



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC APPLICATION NO.E009 OF 2020**

**HMI.....APPLICANT**

**VERSUS**

**KBH.....RESPONDENT**

**RULING**

1. The applicant/plaintiff herein one HMI instituted a suit by way of a plaint before Tononoka children's court on 20<sup>th</sup> September 2019. The suit was registered as Tononoka Children's case No 435/2019. On 30<sup>th</sup> September 2019, the applicant/plaintiff filed an application seeking among other prayers, an order restraining the defendant a British National who is also the father to her child the subject herein from leaving the country pending hearing and determination of the application. The said prayer was granted ex parte thus barring the respondent from leaving the country.

2. Subsequently, on 8<sup>th</sup> October, 2019, parties by consent agreed to have the proceedings terminated as they were ready to settle as husband and wife. The court without hesitation marked the matter settled.

3. However, on 14<sup>th</sup> February, 2020, the defendant filed an application of even date seeking various orders which were granted at ex parte stage thus directing as follows;

**(a) That a temporary injunction be and is hereby issued restraining HMI either by herself, agents, servants and or assigns from selling of and/or causing a change of ownership to the matrimonial home Mtwapa Title Number Kilifi/Mtwapa/xxxx pending hearing and determination of this application.**

**(b) That whoever shall contravene the orders herein once issued and served shall be liable to arrest and prosecution.**

**(c) That in the interim, the plaintiff to retain the actual custody while the defendant shall have unlimited access to the child at least twice a week whenever the defendant is in Kenya and to talk to the minor twice a week on whatsapp whenever he is away.**

**(d) That the plaintiff/ respondent to furnish the defendant /applicant with copies of the passports and the Birth certificate for the child JRH to enable him register the child as a British National for the child's benefit.**

**(e) That a temporary injunction be and is hereby issued restraining the plaintiff either by herself, agents, assigns/or relatives from removing the child JRH from the local limits of the jurisdiction of the republic of Kenya.**

**(f) That the plaintiff be and is hereby restrained in the interim from and or harassing or abusing the defendant either by sending him offensive text messages, trying to damage his livelihood by contacting his colleagues and family in the UK, with abusive messages, posting damaging materials on social media, threatening to burn the defendant or wishing that he dies of cancer etc.**

**(g) That application be served for inter partes hearing on 13<sup>th</sup> May, 2020.**

4. However, from the hand written record attached to the application, it would appear that the plaintiff did not comply with the several orders made by the trial court giving rise to several applications and counter applications some of which are still pending hearing and determination.

5. On 28<sup>th</sup> August, 2020 the court was notified of the plaintiff's disobedience to the order directing that the defendant be allowed access to the

child. The plaintiff was further directed to comply but refused culminating to her committal to civil jail for 7 days. That even after her release, she still refused to comply.

6. Consequently, the court directed the defendant to file a formal application by way of a notice to show cause why the plaintiff could not be committed to civil jail for six months for non-compliance with the orders of 14<sup>th</sup> February 2020. On 21<sup>st</sup> October 2020, a notice to show cause was filed. The same was opposed vide a replying affidavit sworn on 29<sup>th</sup> October 2020 by the plaintiff resisting contempt proceedings arguing that the documents sought to register the child as birth record got lost and every attempt to find and have them produced in court were futile.

7. After hearing the application, the court in its ruling delivered on 6<sup>th</sup> November 2020 found that the plaintiff did not tender any proof even by way of a police abstract to show that she had lost the birth identification documents for the baby.

8. The court having found that the plaintiff was in breach of the court order issued on 14<sup>th</sup> February, 2020 directed her to purge the contempt by producing the minor's documents in court failure to which imprisonment for a period of 21 days to follow before further directions could issue in the best interests of the child.

9. During the delivery of the ruling, the applicant/plaintiff was absent. Mr. Were counsel for the plaintiff pleaded for his client to be given 7 days to purge the contempt. The court acceded to that prayer and directed the plaintiff to purge the contempt by producing the documents and the child in court. The case was then listed for mention on 9<sup>th</sup> November, 2020.

10. On 9<sup>th</sup> November, 2020, the plaintiff and the child were not present in court. The reason given was that they were sick and were in hospital seeking treatment. Dissatisfied with the reason for their absence, the court ordered for them to appear at 3.00 p.m the same day failure to which warrant of arrest to issue. At 4.16 pm the same day, the plaintiff and the child were nowhere to be seen. The court then proceeded to issue a warrant of arrest.

11. Aggrieved by those orders, the plaintiff moved to this court under a notice of motion dated 9<sup>th</sup> November, 2020 and filed on the same day pursuant to Orders 5(1), 22 (22) and 45(1)&(2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders that:

**i. Spent;**

**ii. That this Honourable court be pleased to immediately stay all the proceedings in Tononoka children's case no 435/2019 before Hon Sindani pending the revision and review of her ruling delivered on 6<sup>th</sup> November, 2020.**

**iii. That this Honourable court be pleased to issue other directions on the custody and care towards the minor herein, JR aged 2 years and 9 months pending the hearing and determination of the applicant's application for review/revision herein.**

12. The application is premised upon grounds set out on the face of it and an affidavit sworn on 9<sup>th</sup> November, 2020 by HMI the applicant herein. She averred that the inability to present the minor's documents in court was not deliberate as they had got lost and a report to the police subsequently made. She attached a copy of O.B No. as proof of reporting the loss.

13. She also stated that on the date she was supposed to appear in court, she was sick together with her child. She urged the court to stop the lower court proceedings as the defendant /respondent is a British National due to leave the country by 18<sup>th</sup> December, 2020 and that his return date is not known.

