



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CIVIL APPEAL NO. 40 OF 2017**

**OGM (Suing as the father of KGW).....APPELLANT/APPLICANT**

**VERSUS**

**FG.....1<sup>ST</sup> RESPONDENT**

**PGM.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By an application dated 4/9/2020 the Appellant sought Orders that

(1) -----

**(2) That pending the hearing and determination of the Application herein, the Honourable court be pleased to order the Children’s Officer Kerugoya to assist in locating, finding the subject (KGW) and handing her over to the Applicant as per the court Decree of 18/5/2020 and Court Order of 14/8/2020 with assistance and security to be provided by the OCS Kerugoya Police Station.**

**(3) That the Honourable Court be pleased to issue a Notice to Show cause directed to FG and PGM to show cause why they should not be committed to serve 6 months’ imprisonment for disobeying the High Court Order issued by Lady Justice L. W. Gitari on 14/8/2020.**

**(4) That in addition to being committed to jail, FG and PGM herein be ordered to pay a fine.**

**(5) That the Respondents be ordered to pay costs incurred by the Appellant on 26<sup>th</sup>, 27<sup>th</sup> and 28<sup>th</sup> August 2020 to be assessed on high scale.**

**(6) That the costs of this application be provided for.**

2. The application is brought under **Section 5(1) of the Judicature Act and Article 159, 73, 50(9) of the Constitution.**

Upon grounds stated at the face of the application, and supported by an affidavit sworn by the Applicant on the 4/9/2020.

3. In response to the applicant the Respondent swore, by the 1<sup>st</sup> Respondent a Replying affidavit on the 12/10/2020.

To urge the application the parties Advocates filed written submissions.

**Brief Background to the application**

4. The Applicant/Appellant is the biological father of the minor KGW while the Respondents are the maternal Grandparents of the minor. The child was born on the 8/7/2014. The mother died at childbirth. At the hospital, the Respondents proposed to the Appellant that they would stay with the subject minor as the Appellant cleared hospital bills and embarked on making burial arrangements of his wife.

5. After the burial, the Appellant requested the Respondents to release the minor back to him. The request was turned down and the respondents refused and failed to release the minor prompting the Appellant to approach the Children’s Court vide Children’s Civil Case No.

16 of 2017 (Kerugoya) for an order seeking that the defendants (Respondents) do deliver and/or surrender the minor to the biological father, the Appellant.

6. The Defendants (Respondents) filed a defence and counterclaim seeking an order for full and legal custody of the minor.

7. The Children's Court Magistrate, upon hearing the parties delivered Judgment in favour of the Respondents, and granted them custody of the minor until when the minor attains the age of eleven(11) years when the order may be reviewed or extended as per the minor's wishes.

8. The appellant appealed against the Children's Court judgment vide this appeal.

In the Judgment delivered on the 18/5/2020, Gitari J. set aside the Children's Court Judgment, and substituted it with an order dismissing the counterclaim, and entered Judgment for the Plaintiff (Appellant) as prayed in the plaint dated 5/4/2017, with no orders as to costs.

9. A decree was drawn extracted and issued on the 10/6/2020, that

**a) That the Plaintiff be granted physical, legal and actual custody over KGW (the minor child).**

**b) That the defendants do deliver up and/or surrender the minor to the Plaintiff.**

**c) That the Defendants be and are hereby restrained from denying the Plaintiff access to the subject minor and the Plaintiff be and is hereby allowed to reside with the minor at his residence.**

10. There is sufficient evidence that the Decree was served upon the Respondents. They refused and/or failed to comply with the decree of the Court.

11. The appellant went back to court by an application dated 18/6/2020 seeking enforcement of the decree.

12. By a ruling dated 14/8/2020 the Court (Gitari J) ordered that the Respondents do produce the minor before the Deputy Registrar within 14 days for handover to the Appellant. That was not done, despite further orders on the 26th and 27th August 2020.

13. By the present application (dated 4/9/2020), the appellant has taken out contempt proceedings against the Respondents, to explain themselves, by a notice to show cause why they have failed to obey court orders and release the subject minor to the Appellant, for which an order of committal to civil jail, and a fine are sought against the Respondents.

