



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 112 OF 2016**

**IN THE MATTER OF CHILDREN'S ACT &**

**IN THE MATTER OF ZJA & TA (MINORS)**

**HOO.....APPELLANT/APPLICANT**

**V E R S U S**

**CSF.....RESPONDENT**

**RULING**

1. By an application dated 5<sup>th</sup> June, 2018 filed pursuant to Article 53(2) of the Constitution, Sections 4, 76, 113 and 114 of the Children's Act, Order 40 rule 3(1), Order 51 rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 3(c) of the Civil Procedure Act, Section 5 of the Judicature Act and Section 28(6) and 29(2) of the Contempt Act, the applicant is seeking orders as follows;

**(i) That this matter be certified urgent and be heard exparte on priority basis.**

**(ii) That this Honourable Court do cite the appellant/respondent for contempt of Court and the Appellant/Respondent be committed 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.**

**(iii) That the appellant/Respondent be denied audience before this Honourable Court until such time as the Appellant/Respondent shall have purged his contempt.**

**(iv) That this Honourable Court be pleased to issue any other orders for contempt of court as it may well deem to be fit.**

**(v) That costs of this application be borne by the Appellant/Respondent.**

2. The application is premised upon grounds set out on the face of it and an affidavit sworn on 21<sup>st</sup> May 2018 by CSF. It is the applicant's case that, vide court orders issued on 21<sup>st</sup> October 2016 and 18<sup>th</sup> November 2016 by Honourable M. A. Otindo Resident Magistrate Milimani Children's Court, she (applicant) was granted physical, telephone and skype access of the minor the subject of the court proceedings herein.

3. That in flagrant disobedience to the said orders, the respondent has continued to act in wilful and frequent contravention of the said order by denying her and one ZJA access to TA the subject herein.

4. She further averred that she has been denied access to T for five consecutive school holidays since the Judgment was delivered i.e December 2016, April 2017, December 2017 and April 2018.

5. That denying access to the minor is not in the best interest of the child as she continues to miss motherly love and that of her sister ZJA with whom she is staying.

6. She further averred that, despite travelling to Kenya on several occasions so as to have access to the minor who is also missing her sister Z, it has been fruitless as the respondent has denied her access to the minor. That since July 2017, the appellant/respondent has only allowed her intermittent telephone / skype access to T contrary to the court order that she was to have unlimited daily access to the baby.

7. She contended that, if the said disobedience continues, it will cause her unnecessary inconvenience. She stated that she is unable to file contempt proceedings before the lower court as all proceedings were put on halt pending the proceedings filed by the appellant before this court.

8. In response, the appellant / respondent filed Grounds of Opposition stating that;

(i) The Chamber Summons is defective, has no merit and is based on a misconception of the law.

(ii) The application seeking committal of the respondent for contempt of court offends the provisions of Section 10(3) of the Magistrates Act No. 26/2015 which clothes a Magistrate's Court that issues orders to punish anybody acting in contempt of those orders. (See **H.A.O v PLS (2017)eKLR**).

(iii) That the alleged contempt was not committed (if at all) before the court, and the court does not have original jurisdiction to prove contempt committed before another court. She referred the court to the decision in the case of **Olive Mwhiki Mugenda and Another v. Okiya Omtata Okioti and 4 Others (2016)eKLR**.

(iv) That the application is an abuse of the court process as it seeks to wholly determine the appeal at an interlocutory stage and should therefore be dismissed.

(v) That the application offends the legal principle that in all matters concerning a child, the cardinal consideration is the best interest and the welfare of the child.

