



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA (FAMILY DIVISION)

AT MOMBASA

CIVIL APPEAL NO. 16 OF 2020

HMIAPPELLANT/RESPONDENT

VERSUS

KBH.....RESPONDENT/APPLICANT

RULING

1. What's before this court for determination is a notice of motion application dated 24th may,2021 by KBH the respondent/applicant herein ,supported by his supporting affidavit sworn on 24th may 2021.the application seeks the following orders:

a. spent

b. That this honourable court be pleased to find the respondent herein in contempt of this honourable court's order issued on 19th may 2021.

c. That this honourable court be pleased to order that the child protection unit and the officer in charge of the nearest police station to where the minor can be tracked do assist in retrieving the minor for purposes of placing him in the applicant's custody, pending hearing of all suits pertaining to the said minor.

d. That in view of the urgency of this matter ,the respondent herein,HMI be arrested and committed to civil jail and be appropriately punished for blatantly refusing and/or failing to comply with/being in contempt of the orders of this honourable court issued on the 19th of May 2021 for a term of 6 months.

e. That this honourable court be pleased to grant legal and actual custody of the minor, Joseph Ronald Hurley to the father, the applicant herein pending hearing and determination of all suits pertaining the minor, with virtual access to the mother, the respondent herein pending her mental assessment.

f. That this honourable be pleased to enjoin one Mr.JI to these proceedings and to find the said Mr.JI in contempt of this honourable court.

g. That the costs of this application be borne by the respondent.

2. The application is based on the grounds that ;this honourable court issued orders on the 19th of May 2021 to the effect that both parties shall share legal and actual custody of the child ,each party having actual custody for 4 days; the respondent herein is in contempt of the said orders which she has now breached since she has denied the applicant access to the minor as was directed by this honourable court; the respondent communicated with the applicant on the 21st may 2021 indicating that something bad had happened to the body of the minor ,suggesting abuse; if it is true ,could only have happened when the child was in the custody of the respondent since he had been examined in hospital and was found in good health prior to the hand-over on 19th of May 2021;the applicant is now afraid for the well – being of the child since he is exposed to a hostile environment and is apprehensive that the respondent has caused him damage and /or may kill him; if orders sought herein granted ,substantial loss may occur to the minor caused by the respondent who is of questionable moral character, and who has not been subjected to any necessary assessment on whether or not she is able to offer care and protection over the child.

3. The respondent/applicant in his supporting affidavit averred that on the 21st of May 2021, he punctually arrived at the Mvita Sub-County Children's Office in the company of his advocate Mr.Obonyo at 3.30 pm awaiting the hand over at 4.00pm of the minor by the respondent as directed by this honourable court. The Mvita Sub County Children's Officer, Mr.Emmanuel Tendet and the volunteer children's Officer

Mr. Joshua Otieno were the persons in the office.

4. The respondent/applicant further averred that the respondent's biological brother Mr. JI showed up at Mvita Subcounty Children's Office at around 3.50 pm alone and indicated that the respondent was caught up in traffic at the Nyali Bridge and that she would have there in half an hour. That after one and a half (1 1/2) hours with him making calls to the respondent, he revealed that the respondent was not picking up his calls and had switched off her mobile phone. The respondent /applicant annexed a statement alleged to have been written by Mr. JI stating that he was with the respondent HMI together with the minor in Mtwapa ta 3pm and that he did not notice anything peculiar with the child and that the respondent promised to follow him to town for purposes of handing over the child.

5. The respondent/applicant stated that he is highly apprehensive that the child may be in actual physical danger since the mother, Ms. HMI, at around 2.06 pm on the same date i.e. 21st May, 2021, sent him a whatsapp message suggesting that the child had been physically abused and annexed a screenshot of the said message as 'kh4'. and that the child had been taken to hospital for a full check-up prior to the hand over and a copy of the doctor's letter filed in court on 19th May, 2021 the court had the benefit of seeing the child presented by himself for the hand over and confirmed that the child was in good health.

6. The respondent/applicant further stated that 22nd May 2021, the children's officer went to the Mtwapa police station and recorded an O.B in a bid to locate where the child had been taken and has prepared and filed a report to support what he has stated and annexed an OB as KBH-5. and that the best interest of the minor is at risk and substantial harm may come to the child if this honourable court does not interfere and ensure that the order of justice is served.

7. The application was brought under the provisions of the following provisions: sections 1A, 1B and 3A of the civil procedure act, cap 21, laws of Kenya; section 4 (2) and 76 of the children's act no. 12 of 2001, section 5 of the judicature act cap 8 of the laws of Kenya; the contempt of court act 1981 part 23 and 81 of the civil procedure rules 2020 of England.

8. The appellant /respondent did not file any response.

Analysis and determination

9. Have considered the application and its supporting affidavit and the issue that emerge for determination is;

Whether the applicant should be grant the orders sought.

10. The court in **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** stated that, "*The applicable law as regards contempt of court existing before the enactment of the Contempt of Court Act was restated by the Court of Appeal in Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the Judicature Act which provided that:*

"The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."

This section was repealed by section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the Judicature Act, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the Judicature Act.

This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules."

I agree with the above reasoning that since the act that repealed section 5 of the Judicature Act has been declared unconstitutional, the effect is that section 5 of the Judicature Act still stands. Having concluded as aforesaid, I find it fit to examine the procedure for instituting contempt of court proceedings under section 5 of the Judicature Act which provides as follows:-

1. The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

11. Accordingly, I also agree with the reasoning of the court and find that the applicable law in this case is section 5 of the Judicature Act and the provisions of the England Civil Procedure Rules.

12. The court in **SAMUEL M. N. MWERU & OTHERS V NATIONAL LAND COMMISSION & 2 OTHERS [2020] ECLR** further stated **that,**

"It is an established principle of law that in order to succeed in civil 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 by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-

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

(a) the terms of the order (or injunction or undertaking) were clear and 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 a 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 to a contempt in theory only and does not render the contemnor liable to punishment.

It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established.

And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one':-

'The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far reaching.

There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.'

Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

13. From the above citation it is clear there are four elements to be proved beyond reasonable doubt in contempt of court proceedings;

(a) the terms of the order (or injunction or undertaking) were clear and 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.

14. The order for 19th may 2021 was clear as it was a consent and binding to all parties.

15. It is not clear whether the respondent had knowledge or proper notice of the terms of the order. No evidence to show the said orders were served upon the respondent and that they were explained to her.

16. Without prove that the respondent had knowledge of the orders it would be difficult for this court to find that she was in breach of the said orders.

17. No evidence tendered to show that the respondent's conduct was deliberate. The applicant relies much on the handwritten statement alleged to be made by one JI at the children's office.

18. It's my finding that the applicant has not established a prima facie case to warrant the respondent to be held in contempt of court. And therefore his application for contempt of court fails.

19. In the case of **Clerk, Nairobi City County Assembly v Speaker, Nairobi City County Assembly & another; Orange Democratic Party & 4 others (Interested Parties) [2019] eKLR** the court quoted the case of **Christine 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.”

Ogwel – Court assistant

Mr. Obonyo Advocate for Applicant – Present in person

Applicant – Present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE