



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA (FAMILY DIVISION)**

**AT MOMBASA**

**CIVIL APPEAL NO. E016 OF 2020**

**HELLEN MARIA IMOKOR.....APPELLANT/RESPONDENT**

**VERSUS**

**KEVIN BARRY HURLEY .....RESPONDENT/APPLICANT**

**RULING**

1. What is before this Court for determination is a Notice of Motion application dated 24<sup>th</sup> May, 2021 by Kevin Barry Hurley, the applicant herein. It is supported by his affidavit sworn on 24<sup>th</sup> May, 2021. He seeks the following orders:

(i) spent

(ii) That this honourable court be pleased to find the respondent herein in contempt of this honourable court's order issued on 19<sup>th</sup> May, 2021;

(iii) 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;

(iv) That in view of the urgency of this matter, the respondent herein, Hellen Maria Imokor 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 19<sup>th</sup> of May, 2021 for a term of 6 months;

(v) 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;

(vi) That this honourable be pleased to enjoin one Mr. John Inyait to these proceedings and to find the said Mr. John Inyait in contempt of this honourable court; and

(vii) That the costs of this application be borne by the respondent.

2. The application is anchored on the grounds in support of it and the affidavit sworn by the applicant. In his supporting affidavit, the applicant averred that on the 21<sup>st</sup> 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 p.m., to await the hand over of the minor by the respondent at 4.00 p.m., as directed by the Court. The applicant deposed that the Mvita Sub-County Children's Officer, Mr. Emmanuel Tendet and the Volunteer Children's Officer, Mr. Joshua Otieno, were in the said office.

3. The applicant averred that the respondent's biological brother Mr. John Inyait showed up at Mvita Sub-County Children's Office alone at around 3.50 p.m., and indicated that the respondent was caught up in traffic at the Nyalali Bridge and that she would be at the venue in half an hour. That after one and a half hours with him making calls to the respondent, he revealed that she was not picking up his calls and that she had switched off her mobile phone. The applicant annexed to his affidavit a statement alleged to have been written by Mr. John Inyait stating that he had been with the respondent, Hellen Maria Imokor, together with the minor at Mtwapa at 3p.m., and that he did not notice anything peculiar with the child and that the respondent had promised to follow him to town for purposes of handing over the child.

4. The applicant stated that he was highly apprehensive that the child may be in actual physical danger since the respondent herein, at around

2.06 p.m., on the same date i.e. 21<sup>st</sup> May, 2021, sent him a WhatsApp message suggesting that the child had been physically abused. The applicant exhibited a screenshot of the said message as annexure 'KH4'. The applicant deposed that the child had been taken to hospital for a full check-up prior to him being handed over to the respondent and a copy of the Doctor's letter had been filed in Court on 19th May, 2021. He further averred that the Court had the benefit of seeing the child presented by himself for the handing over and he confirmed that the child was in good health at the said time.

5. The applicant further stated that on 22nd May, 2021, the Children's Officer went to Mtwapa Police Station and recorded a report in the O.B, in a bid to locate where the child had been taken. That the said Children's Officer filed a report to support what the applicant stated in his affidavit. The applicant annexed a copy of the report and the OB entry as exhibit 'KBH-5'. He averred that the best interests of the minor are at risk and that substantial harm may come to the child if this Court did not intervene and ensure that the justice was served. The respondent did not file any response to the present application.

6. On 29<sup>th</sup> July, 2021 Judge On'ginjo delivered a ruling in regard to the application dated 24<sup>th</sup> May, 2021 and dismissed it for lack of proper service.

7. The applicant felt aggrieved and on the same day, he filed an application for review of the orders made by the said Judge on 29<sup>th</sup> July, 2021. She set aside the orders to enable the applicant to effect proper service of the present application to the respondent, through the OCS Mtwapa Police Station.

8. An affidavit of service sworn by Lawrence Obonyo Advocate was filed on 3<sup>rd</sup> August, 2021. In his affidavit of service, Mr. Obonyo stated that on 30<sup>th</sup> July, 2021 in the company of the applicant, by Mr. Benard Omondi, PC Bernard Moguche and Sgt Hawa Ali, they went to the premises of the respondent situated behind Milly Foods, past Mtwapa Toll Station, about a kilometre to the right and on reaching the premises, at around 3.05 p.m., they pressed the bell and knocked on the gate several times but no one allowed them entry. That they were able to hear footsteps and see a lady looking at them through the gate from inside the premises.

9. The applicant's Counsel further averred that after waiting for a few minutes, they opted to effect service by sliding the documents they had beneath the gate since the lady was not responsive to them. That having slid the documents beneath the gate and waiting for a few more minutes, they noticed the lady looking at the documents without saying a word and they then drove away.

10. On 5<sup>th</sup> August, 2021 when the application dated 24<sup>th</sup> May, 2021 came up for a fresh hearing, there was no appearance for the respondent. Mr. Obonyo submitted to this Court that the respondent was duly served and referred to the affidavit of service filed on 4<sup>th</sup> August, 2021. He also said that the child had not been able to attend hospital for immunization. That he had also not attended school since May, 2021, yet his father (applicant) had paid fees at Prarie School.

