP HON. JUSTICE S.U. BATURE

COURT CLERKS: JAMILA OMEKE & ORS

COURT NUMBER: HIGH COURT NO. 24

CASE NUMBER: SUIT NO. FCT/HC/CV/328/2020

DATE: 26/5/2022

BETWEEN:

TEMITOPE SABINA AKINYEMIPETITIONER

AND

OLANREWAJU AKINYEMI.....RESPONDENT

APPEARANCE:

H. K. Salami Esq for Petitioner/Respondent.

Respondent/Applicant absent and unrepresented.

RULING

By a Motion on Notice with Motion NO M/6114/2021, dated 22nd day of September, 2021, filed on the 23rd of September 2021, brought pursuant to Section 71 of the Matrimonial Causes Act CAP M7. LFN, 2004 and under inherent Jurisdiction of this Honourable Court, the Respondent/Applicant herein prayed for the following:-

"An Order varying temporary custody of the only child of the marriage, Rebecca Iyanoluwa Akinyemi; to the

Petitioner/Respondent's mother (Mrs. Mary Adejo) to have custody till the Petitioner/Respondent returns from her studies abroad (Canada) pending determination of the substantive appeal filed at the Court of Appeal."

And for such further order or orders as this Honourable Court may deem proper to make in the circumstances.

The grounds predicating the Application are as follows:-

1. There is no relief sought for the temporary custody of the child of the marriage which was granted to the Petitioner/Respondent's mother.
2. The Petitioner/Respondent has travelled to Canada since 2020 before the Judgment of the Court was delivered without making proper arrangement on the custody of the child of the marriage.
3. The consent of the Respondent/Applicant was not sought and obtained before dumping the only child of the marriage with the Petitioner/Respondent's mother.
4. That during the absence of the Petitioner/Respondent, the mother of the Petitioner/Respondent has changed the school of the child of the marriage.
5. The Respondent/Applicant has filed a Notice of Appeal against the order of Court granting custody to the Petitioner/Respondent.
6. Since delivery of the Judgment of this Honourable Court on the 16th of June of 2021, the Petitioner/Respondent has travelled out of Nigeria to Canada and left the only child of the marriage in the care of her aged mother who suffers from poor health.
7. The Respondent/Applicant was denied access to his daughter throughout the period when the Petition was being heard, even when she was ill.
8. The Petitioner/Respondent's mother is of advanced years and lacks the vigor to take care of the only child of the marriage who is Six (6) years old.
9. The welfare of the only child of the marriage will be prejudiced if she is left in the custody of the Petitioner/Respondent's elderly and infirm mother.

10. The Respondent/Applicant is the biological father of the only child of the marriage and he is a man of means and resources who desires to provide his only child with the best of care and attention.

In addition, Respondent/Applicant avers in paragraphs 8, 11, 12, 13, 14, 15, 16, 17, and 18 of his supporting Affidavit thus:-

- "8. That the Petitioner/Respondent's mother will be a bad influence on the young and impressionable only child of the marriage as she is an ardent believer in fetish and regularly consults various local shames for purpose of divination.**
- 11. That I am aware of the fact that the Petitioner/Respondent has been making secret arrangements to secure travel documents for the only child of the marriage with a view to absconding to Canada with her.**
- 12. That the Petitioner/Respondent has also started making attempts to secure permanent residency in Canada.**
- 13. That the welfare of the only child of the marriage will be prejudiced if she is left in the custody of the Petitioner/Respondent's elderly and infirm mother.**
- 14. That I have made arrangements with my mother, Mrs Akinyemi Mary of 21, Folashita Abarenje, Ikotun, Lagos to take care of my daughter.**
- 15. That my mother is of a young age and has her own business in her compound and has natural love for my daughter since her birth.**
- 16. That I have provided a good alternative school for my daughter in Lagos.**
- 17. That I desire to provide my only child with the best of care and attention.**

18. That it would be in the best interests of justice and the welfare of the only child of the marriage if this application is granted."