14. The court was further urged to stay the lower court proceedings and order of custody by issuing further directions in the interest of the minor now 2 years and 9 months

15. The court certified the application urgent on 10<sup>th</sup> November, 2020 and ordered for inter partes hearing on 16<sup>th</sup> November, 2020. On that day, parties were not ready and hearing was rescheduled to 23<sup>rd</sup> November, 2020 which date Mr. Were for the applicant sought to file further affidavit to the replying affidavit.

16. The court went further and granted temporarily the prayer for stay of execution of the warrant of arrest issued on 6<sup>th</sup> November 2020 and extended on 9<sup>th</sup> November, 2020 pending hearing and determination of the application. Hearing herein was then fixed for 26<sup>th</sup> November 2020. On that date, Mr. Were for the applicant was absent and the application was dismissed for want of prosecution. The same was later reinstated and hearing proceeded on the merits of the application dated 9<sup>th</sup> October 2020.

17. In response to the application, the defendant/respondent filed a replying affidavit sworn on 16<sup>th</sup> November, 2020 stating that the application was filed maliciously, in bad faith and with concealment of material facts with the sole purpose of misleading the court.

18. That the applicant is not willing to let the defendant access his child. He averred that he is a career police officer who has served with distinction in both local and international positions hence understands the right of a children very well.

19. He contended that the plaintiff /applicant's intention is to sell the family matrimonial home and then secretly leave for Italy. He went further to state that he travelled to Kenya in February, March and August 2020 to come and see his child out of love and that he has only managed to see the child for only seven days. It was contended that court orders must be obeyed and that the interests of the child are

paramount.

20. During the hearing, both counsel basically adopted the averments contained in the affidavits in support or replying affidavit. Mr. Were submitted that the plaintiff/applicant is not opposed to the defendant/respondent accessing the baby during the day time under supervision. He contended that the mother to the child is opposed to overnight stay of the baby with the father owing to his tender age.

21. Mr Obonyo adopted the content in the detailed replying affidavit contending that the defendant has previously stayed with the child overnight and safely returned him to the mother. He urged the court to dismiss the application.

### **Determination**

22. I have considered the application herein, affidavit in support, and the response thereto. I have also considered oral submissions by both counsel. The only issue that arise for determination is whether the applicant is entitled to review orders. This court's jurisdiction to review the orders issued by Tononoka children's court on 6<sup>th</sup> November, 2020 has been summoned basically under Order 45(1)&(2) of the Civil Procedure Rules .The applicant is seeking stay of proceedings in Tononoka children's court case No 435/2019 and review of the orders directing arrest and subsequent committal of the applicant to civil jail for disobeying a court order which is contested as irregularly issued and or without justification.

23. It is incumbent upon the applicant to establish that conditions set out under order 45 Rules 1 and 2 of the CPRS have been met. For avoidance of doubt, order 45 rule 1 (1) provides;

**“Any person considering himself aggrieved-**

**a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

Rule 2 (1) goes further to provide that;

**“An application for review of a decree or order of court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree, or made the order sought to be reviewed”.**

24. In the case of **Francis Njoroge V Stephen Maina Kamore (2018) e KLR** the court had this to say;

**“therefore, order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exists;**

**(a) there must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or**

**(b) there was a mistake or error apparent on the face of the record; or**

**(c) there are other sufficient reasons; and**

**(d) the application must have been made without undue delay.**

25. There is no doubt that the application was filed within 3 days after delivery of the impugned ruling or order. To that extent, there was no inordinate delay. The next question that pegs for an answer is whether this court is properly seized of the matter. The orders that I am being asked to revise or review were made by a lower court. They are not my orders so to speak in the context of the wording of Order 45(1)&(2) of the CPRS. Ideally and procedurally, the review application ought to have been filed before the court that made the orders the subject of the review orders being sought before me.

26. It is upon refusal by the court that issued the orders that an appeal could crystalize to the high court. In compliance with order 45 rules 1 and 2 of the CPRS which is cited by the applicant, this is a wrong forum for the orders sought.

27. It is trite that areview application or orders cannot substitute the remedy of appeal. See **LivingStone Kunini Ntutu V County Council of Narok and 2 others(2015)Eklr** Where the court of appeal held that;

**“The review court cannot sit as an appellate court. Mere possibility of two views is not a ground for review. Thus re-assessing evidence and pointing out defects in the order of the court is not Proper”**

The court went further to state that;

**“If any of the parties was of the view that Khamoni J had erred in law in reaching the aforesaid conclusion it was at liberty to appeal against the decision but not to seek a review”**

28. Similar position was held in the case of Joseph Kamenju Mwaura Vs Sammy Ngure Muthinji (2019) e KLR where the court stated that:

**“It must be understood that a review is not a substitute for an appeal”.**

Equally, in Abass Belinda Vs Fredrick Kangwamu and another (1963) E.A 557 the court held;

**“appoint which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for an application for review though it may be a good ground for appeal”.**

29. From the wording of section 80 of the CPA, Order 45 of the CPRS and the case law cited, this court is not properly call upon to exercise jurisdiction. The review application is technically a disguised appeal. The applicant is alleging that she was irregularly condemned for disobeying a court order and subsequent order for committal to civil jail made. An application for review could only apply to the same court that committed her if the threshold under Order 45 is satisfied.

30. Disobedience of court orders is an act that borders on criminal proceedings. This court can only intervene if properly moved. Accordingly, it is my finding that the application is not merited and the same is hereby dismissed with no order as to costs.

**Dated, signed and delivered virtually this 15<sup>th</sup> day of December 2020.**

**J.N. ONYIEGO**

**JUDGE**