



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYAHURURU

MISC. CIVIL NO. E004 OF 2021

ENM.....APPLICANT

-VERSUS-

SKM.....RESPONDENT

RULING

1. By a notice of motion dated 1<sup>st</sup> February, 2021, the Applicant lodged a notice of motion seeking orders;

**I. That the instant application be certified urgent and heard on priority basis.**

**II. That pending hearing and determination of the instant application, the Applicant granted unconditional free bond and custody of the subjects: JMK and ASWK children of tender years be granted to the mother, the Applicant in their best interest and there be a stay of proceedings and orders of Nyahururu Children's Case No. 12 of 2020.**

**III. That the Honourable Court be pleased to exercised its powers under Section 362 of the Criminal Procedure Code and its supervisory jurisdiction over subordinate courts and call for Nyahururu Children's Case No. 12 of 2020 for purposes of satisfying itself as to the correctness of the orders issued by Hon. V. Kiplagat R.M. issued on 29/01/2021 convicting the Applicant for contempt of court and summarily ordering her to hand over custody of the subjects; who are children of tender ages; to the Respondent and proceed to revise the said orders in the interest of justice.**

**IV. That the matter be re-allocated and heard by a different court.**

**V. That costs of this application be borne provided for.**

2. It is based on grounds;

**a. That Applicant is the Applicant in Nyahururu Children's Case No. 12 of 2020 as the biological mother of the subject, JMK and ASWK, children of tender years and who has had custody over the subjects throughout their lives.**

**b. That the trial court issued orders on 15<sup>th</sup> February, 2020 ex-parte in the absence of the Applicant in terms that the Respondent was granted leave to pick the children from the Applicant to enable him prepare them for the new school term but with prior notification.**

**c. That the Applicant filed an application for review of the said orders dated 4<sup>th</sup> January, 2021 and the same is yet to be heard or determined.**

**d. That the subjects started school at [Particulars withheld] School, Meru and have been progressing well until January 2019 when the Respondent moved them to another school till March 2019 when schools were closed due to Covid-19. The subjects have now been reinstated back to [Particulars withheld] School.**

**e. That no custody orders have been made in respect of either the Respondent or the Applicant as the suit is yet to be heard and determined.**

**f. That the subjects have indicated their desire to continue schooling at [Particulars withheld] School, Meru.**

**g. That the application dated 19<sup>th</sup> December, 2020 came up for hearing on 22<sup>nd</sup> December, 2020 before Court No. 5 but the said court recused itself from hearing the matter and directed that the matter be placed before the Head of Station, Court No. 1 for re-allocation on 29<sup>th</sup> December, 2020.**

**h. That the children's officer's report dated 20<sup>th</sup> January, 2021 made recommendations that pending the hearing and determination of the suit, the subjects remain in custody of their mother, the Applicant herein where they are currently schooling.**

**i. That on the said 29<sup>th</sup> December, 2020, Counsel for the Respondent took directions that the matter do proceed for hearing before the said re-allocating court on 31<sup>st</sup> December, 2020 and proceeded to serve a hearing notice for 31<sup>st</sup> December, 2020 which was received under protest as Counsel for the Applicant was on vacation leave and that the notice was too short and further that the said court was not a children's court for all intents and purposes.**

**j. That however, the court proceeded to hear the application in the absence of Counsel for the Applicant or the Applicant or at least a children's officer's report and made orders in terms that the orders issued on 16<sup>th</sup> December, 2020 be enforced with the help of the children's officer in Meru to assist the Respondent get the children to prepare them to go to school when schools reopen.**

**k. That the said orders are vague and difficult to interpret since the subject have already been enrolled in school where they began their education journey and further that the Respondent does not have custody; whether legal or actual, of the subjects herein.**

**l. That the orders issued on 16<sup>th</sup> December, 2020 do not grant custody to the Respondent and are not in the best interest of the subjects either.**

**m. That it is in the best interest of the subjects that the said orders be reviewed, varied and/or set aside, the suit set down for hearing so as to make a conclusive determination on the best interest of the subjects.**

**n. That the Respondent filed an application dated 19<sup>th</sup> December, 2020 seeking that the Applicant be cited for contempt of court and be punished by committal to civil jail for a period of 6 months. The court delivered a ruling the said application on 29<sup>th</sup> January, 2021 convicting the Applicant for contempt of court but deferring sentencing to 4<sup>th</sup> February, 2021, the Applicant, who had attended court together with the subjects handed the subjects to the Respondent on 29<sup>th</sup> January, 2021 in court but the subjects, who are of tender age run back to their mother kicking and screaming and severely traumatized with the turn of events. The court stated that it would severely punish the Applicant on 4<sup>th</sup> February, 2021 for staging a dramatic show in court. The court blatantly ignored the application dated 4<sup>th</sup> January, 2021 for review, setting aside and/or varying the orders the Applicant was convicted of still pending in the said court.**