It is argued for the Applicant in the written address, while relying on the case of **WILLIAMS V WILLIAMS (1987)2 NWLR (PT. 54) AT 89, Karibi Whyte, J.S.C** and Section 71 (1) of the Matrimonial Causes Act among other authorities, that the best interests of the child herein cannot be served by leaving her in the custody of an absentee mother and an elderly infirm grandparent.

Moreso, that it is clear in this case that the Petitioner/Respondent's priorities for the time being are not to provide care for the only child of the marriage as she has prioritized her career over the welfare of her daughter.

Counsel relied on the case of **OKAFOR V OKAFOR (1978) 6 (CITC)1927, PER OPUTA, (as he then was) and IHONDE V IHONDE (UNREPORTED) JUDGMENT OF THE HIGH COURT OF LAGOS STATE DELIVERED ON 17TH April, 1972.**

Finally, Learned Counsel urged the Court to consider the best interests of young Miss, Rebecca IyanoLuwa Akinyemi and grant temporary Custody of her to the Respondent/Applicant who is her loving father.

Meanwhile, in the Petitioner/Respondents Affidavit in answer to this Motion on Notice, it is averred in paragraphs 3vi, viii, ix, (a), x, xi, xii, xiii, xiv, xv, xvi, xx, xxi **and xxii as follows:-**

"3vi. That contrary to the statements made by the Applicant in paragraphs 4 and 5 of his Affidavit in support of his motion, the Petitioner's mother is neither infirm, aged nor in a state of poor health.

viii. That further to paragraphs vi and vii above and contrary to paragraph 15 of the Applicant's Affidavit, the Petitioner's mother was born on 26th March 1965 and is 56 years old without any health challenge other than the pain she had to bear from losing her husband and only son. The Applicant on the other hand who is the first child of his parents, is 14 years old and his mother,

by simple calculation and expectation, cannot be younger than 60 years.

- ix. That contrary to the Applicant's assertion in paragraph 7 of his Affidavit, the Petitioner's mother has been largely responsible for the emotional welfare, care, and maintenance of the child of the marriage since she was 4 months old.*
- x. That contrary to the defamatory assertion in paragraph 8 of the Applicant's Affidavit, the petitioner's mother is a fervent Christian and well respected in her place of worship and will never indulge in such practices.*
- xi. That contrary to paragraph 9 of the Applicant's Affidavit, the Petitioner made several attempts for the Applicant to speak with the child of the marriage before, during and after the hearing of the Petition, but such attempts were met with stiffness and resolute indifference.*
- xii. That further to the above and contrary to paragraphs 9 and 10 of the Affidavit, the Petitioner sent several emails and text messages to the Applicant; and even purchased a mobile phone and provided a dedicated phone line for the child of the marriage to have direct access to the Applicant upon realizing that the Applicant had blocked her from sending him messages. Now shown to me, marked as Exhibit C1-C7 and herewith attached is the bundle of several email correspondences between the Applicant and the Petitioner.*
- xiii. That further to paragraph xii above, there has never been any time the Applicant showed up or requested to see his daughter and he was refused. The Petitioner as a matter of fact, had always encouraged, and had given instructions that the Applicant be granted unfettered access to his daughter whenever he comes to see her.*

