IN THE FAMILY AND JUVENILE COURT 'B', FORMER COMMERCIAL COURT BUILDING – ACCRA HELD ON TUESDAY 8TH NOVEMBER 2022. BEFORE HER HONOUR MRS. MATILDA RIBEIRO, CIRCUIT COURT JUDGE, SITTING AS ADITIONAL MAGISTRATE WITH MADAM FELICIA COFIE, AND MADAM REGINA TAGOE AS PANEL MEMBERS.

Suit No: A6/136/2018

SABAINA BOADI (NO. 3) ….. APPLICANT

DANSOMAN

ACCRA

FRANCIS PANFORD (No. 3) ….. RESPONDENT

DANSOMAN

ACCRA

Applicant: Present

Respondent: Present

Counsel for Applicant, Absent.

RULING

This is a ruling on yet another application for variation of custody. This time around, filed by Applicant/Applicant (hereinafter referred to as Applicant) on the 22nd day of June, 2022. Respondent also filed an affidavit in Opposition to the instant motion on the 7th day of July 2022.

Applicant's case in support of her current application is that ever since Respondent was granted custody of the children in November 2020, he has refused to allow her access to them irrespective of constant reminders to him for same. She said it was in the issue's previous school that she used to see them. She alleged further that whenever she gives the issues items like money, shoes, snacks and foodstuff provisions, etc.. Respondent reprimands them for receiving same from her, returns them to her amidst insults including text messages. She annexed 'Exhibit SP 1 Series' being text messages and WhatsApp chats between the parties and 'Exhibit SP 2' being pictures of items Applicant bought for the issues which were returned to her by Respondent in support of her case. She alleged also that Respondent has relocated the second issue to an unknown school around Tetegu contrary to the orders of the Court. She therefore prayed for an order compelling Respondent to hand over the second issue to her to re-enrol her in the former school where the other issue is. It however came up in the course of proceedings that it is not only the second issue Respondent relocated but also, the first issue.

Though her motion paper reads "*Please take notice and notice is hereby given that the Plaintiff/Applicant herein will move this honourable Court by Motion on Notice to relist suit for variation of Custody Order granted to the Defendant by the Honourable Court in lieu of Plaintiff as he has flouted the Honourable Court's Order of granting access to the Plaintiff upon the grounds contained in the accompanying affidavit*" the relief endorsed on the affidavit in support per paragraph 14 is " ***for an order compelling Respondent to hand over the second issue to Plaintiff to enable her re-enrol her in the former school where the other child is enrolled to continue her their education to enhance their future ……..***" In her Supplementary Affidavit filed on the 12th day of July 2022 however, she prayed the Court to give effect to the judgment of this Court dated 15th February 2018 by restoring custody to her.

Respondent on the other hand confirmed relocating the issues to another school because of the cost of school fees and the distance between the issues' school and his residence. According to him, the children are embittered and hold the view that their mother abandoned them. They have therefore vowed not to have anything to do with their mother. He is also of the view that granting the application will destabilize the issues in terms of their

education and morale upbringing. He stated further that should the application be granted, he is not in a position to pay maintenance for the issues because of challenges in the farming industry, his line of business. He also annexed 'Exhibit FB1 Series' and 'Exhibit FB2' Series being receipts of payment of school fees, books and uniforms paid by Respondent for the first and second issues respectively in support of his case.

The question before the Court is whether or not custody of the two issues should be granted or restored to Applicant herein.

Custody orders are not absolute, they can be varied depending on the circumstances of the case and this is not the first time the issue of variation of custody has come up in the case involving the parties and issues herein. **Attu v Attu [1984-86] 2 GLR 743,** per Brobbey J. as he then was held that; **"***There could be no permanent or immutable order of custody because the Matrimonial Causes Act, 1971 (Act 367), s 27 (1) empowered the High Court to rescind or vary any order of custody of any child as it thought fit. There was no precondition on the rescission or* ***variation save that it should be made in the best interest of the child concerned***" (emphasis supplied). At the time of this judgment, the Children's Act was not in force but this decision which sought to apply **section 27(1) of the Matrimonial Causes** Act can be applied mutatis mutandis to this case. The crux is that any such variation should be in the best interest of the issues. Let us now consider the circumstances of the instant case to see if it will be in the best interest of the issues to restore custody to Applicant.

