



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
MILIMANI LAW COURTS
CIVIL APPEAL NO.E056 OF 2021

TWW.....APPELLANT

VERSUS

KJH.....RESPONDENT

RULING

TWW, the Applicant herein, has brought this Notice of Motion dated 10th July 2021 seeking the following orders:

- (a) That this application be certified as extremely urgent and service thereof be dispensed with and the same be heard *ex parte* in the first instance.
- (b) That in the interim and pending the hearing and determination of this Application, the honourable court be and is hereby pleased to stay the ruling delivered virtually on the 7th July 2021 and orders issued by Honourable G. M. Gitonga (MR) Principal Magistrate on the 9th July 2021 in Children's Case No. E039 of 2021 holding the Applicant in contempt of court for disobedience of orders dated 14th January 2021 and 6th April 2021 and directing the Applicant to appear before the court for sentencing on 12th July 2021 at 11.30am or at any other time as the lower court may direct.
- (c) That in the interim and pending the hearing and determination of this Application, the honourable court be and is hereby pleased to stay the ruling delivered virtually on the 7th July 2021 and orders issued by Honourable G. M. Gitonga (MR) Principal Magistrate on the 9th July 2021 in Children's Case No. E039 of 2021 holding the Applicant in contempt of court for disobedience of orders dated 14th January 2021 and 6th April 2021 and directing the Applicant to appear before the court for sentencing on 12th July 2021 at 11.30am or at any other time as the lower court may direct.
- (d) That in exercise of this court's supervisory jurisdiction, this honourable court be pleased to call for the lower court file being Children's Case No. E056 of 2021, between KJH and TWW, to examine the legality and constitutionality of the proceedings of the virtual court of the 7th July 2021.
- (e) Costs be provided.
- (f) Any other order that this court may deem fit and just in the circumstances.

In support of the Application, TWW advanced grounds found on the face of the application and on the Affidavit in Support. It is her case that the Respondent and her are parents of Baby JHH who is subject of contentious litigation before the Children's Court in Children Case No. E039 of 2021; that the Respondent approached the Children Court with an application for contempt of court dated 21st May 2021 where he made numerous allegations against the Applicant including her non-compliance with the court order dated 14th January 2021 and 6th April 2021; that on 7th July 2021, through virtual court proceedings, Honourable G. M. Gitonga delivered the impugned ruling and order by holding the Applicant in contempt of court for allegedly knowingly and wilfully disobeying the orders of the court dated 14th January 2021 and 6th April 2021; that the court proceeded further to order the Applicant to appear before the court for sentencing on 12th July 2021 at 11.30am through an order issued on 9th July 2021; that the Applicant is living in fear of possible imprisonment after having been convicted for being in contempt of court orders yet the court did not have and does not have the authority under the law to punish the Applicant for

being in contempt other than contempt that is committed on the face of the court and that the trial magistrate proceeded to cite the Applicant for contempt and declined to entertain the Applicant's explanation for her difficulty in complying with the court order as the Children Officer's Report had not been filed before the court as it had been ordered on 25th January 2021.

She urges that unless this court stays, varies or suspends the lower court's finding of the Applicant to be in contempt of court and or stays the lower court proceedings in their entirety, the Applicant shall continue living in fear and risk of possible arrest at the detriment of the best interest of the minor as she is the primary care giver of the minor in question. In her Supporting Affidavit, the Applicant reiterated the same grounds in support of the Application. She has also reiterated the Grounds in her Memorandum of Appeal on paragraph 14 of her Supporting Affidavit.

On 13th July 2021 this court directed that the Application be served on the Respondent and that parties attend court on the 15th July 2021 for directions. The Respondent did not attend court despite having been served with the Notice to attend and Affidavit of Service to that effect filed in court. Mr. Shadrack Wambui appeared for the Applicant on behalf of Mr. Omari and argued the Application. He told the court that the sentencing of the Applicant had been postponed from 12th July 2021 at 11.30am to 15th July 2021 at 2.30pm. He submitted that they were in court to stop the intended sentencing and that the Applicant questions the jurisdiction of the lower court to punish her on contempt of court. He submitted that jurisdiction flows from the law; that the Children's Act created the Children's Court and therefore its jurisdiction flows from that Act; that in the absence of a particular provision giving the lower court sitting as Children's Court Jurisdiction, that court lacks jurisdiction to punish the Applicant for contempt of court and therefore that court cannot exercise what it does not have.

He submitted further that Section 10 of the Magistrates' Courts Act gives that court power to punish for contempt of court and posed the question whether the Children's Court can invoke the power granted by section 10 of the Magistrate's Court. He submitted that after the Contempt of Court Act was declared unconstitutional the only law applicable in respect of contempt of court proceedings is the Judicature Act that empowers the Court of Appeal and the High Court, and not the Magistrates' Court, to punish for contempt of court.