14. **Grounds and Affidavit in support of the Application.**

The Appellant/Applicant deposes that despite service of the Court's decree and the Order dated 14/8/2020, the Respondents have failed to produce the minor before the Deputy Registrar and/or release her to the Appellant. It is averred that on the 26/8/2020 the 2<sup>nd</sup> Respondent, together with his Advocates appeared in court but without the minor during which time the Deputy Registrar directed that the minor be brought to court on the 27/8/2020.

15. The child was not produced to court but the 2<sup>nd</sup> Respondent and HIS Advocate attended court. It is the Appellant's averments that the Respondents have continuously disobeyed all the court orders and ought to be cited for contempt and punished accordingly as to uphold the court's dignity.

**The Respondents Replying Affidavit to the application filed on the 12/11/2020.**

16. The Respondents deny having been served with the court orders nor disobeying any such orders. They state that they applied for a stay of execution order against the Judgment delivered on the 18/5/2020, but that on the 14/8/2020, the court declined the stay and dismissed the application, and ordered that the child be handed over to the Appellant in 14 days. The 14 days lapsed on the 28/8/2020.

17. It is further averred that there is pending before the Court of Appeal at Nyeri, an application for stay of the Orders of this Court vide Nyeri C. A No. 83 of 2020 wherein submissions have been filed and only waiting for the Ruling.

On the above, the court has been urged to dismiss the application to await the ruling of the Learned Judges of Appeal.

**18. Issues for determination**

(1) Whether the Respondents are in contempt of

court orders.

(2) If the above is in the affirmative, whether they

ought to be punished for the disobedience of the court orders.

**Analysis and Determination.**

19. The applicable legislation that under pin an application for contempt of court of law is **Section 5 of the Judicature Act, Cap 8 Laws of Kenya**, after the High Court nullified the Kenyan home grown contempt of Court Act, 2016 – (Mwita J) in **Kenya Human Rights Commission –v- Attorney General & Another 2018 eKLR**. The Court declared the said Act invalid for lack of public participation as required by **Article 10 and 118 (b) of the Constitution**.

20. The Court of Appeal in **Christine Wangari Gachege –vs- Elizabeth Wanjiru Evans & 11 Others (2014) eKLR** restated the applicable law on contempt of court as that which was applicable before the enactment of the 2016 Act, and rendered that the applicable law, the English law on committal for contempt of court under Rule 81.4 of the England Civil Procedure Rules, which deals with breach of Judgment, Order or undertakings, was applied by virtue of **Section 5(1) of the Judicature Act**.

21. The application is therefore well grounded on the applicable law – see also **Samuel M. N. Mweru & Others –vs- National Land Commission & 2 Others (2020) eKLR**.

22. For a party to succeed in an application for contempt of Court order or decree, at least four elements must be satisfied;

a) That the terms of the order (or injunction or undertaking) are clear and unambiguous and are binding on the Defendant.

b) That the Defendant has knowledge of or proper notice of the terms of the order.

c) The Defendant has acted in breach of the order.

d) The Defendant’s conduct is deliberate.

23. Contempt proceedings are quasi – criminal in nature as the liberty of a person is at stake. The standard is therefore higher than in Civil Proceedings on a balance of probabilities but not beyond reasonable doubt as is required under Criminal Proceedings.

24. This principle was reiterated in the case **Gatharia K. Mutikika –v- Baharini Farm Ltd (1985) KLR 227** and cited in the case **Katsuri Ltd –v- Kapurchand Depar Shali (2016) eKLR** whereof it was stated

“the courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved ----- it must be higher than proof. On a balance of probabilities, almost, but not exactly, beyond reasonable doubt.”

25. The said Court proceeded to add, thus,

“the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge -----“

26. The test for when disobedience of a civil order constitutes contempt has been stated in the case **Samuel M. N. Mweru (Supra)** thus

“as whether the breach was committed “deliberately and malafide; A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good father avoids the infraction.”