A brief background to this case will be helpful. The parties are the biological parents of the two issues aged thirteen (13) and nine (9) years, both females. The parties are currently divorced. In a judgment of this Court dated 15th February 2018 custody of the two issues was granted to Applicant, the mother. The Respondent was given access to the children fortnightly during weekends and also during the half period of each of the issues' school vacation among others. The parties were at the time separated but not divorced. In a subsequent ruling of this Court dated 24th November 2020, custody was varied in favour of Respondent based on the prevailing circumstances at the time upon an application by Respondent. At the time, the children had been with him for about five (5) months without

access to Applicant as a result of an incident which occurred in Applicant's home whilst the issues were with her. She sent the children to Respondent in his absence as a result of the incident. At the time of that ruling, Applicant did not make any claim against Respondent's prayer for variation of custody in his favour. She asked the court to use its discretion to determine the matter in the face of the developments at the time. The court having considered the circumstances of the parties and the issues at the time especially the disposition of Applicant at the time (not being particularly interested in the custody of the issues), varied custody in favour of Respondent. The custody granted to Respondent was however time bound and conditional. The Court ordered thus "*we order a variation of the custody order in the judgment of this Court dated 15th February 2020 and grant custody of the two issues to Respondent/Applicant herein (their father) for one (1) year effective November 2020 with bi-weekly weekend access and half of the issues vacation periods to Applicant/Respondent.* ***This is subject to review at the end of the one year****. Respondent Applicant shall send the issues to Applicant/Respondent on Saturday mornings by 9 am and she shall, in turn, return them to him on the Sunday following by 4:00 pm. The parties shall also share holiday access example, the Christmas and New Year holiday periods.* ***Considering the definite nature of the custody granted Respondent/Applicant, the issues' school shall not be changed by virtue of the variation in custody until otherwise ordered by the court***" (emphasis supplied).

After the one year, the parties did not come back to court. Respondent however went ahead and enrolled the issues in another school without recourse to the Court in flagrant disregard of the orders of the Court. The Court has sighted his letter to St Bernedette School in Dansoman dated 19th June 2021 informing them of his decision to withdraw the issues effective January 2022 due to transport challenges. This was during the pendency of the orders of the Court and yet he did not deem it necessary to inform the court of same. He stated in his Affidavit in Opposition that he had to change the issues' school due to the cost of school fees and challenges of transportation to and from school.

The Social Enquiry Report (SER) confirms that the children were withdrawn from the St. Bernadette school in Dansoman to Star of the Sea School, then to Redeemer Academy School, Tetegu within the period they were in Respondent's custody due to increments in school fees

and proximity. It will be noticed from the evidence on the record that when Respondent withdrew the issues from the St Bernedette school, he enrolled them in the Star of the Sea school also in Dansoman in the first term of the 2022 academic year. So, is the transportation challenges he gave to the St. Bernedette school justifiable since the issues were still commuting to and from Dansoman? In the same term he again changed their school to Redeemer Academy School, Tetegu. All these without regard to the orders of the court or the consent of the mother.

His position now is that, if the Court grants custody to Applicant, then he will not be in a position to maintain them because his farming business is not doing well. In my view, this position by Respondent is not acceptable. Parents have a responsibility to maintain their children whether or not they are working. If he is able to provide the needs of the issues whilst in his custody, then he should be able to pay maintenance for their upkeep should he be ordered to do so if indeed he has the best interest of the issues at heart. The record shows that prior to the children going into his custody, he was not consistent with the maintenance of the issues which led to maintenance arrears of about GHC10,950.00 as at September 2020. Ironically, after flagrantly disobeying the orders of the Court, he now rather gives conditions for Applicant to have supervised visitation access to the issues in his home. Really? He, having acted contrary to the orders of the court, now gives his own conditions and directives on supervised access to Applicant using the issues' current educational circumstances and morals as the basis. The fact is, if he could leave the issues in the care of third parties to work on his farm in the Central region, why not in the care of the biological mother? If indeed the children are that embittered against Applicant for leaving them at his residence in his absence, the parties should have worked on the children by now by making them appreciate the consequences of the events which happened about two years ago and helped the issues to make peace with Applicant by now. Like they say, time heals all wounds. A higher responsibility lies on Respondent in whose custody the issues have been for about 2 years now, but it appears he himself has vowed not to allow the issues have anything to do with Applicant. To the extent that he does not allow them to accept anything from Applicant; be it money, clothing, or provisions (this was confirmed by the issues and some utterances by

Respondent in Court). He may for good reasons advise the issues not to accept anything from anyone, but this should certainly not apply to a parent and for that matter, Applicant their mother. He alleges that he and his new wife have instilled Christian principles in the children, and he would not like Applicant to corrupt same. Isn't forgiveness a major tenet of Christianity? If indeed it is the children who refuse to go to Applicant because of the way he left them in Respondent's home, what has he a Christian father done about it? It seems to the court that instead of brokering peace between the issues and Applicant, he is rather fuelling the fire of hatred, and this should not be encouraged. Cutting off all links between Applicant and the issues is not the way forward. **Section 57 of The Children's Act 1998 (Act 560)** provides that *"A non-custodian parent in respect of whom an application is made to a Family Tribunal for an order of parentage, custody, access or maintenance under this Part shall have access to the child who is the subject of the order"* When Applicant had custody of the issues, Respondent had unfettered access to them. Why should the situation be different when he has custody? His disposition in this whole matter has been as if things must always be as he wants and expects them to be without regard to other relevant concerns like the best interest of the issues, the law, and orders of the Court. He will not comply if it is contrary to his expectations. Forgetting that although he is the father, the issues have a mother and both parties have rights and responsibilities imposed on them by the laws of this land including **sections 6 of the Children's Act 1998 (Act 560).** This attitude and or conduct of Respondent is in the view of the court, not in the best interest of the issues.

According to the Social Enquiry Report (SER), the issues prefer to be in the care of Respondent because of how Applicant left them in his care in 2020. They were embittered about the way their mother left them in the care of their father. Upon the recommendation of the Probation Officer in the SER, they were invited for an interaction with the panel. The court observed from its interaction with the issues that they seem to be greatly influenced by what Respondent tells them about Applicant and other matters resulting out of the Court proceedings. For instance, the issues explained that their refusal in accepting anything in cash or kind from Applicant was because the Court asked Respondent to pay money to Applicant instead of using it to pay their school fees, so they were not happy. That is what

Respondent apparently told the issues and they believed him. He failed to explain to the issues that he failed to pay the maintenance ordered by the court when they were living with Applicant which resulted in a huge arrears and so he was ordered to pay it to Applicant in instalments. And that the Court never ordered him to use the issues' school fees to pay the maintenance arrears. It also came out during the court's interaction with the issues that they have forgiven Applicant and she, them. They were happy when they spent the first weekend access with Applicant in August 2022 after about two (2) years.

A careful perusal of the grounds in support of Applicants motion and having also read the Social Enquiry Report (SER), it was observed that Applicant came back to court because Respondent denied her access to the issues. Her only means of access to the issues was by visiting the issues in school until Respondent changed their school to one unknown to her. Perhaps she might not have come back for custody if she had reasonable access to the issues. Indeed, she also failed to come back to court upon the expiration of the one year probably because she was getting access to the issues in school. It was only after the issues' school was changed to one that she did not know that she came to court for redress.

In the determination of the variation of custody, we cannot do without the views of the children in issue. **Sections 11 of The Children's Act 1998 (Act 560) provides that "***No person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his well-being, the opinion of the child being given due weight in accordance with the age and maturity of' the child"* and **section 45(2)(c)** also states that " *Subject to subsection (1) a Family Tribunal shall also consider—*

(c) the views of the child if the views have been independently given;"

The issues stated during their interaction with the panel that they will not mind living with Applicant but for the potential impact it will have on their education especially, that of Nhyira, the first issue who is being prepared for BECE in 2023. In 2020, Nhyira was in class five (5) and should have been in JHS 1 by now, but she has been placed in JHS 2 thus requiring a lot of work to adjust and prepare for BECE next year. This has led to her being signed up for extra tuition at home and extra classes at school leaving her with very limited time for

anything else including time with her mother now that they have been able to reconnect. The first issue goes to school Monday to Saturday, during vacations and also does extra home tuition twice a week. Respondent is now using the first issue's extra classes as reasons why Applicant cannot have the access ordered by the Court when it was, he who took these decisions without regard to the pending orders of the Court in respect of weekend and vacation access and for the issues to be retained in the St. Bernadette school over the one-year period until otherwise ordered by the Court.

Parents who have a duty to make decisions and choices on behalf of their children should exercise good judgment and not make choices that will put undue pressure on the children as is the current situation. Jumping the first issue a year ahead with the attendant pressure that she is having to go through without much time for any other activities is not the best. He has also recently (during the pendency of the instant application before the court) registered the second issue for weekend classes in school despite the pending weekend access order of this Court. Development should be holistic and balanced. All work and no play may make Nhyira a dull girl.