#### **Applicant's Submissions**

9. In her submissions dated 2<sup>nd</sup> October 2019 and filed on 4<sup>th</sup> October 2019, M/s Jennifer Shamalla counsel for the applicant submitted on three issues namely;

**(i) whether the court has jurisdiction to determine this application and grant the orders asked for;**

**(ii) whether the orders given on 21<sup>st</sup> October 2016 are valid;**

**(iii) whether the applicant/respondent is in contempt of court.**

10. Regarding jurisdiction to entertain contempt proceedings, learned counsel argued that under Article 165(6) of the Constitution, the High Court has supervisory jurisdiction over Subordinate Courts. Further, that the High Court having declared the Contempt Act as unconstitutional in **Human Rights Commission v. Attorney General and Another (2018)Eklr**, Section 5 of the Judicature Act which previously conferred jurisdiction on contempt proceedings but amended by the contempt Act which was declared null and void was automatically back in action and or reinstated.

11. In Shamalla's view, the High Court has jurisdiction and not the Magistrate's Court. To support this proposition, counsel referred the court to the decision in the case of **Ramadhan Salim v. Evans M. Maabi T/A Murphy Auctioneers and Another (2016)eKLR** where the court held that a Magistrate's Court had no jurisdiction under Section 5(1) of the Judicature Act to punish for contempt.

12. Concerning the second issue on the validity of the orders issue on 21<sup>st</sup> October 2016, by the Children's Court, counsel submitted that the order of the court must be obeyed and the party disobeying must show cause why he or she should not be punished. That the applicant is duty bound to comply with the orders of the lower court.

13. Turning to the 2<sup>nd</sup> issue on whether the appellant is in contempt of court orders, counsel submitted on the ingredients of what needs to be proved against a contemnor before being punished for disobedience of a court order as articulated in the case of **Cecil Miller v. Jackson Njeru and Another (2017)eKLR** where the court outlined the ingredients as:-

**(a) the terms of the order / or injunction or undertaking, were clear and unambiguous and were binding on the defendants.**

**(b) the defendant has knowledge of or proper notice of the terms of the order.**

**(c) the defendant has acted in breach of terms of the order and;**

**(d) the defendant 's conduct was deliberate.**

14. According to counsel, all the above ingredients have been satisfied against the appellant as the orders were served upon him and therefore brought to his knowledge on what his obligations were all about. That the disobedience is deliberate and not in the best interest of the child.

## **Appellant's / Applicant's Submissions**

15. The firm of Wanjiku and Wanjiku appearing for the appellant/respondent filed their submissions on 6<sup>th</sup> December 2019 submitting on three issues as follows;

**(i) whether the court has jurisdiction to hear and determine the application before it.**

**(ii) whether the motion is bad in law and incompetent.**

**(iii) whether there is evidence of disobedience by the appellant.**

16. Regarding jurisdiction, counsel submitted that there is no order issued by this court to warrant its action. Counsel stated that the orders alleged to have been disobeyed were issued by the lower court and it is only the lower court which can punish. That with the annulment of the Contempt Act by the High Court, the applicant has not stated the exact law applicable in contempt proceedings.

17. Learned counsel opined that should the High Court entertain the application; it will jeopardise the appellant's right of appeal. According to counsel, the relevant provision is Section 10 of the Magistrate's Act which confers powers to punish on the trial court.

18. Concerning the second issue, counsel submitted that the motion is bad in law in that; it is filed as a Notice of Motion instead of application notice; it does not state the grounds upon which the application is made; the affidavit has no evidence of acts of disobedience by the applicant; the motion does not identify each alleged act of contempt as articulated in the case of **Christine Wangari Chege v. Elizabeth Wanjiru Evans and Others (2014)eKLR.**

19. According to counsel, the application was not served personally upon the alleged contemnor unless dispensed with the court.

20. As to whether there is evidence of disobedience by the appellant, learned counsel argued that there was no proof as the issues raised were matters of fact raised by counsel for the respondent/applicant who cannot for sure depone on matters of fact on behalf of her client hence hearsay evidence.

21. Counsel asserted that, the respondent/applicant does not live with the respondent hence not in a position to confirm whether the respondent has been accessing the baby or not – via skype or telephone. That the affidavit in support of the application has no evidence of lack of access or communication to the minor. That contempt proceedings being quasi criminal in nature requires that the burden of proof is on the person who alleges.