On 15th July 2021, I considered the issue of stay of the orders of the lower court requiring the Applicant to physically attend court for sentencing for contempt of court. I declined to grant that prayer and directed that I would give my reasons for doing so when I consider all the issues canvassed before me in this Application.

I have considered this matter. I have read the Children Act. I note that the closest it comes to punishing for disobedience of court orders under the provisions of the Children Act is section 101. This section gives power to the Children Court to enforce its orders on maintenance and contribution. Under Section 101 (7) the court has power to issue a warrant committing a respondent to imprisonment for specified time for disobedience of the maintenance and contribution orders. The orders attracting this punishment are maintenance and contribution orders. It does not provide for punishment on contempt of court on disobedience of other orders.

Other than the Children Act there is the Magistrates' Court Act which under Section 10 is clear on the powers of court to punish for contempt. Both courts, Children Court and Magistrates' Court are Subordinate Courts established under Article 169 (1) (d) and (2) of the Constitution. Both courts are manned by magistrates. A magistrate sitting in Children Court holds the same qualifications as same magistrate who sits in the other regular courts (to borrow that language). The magistrate handling children matters in the Children Court is pulled from the mainstream magistracy and assigned duties in the Children Court. The only difference is that a magistrate sitting in Children Court exercises special jurisdiction: that of dealing with issues touching on children. The question I pose here is this: is it the intention of the Legislature to abandon a court like the Children Court without clothing it with power to punish for contempt of court given that the issues this courts deals with touch on the children, a vulnerable group of our society, which issues are of a delicate nature? The Children Court deals with children. The law gives children special treatment for obvious reason that they are vulnerable and deserve protection. The best interests of a child are of paramount importance in all matters and decisions touching on children. It is my belief that such an important area of the law cannot be left without protection. It is upon the courts to ensure that there is no vacuum in law in order to protect the children.

I have considered this matter. It is my view that Section 10 of the Magistrates' Court Act gives magistrates power to punish for contempt of court and therefore a magistrate sitting in the Children Court is not prevented from exercising the powers conferred to the magistrates under Section 10 of the Magistrates' Court Act to punish for contempt. On this issue I am persuaded by the reasoning in Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR that:

“A court without contempt power is not a court. The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer's eye, the power of contempt “is inherent in courts, and automatically exists by its very nature.”

In Re ZJA & TA (minors) [2020] eKLR, the High Court was moved to grant orders, inter alia, to cite the Appellant/Respondent for contempt of Court and committing the Appellant/Respondent to civil jail for a period of six (6) months in accordance to Section 28(6) and Section 29(2) of the Contempt of Court Act 46/2016; and secondly, orders to deny the Appellant/Applicant audience before this Honourable Court until such time as the Appellant/Respondent shall have purged his contempt. The contempt sought to be punished by the High Court was committed at the Children Court but for reasons given in that Application, the Applicant filed for contempt of court proceedings before the lower court perhaps holding the view that the court did not have jurisdiction to punish for contempt of court. The High Court considered the matter before it and made pronouncements therein. Of particular relevance to this court is paragraph 26 of the Ruling:

“The application before court is purported to have been filed pursuant to Sections 28 and 29 of the Contempt Act Cap No. 46/16 which has since been declared unconstitutional for having been enacted without public participation. See Kenya Human Rights Commission vs. Attorney General and Another (2018)eKLR. In the absence of that Act, this court is left with Section 10(3) of the Magistrate's Courts Act which provides;

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

(2) ...

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

(4) ...

(5)

(6) The court may sentence a person who commits an offence under Sub-Section (1) to imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shilling 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 exercise of the ordinary original criminal jurisdiction of the court

The court further stated that:

I am in agreement with the respondent that the court with original jurisdiction is the court which issued the impugned orders and not this court. See HAO v PLS (2017)eKLR. It is trite that jurisdiction is key and the cornerstone of litigation and without it a court cannot move a step further hence it should down its tools. See Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd (1989)eKLR.

I am persuaded by this decision and I agree with the reasoning therein. The trial court is the correct court to punish to contempt of court committed against the orders of that court.

Secondly, I have noted that the same grounds supporting the Notice of Motion are the same grounds in the Memorandum of Appeal. By granting the orders sought here, this court will be compromising on the Appeal before it is argued.

It is my considered view that the Notice of Motion dated 10th July 2021, though not opposed due to failure of the Respondent to attend court, cannot be allowed for the reasons advanced above. Consequently, the Notice of Motion is declined. Let the Applicant move the Court on the pending Appeal. To that end, she should file Record of Appeal and serve it on the Respondent. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 29TH JULY 2021

S. N. MUTUKU

JUDGE