



**CEA v BA (Family Miscellaneous Application E062 of 2021)  
[2023] KEHC 430 (KLR) (Family) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 430 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
FAMILY MISCELLANEOUS APPLICATION E062 OF 2021  
MA ODERO, J  
JANUARY 27, 2023**

**BETWEEN**

**CEA ..... APPELLANT**

**AND**

**BA ..... RESPONDENT**

**RULING**

1. Before this court for determination is the notice of motion dated August 4, 2022 by which the applicant CEA seeks the following orders:-

- “1. spent.
- 2. spent
- 3. that the court be pleased to find that the respondent BA is in contempt of order issued by the court on July 28, 2021 restraining the removal of the minor, ABE from the jurisdiction of the court.
- 4. that the court be pleased to issue an order directing BA to show cause why he should not be cited for contempt of court.
- 5. that the court be pleased to commit BA to civil jail for a period of 6 months or any other period or any other sanction it may deem fit and appropriate in the circumstances of the case.
- 6. that if order (5) is granted the honourable court be pleased to order the officer commanding Nairobi Parklands police station be ordered to ensure the enforcement of the order.



7. that the court be pleased to order the respondent to cater for the costs of this application.
  8. that the court be pleased to issue any other order it deems fit in the circumstances of the case.”
2. The application was premised upon article 50(1), 159(2) (a), 159 (2) (b), 159 (2)(d), 159(2) (e), 165(3) (a), 165 (3) ( e) of the Constitution, section 5 of the Judicature Act, sections 1A,1B, 3A and 85 of the Civil Procedure Act, order 40 rule 3 and order 50 rule 1 of the Civil Procedure Rules 2010 and the inherent jurisdiction of the court and was supported by the affidavit of even date sworn by the applicant.
  3. The respondent AB opposed the application through the replying affidavit dated August 23, 2022.
  4. The matter was canvassed by way of written submissions. The applicant filed the written submissions dated October 20, 2022 whilst the respondent relied upon his written submissions dated October 18, 2022.

### **Background**

5. The applicant a Kenyan citizen and the respondent who is a German national residing and working for gain in the Republic of Kenya got married to each other in the year 2005. Their union was blessed with one child, a son who is now aged about six (6) years old. The marriage between the parties fell into problems and the couple separated on May 5, 2019.
6. The respondent herein filed in the Children’s Court civil case No 1534 of 2019 seeking orders for shared custody care and control of the minor as well as orders for access and shared maintenance of the minor. The respondent also sought for leave to travel overseas with the minor.
7. On July 14, 2020 the learned trial magistrate delivered a judgement in the following terms:-
  - “ 1. That the plaintiff is hereby granted primary custody of the minor.
  2. That the defendant is granted access to the child in the following terms; alternating weekend i.e. Saturdays 10.00 am to Sunday 3 pm until the defendant is deemed to be financially independent. During the school days, she is at liberty to visit the child and also participate in school activities as per the school rules.
  3. That leave to travel granted and shall be exercised during the time he has custody and/or access to the minor.
  4. That each party shall provide for the food and shelter expenses when they are in their care, the plaintiff however shall fully take care of the education, medical and clothing expenses of the minor whether in his custody or not, on his own volition at liberty to support the defendant when the minor is in her care for access when she is still financially incapacitated.
  5. That no orders as to costs.
  6. That the defendant do facilitate the process of the German passport.”
8. Being dissatisfied with the decision of the Children’s Court the applicant filed the memorandum of appeal dated July 21, 2021. Contemporaneously with that memorandum of appeal the applicant filed



the notice of motion dated July 21, 2021 seeking various orders. This court heard that application and *vide* a ruling delivered on December 3, 2021 dismissed the application in its entirety.

9. The applicant then filed this present application seeking to have the respondent punished for contempt.
10. As stated earlier the application was opposed.

### **Analysis and Determination**

11. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties. The only issue for determination is whether the respondent is in contempt of court orders.
12. Section 5(h) of the *Judicature Act* governs contempt proceedings in Kenya and gives both the High Court and the Court of Appeal powers to punish for contempt of court orders.
13. It is trite law that courts do not make orders in vain. A person to whom a court order is directed is under an obligation to obey such orders. In the case of *Hadkinson v Hadkinson* [1952] All ER the court stated as follows:-

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

14. In the case of *Econet Wireless Kenya Ltd v Minister of Information of Kenya & Another* [2005] eKLR, the court relying on the decision of the Court of Appeal in *Gillab Chand Papatlal Shah & another v Civil Application No. 39 of 1990* stated that:-

“It is essential for the maintenance of the rule of law and order that the authority and dignity of our courts are upheld at all time. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibilities to deal firmly with proved contemnors.” (own emphasis)

15. Similarly in *Teachers Service Commission v Kenya Union of Teachers & 2 others* [2013] eKLR the court stated as follows:-

“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.”

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this court will not be the one to open that door. It



one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.” (own emphasis)

16. In order to succeed on an application for contempt, the applicant must prove the following:-
  - (a) That the terms of the order (or injunction or undertaking) are clear unambiguous and are binding on the defendant.
  - (b) That the defendant had knowledge of and proper notice of the said court order.
  - (c) That the defendant deliberately acted in breach of the said order
17. The standard of proof required in contempt proceedings is higher than that required in an ordinary civil case since the punishment may include loss of liberty to the contemnor.
18. In *Gathaira K Mutikika v Babarini Farm Ltd* [1985] KLR the court held that:-

“ A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved..... it must be higher than proof on a balance of probability, almost but not exactly, beyond reasonable doubt. The stand of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.” However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge..... recourse ought not be heard to process contempt of court in aid of a civil remedy where there is any other method doing justice. The jurisdiction of coming for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject....applying the test that the standard of proof should be consistent with the gravity of the alleged contempt.....it is contempt for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.” (own emphasis)
19. On July 28, 2021 this court made interim orders restraining the respondent from removing the minor from the jurisdiction of the court. I have no doubt that the said interim order was clear and unambiguous. I equally have no doubt that the respondent was fully aware of said interim order. Indeed the respondent does not claim to have been unaware of the said.
20. The applicant claims that the respondent breached the said orders by removing the child to Germany on August 1, 2022.
21. What the applicant has omitted to state is that the parties entered into a consent on August 13, 2021 by which the respondent was permitted to travel with the child to Germany during the christmas vacation in the month of December.
22. Further this court delivered a ruling on December 3, 2021 in which it dismissed in its entirety the notice of motion dated July 21, 2021. Prayer (3) of that motion sought to restrain the respondent from travelling out of the country with the minor. The ruling of December 3, 2021 dismissed that prayer leaving it open for the respondent to travel with the child.
23. As stated earlier the orders of July 28, 2021 were ‘interim orders’. Once the application upon which the orders were grounded was dismissed then the said interim orders also lapsed. As such, the said orders



lapsed on December 3, 2021 when the court delivered its ruling. The respondent cannot be held in contempt of orders, which have already lapsed.

24. It is not in dispute that the subject child is of German nationality through his father. Why should the applicant scream blue murder when the minor is taken by his father to visit his own country? How does that prejudice the applicant?
25. The orders made by the Children's Court in its judgment delivered on July 14, 2020 remain valid and enforceable. Those orders permit the respondent to travel with the minor out of the country during the periods when he has access to the child. Those orders have not been set aside. Therefore, I find nothing wrong in the respondent having traveled to Germany with the child during the period when he had access.
26. The respondent did not abscond with the child. They travelled to Germany to visit the family of the respondents who are also the child's relatives and returned to Kenya on August 25, 2022. There was no intention to permanently deprive the applicant of access to the child. Instead of complaining, the applicant ought to be grateful that her son is being exposed to international travel and to a different culture.
27. My advice to the parties herein is that they bury the hatchet. They should stop engaging in needless and endless legal battles and join forces to provide their son with the best upbringing possible. These legal battles pitting one parent against another are detrimental to the emotional development of the minor.
28. Finally, I find no merit in this application. The same is dismissed in its entirety. Each party to pay its own costs.

**DATED IN NAIROBI THIS 27 DAY OF JANUARY, 2023.**

.....

**MAUREEN A. ODERO**

**JUDGE**

