



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CHILDREN APPEAL NUMBER E1 OF 2021**

MMN.....APPELLANT

VERSUS

AFM.....RESPONDENT

**RULING**

1. The parties herein are involved in a custody dispute for the minor FNM in Nakuru Children’s Court Case Number 87 of 2020.

2. On 27<sup>th</sup> October 2020 their respective counsel N. K. Murithi Advocate (for the plaintiff/appellant/applicant) and Odhiambo & Odhiambo Advocates (for the defendant/respondent) entered into a consent in the following terms.

***1. The Defendant shall have custody of the minor herein from Friday 30<sup>th</sup> October 2020 11.00 a.m. to Sunday 1<sup>st</sup> of November 2020 4 p.m.***

***2. The Plaintiff shall make arrangements for the minor to be dropped and picked from the Defendant’s residence.***

***3. The Defendant shall have unlimited visitation rights.***

3. That pursuant to the consent the appellant/applicant “dropped the minor at the respondent’s home on 30<sup>th</sup> October 2020 and was to pick the minor on 1<sup>st</sup> November 2020 but on going back he found that the respondent had moved out and her phone was switched off

4. The appellant/applicant filed an application dated 4<sup>th</sup> November 2020 pursuant to which an order was issued on 24<sup>th</sup> November 2020 in the Chief Magistrate’s Court at Nakuru directing the respondent to give up the custody of the minor to him in the following terms.

***1. THAT the plaintiff is granted authority to collect the minor from the mother and/or any other person who has custody of the minor.***

***2. THAT any police officer within reach to facilitate enforcement of this order.***

***3. THAT mention date be taken at the registry once the minor is located.***

5. Pursuant to that order the respondent was arrested on 4<sup>th</sup> January, 2021 in Meru. . She was with the minor. She appeared before the Hon Ombata SRM at Nakuru Chief Magistrate’s Court on 5<sup>th</sup> November 2021.

6. The proceedings as to what transpired before the Magistrate’s court have not been annexed to the application herein but the respondent was found in contempt of orders of the court and “***sentenced to 30 days in civil jail***”. The learned trial magistrate stated;

**“RULING**

***The Defendant/Respondent was arrested and brought before this court in execution of the order of the court dated 24<sup>th</sup> November 2020 requiring that the defendant/respondent does hand over the minor into the custody of the applicant/plaintiff herein.***

*It is apparent to the court that the Defendant/Respondent is not willing to obey the said court order. Therefore, demonstrating her contempt of court and the court orders. It is a crime to unlawfully and intentionally disobey a court order.*

*The defendant has made it very clear to this court that she will not obey the court order and is ready and willing to serve prison jail for up to 20 years so long as she does not give up the custody of her child.*

*Section 4 of the Contempt Of Court Act No. 46 of 2016 L.O.K. defines contempt of court to include, civil contempt which means willful disobedience of any judgment, decree, direction, order or other processes of a court or willful breach of an undertaking given to a court and Section 6 of the Act empowers the court to punish for contempt of court on the face of the court in any case where a person (willfully) disobeys an order or direction of a subordinate court.*

*Section 28 provides for the terms of punishment, in the circumstances and considering the facts of this case I order that the Defendant/Respondent herein be and is hereby committed to civil jail for a period of 30 days and/or until the said contempt is purged by the delivery of the minor to the Plaintiff/Applicant herein.*

*The plaintiff shall pay for her subsistence allowance.*

*Further mention on 5<sup>th</sup> February 2021 before trial court for further orders.*

*Ruling delivered on 6<sup>th</sup> day of January, 2021 in the presence of Edith C/A, counsel for Applicant and the Defendant in person*

**HON. R. OMBATA**

**SENIOR RESIDENT MAGISTRATE”**

7. It is against this Ruling that the appellant brings this appeal on the following grounds:-

- 1. THAT the learned magistrate erred in fact of law by committing to civil jail the minor to custody with the Respondent.**
- 2. THAT though the respondent was clearly in contempt of the court proceedings the minor should not be punished for the misdeeds of the Respondents.**
- 3. THAT the custody of the minor ought to have been given the Appellant as per order number 1 issued on the 24<sup>th</sup> November 2020.**
- 4. THAT the appellant is desirous of enrolling minor into baby class and continued incarceration would jeopardize the minor's right to education.**

8. Together with the Memorandum Of Appeal, the appellant filed Notice of Motion dated 7<sup>th</sup> January 2021 under Order 12 rule 7, Order 42 rule 6 and Order 50 rule 6 of the Civil Procedure Rules, and Section 3A & 63( e) of the Civil Procedure Act and all enabling Procedures of the Laws of Kenya, seeking orders inter alia that ;

