



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY APPEAL NO. 23 OF 2018

CM.....APPELLANT/RESPONDENT

VERSUS

DN.....RESPONDENT /APPLICANT

RULING

1. Vide Tononoka children's court case No 296 of 2016, DN the respondent/applicant herein filed a suit against her husband CM the appellant/respondent herein seeking a declaration that; they both had equal parental responsibility in respect of their two children WM and YM and that, custody, care and control be vested on her. The applicant/respondent also sought an order that the appellant does contribute maintenance for the children at a sum Ksh 105,700 per month, obtain medical care, pay school fees and meet educational expenses for the children.

2. On 30th May,2018, Hon L. K. Sindani delivered her judgment declaring that; both parents have equal parental responsibility over the children; legal custody to vest in both parents who were also ordered to retain the children in their respective medical covers and to provide clothing for them; each party to cater for the entertainment while with the children; the defendant to provide shelter for the children and have physical custody with unlimited access to the plaintiff on alternate weekends and half school holidays; the plaintiff to cater for school fees and all school related expenses and contribute a larger share to the children's upkeep in the ratio of 70:30 translating to the monthly sum of kshs 45,500.

3. Aggrieved by the said judgment, the plaintiff/appellant appealed to this court. Upon hearing the appeal, the court delivered its judgment on 17th July, 2020. The court substituted the appellant's monthly maintenance contribution of kshs 45, 500 with kshs30,000. For avoidance of doubt, the court retained the rest of the orders of the trial court. A decree and order dated 24th May, 2021 was thereof extracted.

4. Later, on 11th May, 2021, the respondent/applicant moved this court vide a Notice of Motion dated 11th May, 2021 seeking orders;

(1) That this application be certified as urgent and service thereof be dispensed within the first instance.

(2) That this Honourable court be pleased to order the respondent to pay school fees of kshs107,150 /-, school related expenses of kshs36,300/= and arrears of kshs52,000/= for the subject minors for third term as ordered by the court on 24th August, 2020.

(3) That the respondent herein be summoned before this Honourable court to show cause why he should not be committed to civil jail for blatantly failing to comply with the court order issued by this Honourable court on 24th August, 2020.

(4) That on failing to show necessary cause this Honourable court be pleased to cite the respondent/contemnor for contempt of court for disobeying the lawful court orders issued on the 24th day of August, 2020, ordering and/or directing him to provide school fees to the subject minors and meet school related expenses as ordered by the court and pay the applicant the sum of Kenya shillings Thirty Thousand (Kshs 30,000) on or before the 5th day of each month which orders the respondent /contemnor has disobeyed and/or refused to comply with

(5) That consequent to prayer (3) herein above being granted, the respondents /contemnor herein be committed to jail for a duration not exceeding six (6) months and/or such other duration as the Honourable court may deem fit and expedient.

(6) That the costs of the application be borne by the respondent/contemnor.

(7) Such further and/or other orders be made as the court may deem fit and expedient.

5. The application is anchored on grounds set out on the face of it and averments contained in the affidavit in support sworn on 11th May, 2021 by the applicant. It was averred that the appellant/respondent is in contempt of court orders of 24th May, 2020 thereby refusing to pay school fees, other school related and maintenance expenses for the children as directed by the court.

6. That every effort to reach the appellant/respondent and several requests for her to pay school fees have been ignored by the appellant thus frustrating the children who have been forced to stay out of school.

7. In response, the appellant/respondent filed a replying affidavit sworn on 24th May, 2021 claiming that he had paid the outstanding school fees and that no request for payment of any arrears of school fees had been made. He averred that sometime in January, 2021, his father fell sick thus accumulating a bill of over kshs3,000,000.

8. He claimed that, he is financially constrained considering that a sum of kshs 50,000 is already being deducted from his salary to meet other expenses. He stated that his failure to pay school fees as required has been occasioned by the misfortune of his father's sickness and death which allegedly is well known by the applicant and therefore not deliberate.

9. He contended that, the applicant/respondent is able and therefore should come in and assist. He however deponed that he will pay school fees once his house is in order.

10. In her rejoinder, the applicant filed a further affidavit sworn on 2nd June, 2021 acknowledging that the respondent lost his father but that was not an excuse to run away from responsibility. She further added that the respondent comes from a large family hence he was not the only one to meet his father's sickness and funeral expenses.

11. She averred that the medical bill of 3million claimed by the respondent is not correct as the documents attached by the respondent reflect a sum of kshs1, 910,000.35 already paid plus a balance of kshs137, 929.78.

12. During the hearing, the applicant reiterated the content contained in his affidavit. She also claimed that the appellant/respondent is earning over kshs 450,000 at [Particulars Withheld] where he is working as a security officer; that he is a contractor and a farmer hence a person of means.