**o. The said children's court further ignored and/or disregarded the children's officer's report which opined that it was in the best interest of the subjects that custody of the subjects remains with the Applicant pending the hearing and determination of the custody case.**

**p. That the Applicant has tried to set the matter down for hearing of the main suit to no avail and this matter has taken unduly long time to her and determine as the Respondent is merely abusing the process of this Honourable Court to punish the Applicant and cause untold psychological trauma to the subjects.**

**q. That it is obvious that this children's case has been misconducted and the best interest of the subjects violated thereby necessitating the intervention of this Honourable Court in invoking its supervisory jurisdiction over subordinate court.**

3. It is supported by affidavit of ENM sworn and filed on 3<sup>rd</sup> February, 2021.

4. In response to the application, the Respondent filed grounds of opposition listing grounds;

5. The application fails to make material non-disclosure to wit;

a. There is a pending application(s) before the lower court on custody filed by both the Applicant and the Respondent.

b. The Respondent has made a similar application for custody and this court is ill suited to hear the same whereas invoking original jurisdiction.

c. The Applicant did/has never appealed, set aside, discharged the orders of the interim custody issued by a competent court (lower court). She has defied and continues to defy the said orders leading to her conviction for contempt of court.

d. The Applicant has not purged the contempt as at the time of filing this response and having mitigated on 4<sup>th</sup> February, 2021 she is awaiting sentence.

e. The Applicant has applied for setting aside of the lower court orders of custody and the application pending before court.

6. The Applicant is forum shopping for a favourable court that she would 'cry to' after having been persistently and willfully exhibited acts attributed to be contempt of court.
7. The Applicant fails to disclose that the orders of interim custody were made upon the lower court hearing the parties and not summarily issued as misrepresented in her application. This exhibits the choosy amnesia and selective disclosure meant to whip up emotions at the expense of law and order.
8. The Applicant seeks to rely on a children office's report that no court called for and not made part of the record of the lower court. Notably the Respondent's Counsel has or was not given a copy prior to filing the present application. The report was made at the direction or request of the Applicant and cannot be received by this court in hearing the application dated 1<sup>st</sup> February, 2021. The reports make alarming finding that include;
  - a. The children will not leave the current location (Imenti North) until the case is over. The children officer is usurping the role of the court.
  - b. The children remain in the mother (Applicant's custody) notably the Respondent was never interviewed and none of his comments were taken into account making it a biased and prejudicial report.
9. The Applicant claims she is ready to handover the minors yet she states they do not want to be with the Respondent. This is an act of doublespeak having 'poisoned' the minors about the Respondent leading to the drama she cited she engaged the lower court on 4<sup>th</sup> February, 2021.
10. The Applicant fails to disclose that the minors were taken to school on 4<sup>th</sup> January, 2021 whereas the orders of custody were/had been issued on 15<sup>th</sup> December, 2020; long before the schools reopened and her act of getting a school in Meru was to skirt and or defeat the court orders issued.
11. The Applicant further fails to disclose that she had proposed to hand the children over to the Respondent on 28<sup>th</sup> December, 2020 or 29<sup>th</sup> December, 2020 but having seen 'the light' she remembered about school is reopening on 4<sup>th</sup> January, 2021 hence enrolled them at her discretion in total disregard of court orders.
12. The Applicant fails to disclose that the decision to take the minors to a new school was unilateral and meant to deny the Respondent an opportunity to be with the minors. Their being in school has been repeatedly the song and reason for not handling them over to the Respondent.
13. The Applicant having failed to abide by lawful court orders **this court cannot grant audience to a persistent contemnor**. This court is urged to uphold its dignity, adherence to the rule of law.
14. The Applicant should not be allowed to use this Honourable Court as a catalyst for protecting her while she continues to defy court orders.
15. The Applicant is undeserving of any protection by any court of law as long as she continues to defy lawful orders of the court.
16. It is atrocious that a party can willfully disregard lawful court orders, on the same breath runs to another court, and seeks orders to protect her from another court's lawful orders.
17. Even after being found in contempt of court and the court granting her an opportunity to purge her contempt between 29<sup>th</sup> January and 4<sup>th</sup> February, 2021, the Applicant has continued in her defiance.
18. Notably, the Applicant even had the audacity to fail to attend court without any apologies or any reasons on 4<sup>th</sup> February, 2021 when the matter was coming up for her mitigation and sentence thereby forcing the court to issue warrants of arrest.
19. Simply put, the Applicant considers herself to be above the law and she cannot be allowed to continue defying the orders and authority of lawful court of law.
20. The Applicant should not be granted audience by this Honourable Court before purging her contempt.
21. He further filed **a preliminary point of law** with grounds;
  - a. **The application seeks ambiguous orders to wit free bond, custody, stay of proceedings and a stay orders for the lower court in an amorphous manner making it incorrigible to be issued.**
  - b. **The application is commenced through proceedings not recognized in law seeking to invoke jurisdiction of the court in a manner unknown to law and procedure.**
  - c. **The application seeks to interfere with the jurisdiction of the lower court consequently being unmerited being an abuse of the court process.**