Pending the hearing and determination of the application inter partes **this Hon. Court do direct that the minor be handed over to the appellant in compliance with the orders issued on 24<sup>th</sup> November, 2020.**

Pending the hearing and determination of the appeal **this Hon. Court do direct that the minor be handed over to the appellant in compliance with the orders issued on 24<sup>th</sup> November, 2020.**

9. The matter was heard ex parte in the first on 8<sup>th</sup> January 2021 by the vacation duty judge. The Judge did not grant the ex parte order to release the child pending the hearing inter partes of the application. It was certified urgent and ended up in y docket on 15<sup>th</sup> January 2021 for inter partes hearing. The application was made to release the child. However, there was no response by the respondent and I gave time for one to be obtained. I asked whether there was a children officer's report and Mr. Bosire responded that the report on record was contentious. I directed that a fresh one be prepared by the County Coordinator Children's Services Mrs. A. Wanyonyi

10. A perusal of the application reveals the grounds for the application as set out on the face of the application and in the applicant's affidavit of support. These are mainly that the respondent has willfully opted not to obey court orders issued on 24<sup>th</sup> November 2020, that the minor should not be incarcerated with the respondent, that the appellant is ready and willing to have custody of the minor and also take care of his upkeep, that the respondent is desirous of enrolling the minor in a learning institution, and the incarceration is hindering the same, that the appellant stands to suffer irreparable loss and damage, and the welfare of the minor.

11. The application is opposed vide the respondent's replying affidavit. She depones that it was the duty of the appellant to pick the child, that releasing the child to the appellant while she was in civil jail would grant appellant full custody yet the issue of custody is in dispute, that the child being a minor, his best interests lay with her, and taking him away would deny and violate her visitation rights as per the consent order considering that she would be in civil jail.

12. I heard arguments by counsel, Mr. Bosire for the appellant, Mr. Biko for the respondent.

13. Mr. Bosire argued that the appellant pursuant to the consent order went to pick the child on 1<sup>st</sup> November 2020 only to find that the respondent had moved out of her known abode, and that it was only after investigations that he found that she was in Meru, and police officers brought the respondent and the minor before court. That she was given the option of purging the contempt by giving up the minor or face incarceration. She chose the latter, that it was their position that she could continue serving her term, but the minor be released to his client pending the hearing of the substantive appeal.

14. On his part Mr. Biko submitted that this was a unique case as seen from the circumstances and the prayers sought. He argued that the alleged contempt by his client had not been demonstrated; that the allegations about what proceeded before the lower court were not demonstrated as there was no record; that there was no evidence of intention to enroll minor in school; that the order alleged to have been disobeyed was granted ex parte and no substantive proceedings had been annexed, that the report of the children's officer buttressed the existence of conflict between the parties; that the orders sought would lead to a drastic disturbance of the minors circumstances; that in any event the minor had not been incarcerated but was where he was because that was his current home; that the best interests of the child would be served by the release of both the minor and his mother from custody so as to facilitate the resolution of the matter.

15. In his rejoinder Mr. Bosire pointed out that the counsel for the respondent had conveniently avoided any comment on the consent. He urged that the orders of the court were not issued in vain, and that the respondent was bound to obey the orders of the court.

16. Following the arguments a report was filed by Alice K. Wanyonyi the County Children's Coordinator. The Children Officer's Report ascertained that the bond between the child and the mother was strong and it was in the best interests of the minor who is 3 ½ years old to remain in the custody of the mother.

17. Mr. Bosire filed his objections to this report on the ground that the same was biased. There was no rejoinder from Mr. Biko. No authorities were cited.

18. *The legal provisions upon which the application is predicated are :*

*i. Order 12 rule 7. Setting aside judgment or dismissal*

*Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.*

*ii. Order 42 rule 6. Stay in case of appeal*

*(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) No order for stay of execution shall be made under subrule (1) unless—*

*(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

*(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given. (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling. (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.*

*iii. Order 50 rule 6. Power to enlarge time*

*Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.*

*iv. Section 3A. Saving of inherent powers of court.*

*Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the*

*ends of justice or to prevent abuse of the process of the court.*

*v. Section 63: Supplemental proceedings*

*In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—*

*(e) make such other interlocutory orders as may appear to the court to be just and convenient*

19. In the Notice of Motion the main prayer by the applicant is the release of the child pending the appeal. Order 42 rule 6 is about stay of execution pending appeal, Order 50 rule 6 is about enlargement of time, while Order 12 rule 7 is about setting aside of Judgments. These provisions of the law bear no relevance to the matter at hand as Mr. Bosire did not address the court on the same.