27. Back to the ingredients:

**a) Whether the terms of the Court order were clear and unambiguous.**

The Judgment of the court (Gitari J) dated 18/5/2020 and the decree as drawn and issued on the 10/6/2020. In my view they were very plain and clear, with no ambiguity at all – see Par. 9 above.

28. The Orders clearly stated that the Plaintiff (father of minor) be granted physical legal and actual custody over the minor child;

That the defendants (respondents) do deliver up and/or surrender the minor to the Plaintiff; and further that the defendants were restrained from denying the plaintiff access to the subject minor and the Plaintiff be and was allowed to reside with the minor at his residence.

29. In my very considered view, there is nothing for further explanation or clarification in the court Judgment, it is in plain clear language, with no ambiguity at all.

That is why, being dissatisfied with the said decree, the Respondents moved back to court, by their application dated 10/6/2020, seeking stay of execution of the said orders pending appeal, exhibited by a Notice of Appeal dated 29/5/2020 only ten days after the said ruling. They can therefore not claim to have not been served, or been unaware of the court orders, otherwise they would not have lodged the Notice of Appeal and file the application for stay.

30. What followed was the ruling on the stay application by the court dated 14/8/2020. The court dismissed the application with costs and continued to render that the minor be produced before the Deputy Registrar by the Respondents within 14 days to be handed over to the Appellant, in compliance with the Judgment of the Court dated 18/5/2020.

31. Once again, the above order is in plain and clear language.

The 14 days period given by the court lapsed on the 28/8/2020. The said court orders were therefore binding on the Respondents.

**b) Whether the Defendants, had knowledge of the terms of the order.**

32. It is evident that the Respondents had full knowledge of

the Order. The said Order was emailed to their Advocates by the Deputy Registrar of the court, and physical service upon the Respondents by a Court Baliff, and an affidavit of service filed.

This is further buttressed by facts contained in the 2<sup>nd</sup> Respondent's Replying Affidavit sworn on the 12/10/2020, Paragraphs 8,9,10,15,16,20,21. He would not have deponed to the facts in the affidavit if he had no knowledge of the court decree and orders.

33. By his attending court before the Deputy Registrar on the 26/8/2020, and 27/8/2020 together with his Advocate is clear manifestation and confirmation that the Respondents had full knowledge of the Court orders.

**c) Whether the Respondents acted in breach of the court Orders, and**

**d) Whether the Respondents conduct was deliberate.**

34. By the 28/8/2020 when the court had stated as the period that the minor had to have been handed over to the Applicant, the Respondents had not done so. The court record shows that on the two occasions the 2<sup>nd</sup> Respondent and his Advocate appeared before the Deputy Registrar, the child was not present to be handed over to the Applicant, her father.

35. I have considered the explanation stated as to the failure to present the minor before the Deputy Registrar. On the 26<sup>th</sup> August 2020, the explanation was that, as averred in the Replying Affidavit that the minor and the 1<sup>st</sup> Respondent were at Mombasa, and that the period the Deputy Registrar gave them to bring the child to court on the 27<sup>th</sup> and 28<sup>th</sup> August was not enough for them to travel from Mombasa.

36. The Respondents were aware of the Court orders from the date the order was served upon them, by their Advocates who had indeed acknowledged receipt.

37. In any event, the Replying Affidavit was sworn by the 2<sup>nd</sup> Respondent on the 12/8/2020. There was therefore 16 days upto the 28<sup>th</sup> August 2020 for the Respondents to make arrangements, from wherever the child and the 1<sup>st</sup> Respondent were, to be ready to obey court orders to present the minor to the court.

38. I am not persuaded that the Respondents did not deliberately disobey court orders. It is an open and shut book, and clear to all and sundry, to see the deliberate and willful disobedience of court orders. The Respondent conduct cannot be explained otherwise, than that it was deliberate and willful.

39. As stated in the decision cited above, **Gatharia K. Mutikika (Supra)**, the standard of proof has been met, so is the test. The Respondents' guilt, by their own averments in their Reply Affidavit has strictly been proved.