**d. That the entire application lacks in merit and this court cannot exercise supervisory jurisdiction over the lower court in children proceedings particularly in the manner they are commenced by the Applicant.**

22. The parties agreed to canvass both application and the preliminary point of law via written submissions.

**APPLICANT'S SUBMISSIONS:**

23. The Applicant submits that she filed instant application invoking **Article 53(2) of the Constitution, Section 18 of the Civil Procedure Code, and Section 83 of the Children's Act and Section 362 of the Criminal Procedure Code.**

24. The subject matter related to two subjects of tender years JMK (7) and ISWK (3) refers court to background of matter in the supporting affidavit.

25. Thus the Applicant seeks the intervention of this Court for orders that the Applicant be granted custody, the warrant of arrest issued against her be lifted, the matter set down for hearing of the main suit expeditiously and by a different court, and that the best interest of the subjects be the sole principle in the conduct of the matter.

26. It is submitted that, that the children's court has been concentrating on the interest of the parents in this suit while those of the subjects have taken a back seat. This is demonstrated by the fact the suit was filed one year ago yet there is no interim orders of custody and/or maintenance granted pending the hearing and determination of the suit. The interests of the subjects ought to have been the sole guiding principle in the conduct of the matter.

27. The was marred by numerous applications and technicalities thereby defeating the very essence of a children's case; the best interest of the subjects.

28. That the Respondent in this matter has been pushing a vendetta against the Applicant seeing that on 18<sup>th</sup> January, 2021 they both appeared before the children's officer, Imenti North and he did not even bother to inquire about the subjects or visit them.

29. Even when the Applicant was admitted in hospital, the Respondent showed absolutely no concern about the welfare of the subjects given that their mother was now confined in a hospital ward.

30. That conduct should inform this Court to discern the motive of the Respondent in these proceedings. He is on a vengeance mission against the Applicant and the children are the innocent victims.

**31. It is submitted that, Article 53(2) of the Constitution of Kenya, 2010 provides that; "A child's best interests are of paramount in every matter concerning the child."**

**32. Section 83(1) of the Children Act (Cap. 141) sets out the factors to be considered by the court while determining whether or not a custody order should be made in favour of the applicant. Under sub-section 83(1) (j), the court is required ultimately to have regard to the 'best interests of the child' as fundamentally obligated under the afore-analyzed Article 53(2) of the Constitution of Kenya.**

33. Accordingly, the principle of the best interests of the child is the supreme parameter in matters concerning the welfare of child such as the question of the custody of the subject child/children.

34. It is contended that, the contempt of court proceedings is half-civil half-criminal and hence invoking **Section 362 of the Criminal Procedure Code** is well within the law. Further, these are proceedings relating to children and hence this Court does not entertain and/or given undue regard to procedural technicalities.

35. The power of the High Court to supervise the courts subordinate to it applies in all the matters, proceedings and suits and when it comes to matters concerning children, the Superior Court exercises extra supervision to ensure that the principle of the best interest of the subject is observed.

36. It is submitted that, the Court is being asked to do supervise and redirect these proceedings. This Court is being asked to intervene and order that this suit be set down for hearing rather preferring to delay the proceedings in order to cause untold inconveniences to the Applicant and the subjects.

37. That in the interest of justice and expeditious disposal of the suit, the Applicant had conceded to the jurisdiction of this Nyahururu Law Courts despite all the pointers indicating that this suit ought to be heard and determined at the Children's Court, Meru since the subjects and the mother reside at Meru.