11. Mr. Obonyo submitted that the letter from Mvita Sub-County Children's Office explains that they had been unable to get hold of the child and the (mother) respondent as the two had gone missing and as such, they had not been able to prepare a Social Inquiry Report.

12. He further submitted that the lower court had issued warrants of arrest against the respondent on three occasions. He urged this Court to grant the prayers sought.

## **ANALYSIS AND DETERMINATION**

13. This Court considered has considered the application dated 24<sup>th</sup> May, 2021, the supporting affidavit and the affidavit of service sworn by the applicant's Counsel. The issues that emerge for determination are-

**(i) Whether there was proper service on the respondent; and**

**(ii) Whether the respondent is in contempt of court proceedings.**

14. Personal service of an application for contempt of court is key in the success of an application of this nature. If there is need for service to be effected in any other manner, leave of the court must be sought and granted. The Court in **Samuel M. N. Mweru & others v National Land Commission & 2 others** [2020] eKLR stated as follows-

*“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 (sic), 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.***” (emphasis added).

15. On whether there was proper service of the application herein and the orders of 19<sup>th</sup> May, 2021, it is necessary to look at decided cases, and in particular the decision 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** cited the case of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR**, where it was 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. The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service.”*** (emphasis added).

***The Civil Procedure (Amendment No.2) Rules 2012 of England rule 81.10 provides;***

***(1) A committal application is made by an application notice under Part 23 in the proceedings in which the judgment or order was made or the undertaking was given.***

***(2) Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under Part 23.***

***(3) The application notice must—***

***(a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and***

***(b) be supported by one or more affidavits containing all the evidence relied upon.***

***(4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.***

***(5) The court may—***

***(a) dispense with service under paragraph (4) if it considers it just to do so; or***

***(b) make an order in respect of service by an alternative method or at an alternative place.*** (emphasis added).

16. In this case, following an application for an order for review of the ruling of 29<sup>th</sup> July, 2021, Judge On’ginjo granted the order sought and stated as follows,

***“ .....in the circumstances the best this court can do and for the subject child whose interest is paramount is to set the orders made yesterday 29/07/2021 aside to enable the applicant to effect proper service through the OCS Mtwapa Police Station so that application dated 24/05/2021 can be heard afresh during recess.”***

17. The applicant’s Counsel in his affidavit of service stated that on 30<sup>th</sup> July, 2021 in the company of the applicant herein, Mr. Benard Omondi, PC Bernard Moguche and Sgt Hawa Ali, they went to the premises of the respondent situated behind Milly Foods, past Mtwapa Toll Station at around 3.05 p.m., they pressed the bell and knocked on the gate several times but no one allowed them entry. That they were able to hear footsteps and see a lady looking at them through the gate from inside the premises.

18. Counsel further stated that after waiting for a few minutes, they opted to effect service by sliding the documents beneath the gate. That they waited for a few more minutes and noticed the lady looking at the documents without saying a word and then they drove away.

19. From Mr. Obonyo’s depositions, the identity of the lady was not disclosed which leads to the conclusion that he was not certain that the said lady was the respondent. He also attached an extract of a text message to his affidavit of service stating as follows-

*“that around two hours after effecting service upon the premises of the respondent, I received three missed calls followed by a threatening text message (SMS) on my telephone number +254773324261 from an unknown number (+254756300476) which I believe (from the context) is the respondent (Hellen Maria Imokor) insulting me and warning me of dire consequences”*

20. Section 106I of the Evidence Act provides as follows in regard to electronic messages-

***“A court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such a message was sent.”*** (emphasis added).

21. This Court cannot presume that the lady who was seen looking at the documents that were slid beneath the gate was the respondent and/or that the quoted text message was from her as implied by the applicant’s Counsel in his affidavit of service filed on 4th August, 2021.

22. The law requires that the application for committal or contempt of court to be served personally on an alleged contemnor. From the contents of the affidavit of service filed in this matter, it is evident that there was no proper service on the respondent.

23. The applicant did not serve one Mr John Inyait with the present application, yet he seeks for orders for the said person to be held to be in contempt of court. In any event, he cannot be enjoined to the present application without service of the present application having been effected on him.

24. Having found that there was no proper service of the application dated 24<sup>th</sup> May, 2021, to the respondent, there will be no need to delve into the issue of whether the respondent is guilty of contempt of court or not.

25. This court has also noted that the application dated 24<sup>th</sup> May, 2021 did not substantially comply with the provisions of Rule 81 of the Civil Procedure Rules of England and would have been struck out for non compliance even if the court would have found that there was proper service of the application dated 24<sup>th</sup> May, 2021.

26. The upshot is that the application dated 24<sup>th</sup> May, 2021 is hereby dismissed for want of personal service on the respondent. In the interest of justice I make the following orders -

**(i) In the best interest of the child, the police at Mtwapa Police Station accompanied by the Children’s Officer Mtwapa region, are hereby directed to assist in tracing the whereabouts of the child and the mother and have them produced before the duty Judge on 31<sup>st</sup> August, 2021 for further orders of the court.**

**(ii) There shall be no order as to costs.**

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 11TH DAY OF AUGUST, 2021. IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020, THE RULING HEREIN HAS BEEN DELIVERED THROUGH TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of-**

**Mr. Lawrence Obonyo for the applicant**

**No appearance for the respondent**

**Mr. Oliver Musundi – Court Assistant.**