

**CIVIL COURT
(FAMILY SECTION)**

**THE HON. MADAM JUSTICE
JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)**

Today, Monday 14th October 2019

Application no. : 153/2019/3 JPG

Case no : 29

**PIL
Vs
LL**

The Court:

Having seen the sworn application filed by PIL, dated 1st August 2019, a fol 1 et seqq., wherein it held:

That the applicant has an interest that the minor child, hereinafter indicated, be not taken outside Malta;

That the respondent is the person having, or who might have, the legal or actual custody of the said minor child;

Wherefore, the applicant respectfully requests that this Court orders the issue of the warrant of prohibitory injunction against the respondent enjoining him not to take or allow anybody to take, the said minor out of Malta;

Particulars of the minor children

P, a seven-year-old boy, born on the 25 December 2011. The boy has brown hair and brown eyes as seen in the photo herewith attached and marked DOK A.

M, a nine-year-old girl, born on the 6 February 2010. The girl has green eyes and blonde hair as seen in the photo herewith attached and marked Dok B.

Having seen the Court's decree dated 1st of August 2019, provisionally upholding the demand for the prohibitory in junction, ordering notification and a right of reply to the defendant, and appointing the application for hearing for the 21st of August;

Having seen the application filed by the Director (Civil Registration) as the Officer in charge for the issuing of passports and of the Commissioner of Police as the Principal Immigration Officer, dated 2nd August 2019, a fol 10, wherein it held:

That the applicants have been served with the Warrant of Prohibitory Injunction in the given names, together with the decree of the 1st August 2019 whereby this Honourable Court has provisionally acceded to the applicant's request namely PIL in order to enjoin LL from taking the minors PL and ML out of Malta;

That from investigations that the applicants have conducted is resulted that the minor has a passport issued by the X Authorities;

That passports issued by foreign authorities cannot be seized by the Executive Police;

Wherefore, the applicants while bringing the above to the formal attention of this Honourable Court, respectfully request this Honourable Court that in the circumstances give such directions, including an order to the father of the children namely LL whom is in possession of the above mentioned foreign passports to deposit such foreign passports of the minors under its authority,

subject to any other measures which this Honourable Court may deem appropriate and opportune.

Having seen this Court's decree dated 2nd August 2019, ordering the respondent to deposit the children's passports under the authority of this Court;

Having heard oral submissions of counsel to both parties;

Having seen the sworn reply filed by LL, dated 2nd September 2019, a fol 18 et seqq., wherein it was held:

- i. *That the defendant has been served with the warrant of prohibitory injunction in the aforesaid names and with the decree of the second (2) of August of the year two thousand and nineteen (2019) year, during the court sitting dated the twenty-first (21st) of August of the year two thousand and nineteen (2019);*
- ii. *That in the first place, this Honourable Court shall abstain from taking cognisance of the plaintiff's demand given that the action as propounded by the applicant is devoid of valid legal basis and hence, it is unfounded in fact and in law;*
- iii. *That without prejudice to the above mentioned, the plaintiff's demand does not merit acceptance given that there are no reasonable grounds which justify that the minor children be impeded from being taken out of the Maltese Islands. That for the sake of clarity, only the minor child M has been impeded from leaving the Maltese Islands, and P is currently residing in MD;*
- iv. *That the plaintiff's demand is unfounded in fact and in law on account of the fact that the issues relating to care and custody and the rights and duties of the parties as parents of M and P, have already been dealt within the jurisdiction of the Court of MD. That resultantly, the defendant has been **vested with absolute care and custody of the minor children**, whereas the*

plaintiff has been obliged to pay maintenance, as well as having access rights in terms of the judgment dated the sixteenth (16th) of July of the year two thousand and eighteen (2018), which judgment and its translation are herewith being marked and attached as docs 'A' and 'B'. That in view of the circumstances of the case, the MD Court reached the conclusion that it is in the paramount interests of the children that the care, custody and residence of the minor children be vested in the defendant, particularly because the children have been living together with their father since September of the year two thousand and seventeen (2017), which ambiance has offered them stability and safeguard. That the mentioned judgment is res judicata given that the plaintiff opted not to appeal;