40. There is no doubt that the Respondents willfully and deliberately disregarded the clear court orders, not once, not twice, but severally. They knew the full import of the court orders that they disobeyed. There was no mistake as to what they ought to have done – to present the minor before the Deputy Registrar to be handed over to her father, the Applicant. If they were in doubt, they never approached the court for clarification. They were in any event represented by a legal mind, who ought to, and is expected to explain to his clients the purport of a court order.

41. In the case **Hon. Basil (criticos –v- A. G & 8 Others (2012) eKLR**, Lenaola J, (as he then was) rendered that

**“It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”**

42. I am minded that though the Respondents had sought a stay order from the Court of Appeal, such stay is yet to be granted by the said court. As such, the orders and decree of the High Court ought to have been obeyed, up to and until the Court of Appeal renders itself. An appeal on its own is not, and cannot be a stay of a decree/order of the court.

43. This Court has not been told by either of the parties that the Learned Court of Appeal Judges granted temporary stay orders pending their substantive ruling. I stand guided if such interim orders of stay were granted; and if so, none were availed to me.

44. **Section 5 (1) of the Judicature Act** provides;

**“5 (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 uphold the authority and dignity of the Subordinate Courts.”**

45. I am aware that these contempt proceedings are in respect of a four (4) year old minor. She may not be able to fully comprehend what her grandparents may be fighting over with her biological father. One day, she will.

46. I concur with the Respondents' submissions that the best interest of the minor is of paramount importance, a fact this court jealously upholds. This however does not give the Respondents blanket powers and authority to disobey and disregard court orders deliberately and willingly.

47. Every deliberate act by a person has consequences – positive or negative as the case may be.

Having come to a finding that the Respondents are in contempt of valid court orders, I come to the conclusion that they are both guilty of wilful disobedience, and must therefore be punished accordingly, as provided under the law – **See Section 5 (1) Judicature Act (Supra)**.

48. **Article 159(1) of the Constitution** provides that Judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under the Constitution.

It is a crime to unlawfully and intentionally to disobey a court order.

49. The Applicant has urged that the contemnors be summoned to show cause why they should not be committed to serve Six(6) months imprisonment for disobeying the subject court orders, as well as be ordered to pay a fine.

50. It is trite that any person who commits an act of contempt of a court order is liable for punishment – **Shimmers Plaza Ltd –vs- National Bank of Kenya Limited (2015) eKLR** – where the court reiterated the importance of

respect for court orders.

51. The Court of Appeal in **Kyoga Hauliers Limited –v- Long Distance Truck Drivers & Allied Workers Union (2015) eKLR** held that

**“The power to deal with contempt of Court is provided under Section 5(1) of the Judicature Act, Section 63 (c) of the Civil Procedure Act and Order 40 Rule 31 of the Civil Procedure Rules.**

**Of importance in the determination of this issue is however Section 5 (1) of the Judicature Act ----- and resultant consequences which are punishment in the form of imprisonment or attachment and sale of the contemnor’s property.”**

52. The above holding was also held by the Court of Appeal, differently constituted, in Christine Wangare Gachege (Supra) that of relevance was Section 5 of the Judicature Act that provides for punishment of disobedience of court orders in the form of imprisonment or attachment and sale of the contemnor’s property.

53. For the foregoing, and in order to maintain the rule of law and uphold the dignity of the court, I hereby order and direct that the Respondents, FG and PGM having been found to be in contempt of lawful and valid court orders, do present themselves personally to this court, on a date and time to be stated, to show cause why they should not be subjected to appropriate court sanctions for their willful and deliberate disobedience of court orders.

54. However, in view of the pending Court of Appeal ruling in Civil Appeal No. 83 of 2020 on stay of execution of the said court orders, I hereby suspend the above orders to await the ruling, and for reasons that it would be in the best interest of the minor that this court awaits the ruling of the Court of Appeal, to avoid the child being tossed from one party to the other should stay orders be granted.

55. However, I order and direct that the Applicant shall, as soon as the Court of Appeal ruling is delivered, inform this court for necessary further Orders, in view of the Orders stated at Paragraph 53 above.

Orders accordingly.

**Dated, Signed and Delivered Electronically by consent at Kerugoya this 14<sup>th</sup> December, 2020.**

**J. N. MULWA**

**JUDGE**

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