



**GMM v SAS (Family Appeal E12 of 2020)  
[2022] KEHC 14593 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 14593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E12 OF 2020  
JO NYARANGI, J  
SEPTEMBER 30, 2022  
IN THE MATTER OF THE CHILDREN ACT NO.8 OF 2001  
IN THE MATTER OF AAS AND ASA  
(MINORS)**

**BETWEEN**

**GMM ..... APPELLANT**

**AND**

**SAS ..... RESPONDENT**

*(Being an appeal from the entire ruling and order of Hon.L.K.Sindani (S.R.M) given in the Tononoka Children's Court on 16th day of November, 2020 in Children's Case No.107 of 2018)*

**RULING**

1. The application before this court is a chamber summons filed on November 25, 2021 and supported by the affidavit of the appellant/applicant sworn on October 15, 2021. The application seeks the following orders;
  - a. Spent
  - b. That the respondent be ordered to appear in court to show cause why he should not be committed to civil jail for failure to comply with the court orders given by the honourable trial court on November 16, 2020(see para 3 of page 6 thereof).
  - c. That in the alternative and without prejudice to the foregoing, this honourable court be pleased to issue warrants for the arrest of the respondent in execution of the orders of the honourable trial court issued on November 16, 2020(see para 3 of page 6 thereof).



- d. That this honourable court be pleased to make such further orders as it may deem fit and just to grant.
  - e. That the costs of the application be borne by the respondent.
2. The applicant's case is that she and the respondent are both the parents of the subject minors who are of tender age. Vide the trial court's judgment delivered on November 25, 2019, the applicant was granted custody of the children while the respondent was granted access during school holidays. That the respondent applied for review of the said decision and on November 16, 2020 the trial court reviewed its orders thus granting the respondent custody of the children and the applicant unlimited access during April and August holidays with half of November and December holidays.
  3. She averred that since early 2020 when the respondent took the children from her, he has denied her access to the children often giving flimsy reasons in justification of the same. That the respondent has also denied her telephone access to the children and every attempt made to reach the children has been futile and often attracting insults from the respondent. That the respondent has restricted her access to only when she is in Mariakani and not any other place despite the fact that she is based in Nairobi.
  4. She stated that denial of access to the children is not only contemptuous but also a violation of the best interests of the children. That unless compelled by this court to allow her access to the children, the children will continue to suffer due to the defiance of the court orders by the respondent.
  5. In response, the respondent filed a replying affidavit on March 18, 2022 thus stating that; the application is incurably and fatally defective and an abuse of the court's process; that the application should be heard by the court that issued the orders as this court is only sitting on appellate jurisdiction and; that this court cannot be invited to interpret the orders subject of the appeal.
  6. He deposed that he has never denied the applicant access to the children and that she had only appeared once since march 2020 in company of the police resulting to him being forced to take the children to the police station where the OCPD advised the appellant not to force the children to go with her if they were unwilling. That this incident turned to insults from the applicant who accused him of brain washing the children and inciting them against her. Further, he accused the applicant of not disclosing to the court the dates she ever visited the children and was denied access.
  7. He claimed that the applicant has been talking to the minors on phone including video calls although at odd hours (late in the night). That the applicant's intention is to take the children away despite her being granted access only. That he has been willing to let the applicant see the children even during midterm which is not in the orders. He urged the applicant to seek reconciliation with the minors instead of fighting him by using the police to intimidate him. That the applicant has never remitted child maintenance since March 2020 and therefore unfit fit to raise the minors.
  8. He further averred that; he has enrolled the minors in school; the minors have already adapted to their new environment; the children are doing fine and joyful in the company of their siblings; the applicant has been threatening him claiming that the children are not his and that they have their Caucasian (mzungu) father; he has been receiving calls and messages from strange numbers of foreign countries demanding for the children and; that the children are not safe away from him as they may be taken out of jurisdiction of this court.
  9. When the matter came for directions, parties through their respective counsel canvassed the application orally.



10. Counsel for the applicant Mr Kioko reiterated the averments contained in the applicant's affidavit in support of the application. He urged the court to uphold the best interests of a child principle pursuant to Article 53 of the Constitution as a basis to granting the orders sought.
11. Counsel for the respondent Mr Anaya also adopted the content contained in the affidavit in reply thus submitting that the applicant was at liberty to visit the children any time and that no one has denied her access. He contended that the applicant was not interested in prosecuting the appeal but to have the respondent committed to civil jailed hence urged the court to dismiss the application with costs.
12. I have considered the application herein, the response thereof and rival submissions of both counsel. The only issues that emerge for determination are; whether this court has jurisdiction to grant the orders sought and; if it does, whether the orders sought should be granted.
13. It is trite law that a high court has unlimited jurisdiction to determine disputes relating to civil and criminal matters. However, the same Constitution does recognize the hierarchy of our court system with their respective jurisdictional mandate stipulated in various statutes. Thus, the fact that the high court has unlimited jurisdiction on both civil and criminal matters does not mean that it should usurp the mandate donated to a subordinate court.
14. Whether this court has jurisdiction to grant the orders sought or not, is a matter of fact that it is sitting in its appellate capacity in this matter. The Issue of jurisdiction is a crucial aspect which has to be determined first in any matter in controversy.
15. In dealing with the issue of jurisdiction, Nyarangi, JA in the case of Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] eKLR had this to say;

' I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'
16. Further, the supreme court in dealing with the issue of jurisdiction in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR stated thus;

' A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.'
17. In this case, the respondent argued that the application should be heard by the court that issued the orders as this court is only sitting on appellate jurisdiction and cannot be invited to interpret the orders subject of the appeal. The applicant did not comment on this aspect but instead chose to argue the application for contempt.
18. The orders in question are orders of the children's court issued on November 16, 2020 granting custody of the children to the respondent and unlimited access to the applicant during April and august holidays with half of the November- December holidays.



19. The court of appeal in the case of [FAM V HSS \[2008\] eKLR](#) while dealing with a similar issue observed that;

' Secondly, the orders that were allegedly breached by the wife were not made by the superior court either in its original or appellate jurisdiction. They were made by the Children's Court and were the subject matter of the appeal. It is submitted that the superior court sitting as an appellate court had no jurisdiction to enforce the orders of the subordinate court through an application for committal for contempt. We respectfully agree. The orders of the Children's Court could only have been enforced by the superior court through independent proceedings and not through interlocutory proceedings in the appeal against the same orders. We are satisfied that the superior court sitting as an appellate court lacked jurisdiction to entertain both the application for leave and the application for committal for contempt.'

20. From the pleadings and counsel for the applicant's oral submission, the orders being sought are a product of the lower court's decision which orders substantially forms the subject of the pending appeal. Any prayer for enforcement of those orders is purely a matter for the trial court. The high court in its appellate capacity cannot usurp the trial court's mandate.

21. Accordingly, it's my finding that this court has no jurisdiction to determine the application for execution of the trial court's orders. Having found that this honourable court has no jurisdiction to determine the application herein, I will not delve into the substantive issue on whether there was disobedience of the court order or not. Therefore, it is my finding that the application herein is an on starter and incompetent hence dismissed with no order as to costs.

**Dated, signed and delivered virtually in Mombasa this 30<sup>th</sup> day of September 2022**

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**J. N. ONYIEGO**

**JUDGE**

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