- v. *Other than that, the plaintiff is faced with criminal proceedings in the MD Court when she repeatedly failed to pay maintenance in favour of the defendant for the two minors, as reflected in the accusation together with its translation, which documents are herewith being marked and attached as docs 'C' and 'D'. That the plaintiff failed to mention that in case she returns to MD she will be punished as a result of her default in paying maintenance;*
- vi. *That with all due respect, the defendant is contesting the mentioned warrant given that the plaintiff herself gave her explicit consent when authorising the minor children to travel abroad together with the defendant as well as with the paternal grandmother LP, which declaration of consent and its translation are being herewith marked and attached as docs 'E' and 'F';*
- vii. *That the plaintiff failed to mention that **on various occasions she resorted to violence as a means of punishing the minor children, and this happened in the presence of the defendant, and in particular on one instance when M was punished by the plaintiff way back in April of the year two thousand and seventeen (2017)**! That other than that, for the sake of clarity, during the period when the minor children were residing in Malta, the plaintiff failed in her duties of sending the minor children to school for elongated periods;*

- viii. *That even though the plaintiff tried to implicate that she was thrown out of the matrimonial home during her marriage with her defendant, this is wholly untrue. That the plaintiff committed **adultery with a man who was residing together with the parties in the matrimonial home, and additionally the plaintiff consummated other illicit and imprudent acts which led to the termination of marriage**, as shall be proven in the course of the proceedings;*
- ix. *That subsequent to this period, the minors was constrained to live together with the defendant given that the plaintiff **acted in her sole interests**. That the defendant has taken due care to the children's upbringing, both financially and emotionally. That during the preceding years, the contact of the plaintiff with the children has been sporadic. This confirms that the plaintiff's interests in instituting this action was clearly not for the childrens' sake but to vindict herself from the plaintiff!*
- x. *That it is worth mentioning that during the period when the parties resided in Malta as a married couple, the minor children have expressed their wish to return back to MD since they couldn't adapt in Malta. That as a matter of fact, the minor child P was acting aggressively while in Malta, and M couldn't adapt well;*
- xi. *That after this time-period, the children went back to MD where they received their education and good care, and they have **expressed their wish to reside in MD together with the defendant and the paternal grandmother**. That additionally, as a matter of fact the minor children have no ties with the Maltese Islands, and it is wholly inconsiderate to impede the minor child M from returning back to their home country. That it should be the case that the plaintiff initiates the exercise of her right of access, which right has never been deprived from the defendant, and at the same time the minor children continue to reside in MD;*
- xii. *That furthermore and without prejudice to the abovementioned, the plaintiff failed to outline that she is preserving the prima facie right by means of this*

action which she allegedly possess and therefore, the plaintiff's request ought to be disregarded, in terms of article 873 of Chapter 12 of the Laws of Malta;

xiii. That for the aforementioned reasons, there are no grounds for this Honourable Court to accept the plaintiff's demand for the issuance of the warrant of prohibitory injunction, given that there is no just cause why this Court should adhere to the plaintiff's demands which request isn't based on any imminent fear, but simply on vengefulness.

That in light of the abovementioned, the defendant humbly requests this Honourable Court to disregard the plaintiff's demand.

Having seen decree given on the 25th September 2019, regarding the access of the plaintiff to her daughter (Vide page 49);

Considers;

The plaintiff is requesting the Court to issue a warrant of prohibitory injunction on the Respondent to impede him from taking his children out of the Islands of Malta. The Respondent has raised the plea of lack of jurisdiction contending that jurisdiction lies with the Courts of MD who issued a judgment on 16th July 2018, awarding care and custody of the minor children in the hands of the Respondent.

Plaintiff submits that this judgment was awarded without her knowledge and that she had not been duly notified, in spite of the fact that her husband knew very well her address. In fact, she consented for her children to go for a holiday and instead her husband instituted proceeding for separation and care custody of their children in her absence and without her knowledge.

The plaintiff alleges that both she and her husband work regularly in Malta and reside in Malta, however their children are residing with Respondent's parents in MD.

