

DISCLAIMER: This document was produced in 2005 and is a summary of the laws of Kenya that appertain to international parental child abduction, contact and relocation as they were at that time. **reunite** International Child Abduction Centre cannot vouch for the accuracy of this information for use in litigation and it is not intended to provide case specific advice.

KENYA

Overview

Kenya is a former British colony that gained independence in 1963. Therefore, the Kenyan legal system has been influenced by English law, in addition to customary and Islamic law. The sources of law are the Kenyan Constitution, Kenyan legislation, Kenyan subsidiary legislation, Kenyan case law, customary laws (including Hindu, Muslim and African laws), English doctrines of equity and English common law. Legislation relating to children was brought together under the Children's Act 2001.

Although the majority of the population of Kenya are Christians there is a Muslim minority and a minority who are followers of indigenous beliefs. Therefore the Constitution does not establish an official religion for the State. The Muslim population in Kenya is of diverse origin and although the majority follow the Shafi School of law there are also followers of other schools.

Foreign Orders

Foreign court orders can be enforced in Kenya if they comply with the Foreign Judgements (Reciprocal Enforcement) Act, Cap 43 Laws of Kenya. The judgements of the superior courts of reciprocating countries can be applied but must first be registered in the High Court of Kenya within six years of the date of the judgement. Reciprocating countries include Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia and the United Kingdom.

Court Structure

The courts of first instance are the Magistrate Courts. There are six types of Magistrate Courts. In order of seniority beginning with the lowest these are

the District Magistrate Court, Resident Magistrate Court, Senior Resident Court, Principal Magistrate, Senior Principal Magistrate and Chief Magistrate. These all have original jurisdiction. There are also Kadhi Courts as established by Kadhi's Court Act No.14 of 1967, which have original jurisdiction over personal status matters where all parties are Muslims. However, since the introduction of the Children's Act of 2001 all matters regarding children, including Muslim children, come under the jurisdiction of Children's Courts.

At the next level is the High Court. This court has original jurisdiction in civil and criminal matters and is also the court of appeal for the Magistrate Courts and Kadhi Court. It is divided into commercial, constitutional, civil and criminal and family and probate sections. The Court of Appeal hears appeals from the High Court.

Filiation

According to Article 24 (1) of the Children's Act if the parents of the child are married they have equal parental responsibility. Parental responsibility, as defined by Article 23 of this act, means all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property. If the parents were not married at the time of the birth of the child but are subsequently married then both parents have parental responsibility.

Although the Children's Act 2001 does not use the term illegitimate, if a child is born out of wedlock the mother has parental responsibility for the child's care and maintenance in the first instance. The father can gain parental responsibility according to Section 25 of the Children's Act. The parental responsibility of the father is established in the following circumstances:

1. On the application of the father to the court for parental responsibility.
2. If an agreement is made between the mother and father providing for the father to have parental responsibility.
3. If the parents have lived together for at least twelve months after the birth of the child.
4. If the father has acknowledged paternity.
5. If the father has maintained the child.

Custody

Since the introduction of the Children's Act matters of custody and guardianship have been decided giving priority to the best interests of the child and not the religion of the child. Previously, Kadhi Courts generally awarded custody of Muslim children to the mother until her male children were seven and female children fourteen. The continued application of Islamic law in custody issues has been rejected by the Kenyan Court of Appeal. Therefore religious considerations will not take priority over the welfare of the child, regardless of the child's religion.

According to Section 82(3) of the Children's Act custody can be awarded to a parent, a guardian, any person who applies for custody with the consent of a parent or guardian and has had custody for three months prior to the application, or any person who can show good cause to be awarded custody. When the court awards the care of the child to one parent it can also order that the other parent will have equal parental responsibility with the custodial parent, except in the right of possession of the child. The prima facie rule in Kenya is that custody of young children will be awarded to the mother.

Factors taken into account when awarding custody include the conduct and wishes of the parent, guardian or child, the wishes of the relatives of the child or any person who has had actual custody of the child during the three years preceding the application, the wishes of the child, the likelihood that the child has or will suffer harm if a custody order is not made, the customs of the community to which the child belongs, the religion of the child, any previous orders made concerning the child, the circumstances of any siblings and the best interests of the child.

The age of majority is eighteen as established by Section 2 of the Age of Majority Act, Chapter 33, Laws of Kenya and confirmed by the Children's Act.

Guardianship

In Kenyan law a guardian is defined in Section 102 of the Children's Act as "a person appointed by will or deed by a parent of the child or by an order of the court to assume parental responsibility for the child on the death of the parent of the child either alone or in conjunction with the surviving parent of

the child or the father of a child born out of wedlock who has acquired parental responsibility for the child in accordance with the provisions of this Act.” The guardian need not be a Kenyan citizen nor resident in Kenya to be appointed guardian.

Access

The Mohammedan Marriage and Divorce Act, Cap 155, Laws of Kenya, does not refer to the issue of access to children after divorce, however Article 114 of the Children’s Act does allow the court to make orders for the protection of the child. These include access orders, residence orders and exclusion orders, which all regulate access to a child. Child assessment orders and family assistance orders can be issued by the court in order to investigate a child’s welfare and assist a family when there are problems providing adequate care of a child. Under this article a child can also be made a ward of court. The power of arrest may be attached to any of these orders.

Nationality

The requirements for the acquisition of citizenship are established in Chapter 6 of the Constitution. Article 89 states that everyone born in Kenya with at least one parent of Kenyan nationality will acquire Kenyan nationality. A person born outside Kenya will only obtain Kenyan citizenship if the father is a citizen of Kenya. According to Section 3 of the Law of Domicile, Chapter 37 of the Laws of Kenya, an illegitimate child will acquire the domicile of the mother, while a legitimate child will acquire the domicile of the father.

Leaving the Jurisdiction

There are no limits on the travel of Kenyan citizens, unless there are specific orders preventing free travel into and out of Kenya.

International Law

Kenya signed the UN Convention on the Rights of the Child without reservation in 1990.

Parental Child Abduction

Parental child abduction is a punishable offence if there is an order in place preventing that parent from taking the child. A court can issue a production order under Article 114 of the Children's Act, which requires who is unlawfully concealing or detaining a child or who intends to remove a child from Kenya or the local jurisdiction to disclose the location of the child or to produce them to the court. The order can also restrain a person from removing the child from the jurisdiction of the court for a specific period.

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