

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**FAMILY DIVISION**

**MISCELLANEOUS APPLICATION NO 15/2013**  
**ARISING FROM DIVORCE CAUSE NO 43/2012**

**TIBENDERANA JAMES.....APPLICANT**

**VERSUS**

**REEM AL TORKI.....**  
**.....RESPONDENT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR A SEARCH AND PRODUCTION ORDER, DISCLOSURE ORDER, RECOVERY ORDER AND CUSTODY ORDER**

**BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This was an application by Notice of Motion made under Articles 34(1) & (2) of the Constitution of the Republic of Uganda; sections 29 of the Divorce Act cap 249; sections 36, 41, 62 and 63 of the Children Act cap 69; section 98 of the Civil Procedure Act; and sections 33 & 39(2) of the Judicature Act cap 13. The application is for orders that:-

- a) A search and production order be made for Nasser Yusuf Kananura Altorki – Tibenderana (the child) born on 2<sup>nd</sup> January 2007.
- b) A disclosure order for the location and domicile of the child be issued.
- c) A recovery order for the child to be put in custody of the applicant.
- d) A custody order for the child in favour of the applicant.

The grounds of the application, which are also contained in the affidavit of the applicant, Tibenderana James, are briefly that:-

1. The applicant is the biological father of Nasser Yusuf Kananura Altorki Tibenderana born on 2<sup>nd</sup> January 2007.
2. The applicant's constitutional right and statutory obligation to provide all the necessary needs, including but not limited to education for the child has been violated by the respondent.
3. The child has been unilaterally removed by the respondent from Uganda to an unknown location.
4. The location of the child has been concealed by the respondent.
5. The child has been permanently separated by the respondent from the applicant against his will and in violation of his constitutional rights.

This court granted the applicant's prayer to have the application proceed *ex parte* after noting that the respondent was served by substituted service, that is, by advertising the hearing notice in the Monitor Newspaper of 21/08/2015, after attempts to serve in the ordinary way and through service out of jurisdiction failed.

When the application was called for hearing, this court, after noting that the prayers concerning custody of the child were in this application as well as in the petition, directed that the same be left out and be addressed in the petition to avoid duplicity. This application therefore focused only on prayers (a) and (b), that is, on the search and production order for Nasser Yusuf Kananura Altorki -Tibenderana, and the disclosure order for the location and domicile of the child.

***Issue 1: Whether the applicant is entitled to the search and production order.***

Section 62 of the Children Act provides that when a court has been informed on information on oath that a child has been removed unlawfully from an approved home, it may make a recovery order directing the production of a child by a person in possession of such child; or requiring removal of the child by any authorised person; or requiring any person who has information leading to the child's whereabouts to disclose it; or authorising search of any premises where the child is believed to be staying; and specifying the name of the child in question and the person who has the current main parental responsibility.

Section 1 of the Children Act defines an approved home as a government or nongovernmental home approved by the Minister to provide substitute family care for a child.

It includes a babies' home and children's home which provide care and accommodation for children aged below six years and aged between three to under eighteen years respectively.

It is very clear from the foregoing provisions that a recovery order directing production of a child or a search of premises where a child is believed to be staying can be sought under section 62 of the Children Act if that child has been removed unlawfully from an approved home.

The applicant attached a tenancy agreement (Annexure A) to his affidavit and sworn witness statement, plus the Landlord's acknowledgement of his rent payments. This indicates he rents the house where the family stays. The adduced evidence shows the child was removed from the house where the family stayed with the child. There is nothing to show that this residential house is an approved home within the definition given by the Children Act.

In the given circumstances, having addressed the applicable laws on the situation, I decline to issue the search and production order because the facts of the instant application are not covered by section 62 of the Children Act.

***Issue 2: Whether the applicant is entitled to a disclosure order.***

Section 41 of the Children Act states that when a family and children court is satisfied that information concerning a child is being withheld by any person, it may summon that person to disclose the information.

The powers to summon the person with information concerning a child are conferred on the family and children court. However, this court has unlimited original jurisdiction, including powers under sections 33 of the Judicature Act and 98 of the Civil Procedure Act to exercise its inherent powers for the ends of justice to finally determine the instant matter and avoid multiplicity of proceeding

Article 31(4) & (5) of the Constitution of Uganda provides that it is a right and a duty on parents to care for and bring up their children; that 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. Article 34(1) provides that children have a right to know and be cared for by their parents or those entitled by law to bring them up. The same rights and duties are provided for under section 4 of the Children Act, which provides that a child is entitled to live with his or her parents or guardians unless a competent authority

determines otherwise; that parents, guardians and persons having custody of a child have a duty to maintain and protect the child; and that parents have parental responsibility for their children.

The applicant's affidavit evidence is that he is the biological father of the child Nasser Yusuf Kananura Al Toriki Tibenderana and the sole breadwinner for the family. The petitioner and the respondent have always been domiciled in Uganda. It is the applicant's evidence that the respondent blocked his interaction with the child and prevented his participation in his day to day upbringing of the child; that in December 2012 after learning that the respondent was going to board a KLM Airline with the child to an undisclosed location, he tried to stop the removal of the child in vain through the Central Police Station, under ref *S/D 103/05/12/2012*; that he has placed an inquiry on the whereabouts of the child, including communicating to the respondent to return the child, to no avail. The applicant avers that he is greatly jeopardised by the respondent's unilateral removal of the child from Uganda and the jurisdiction of this court, rendering it onerous for him to access the child as his father so that he exercises his rights as a parent.

The applicant attached various documents to his affidavit to confirm his averments. These included a tenancy agreement (Annexure **A**) and the Landlord's acknowledgement of his rent payments, indicating that he rents the house where the family stays; invoices (Annexure **B1 – 3**) showing that he has been paying school fees for the child, Al Toriki Tibenderana, at the International school of Uganda; and correspondence (Annexures **C, D, E1 – 5**) showing that he made inquiries regarding the whereabouts of the child to no avail; plus the birth card for the child, his enrolment confirmation to International School of Uganda, the islam marriage certificate of 23/04/2006, the Islamic divorce certificate of 06/09/2012, and an acknowledgement dated 07/12/2012 of handing over of house keys to the family's residence by the respondent's counsel to the applicant's counsel.

The foregoing evidence has not been rebutted by the respondent, who never filed an affidavit in reply to this application. Order 8 rule 3 of the Civil Procedure Rules provides that,

*“...every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated not to be admitted in the pleading of the opposite party, shall be taken to be admitted...”*

In **Habre International Co Ltd V Ebrahim Alakaria Kassam & Others SCCA 04/1999** the Supreme Court held, *inter alia*, that wherever the opponent has declined to avail himself of the opportunity to put his essential and material case, in cross examination, it must follow that he believed that the testimony given could not be disputed at all.

It is clear from the adduced uncontroverted evidence that the applicant is the father of Nasser Yusuf Kananura Altorki Tibenderana, a child, who has been unilaterally removed by the respondent from Uganda to an unknown concealed location; and that the child has been permanently separated by the respondent from the applicant against his will and in violation of his constitutional rights as a parent.

In this case where the evidence shows that the child's mother (the respondent) concealed the location of the child, and where the applicant who is the father of the child wants to know his child's location, it would be appropriate for court to summon the respondent to disclose the child's location.

In that regard, having carefully considered the application, and analyzed the facts of this case and the laws cited above, I allow the application but only as regards a disclosure order summoning the respondent to disclose the location and domicile of the child. Costs of the application will be in the cause.

**Dated at Kampala** this 3<sup>rd</sup> day of December 2015.

Percy Night Tuhaise

**Judge.**