



**(JGM & LKM Suing thru mother) TN v GM (Family Appeal
E04 of 2022) [2023] KEHC 21204 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
FAMILY APPEAL E04 OF 2022
SM MOHOCHI, J
JULY 28, 2023**

BETWEEN

(JGM & LKM SUING THRU MOTHER) TN APPLICANT

AND

GM RESPONDENT

RULING

Introduction

1. Before me is an application pursuant to Section 8(1), (2), (3). 13(1). (2). 31(2) (vi), 111, 121l of the [Children Act](#) No.29 of 2022, Rule 4 of the [Children \(Practice and Procedure Parental Responsibility\) Regulations, 2002](#), Order 40 Rule 3 of the [Civil Procedure Rules](#).
2. The Applicant seeks the following reliefs:
 - I. This Application be dispensed with at the first instance and for reasons to be recorded and the matter be certified as urgent and be heard ex- parte.....Spent.
 - II. The Court summons the Respondent-Tabitha Nyambura, to show cause why she has not complied with orders issued on June 16, 2023.
 - III. That the Court finds the Respondent in contempt of Court.
 - IV. Any such other or further punitive orders in respect of the said disobedience as may be necessary for the ends of justice to be met.
 - V. Costs of the application be borne by the Respondent.
3. The Application is supported by a sworn affidavit of Gilbert Mwangi and is based on the following grounds:



- a. That on June 16, 2023 the Court delivered a ruling in the presence of the both parties and gave orders as follows;
 - i. The Applicant shall enroll the minor at a school in Nakuru acceptable to the Respondent and shall not transfer the custody of minor JGM to any other third party without the orders of the Court.
 - ii. The Respondent shall access minor JGM to be availed by the Applicant at Nyayo Gardens in Nakuru every Saturday from 9:00 AM to 6:00P.M.
 - b. That the Respondent, has refused, failed, neglected and ignored to comply with the said order.
 - c. That the Respondent, has refused to honor the custody and access orders issued by this Court and has refused to allow the Applicant to access the minors.
 - d. That the Respondent, has also allegedly enrolled a minor in an unknown education institution without consulting and /or discussing the same with the Respondent/ Applicant.
 - e. That the Applicant, fears that the safety condition and well-being of the minor might be at stake and it is imperative that this Court summons the Respondent to produce the minor in Court and or explain her whereabouts; and
 - f. That, it is in the interest of justice and in the best interest of the minors herein, that this application is heard urgently and the orders sought herein be granted.
4. In a nutshell the Applicant alleges the Respondent is in contravention of the Court orders and should be found to be in contempt and appropriate action taken upon her.

Applicant's Case

5. The Applicant alleges that the disregard of the Court order was instant on the 16th June after the Court session whereby the Respondent and her advocate would not agree on the modalities of actualizing the applicant's visitation rights the next morning.
6. That on June 19, 2023 he received a letter from the Respondent Advocate on record which letter purported to modify and/or alter the orders of access issued by Court on June 16, 2023.
7. That on June 20, 2023 he wrote to the Advocates on record for the Respondent affirming his resolve to comply with the orders of the Court dated June 16, 2023.
8. That despite the Respondent being aware of the orders issued by this Court on June 16, 2023, she has deliberately disobeyed orders and has shown her intention to continue doing so vide the letter dated June 19, 2023.
9. That on 17th and June 24, 2023 the Respondent was supposed to avail the minors at Nyayo Gardens, however she failed to do so contrary to the orders by the Court.
10. That since the said orders were issued the Respondent has refused and or neglected to obey the same.
11. That the Respondent has refused to honor the custody and access orders and has refused to allow him to access the minors.
12. That the Respondent has also allegedly enrolled a minor in an unknown education institution without consulting and /or discussing the same with him.



13. The Applicant fears that the safety, condition and wellbeing of the minors might be at stake and it is imperative that the Court summons the Respondent to produce the minors in Court and or explain her whereabouts.
14. The Applicant contends that the dignity and authority of the Court must be protected at all times.
15. He verily believes that the parents of a child shall have parental responsibility over the child on an equal basis. and neither the father nor the mother of the child shall have a superior right or claim against the other in exercise of such parental responsibility.

Respondent's Case

16. The Respondent Admits to being privy to the Ruling rendered on June 16, 2023 in the presence of the applicant and her advocate on record.
17. The Respondent in their brief submissions relied on the case of *MMN v AFM* [2021]eKLR on the centrality and place of the child in these proceedings in its finding that:

“There has already been sufficient trauma in the Child life: a broken home, separated parents, being tossed between mother and father. The child who is only the subject of and not the cause of dispute and ought to be protected in the process of settling the dispute. He is a human being and not a chattel”.

18. And in the case of *CCM v MNM* [2018] eKLR which cited the repealed *Contempt of Court Act* urging restraint on litigants in its invocation
19. The Respondent submits that, the applicant ought to have just facilitated the minor's transportation before it can be stated that the appellant is in contempt.
20. The Respondent contends that the Application fails to fulfil the established principles as enunciated in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR:

“It is an established principle of law that in order to succeed in Contempt proceedings, the applicant has to prove

- (i) the terms of the order,
- (ii) Knowledge of these terms by the Respondent,
- (iii). Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of book *Contempt in Modern New Zealand* who succinctly stated: -

“There are essentially four elements that must be proved to make the case of contempt. The applicant must prove to the required standard (in contempt cases which is higher than civil cases) that:-

- a. the terms of the order (or injunction or undertaking) were clear, unambiguous and were binding on the defendant;
- b. the defendant had knowledge of or proper notice of the terms of the order;



- c. the defendant has acted in breach of the terms of the order; and
- d. the defendant's conduct was deliberate.

.....Two principals emerge. The first is liberty:- it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a Court order, if reasonable doubt exists about the essentials. In this regard, I am not satisfied that wilful disregard of the Court order has been established.

The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the Court commits contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an "accused person.

Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that, casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount contempt in theory only and does not render the contemnor liable to punishment

21. The Respondent contends that the Application is bad in form relying on the case of *Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* (2014] eKLR in which the Court of Appeal held that:

“An application under Rule 81.4 (breach of judgment, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the Judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The application notice and the affidavit or affidavits must be served personally on the respondent unless the Court dispenses with service if it considers it just to do so, or the Court authorizes an alternative method or place of service.” (Underlining mine)

The law requires that the application for committal or contempt of Court to be served personally on the respondent. The applicants did not comply with that requirement or the Court order and instead served the advocate.

22. That she was notified of the contents and she asked that the Applicant does facilitate movement of the minor for the next Saturday as it was already late Friday evening when the directions were relayed to her.
23. The Respondent contends that the Applicant was on her back, stating that she needed to find a school for the minor no later than Monday June 19, 2023 and that the child could not stay at home pending her looking for a school.
24. That given the pressure, she enrolled the child at a nearby kindergarten (New Ride Nursery School) and communicated to the Applicant that it was a stop-gap measure pending the finding of a suitable school, as the school term only has 4 weeks left, and as such this would give them ample time to source for a school.



25. That the choice of a school was not agreeable to the applicant stating that the school should not be at Karunga area (allegedly for his safety), and suggested a list of his ideal schools, stating that whichever school that was picked he would only pay half the cost and for her to pay half.
26. That she communicated that that would be discussed and, in any event, she could only enroll the minor in a school that she could afford half the fees, as she is not formally employed.
27. She suggested that the Applicant can pick the minor on one weekend per month from Friday evening running through to Sunday evening, as well as one week on school holidays, as this would free her up to work, as she works on Saturdays as well, and in any event, her suggestion would far surpass the prescribed hours of between 9:00am and 6:00pm Saturdays as directed by the Court.
28. That the Applicant is insisting that she must be the only one who could bring the minor to Nyayo gardens on Saturdays, to which she contests urging that she was only forbidden from transferring custody of the minor, though she could send another family member to deliver the child to Nyayo gardens.
29. That the Applicant has equally rejected possibility of another relative delivering the minor at Nyayo gardens on Saturdays.
30. Respondent contends that she cannot be available on every Saturday as she needs to work in order to support the minors.
31. That she asked the applicant, to facilitate transportation of the minor which he has declined, as the money that she makes goes towards supporting the minors needs in terms of food, shelter, clothing, entertainment, diapers and their day to day needs as the applicant is not giving any financial support, at all.
32. That she has not in any way refused to comply with the Courts directions, as she is intent on the full and complete realization of the best interest of the minors, and is embarrassed to appear before the honorable judge on the same issue.
33. Respondent has requested for a date before the subordinate Court and has been granted audience on August 7, 2023.
34. The Respondent laments to have striven to accommodate the applicant's wishes in all ways possible without success.
35. She Complains that to date, the applicant has not delivered the minor's clothes as well as her school uniform despite request.
36. Respondent contends the minor JGM is thriving even as she strives to provide her a stable and consistent environment and routine, surrounded by family who love her, including her younger brother LKM, and with access to her father in a manner that harmoniously works for all of us.
37. Respondent contends any perceived disobedience is regretted and is not deliberate, at all.

Analysis and Determination

38. The Issues emerging for the Courts Considerations are;
 - a. Whether the Orders of June 16, 2023 were complied with?
 - b. Whether the Respondent should be found in contempt of Court



- c. What sanction the Court should effect upon finding of contempt?
39. This Court recalls urging the parties herein to ventilate their child custody before the children’s Court and desists protracting their dispute a by multitude of Applications in the High Court.
40. The Court wishes to remind the Respondent that the matter before the children’s Court relates to a contestation of custody and the capacity of both parents to take care of the minors shall be in focus by the Court. The Respondent is equally to remain alive to her conduct through the trial as the same shall have a bearing.
41. From the Pleadings and submissions of the Parties its apparent that; the Respondent, has refused, failed, neglected and ignored to comply with the said order, she now alleges to be busy without time to take the minor to the meeting point on Saturdays as ordered, that she is of modest financial means and that the Applicant should meet the expenses.
42. The Respondent has equally got the minor admitted at a school without the input of the Applicant as ordered.
43. Contempt of Court is that conduct or action that defies or disrespects authority of Court. [Black’s Law Dictionary](#) 9th Edition, defines contempt as:

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a Court or legislature. Because such conduct interferes with the administration of justice.”
44. Properly put, contempt, is conduct that impairs the fair and efficient administration of justice. Section 5 of the [Judicature Act](#) confers jurisdiction on the superior Courts to punish for contempt.
45. Order 40 rule (3) of the [Civil Procedure Rules \(2010\)](#) provides that, in cases of disobedience, or of breach of any terms of a temporary injunction, the Court granting that injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release. This application has therefore invoked this Court’s powers in terms of Order 40 rule (3).
46. The reason why Courts punish for contempt is to uphold the dignity and authority of the Court, ensure compliance with directions of the Court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by Courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and/or disobeyed an order that was directed at him/here.
47. The application before Court seeks to have the Respondent cited contempt of this Court’s order of June 16, 2023 and to be committed him to civil jail and/or fined as the Court may deem fit.
48. In dealing with the question of contempt in the [Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another](#) [2005] KLR 828, Ibrahim, J. (as he then was), underscored the importance of obeying Court orders, stating:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom



an order is made by Court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void. (emphasis)

49. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the Court order, if he were to succeed. This was aptly stated in *Gatharia K. Mutikika v Babarini Farm Limited* [1985] KLR 227, that:

A contempt of Court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard 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 to be had to process of contempt of Court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing 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 party 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 competent 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.

50. This Court finds the conduct of the Respondent to be contemptuous of the Court and that notwithstanding any difficulties she might have face in compliance ,she did not deem it necessary to approach the Court for clarity.
51. The Casual response by the Respondent denotes a party who imagines that the interim orders she enjoys are temporary and can be varied, reversed or altered subject to her behavior.
52. For avoidance of doubt and clarity, the orders of June 16, 2023 were interim orders to facilitate hearing and determination of the Nakuru Children’s case E030 of 2028 which comes up in Court on August 7, 2023. The Orders are not ambiguous and that parties should strictly comply with the orders.
53. Due to the gravity of consequences that emanate from contempt proceedings, this Court discourages personalized contempt proceedings by parties in children custody disputes.
54. This Court remains alive to the best interest of the child principles and for the same shall restrain from visiting penal sanctions upon the Respondent.
55. Having found the Respondent to be in contempt, this Court shall afford the Respondent a last opportunity to purge the same, by forthwith fully complying with the Court Order and filing a report of the compliance within the next 14 days from today.
56. The Respondent shall be expected to ensure visitation of minor JGM to the Applicant from Saturday the July 29, 2023.



57. As for both parents concurring on a school the minor is to attend, the Respondent should ensure conversation and concurrence occurs within the next 14 days from today.
58. Upon Default of the Order to purge contempt, the Respondent shall forthwith be liable to pay a fine of Kshs 20,000/-.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 28TH JULY 2023.

MOHOCHI S.M

JUDGE

JULY 28, 2023