38. The Applicant has brought the subjects to court on three occasions noting that they travel from Meru yet this matter has never kicked off. It is upsetting and in total violation of the best interest of the subjects that the matter should proceed the way it is proceeding hence necessitating the filing of this application seeking the intervention of the supervising court.

39. It is submitted that two trial courts have recused themselves from handling this matter yet it is a simple case that should be simplified by simply setting the matter down for hearing of the main suit and even making a determination on the spot.

40. The subjects are both of tender years and are getting severely traumatized especially now that their mother; their sole care giver is staring

at criminal sanctions including jail term for simply upholding their best interest.

41. Thus the applicant urges this Court to make the appropriate orders, revise the orders holding the Applicant in contempt, lift the warrant of arrest, order that interim custody of the subjects be with the Applicant and further direct that this matter be heard by a court other than Court 4 and 5 within the shortest time in the best interest of the subject.

#### **RESPONDENT'S SUBMISSIONS:**

42. The Applicant, Mr. Samuel Kihuni Mathenge, submits that the orders sought by the contemnor in the miscellaneous application are amorphous as they seek among other things a substantive determination of matters and issues still pending before another competent court of law with competent jurisdiction.

**43. That** the application purports to move this court through a miscellaneous application but no suit is filed alongside it. As such, the same is incurably defective and ought to be dismissed forthwith with costs to the Applicant herein.

44. Thus as a whole or in part, prayer 1 is incapable of being granted as there is no suit or appeal in this court hence it is a waste of court's precious time and only invites further delay in the substantive determination of the suit before the lower court with competent jurisdiction.

45. That the court is wrongly moved, under Section 362 of the Criminal Procedure Code as said provisions ought to be invoked while seeking intervention of the High Court in purely criminal proceedings. The matter in issue is civil/children case.

#### **ANALYSIS AND DETERMINATION**

##### **46. The law**

47. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court vis provisions of **Art 165 constitution of Kenya. Sub art (7)** is to the effect that; For the purposes of **clause (6)**, the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

48. Under **LEGAL NOTICE NO. 117 OF 28th June, 2013 THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES**, commonly referred to as **MUTUNGA RULES** the High Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

49. **Article 53(2) of the Constitution of Kenya, 2010** which deals with fundamental rights of the children, provides that;

**“A child's best interests are of paramount in every matter concerning the child.”**

50. Section **83(1) of the Children Act (Cap. 141)** sets out the factors to be considered by the court while determining whether or not a custody order should be made in favour of the Applicant. Under **sub-section 83(1) (j)**, the court is required ultimately to have regard to the **'best interests of the child'** as fundamentally obligated under the provisions of **Article 53(2) of the Constitution of Kenya**.

51. The **Constitution of Kenya 2010** requires that in all matters concerning children, the best interest of the child shall be of paramount importance. **Article 53(2)** of provides:

**“(2). A child's best interests are of paramount importance in every matter concerning the child.”**

52. Section **4(2) and (3)(b) of the Children Act** echo the constitutional imperative:

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

**c. ...”**

53. What is stated in Section **4 (3)(b) of the Act** is the paramountcy principle which is vital in all matters concerning children and must be given prominence. While considering this matter, this Court was alert to the welfare of the children herein who are of tender years. The

matter is not about the Applicant and the Respondent and as their interests are secondary to those of the children.

54. The foregoing provisions require Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein.

55. Accordingly, the principle of the best interests of the child is the supreme parameter in matters concerning the welfare of child such as in the question of the custody of the subject child/children herein.

56. Contempt of court proceedings are half-civil half-criminal and hence invoking Section 362 of the Criminal Procedure Code is well within the law. Under **HIGH COURT (ORGANIZATION AND ADMINISTRATION) GENERAL RULES 2016 vide Rule 42** the High court can do Revision of orders of a subordinate court in contempt proceedings. Rule **42 (1)** is to the effect that, the Court may on application made by a person aggrieved by the order made by a subordinate court to punish for contempt revise such order on such terms as it thinks fit .....In **subsection, (2)** The Court has power to revise an order made by a subordinate court to punish .....and .....make such other order as may be necessary.

57. In revisionary matters the court can act suo motto or on application by the aggrieved party. The applicant and the children herein are affected and aggrieved herein thus entitled to move this court for redress. Thus court finds no merit on objection to this court jurisdiction in view of the interest of the minor children rights being in jeopardy.

58. Further, these are proceedings relating to children and hence this Court does not entertain and/or give undue regard to procedural technicalities. The power of the High Court to supervise the courts subordinate to it applies in all the matters, proceedings and suits and when it comes to matters concerning children, the Superior Court exercises extra supervision to ensure that the principle of the best interest of the subject is observed.

59. What this Court is being asked to do is to supervise and redirect these proceedings. This Court is being asked to intervene and order that this suit be set down for hearing rather than preferring to delay the proceedings in order to cause untold inconveniences to the Applicant and the subjects children.

60. The suit has been oscillating in Nyahururu Law Courts despite all the pointers indicating that this suit ought to be heard and determined at the Children's Court at Meru since the subjects and the mother reside at Meru.

61. On the issue of proceedings in the lower court impugned herein, the court has gone through the records of typed proceedings which has occasioned the delay of instant ruling. **The Loss of My relative on 2/3/2021 thus 10 days of compassionate leave, service week at High court at Garissa 22/3/2021 to 25/3/2021, Easter vacation and my subsequent indisposition also contributed to the delay.**

62. Thus the court made observations in the proceedings and directions as hereunder;

#### **LOWER COURT PROCEEDINGS AND THIS COURT ANALYSIS AND DIRECTIONS.**

63. This matter was originated by way of plaint in the lower court on 14/05/2020 by the Respondent husband to Applicant seeking reliefs centered on the custody of two (2) minor children JMK boy aged 7 and SWK aged 3 years.

64. The Respondent is their father and the Applicant is their mother. Applicant was described to be residing and working in Nairobi. On the Defendant's part in reply, she stated that she works in Meru and also the children in issue here school in number [Particulars Withheld]-Meru.

65. On 11/09/2020, the custody of children was ordered to be in the Applicant/Defendant in the suit vide order of Hon. Muhoro RM.

66. On 15/09/2020 the matter moved to Hon Wanyanga RM as Muhoro RM had fixed it for mention before Court 5. The court extended interim custody orders to 17/09/2020.

67. Then court 5 decided to hear and determine the matter and it stated that **there is nothing wrong with the Court 5 by hearing matter which was in Court 6.**

68. Then Court 5 ordered the two (2) minor children be handed over to the Respondent/Plaintiff in suit. Then court 5 ordered the children be produced in court.

69. On 15/12/2020 court 5 gave Respondent leave to go pick the children from Applicant. On 21/12/2020, the court 5 ordered summons to issue to Applicant to attend court with the children on 22/12/2020.

70. Then without any apparent reason, Court 5 recused itself and purported to handover the file to Court 3 for further orders.

71. On 22/12/2020 Court 3 Mwangi SRM declined to take over the matter and stated that; **"Court 5 cannot recuse itself and go ahead to reallocate to another court."** Then she referred the file to Court 1 which is administratively the allocating court.

72. On 29/12/2020 the Court 1 went ahead to entertain the matter. Court 1 was being lead to believe Court 5 handed over custody of children to Plaintiff. But oblivious of orders of Court 6 on interim custody to applicant which Court 5 could not have overridden or varied.