13. Mr Okongo for the respondent also adopted the content contained in the replying affidavit. Learned counsel submitted that the respondent was only in arrears of school fees for one term and half for the previous term. He contended that before a litigant is committed to civil jail, the applicant must prove existence of the order; knowledge of the order; terms of the order and deliberate disobedience. In support of this argument, the court was referred to the case of **Katsuri Ltd vs K.K shah** which authority was not attached.

Analysis and Determination.

14. I have considered the application herein, affidavit in support and the response thereto. I have also considered oral submissions by both parties. It is trite that contempt proceedings are geared towards instilling obedience to court orders thus upholding the integrity and authority of the court.

15. Acts of contempt are quasi-criminal in nature which is not necessarily proved beyond reasonable doubt nor on a balance of probabilities. The burden to prove acts of contempt of a court order lies upon the one alleging breach and therefore the standard of proof is above that on a balance of probabilities and below proof beyond reasonable doubt. See **Mutitika Vs Baharini Farm Lt (1985) e KLR**

16. However, before a court could find one guilty of contempt, it is incumbent upon the applicant to prove certain salient elements expressed in the case of **Katsuri Ltd vs Kapurchand Depar Shah (2016) e KLR** as follows;

(1) Terms of the order alleged to have been disobeyed must be clear, unambiguous and binding on the defendant.

(2) The defendant had knowledge or proper notice of the terms of the order

(3) The defendant has acted in breach of the terms of the order

(4) The defendant's conduct was deliberate

17. In the instant case, the respondent was aware of the orders of 24th August, 2020 which he acknowledged in his affidavit; Further, the order to pay school fees and other related expenses as per the ruling f 17th May, 2020 were clear and unambiguous a fact admitted in the replying affidavit and his counsel's submission that he was aware of his obligation but he had been hindered by the death of his father.

18. It is an admitted fact that the defendant acted in breach of the orders. He admitted that he has not honored fully the court order due to financial constraints. Is he in genuine financial constraints or deliberate refusal?

19. In the case of **RepublicVs City Council Nairobi and 2 Others Exparte Kaka Travelers Cooperative Savings and Credit Ltd (2012) e KLR** the court held that to commit a party for contempt, there must be deliberate and willful disobedience of a court order. Also, in the case of **Republic Vs Cabinet Secretary, Ministry of Education and Another exparte Thadayo Obando (2018) e KLR** the court stated that,

to sustain an order for contempt of court, an order must be clear and unambiguous. Similarly, the Supreme Court in **Republic Vs Ahmed Abolfathi Mohamed and Another Cr Application No 2 /2018** held that to commit for contempt of court, it must be proved that a person has willfully and deliberately violated a court order. See also **Michael Sistu Mwaura Kamau Vs Director of Public Prosecution and 2 others (2018) e KLR** where the court emphasized that a party cited for contempt must be made aware of the order alleged to have been disobeyed.

20. The last element which is very crucial is whether the failure to pay school fees and other related expenses was deliberate. According to the applicant, the respondent/ appellant is earning over kshs 450,000 per month, he is a contractor and farmer. However, no evidence was tendered to prove such sources of income and the amount earned. On the other hand, the respondent did not dispute earning kshs450,000 nor engaging in contracts nor farming. It was incumbent upon the respondent to show how much he is earning and the commitments if any. He ought to have filed an affidavit of means indicating his worthiness. From the lower court proceedings and the judgment of the high court, both parties are engaged in gainful employment through which they generate monthly income which is not denied.

21. It is upon a party claiming inability to prove that his sources of income are genuinely depleted but not stage managed by say overcommitting one's whole salary to avoid parental responsibility. Failure to disclose his sources of income more especially his monthly income will leave this court to believe that the respondent is deliberately refusing to honor the court order.

22. Court orders are sacrosanct and are not issued in vain. They are meant to confer and spur confidence in the judicial and legal system. Parties cannot loosely be left to choose what to obey and when to obey a court order. Courts must act firmly against any acts of disobedience to court orders. I do not think the unfortunate death of the respondent's father could make the respondent abdicate parental responsibility over his children. The best interests of a child surpass any other interest. The respondent was aware of his obligation but he chose to ignore. This is not the first time he is deliberately ignoring a court order in this proceedings.

23. Accordingly, for the reasons above stated, the respondent is hereby found guilty of contempt of court. He is given 30 days within which to clear the outstanding school fees and related expenses plus maintenance if any in default he shall pay a fine of kshs100,000 or serve 30 days. Mention on 28th October 2021 to confirm compliance.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF SEPTEMBER, 2021

J. N. ONYIEGO

JUDGE