22. Lastly, counsel urged the court to uphold the paramouncy principle that committing the father to the children to jail is not in the best interest of the children.

### **Analysis and Determination**

23. From the onset, I wish to express my disappointment at the prolonged delay of this proceedings involving a simple appeal but for unknown reasons parties are not ready to canvass the same and instead have opted to filing several applications. The application before me seeks committal of the respondent/applicant to Civil jail for disobedience of the lower court orders granting access of the subject therein on telephone or skype to the applicant and her step sister Zara who are residents in Jordan.

24. According to the applicant, she is supposed to have physical access to the baby each holiday and through telephone conversation or skype daily which communication the appellant/respondent has allegedly frustrated by blocking the same.

25. The respondent has opposed the application arguing that this court has no jurisdiction to grant the orders sought as the impugned orders were not granted by this court.

26. 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.**

27. Prior to the enactment of the magistrate's Act No. 46 of 2016 which came to force on 2<sup>nd</sup> January 2016, magistrates had no jurisdiction to punish for contempt save for acts of contempt on the face of it or disobedience of orders with regard to grant of temporary injunction under order 40 of the Civil Procedure Act. During that time, jurisdiction to punish for contempt was a preserve of the High court as a court with original jurisdiction pursuant to section 5(1) of the Judicature Act. See **Ramadhan Salim v Evans M. Maabi T/A Murphy Auctioneers and another(supra)**.

28. When the contempt Act came to force on 23<sup>rd</sup> January 2017, it actually provided for procedure in handling proceedings on contempt committed on the face of it and conduct committed outside court but classified as constituting an offence committed against the court. The Act did not deal with disobedience of court judgments or decrees as provided under Section 10(3) of the magistrate's Act. Under section 36 of that Act, it provided that the provisions of that Act superseded those of any written law. This Act which has since been nullified did not amend the provisions of the magistrate's Act and in particular Section 10(3) which is relevant in this case. Therefore, in my view the nullification of the Contempt Act by the High Court on 9<sup>th</sup> November 2018 has no effect on the magistrate's court in punishing contemnors for acts of disobedience committed against its orders under Section 10(3) of the Magistrate's Act.

29. Indeed, in the Ramadhan case above quoted, the issue revolved around disobedience of court orders issued before the Magistrate's court Act of 2015 came to force by which time magistrates had no powers to handle contempt proceedings hence the pronouncement by the court of appeal. The same court actually affirmed the position that with the new magistrates Act, Magistrates have powers under Section 10 of that Act to hear and punish for contempt arising out of their decisions. The court went further to state;

**“ From the above, it does appear that the Magistrate did not have jurisdiction to entertain the contempt proceedings as he correctly held. That jurisdiction belonged to the High Court and Court of Appeal. It is instructive that when the High Court and this court exercise that jurisdiction, it extends to the contempt committed in the Subordinate Court. The only jurisdiction the magistrate's court could exercise when dealing with contempt of court is, if it is committed in the face of the court. However, the Magistrate's Courts Act, 2015 which came into force on 2<sup>nd</sup> January 2016 now gives the magistrate's courts unlimited jurisdiction to punish for contempt...”**

30. In view of the above provision, 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**.

31. Having held as above, this court cannot proceed to determine the merits on the contempt proceedings for doing so will usurp the authority of the Magistrate's Court and further prejudice its determination should a similar application be filed in the same court. It will also curtail the parties' right of appeal in case of an appeal. Accordingly, and for the above reasons stated, the application dated 5<sup>th</sup> June 2018 is hereby dismissed with costs being in the cause.

32. Taking into account that this appeal has taken unnecessarily long, I will direct that hearing of the appeal be fixed with immediate effect to have the matter determined once and for all. Order accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12<sup>TH</sup> DAY OF AUGUST 2020.**

**J. N. ONYIEGO**

**JUDGE**