Considers;

With regards to the Respondent's plea with the lack of jurisdiction of these Courts, reference is being made to the article 742 of Chapter 12 of the Laws of Malta:

742. (1) Save as otherwise expressly provided by law, the civil courts of Malta shall have jurisdiction to try and determine all actions, without any distinction or privilege, concerning the persons hereinafter mentioned:

(a) citizens of Malta, provided they have not fixed their domicile elsewhere;

(b) any person as long as he is either domiciled or resident or present in Malta;

(c) any person, in matters relating to property situate or existing in Malta;

(d) any person who has contracted any obligation in Malta, but only in regard to actions touching such obligation and provided such person is present in Malta;

(e) any person who, having contracted an obligation in some other country, has nevertheless agreed to carry out such obligation in Malta, or who has contracted any obligation which must necessarily be carried into effect in Malta, provided in either case such person is present in Malta;

(f) any person, in regard to any obligation contracted in favour of a citizen or resident of Malta or of a body having a distinct legal personality or association of persons incorporated or operating in Malta, if the judgment can be enforced in Malta;

(g) any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.

(2) The jurisdiction of the courts of civil jurisdiction is not excluded by the fact that a foreign court is seized with the same cause or with a cause connected with it. Where a foreign court has a concurrent jurisdiction, the courts may in their discretion, declare defendant to be non-suited or stay proceedings on the ground that if an action were to continue in Malta it would be vexatious, oppressive or unjust to the defendant.

- (3) *The jurisdiction of the courts of civil jurisdiction is not excluded by the fact that there exists among the parties any arbitration agreement, whether the arbitration proceedings have commenced or not, in which case the court, saving the provisions of any law governing arbitration, shall stay proceedings without prejudice to the provisions of sub-article (4) and to the right of the court to give any order of direction.*
- (4) *On the demand by any person being a party to an arbitration agreement, the courts may issue any precautionary act, in which case, if such party has not yet brought forward his claim before an arbitrator, the time limits prescribed in this Code for bringing the action in respect of the claim shall be twenty days from the date of issue of the precautionary act.*
- (5) *A precautionary act issued in terms of the preceding sub article shall be rescinded:*
- (a) if the party against whom it is issued makes such deposit or gives such security sufficient to secure the rights or claims stated in the act; or*
 - (b) if the applicant fails to bring forward his claim, whether before the arbitrator or before the court, within the said time limit of twenty days; or*
 - (c) on the expiration of the duration, original or extended, of the particular act in terms of this Code; or*
 - (d) for just cause on the application of the debtor as the court may deem proper in the circumstances.*
- (6) *Where provision is made under any other law, or, in any regulation of the European Union making provision different from that contained in this article, the provisions of this article shall not apply with regard to the matters covered by such other provision and shall only apply to matters to which such other provision does not apply.*

The record shows that the Plaintiff as well as the Respondent have chosen to live and work regularly in Malta and this for a considerable time, and that the Respondent periodically travels to MD for short visits to his children who are living with Respondent's parents.

Therefore, it is this Court's considered opinion that in terms of Article 742(1)(b) of Chapter 12 of Laws of Malta, since the Respondent is "*resident or present in Malta*", it follows that the Respondent falls in one of the major categories that ground the jurisdiction of the Maltese Courts.

Apart from this, the Court notes that at the time of the filing of this action, **both children of the contending parties were present in Malta.**

Moreover, Article 745(c) of Chapter 12 of Laws of Malta stipulates that:

"(c) a minor subject to paternal authority is presumed to reside in the place in which the parent exercising that authority resides"

It follows therefore that the legal residence of these children is in fact Malta and not MD since both parents are residing and working regularly in Malta.

Moreover, according to **Article 24 of Brussels 1**, that is, **The International Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968:**

"Application may be made to the courts of a Contracting State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter."

In view of the above it is this Court's considered opinion that the Plaintiff is endowed with the requisite elements that ground the jurisdiction of these Courts.

Therefore this Court denies the plea of lack of jurisdiction raised by the Respondent.

Costs are reserved for final award.

Application no. : 153/2019/3

Read.

Mdm. Justice Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

**Lorraine Dalli
Deputy Registrar**