



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 4 OF 2018

IN THE MATTER OF MALINDI CHILDREN'S CASE NO. 3 OF 2016

AND

IN THE MATTER OF APPLICATION FOR CONTEMPT UNDER THE CONTEMPT OF COURT ACT

AND

IN THE MATTER OF THE COURT ORDERS ISSUED BY THE MALINDI CHILDREN'S CASE NO. 3 OF 2016 ON 31ST DAY OF FEBRUARY, 2018

C C M.....APPLICANT

VERSUS

MNM.....RESPONDENT

JUDGEMENT

1. Through the notice of motion dated 6th March, 2018, which is said to be brought pursuant to sections 1A, 1B and 3A of the Civil Procedure Act, the Contempt of Court Act and all other enabling provisions of the law, the Applicant, CCM, seeks an order that the Respondent, MNM, be summoned to appear before this court and show cause why she should not be committed to civil jail for a period not exceeding two years for disobeying the orders issued on 21st February, 2018 in Malindi Children's Court Case No. 3 of 2016. The Applicant also prays for costs.

2. A summary of the Applicant's case, as gleaned from the grounds on the face of the application and an affidavit he swore in support of the application, is that on 21st February, 2018 he obtained an order from the Children's Court at Malindi in Case No. 3 of 2016 compelling the Respondent to pay interim monthly maintenance of Kshs.30,000 with effect from the date of the order. His averment is that the Respondent despite being served with the order and a demand notice being issued to her had failed to pay the amount as directed by the court. The Applicant opines that court orders must be obeyed so as to uphold the rule of law. He further avers that court orders should not be issued in vain. He states that it is only just and fair that the Respondent be committed to civil jail for contempt of the court orders.

3. The Respondent opposed the application through an affidavit sworn on 18th May, 2018. Her response is that the Applicant is her estranged spouse and they are both the parents of the three children who are the subject of the case before the Children's Court. She states that the Applicant has also filed divorce proceedings against her at the Chief Magistrate's Court at Malindi.

4. It is the Respondent's case that the orders issued at Children's Court were issued in her absence and that of her counsel. She also states that she had not been served with the application leading to the issuance of the said orders.

5. The Respondent avers that she had already filed an application seeking a review of the orders.

6. The Respondent further states that the order she is alleged to have disobeyed was in conflict with the order issued by this Court (Chitembwe, J) on 20th September, 2016. She asks the court to dismiss the application so that the parties can pursue the matter before the lower court.

7. The application was by consent of the advocates for the parties dispensed with by way of written submissions. The Applicant submits that since the Respondent did not file her response to the application within the time granted to her, the application should be allowed as being

unopposed. Further, that the act of failing to file a response to the application within the prescribed period was in contempt of the court orders thereby adding to the existing contempt. The Applicant proceeds to reiterate the contents of his application and stresses that the Respondent is in contempt of the orders issued by the Children's Court and should thus be punished.

8. In her submissions, the Respondent contends that the application ought to be dismissed for being defective, incompetent and an abuse of the court process. She emphasizes that she was unaware of the application that gave rise to the subject orders and that the orders were issued *ex-parte* in her absence and in the absence of her counsel.

9. According to the Respondent, the hearing of the application in her absence was an abuse of the court process and a denial of justice as she was not accorded an opportunity to be heard thus resulting in a breach of Article 50 of the Constitution. Further, that this application is an abuse of the court process as the Applicant ought to have filed and prosecuted the contempt of court application before the trial court. In the Respondent's opinion, the Applicant could only approach this Court in its appellate capacity and not for enforcement of court orders through contempt of court proceedings.

10. The Respondent further submits that the Applicant had failed to provide maintenance for eight months, as earlier ordered by the court, prior to securing the impugned orders surreptitiously thus acting against the principle that requires whoever approaches the seat of equity to do so with clean hands. Also, that contempt of court proceedings are of a serious nature as one can face imprisonment or a heavy fine.

11. Turning to another issue, the Respondent asserts that the orders sought to be enforced are in vain, unprocedural and are calculated at denying her justice as they contradict the ruling and orders of this Court dated 20th September, 2016 affirming the orders issued by the Children's Court on 8th June, 2016.

12. The Respondent points out that she had sought review of the orders sought to be enforced and a ruling had not been delivered and granting the prayers sought herein would render her review nugatory. She submits that the Applicant had incessantly filed applications at the Children's Court, instead of prosecuting the main matter, thereby abusing the court process and wasting judicial time.