73. Thus on 31/12/2020 she (Ct 1) ordered Plaintiff to get (children) then from Meru to prepare them for school. The court then ordered application to be heard in Court 4 on 14/01/2020. By this moment and time the custody of children was with Applicant herein since the date of orders of Court 6 were made.
74. On 06/01/2021 an application in the matter was lodged under certificate of urgency for contempt of court proceedings which subsequently proceeded on 21/01/2021 for hearing.
75. On 04/02/2021 the court found Applicant herein guilty of contempt of court orders of 15/12/2020 of Wanyanga SRM Court 5.
76. The court has noted Hon Wanyanga Ct 5 on the said date only issued what was said to be unlimited access as custody had vested to Applicant herein by Court 6 orders. He Ct 5 had commented that, **he could not interfere with Court 6 orders of custody as only Appeal court can do so as his court was of equal status with Court 6.**
77. On 15/12/2021 Court 5 also stated that, it gave Plaintiff leave to go pick children from Defendant in Meru to enable him prepare them for a new school term.
78. Thus the core issue here is whether there is irregularity and prejudice to fair administration of justice.
79. Thus in the first instance the matter ought to have been instituted where the Defendant worked or resided and /or where the subject matter was located, and in this matter the two minor children, thus Magistrate Courts in Nyahururu were not the ones under local court limit jurisdiction to entertain the matter.
80. Jurisdiction of a court is everything and once a court realizes that it has no jurisdiction, it has to lay down its tools, because anything done without the requisite jurisdiction which ordinarily is conferred by statute/ legislation, is a nullity – see **Owners of the Motor Vessel Lillian “S” Caltex Oil (K) Limited (1989) 1 KLR 1.**
81. The above is in respect of general jurisdiction of courts. Thus the question arises as to the status of Nyahururu cm’s courts territorial jurisdiction over the suit subject of the instant application which is of utmost importance and cannot be taken lightly.
82. In the case of a magistrate's court, a suit ought to be filed at the competent court capable of trying it within its territory –see **Section 11 of the Civil Procedure Act. Section 12** thereof states that a suit ought to be filed where the subject matter is situated. In the present application, it is not disputed that the defendant is residing and working in Meru County and with the minor children. **Proviso to Section 12** is to the effect that a suit can be instituted within the local limits whose the defendant voluntarily resides or does business or works for gain.
83. Under **Section 17 and 18 of the Act** upon an application by a party, **or on its own motion**, the High Court may transfer the suit to another subordinate court with territorial jurisdiction, when justice of the case demands such action.
84. Secondly, even assuming they had jurisdiction the allocation of matters in lower court is done by the Head of Station or designated Magistrate standing for Head of Station for good order and to avoid mischief and improprieties in handling of court work.
85. Thus Court 6 could not literally throw file to Court 5 after making interim custody orders in Applicants favour.
86. Court 3 seem to have the know on what I have stated above as when Court 5 purported to recuse himself and “throw” the file to Court 3, it categorically stated that only Court 1 (Head of Station) could do so. Thus referred the matter to Court 1 which now allocated same to Court 4. Court 4 purported now to enforce Court 5 orders by holding Applicant in contempt of court.
87. Of course, the orders of Court 5 purported to literally vary the orders of Court 6 by first giving Respondent unlimited access to children (equal to custody) and then on 15/12/2020 ordering Plaintiff to go pick the children from Applicant.
88. This was done without jurisdiction as the court had already stated that it enjoyed same status as Court 6. Thus court 5 ought to have returned the file to Court 6 for enforcement or clarification or order otherwise. Alternatively ask parties to move to the High Court to vary same interim custody orders.
89. The above irregularities are enough to dispose the instant matter. This is because the subsequent orders and the proceedings of contempt of court were a nullity and of no legal consequences.
90. The court has also to comment on the fact that the Magistrates Court 5, 1 and 4 forgot the best interest of the children principle in this case (minors aged 7 and 3 years) and focused on the bitter contest of the parties to the marriage.
91. From inception, the best interest of the children was to be of paramount importance and should have been determined after interim custody was awarded to the Applicant by Court No. 6.
92. The court finds that the courts herein and especially Court 5, 1 and 4 did lose sight of the principle aforesaid thus the ensuing drama whereof the Applicant seem to have lost temporarily “sanity”.
93. The children were being hurled in court all the way from Meru devoid of any show of kindness and mercy to their situation. Why was Applicant and children (7 and 3 years in age) being hurled from Meru to Nyahururu and back for this matter?

94. In the new justice dispensation under the 2010 Kenya Constitution, the court is enjoined to dispense justice fairly to all parties through a fair hearing – **Article 50 and 159 2(d)**-and without regard to technical and procedural flaws that do not go into the merits of the suit.

95. This court is not going to condone mishandling of the children’s matters and any other matters to the prejudice in fair administration of justice. Thus by virtual of the supervisory jurisdiction powers vested in this court vide provisions of **Article 165 of the Constitution of Kenya**, I order as follows;

**I. The proceedings in the court of Wanyanga RM and especially from 15/09/2020 to 22/12/2020 are a nullity and set aside, thus the purported orders of contempt application by Court 4 finding Applicant herein guilty is also a nullity and set aside.**

**II. The court declares that, the Magistrate Courts at Nyahururu had no territorial jurisdiction to entertain the instant matter. Thus the suit is hereby transferred to CM’s Court at Meru for hearing and determination by the Children’s Court.**

**III. Meanwhile, the interim custody of the two (2) minor children herein is vested in the Applicant ENM until trial court determines custody of the same minors.**

**IV. The trial court will also determine issues for visitation and access by the Respondent pending determination of the suit herein.**

**V. No orders as to costs**

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20<sup>TH</sup> DAY OF MAY, 2021**

.....

**CHARLES KARIUKI**

**JUDGE**

**PRESENT:**

Wangechi for the Applicant

Kihoro for the Respondent

Court Assistant - Eric