20. S. 3A speaks to the inherent jurisdiction of the court to make orders requisite to meet the ends of Justice and to prevent abuse of the process of court, while 63 (e) empowers the court to make such interlocutory orders as may be just and convenient to prevent the defeat of justice. These two provisions are the ones that appear to speak to the facts of this case. However, it is my view that the best interests of the child under Article 53(1) and 53(2) of the Constitution on the equality of parental responsibility and the best interests of the child, fortified by s, 4 of the Children Act ought to have taken center stage.

21. From the foregoing the issues that stand for determination are whether:-

**(1) The minor herein was incarcerated with his mother.**

**(2) Whether the minor should be released to the appellant pending the hearing and determination of the appeal.**

22. To answer the first issue: I looked at the available information to the background of this matter. It emerged from the record and the Children Officer's report that the parties were married but their marriage broke up. There are allegations of domestic violence by the respondent. She left with the child. She fell sick and asked the applicant to take care of the child. A dispute later arose on custody. The applicant filed this case at a time when he had custody. The custody of the minor was given to the respondent for the days 30<sup>th</sup> October 2020 to 1<sup>st</sup> November 2020. That when the applicant went to pick the child on 1<sup>st</sup> November, the respondent and the child were missing. He filed an application on 4<sup>th</sup> of November 2020. This application was not annexed to the application but it is this that gave rise to the order of 24<sup>th</sup> November 2020 from the court. The respondent was traced and brought before the court on 6<sup>th</sup> of January 2021.

23. From the court's ruling the respondent, when brought before the court, was given two options, either hand over the child or go to prison. She chose the latter and was committed to civil jail at the expense of the applicant.

24. It has been argued that she acted in violation of a consent order. A perusal of what is being referred as a consent order reveals the consent sent to court for adoption as an order of the court. It is signed by both counsel and addressed to the children's court. There is nothing in this record to demonstrate that the said consent was adopted as an order of the court. There is no signature of the magistrate or court stamp, to confirm that indeed the same was adopted by the court. Hence there is no consent order before me upon which I can make orders.

25. Secondly, with due respect, taking into consideration that this was an issue of parental responsibility, involving a child, the children's magistrate was duty bound, at the time of adopting the order, if indeed it was adopted, to confirm for the record, from each of the two parents that the consent was acceptable, and workable and even to obtain further details for the record as to where the child was being moved from to where the child was being moved to, and to satisfy itself ( the court) that this was in the best interests of the child in the circumstances of the case.

26. I am not saying here that counsel cannot bind their clients through consents signed by themselves through their client's instructions. I am simply stating here that when it comes to children matters it is important for the court to hear from the parents, and to confirm the details of the consent.

27. This is more so because in this custody dispute the two adults each has an advocate to voice his own concerns. The child is not represented. His interests are pulled between those of his parents. The Court is ought only to lean towards the best interests of the child. This is because the Children Magistrates is empowered to do whatever is necessary to secure the welfare of the child and to prevent the violation of that child's rights. In this case the consent presented before court was not signed by the parents.

28. The appellant has not demonstrated before me that there was a consent order from the children's court.

29. The order of 24<sup>th</sup> November 2020. It is significant that the order says nothing about enforcing any consent order. The order simply authorizes the appellant, with the assistance of police officers to remove the minor from the custody of the mother or any other person. On its face it does not direct the respondent to do anything.

30. I have considered with a lot of anxiety the order of 24<sup>th</sup> November 2020. The best interests of the child are not anywhere within that order; Regardless of the actions of the adults involved, when resolving the issue regarding the child the guiding principles as set out under **Article 53 of the Constitution, Section 4 of the Children Act, the African Charter on the Rights and Welfare of the Child, the UN Convention on the Rights of the Child the best interests of the child are paramount.** While parents must be held accountable and responsible for their actions vis a vis the child and court processes, the rights and welfare of the child must be given paramountcy.

31. Section 4 of the Children Act in particular provides specific guidance, laying great emphasis on the best interests of the child and the duty to safeguard the welfare of the child.

#### **4. Survival and best interests of the child**

**(1) Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.**

**(2) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.**

**(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—**

**(a) safeguard and promote the rights and welfare of the child;**

**(b) conserve and promote the welfare of the child;**

**(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.**

**(4) In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity**

32. In the order of 24<sup>th</sup> November 2014, it is evident that the concern of the court was the removal of the child from the custody of the respondent (the mother) to the custody of the applicant (the father) without any consideration for the welfare of the child as at the time that removal was to take place. There is nothing on record to demonstrate that the child was in any danger or the person in whose custody the child was violent or dangerous, or that a crime had been committed or was about to be committed against the child, to warrant such a removal.