13. The question is whether the Applicant has met the conditions for the grant of the orders sought.

14. The Respondent raised a jurisdictional issue in her submissions. Since a court must establish its jurisdiction before delving into the substance of the dispute before it, I will first address the issue of jurisdiction. The submission by the Respondent is that the alleged disobedience of the maintenance order can only be raised before the court that gave the order. The argument being that it is that court which has been put in disrepute and not this court to which the application has been filed.

15. Section 5 of the Contempt of Court Act, 2016 provides that: -

“Every superior court shall have power to –

a. punish for contempt of court on the face of the court;

b. punish for contempt of court; and

c. uphold the dignity and authority of subordinate courts.”

16. The cited provision empowers this court to punish those who act in contempt of the dignity and authority of subordinate courts.

17. A reading of Section 5 of the same Act clearly shows that a subordinate court can only address contempt perpetrated on the face of the court. The alleged disobedience for which the Applicant seeks to have the Respondent punished was not committed on the face of the trial court. It is therefore clear that the Applicant has knocked on the right door. The Respondent's claim that this court has no jurisdiction to deal with the matter is therefore without merit.

18. The Applicant alleges that the Respondent disobeyed both the maintenance order and the directions given by this court for filing a response to the instant application. It goes without saying that court orders are never issued in vain and the same must be heeded in order to uphold the rule of law. The Applicant's assertion that the Respondent did not file her response to the application within the time given to her is indeed correct. She actually filed the reply sixteen days later and without the leave of the court. However, the Applicant did not move the court to strike out the late response so that the issue could be addressed appropriately. By taking up the matter at the submission stage the Applicant intends to lock out the Respondent from participating in these proceedings. The constitutional requirement for the courts to do substantive justice cannot allow me to agree with the Applicant that his application is unopposed. Justice requires that the Respondent be heard. I thus find that her response is properly before the court.

19. Turning to the main issue, I note that the Respondent was indeed served with the court orders. However, she has disclosed that she has already applied to have the orders set aside since the same were issued without her knowledge. Her averment is that she was not even aware of the application. This is not a good reason for not punishing her for disobeying a court order. Once a court order is issued, it must be obeyed even as the party aggrieved by the order takes remedial action by way of appeal or application for review.

20. However, it is also noted that the order was allegedly received on 28th February, 2018 by the Respondent's counsel. Without giving the Respondent a breather, the Applicant swiftly commenced these proceedings a week later. The question is whether the Respondent can be said to have disobeyed the court order. The order was issued on 22nd February, 2018 and by the time the application was filed on 7th March, 2018 one month had not lapsed. The order required the Respondent to pay maintenance of Kshs. 30,000 per month with effect from the date

of the order. A month had not lapsed from the date the order was issued by the time the Applicant filed this matter. She was therefore not in disobedience of the court order. This application was therefore brought prematurely and it should fail for that reason.

21. It is also observed that the order the Applicant seeks is unlawful. Section 28 of the Contempt of Court Act provides the penalty for a person who is convicted of contempt of court as a fine of Kshs. 200,000 or imprisonment for a term not exceeding six months. The Applicant's prayer to have the Respondent jailed for two years is therefore illegal and this court cannot issue such an order.

22. Although Section 4(1)(a) of the Contempt of Court Act defines civil contempt as **"willful disobedience of any judgement, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court"**, I am of the opinion that parties should be slow in resorting to the Contempt of Court Act where there are other procedures for enforcing court orders. In seeking to enforce a monetary decree, for example, I do not see why a decree holder should forego the procedure provided in the Civil Procedure Rules, 2010 and seek to have the judgement debtor taken through contempt of court proceedings which are criminal in nature. The impression one gets in such a situation is that the decree holder is driven by ill motive and not the desire to harvest the fruits of the judgement. In the circumstances of this case, I find that the Applicant ought to have resorted to the rules governing execution of decrees as enacted in the Civil Procedure Rules, 2010.

23. In short, the application herein is without merit. The same is dismissed.

24. Although I am often reluctant to award costs in matrimonial matters, I find that the Applicant must meet the costs of the Respondent. It was not necessary to institute these proceedings. The Applicant cannot be allowed to drag the Respondent through the court corridors by filing litigation after litigation against her without being made to feel the pain of his litigious streak. My statement that the Applicant is a litigious person is not idle. He is the ex-parte Applicant in Malindi H.C. Judicial Review Application No. 15 of 2017 in which the Respondent is an Interested Party. For the stated reason, the Applicant is condemned to meet the Respondent's costs in this matter.

Dated, signed and delivered at Malindi this 18th day of October, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT