



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. CAUSE NO. 133 OF 2019

G.O.A.....APPLICANT

VERSUS

C.G.....RESPONDENT

RULING

1. This chamber application has been brought under **sections 4, 5, 24, 27(b) and 28** of the **Contempt of Court Act 2016** by the applicant G.O.A. for orders that:-

- (a) contempt of court proceedings be commenced against the respondent C.G. and she be declared to be guilty of contempt of the court orders of the Chief Magistrate's Court in Children Case No. 1353 of 2018 issued on 27th November 2018;
- (b) any other order deemed expedient in the circumstances and in the interest of justice does issue; and
- (c) costs of the application be provided for.

2. In the grounds and supporting affidavit, the applicant's case was that on 27th November 2018 the Children Court made an order compelling the respondent to avail the minor E.C.O. for access by him on each alternate weekends, specifically Saturdays from 9.00 am to 5.00 pm and on Sundays from 1.00 pm to 5.00 pm, the pickup joint being the Hilton Hotel in Nairobi, but that the respondent, despite being aware of the orders, had failed and/or refused to comply with them and had persisted in the refusal.

3. The respondent responded that she was aware of the orders but denied that she had breached them. Her case was that she understood the orders to mean that the applicant was to access the child on a Saturday and on a Sunday on alternative weekends, but that the applicant understood the orders to mean he was to access the child one weekend and skip the next weekend. This misunderstanding had led her to apply to the court for clarification. Secondly, that the orders were that the applicant meets half the cost of delivery of the minor to the Hilton Hotel which he had failed and/or refused to pay. Further, that she has taken the child to Hilton Hotel only for the applicant to fail to show up.

4. The background of this dispute is that the applicant is the father, and the respondent is the mother, of the minor E.C.O. who was born on 28th September 2015. The applicant lives and works in Mombasa and the respondent lives and works in Nairobi. The minor lives with the respondent. The applicant filed the cause seeking sole legal and physical custody of the child. He expressed reservations regarding how the respondent was raising the child.

5. The respondent filed a defence and counterclaim. She denied the allegations by the applicant, and stated that this was a three-year-old child, a child of tender years, and needed the tender care and love of the mother. She claimed that the applicant was violent and had failed to provide for the child's basic needs. She sought that the applicant maintains the child to the tune of Kshs.95,000/= per month. She particularised the child's needs.

6. It was following the dispute that the children court gave the above interim orders.

7. It should be pointed out that the **Contempt of Court Act of 2016** was on 9th November 2018 in **Kenya Human Rights Commission –v- Attorney General & Another [2018]eKLR** declared unconstitutional and invalid for lack of public participation as required by **Articles 10 and 118(b)** of the Constitution, and for encroaching on the independence of the Judiciary. It follows that the present application, in so far as it sought to be grounded on the **Contempt of Court Act of 2016**, was incompetently brought.

8. Secondly, the **Magistrates’ Courts Act, 2015** was enacted to confer jurisdiction, functions and powers on the magistrates’ courts; to provide for the procedure of magistrates’ courts; and for connected purposes. **Section 10** of the **Act** provides as follows:-

“(1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.

(2) A person who, in the face of the Court —

(a) assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;

(b) interrupts or obstructs the proceedings of the Court; or

(c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence.

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.

(4) In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which —

(a) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;

(b) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or

(c) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court.

(5) A police officer, with or without the assistance of any other person, may, by order of a judge of the Court, take into custody and detain a person who commits an offence under subsection (2) until the rising of the Court.

(6) The Court may sentence a person who commits an offence under subsection (1) to imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shillings, or both.

(7) A person may appeal against an order of the Court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the Court.

(8) The Chief Justice may make Rules to regulate procedures relating to contempt of court.”

9. Under **section 10(1) and (3)** of the **Act**, the magistrates’ court can, in civil proceedings, cite and punish any person who willfully disobeys its judgment, decree, direction, order, or breaches an undertaking he has given to the court. Indeed, in **Ramadhan Salim –v- Evans M. Maabi T/a Murphy Auctioneers and Winfred Wanjiku Gaito [2016]eKLR**, the Court of Appeal observed that:-

“.....the Magistrates’ Courts Act, 2015 which came into force on 2nd January 2016 now gives the magistrates’ courts unlimited jurisdiction to punish for contempt.....”

10. This means that, if the applicant felt that the respondent had wilfully disobeyed the orders issued on 27th November 2018 by the Children Court he ought to have filed a notice of motion before the same court seeking that she be found guilty of contempt of the orders and be punished for it. He instead came before the wrong court.

11. For want of jurisdiction, I strike out the application with costs.

DATED and SIGNED this day of MARCH 2022

A.O. MUCHELULE

JUDGE

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF MARCH 2022

A.O. MUCHELULE

JUDGE