- xiv. That the last time the Applicant came to Abuja was during the hearing of the Petition and even then, never bothered to visit his daughter. The child had also dropped several voice notes and messages through her dedicated phone line requesting the Applicant's presence and attention, but the latter has failed, refused, and/or neglected to respond to such messages.***
- xv. Contrary to paragraphs 11 and 12 of the Applicant's Affidavit, the Petitioner has no intention to abscond with the child of the marriage to Canada and certainly no secret arrangement is being made to secure travel documents for her, as this Honourable Court had ordered that any travel with the child of the marriage outside Nigeria, shall be with consent of both parties.***
- xvi. That further to the above paragraph, there is nothing clandestine about the Petitioner's trip to Canada as the Applicant himself had in 2018, written a letter to the High Commissioner of Canada declaring his support for the Petitioner's further studies in Canada and had as a matter of fact, also told the Court during hearing of the Petition for dissolution that he had made several attempts to secure visas for his family to travel to the United States and Canada without success. Now shown to me, marked as Exhibit D, and attached herewith is a copy of the Applicant's letter to the High Commissioner of Canada.***
- xx. That Contrary to paragraphs 16 and 17 of the Applicant's Affidavit, the Applicant has failed to show any proof of real interest in the care and welfare of the child of the marriage and has certainly failed to give her any attention.***
- xxi. That further to the above paragraph, this Honourable Court in the Judgment dissolving the marriage between the parties, ordered that the Applicant shall pay the***

sum ₦40,000 monthly for the upkeep of the child and school fees in the sum of ₦100,000 per term.

xxii. That since the marriage was dissolved on 16th June 2021, the Applicant has failed, neglected, and refused to pay the upkeep of the child as ordered by the Court. The Petitioner and her mother i.e the child's grandmother, have continued to provide for the child and pay her fees. Now shown to me and marked Exhibits E1 and E2, are copies of the recent receipt of payment of the child's school fees made by the Petitioner's mother."

In the Petitioner/Respondent's written address, a sole issue for determination was formulated thus:-

"Whether the Applicant's Application ought to be granted."

While arguing the issue Learned Counsel submitted in paragraph 4:2 thereof that it is clear that a Court of competent Jurisdiction has the inherent power to vary its own decision or order made but, such variation must be as a result of certain factors.

Counsel relied on the case of **OVENSERI V OSAGIEDE (1998) 11 NWLR (PT. 572) 1 SC** in arguing that grounds upon which the Applicant herein wants this Honourable Court to vary its order does not fall under any of the situations postulated by the Supreme Court in the above Judgment.

That the grounds presented by the Applicant herein are entirely mischievous.

It is further argued in that regard that the Applicant has also failed to provide this Honourable Court with credible materials to support his claims of the ill-health or infirmity of the Petitioner's mother which allegedly makes the Petitioner's mother unfit to take proper care of the child of the marriage in the absence of the Petitioner.

Counsel relied on the case of **ICAN V UNEGBU (2012) 2 NWLR (PT. 1284) 216, CA, Per IYANJOKORO, JCA. And AKPOKU V IHOMBU (1998) 8 NWLR (PT. 561) 283.**

Argued further that one would have expected the Applicant present some form of medical report from a competent hospital showing the nature of health of the child's grandmother. That to make sweeping statements and defamatory remarks without substantiating same is a most unfortunate ploy by the Applicant.

Reliance was placed on the evidence presented during trial of the suit as well as the case of **WILLIAMS V WILLIAMS (Supra)** relied upon by the Applicant, particularly page 89 para G thereof.

It is argued in that regard that the child in this case is emotionally attached to her grandmother who has provided care, love and emotional welfare for her since she was an infant.

Submitted further that it is perhaps the Applicant's realization of the unsuitability of his place of residence and the nature of his job to afford the child proper care, that moved him to suggest in paragraph 14 of his Affidavit that he has decided that the child stay with his mother to take care of the child, whom facts have shown has little or no relationship with the child.

That yet again, the Applicant intends to place the responsibility of caring, maintainance, proper upbringing, and emotional welfare of the child in the hands of another person with whom the child has no familiarity.

It is submitted moreso, that in this case, it will be most unfair and severely against the interest of the child of the marriage to uproot her from her familiar surroundings of the Petitioner's mother i.e her grandmother with whom she has lived since she was 4 months old and now commit her to the charge of her paternal grandmother who has for the most part of her life been a stranger to the child.

In conclusion, the Court is urged to consider that the Applicant has failed to proffer any substantial or tangible reason why this Honourable Court should grant his Application. The Court is then urged to dismiss the Application.