33. The applicant, by seeking those orders and the court, in issuing the orders, lost sight of the fact that by virtue of being the subject of a custody dispute, the child immediately became a child in need of care and protection vide s. 119 of the Children Act. The Children Court is properly guided on what to do about the child's welfare in those circumstances. There is the P&C file and the form that ought to be filled out to assist the court to secure the welfare of the child as the dispute is ongoing. Secondly the proper thing for the court would have been to issue an order to have the person found in custody of the child arrested and brought before the court together with the child to explain their action. To secure the welfare of the child, the order ought to have directed that a children officer to accompany the police officers once the child was located. One can only imagine the trauma a 3 year old would suffer being suddenly, and forcefully removed, then taken away from his mother. There has already been sufficient trauma in the child's 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 the dispute and ought to be protected in the process of settling the dispute. He is a human being and not a chattel. All this does not appear to me to have been in the mind of the learned magistrate as he issued the order of 24<sup>th</sup> November 2020.

34. In addition, on the face of it the ruling of 6<sup>th</sup> January 2020, which is the subject of this appeal, made reference to the court order of 24<sup>th</sup> November 2020. It is commendable that when the respondent was brought before the learned magistrate, she did not direct that the child be forcefully removed from the respondent before the respondent was taken to civil jail. The learned Magistrate must have realized that in the circumstances of the case that was not the appropriate thing to do. Instead she directed the respondent to hand over the child to the applicant.

35. What is clear is that the order of 24<sup>th</sup> November 2020 had not required the respondent to hand over the child. It had authorized the appellant/applicant, with the help of police officers, **to collect the child**. There is nothing before me to demonstrate that the respondent at the time of arrest did anything to stop them from collecting the child. I can only deduce that the appellant and the Police Officers realized that the order, as it was, was not enforceable without causing harm to the child, opting to bring both to court. That was commendable.

36. It is my considered view that the argument that she was in contempt of the order of 24<sup>th</sup> November 2020 does not hold water. She was arrested with the child and brought to court. The order authorizing the appellant to collect the child and the respondent refusing to hand over the child while in court were different orders. She was punished for disobeying the latter.

37. Back to the question: Did the learned magistrate in her ruling of 6<sup>th</sup> January 2021 incarcerate the child? Nowhere in that ruling does the record show that the court directed that the child be incarcerated with the mother. The ruling speaks for itself. What happened in that court room was that the child herein fell into the category of children who accompany their mothers to prison due to their tender age. It is a category of children in need of care recognised by the law. The minor herein is not only such a child but also subject to a custody dispute. The court could not automatically order a release of the child as there is a procedure in the Children's Act for the manner in which to deal with children in need of care and protection, including the application of section 114 orders.

38. The dispute on custody relates to a child of tender years. Such a child, unless it is shown that the mother is unable to parent, ordinarily ought to be in the custody of the mother, with access to the father, and subject to Article 53(1) (e) of the Constitution.

**39. Are the prayers sought tenable? No. Why?**

1. They are not available under Order 42 rule 6 of the Civil Procure Rules.
2. The court in its ruling of 6<sup>th</sup> January 2021 did not incarcerate the child, but the mother, and punished her for refusing to obey its order. The minor became a child accompanying the mother to prison.
3. It is evident from the said Ruling that the incarceration of the respondent could not have been in relation to the order of 24<sup>th</sup> November 2021 but in relation to that court's directive to the respondent to release the child to the plaintiff/applicant. The court could have directed the removal of the child from the custody of the respondent but for good reason, did not do so.
4. The children officer's report though not binding militates against the removal of the child from the custody of the mother.
5. The court must hear both parties before it can make orders that appear to be final orders taking into consideration what is best for the minor.

**6. I find and hold as follows:**

- i. The application to release the child to the applicant pending the hearing and determination of the appeal is not merited and is dismissed.
- ii. Both the order of 24<sup>th</sup> November 2020 and the 'Consent' of 27<sup>th</sup> October 2020 are overtaken by events and are of no consequence.
- iii. The custody dispute be heard and determined by any other Children Court other than Hon. Limo.
- iv. A Production Order to issue for the Respondent to appear in court on 1<sup>st</sup> February 2021 before Hon. Ombata for directions on the hearing and determination of the custody dispute.
- v. The issues of custody and access pending the hearing and determination of the custody dispute to be determined before the children court.
- vi. In the meantime pursuant to the recommendations of the County Coordinator Children Services, Nakuru, temporary custody of the minor to be with the mother.
- vii. Orders accordingly
- viii. Each party to bear its own costs

**Dated and delivered virtually this 29th day of January 2021.**

**Mumbua T Matheka**

**Judge**

**In the presence of:**

Court Assistant Edna

For appellant: Mr. Bosire

For respondent: Mr Biko notified and N/A

**Mumbua T Matheka**

**Judge**