On the 30th day of August 2022, the court pending the final determination of this matter, varied slightly the pending access order because of the first issue's current academic schedule in order to ensure that the issues get to spend some time with their mother. To this, Respondent was quick to react that to avoid the challenges of moving the issues back and forth, he will be okay if custody is granted to Applicant. Then I asked, who caused it? Did he ever consider the orders of the court when he unilaterally made all those changes? Did he even consider the best interest of the children? Now that he has changed the school of the issues twice from January 2022 to date and 'jumped' the first issue, is he going to re-enrol them back to the St. Bernadette school and repeat the first issue or the issues will have to commute from Dansoman to school in Tetegu and back daily if custody should be granted to Applicant as he was suggesting? Which one will be more challenging? For him or the issues? Has he considered the inconvenience to the issues and the burden placed on the first issue? Must it always be what is convenient to Respondent? Indeed, Respondent comes to Court for reliefs but in another breath, fails to respect the orders of the Court when he finds

them unfavourable to him. True to his words or intentions, Respondent did not make it possible for Applicant to have access (he failed to send the issues to Applicant as ordered) to the issues from the 30th day of August 2022 to the 11th day of October 2022 even when the second issue was on vacation. He rather signed up the second issue for weekend classes. He gave all sorts of excuses which in the view of the Court are not tenable. This only goes to buttress the point or view of the Court that Respondent will only do what is convenient to him without regard for other considerations, not even the rights and best interest of the issues.

His disposition in this whole matter has been as if things must always be as he wants and expects them to be without regard to other relevant concerns like the best interest of the issues, the law, and orders of the Court. He will not comply if it is contrary to his expectations. Forgetting that although he is the father, the issues have a mother and both parties have rights and responsibilities imposed on them by the laws of this land including **sections 6 of the Children's Act 1998 (Act 560).** This attitude and or conduct of Respondent is in the view of the court, not in the best interest of the issues.

It was also observed in the course of proceedings that Respondent is most of the times out of Accra especially on weekends because of his farming business. His wife with whom the issues are left also operates a shop from Monday to Saturday and closes at about 8:30pm. The shop is however near their residence and the issues current school.

It was held in **Opoku Owusu v Opoku Owusu [1973] 2 GLR 349** that it is the duty of the Court to protect the interest of the issues irrespective of the wishes of the parents and this we will do.

Section 2 of Act 560 also states that "*The best interest of the child shall be paramount in any matter concerning a child.*

(2) The best interest of the child shall be the primary consideration by any court, person, institution or other body in any matter concerned with a child"

Again in **Ansah v. Ansah [1982-83] GLR 1127**, it was held inter alia that "… *the court's duty was to make an order which was reasonable for the benefit of the children. In deciding what was in the best interest of the children, the conduct of the parents, and in the instant case, the pattern of life set up for the children since cohabitation ceased between the wife and husband were important matters to be taken into consideration"*

This dictum was earlier applied in the case of **Aikins v. Aikins [1979] GLR 223.**

So, with all these background and circumstances, in which of the parties' custody will the best interest of the issues be ensured? Applicant was granted custody of the issues in 2018 then out of frustration, she sent them to Respondent. The court varied custody in favour of Respondent on conditions. Respondent breached the conditions, changed the issues' school in flagrant disregard of the orders of this court and the interest of the issues and has also denied Applicant reasonable access to the issues despite the express orders of the Court. Respondent has evinced from his conduct that he will not allow Applicant reasonable access to the issues so long as they remain in his custody and this we find not to be in the best interest of the issues. It was held in the case of **Happee v. Happee [1974] 2 GLR 186** that not only does a parent have a right of access to a child(ren) but more importantly, the child(ren) to the parent and no court should deny a child this right. Since Respondent was not denied access to the issues when they were in the custody of Applicant, it may be appropriate if they are placed in the custody of Applicant to ensure that the issues have reasonable access to both parents. However, with all the changes that have gone on in the lives of the issues especially with the first issues' education and preparation for the Basic Education Certificate Examination (BECE), it is the considered view of the Court that the best interest of the issues will be ensured if the status quo as regard custody is maintained at least till Nhyira is done with her BECE in 2023. The Court therefore orders that custody of the two issues shall remain with Respondent with reasonable access to Applicant till Nhyira is done with her BECE. Being half of the issues' school vacation periods and bi-weekly weekend access with a little tweak (from Saturday after Nhyira's Saturday classes on the days she has to attend classes)

because of Nhyira's current study schedule. Applicant shall pick up the issues in exercise of her right of access and Respondent shall go for them on the Sunday following by 5pm. Same arrangement shall apply to vacation access. The parties shall agree and share access to the issues on public holidays equally.

Since both parties have a responsibility towards the maintenance of the issues as provided by **section 47 of Act 560,** Applicant is ordered to support in the maintenance and care of the issues by paying the issue's school feeding fees and providing for their other necessaries of life as and when they fall due whilst Respondent takes care of all other educational expenses, medicals, and general maintenance.

SGD.

H/H MATILDA RIBEIRO (MRS.)

CIRCUIT COURT JUDGE