I have carefully considered this Application, the grounds predicated same, the supporting Affidavit and the written address. In the same vein, I've also considered the Petitioner/Respondent's Affidavit in response to the Respondent/Applicant's Motion on Notice, the Exhibits annexed as well as the written address.

In my humble view, the issue for determination is whether the Applicant has satisfied the Court to be entitled to the grant of the order sought?

First of all, this Court undoubtedly has the inherent powers to vary its order in certain circumstances.

In the instant case, I have taken Judicial Notice of the Judgment of this Honourable Court and the orders made in respect of same delivered on the 16th of June, 2021.

These proceedings are no doubt sui generis considering the fact that the present Application is brought pursuant to Section 71 (1) of the Matrimonial Causes Act CAP M7 LFN, 2004.

The Section provides:-

"1. In proceedings with respect to the custody, guardianship, welfare, advancement or education of a child of the marriage, the Court shall regard the interests of those children as the paramount consideration and subject thereto, the Court may make such order in respect of those matters as it thinks proper."

Likewise, I too commend the decision of the Court in the case of **WILLIAMS V WILLIAMS (Supra)** cited by both parties where the Court held at page 89, per Karibi Whyte JSC thus:-

"The determination of the welfare of a child is a composite of many factors. Consideration such as the emotional attachment to a particular parent, mother or father; the inadequacy of the facilities, such as educational, religious, or opportunities for proper upbringing are matters which may affect determination of who should have custody. What the

Court deals with is the lives of human beings and ought not to be regulated by rigid formulae. All the relevant factors ought to be considered and the paramount consideration being the welfare of the child. By paramount consideration, I mean preeminent and superior consideration.”

Therefore, with these and other relevant authorities in mind regarding the best interests of the child, the Court shall be guided accordingly and in reaching its decision in this Application, shall consider the best interest of the child as paramount.

Now, although the Respondent applicant has alleged that the party granted temporary custody of child is old, infirm and of ill-health, in addition to the allegation that Petitioner/Respondent's mother will be a bad influence on the child as she's a believer of fetish and regularly consults various local shamans for purpose of divination, I am afraid the Applicant has not provided the Court with any cogent and credible evidence in that regard.

Besides, Petitioner/Respondent has countered all the above facts in her Affidavit in response to the Application.

There's equally no medical report or Birth certificate to prove that the Petitioner's mother i.e the child's grandmother is advanced in age, infirm and incapable of temporarily taking care of the child pending the return of the Petitioner after concluding her studies abroad.

It is not the wish of this Honourable Court to deny the Respondent any of his inalienable rights as the biological father of the child of the marriage.

This Honourable Court considered the evidence presented on both sides as well as proposals made for the child of the marriage while hearing the Petition on its merit.

Therefore, the Court granted those orders in the best interest of the child.

Accordingly, since there's nothing presented to the Court to show that the child of the marriage (who's in the temporary custody of her grandmother) is in any form of distress whatsoever) and without any concrete proof of the allegations, it is my considered opinion that moving the child out of the care of her maternal grandmother whom she has emotional attachment

having lived with her since the age of 4 months, and sending her to live with her paternal grandmother whom she's not familiar with in these circumstances, will not be in the best interest of the child at the moment. The child needs stability in her life emotionally and otherwise.

Moreso, the Court in its Judgement delivered on 21st day of June 2021 had ordered among other things that Respondent/Applicant be granted unrestricted access to his child.

It is stated in ground 5 of the motion on notice that Respondent/Applicant has filed a Notice of Appeal against the order of Court granting custody as well as paragraph 6 of the supporting Affidavit. (Although no document is annexed to show that there's any pending Appeal).

Nevertheless, it is the Court's view that the orders granted by the Court in its Judgment delivered on the 21st of June, 2021 is in the best interest of child and shall remain so, pending the hearing and determination of the Respondent's Appeal before the Court of Appeal.

In the meantime, the Application is refused and accordingly dismissed.

Signed:

***Hon. Justice S. U. Bature
26/5/2022.***