REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 23 OF 2016

RODGERS NYAUNDI MBAKA .....APPELLANT

VERSUS

FRED RIANG'A .....RESPONDENT

(Appeal from the Judgment and Decree in Kisii CM Civil Case No. 499 of 2015 (Hon. J.M. Njoroge SPM)

RULING

1. This is an appeal against the judgment and decree of the Senior principal Magistrate at Kisii delivered on 20th April 2016, in Kisii **CMCC No. 499 of 2015**, which pitted the appellant, **Rodgers Nyaundi Mbaka,** and the respondent, **Fred Riang'a**, and another.

The appellant was aggrieved by the decision and therefore preferred this appeal on the basis of the grounds contained in the memorandum of appeal dated 27th April with a view to having the impugned decision set aside.

2. A Notice of Motion dated 27th April 2016, was filed by the appellant at the same time with the memorandum of appeal.

The application sought orders of stay of execution of the decree as well as temporary injunction orders against the respondent. It was fixed for inter partes hearing on the 11th May 2016, when the respondent failed to appear. It was therefore re-scheduled to the 7th June 2016, when the respondent again failed to appear.

3. Nonetheless, the application was heard "ex-parte" the respondent and orders were granted as prayed in terms of prayers four (4) and six (6).

A stay of execution of the decree was granted pending the hearing and determination of the appeal.

In granting the order, the court specified that the stay was at most with regard to the custody of the two issues born out of the alleged cohabitation.

The order was ultimately extracted on the 13th June 2016, for service upon the respondent.

4. The court record does not however, contain any evidence of service of the order upon the respondent but there is a letter dated 7th December 2016, addressed to the Deputy Registrar of this Court by the appellant requesting for an order to the OCS/OCPD Kenyenya Police Station to enforce the court order.

There is also another letter dated 13th December 2016, addressed to the Deputy Registrar by the respondent indicating that he was never served with the memorandum of appeal and by extension the material court order.

For the avoidance of doubt, both letters did not amount to evidence of service upon the respondent of the memorandum of appeal and/or the material court order.

5. It is instructive to note that in his letter, the respondent implied that his purported signature as appears in the memorandum of appeal or any other related document was forged. He made a request to have the matter investigated by the Criminal Investigations Department (C.I.D). It is not clear whether or not the request was granted.

Be that as it may, a fresh application was filed by the appellant vide a notice of motion dated 15th December 2016 or thereabout seeking orders to cite the respondent for contempt of court for disregarding and disobeying the orders of the court made on 7th June 2016 and to have him committed to prison for a period of six (6) months.

6. In his supporting affidavit, the appellant averred that on the 9th December 2016, he went with the police to enforce the court order but the respondent refused to comply. He therefore implied that the respondent was served with the order and was well aware of its existence. However, there was no evidence to confirm the service or that the respondent was made aware of the court order. At least, there should have been an affidavit of service or a corroborating supporting affidavit from any of the police officers who accompanied the appellant in search of the respondent when he allegedly declined to comply with the order.

7. The appellant presented his application of the 15th December 2016, in court on the 19th December 2016, whereupon it was certified as urgent and an order made to have it served for inter partes hearing.

Indeed, the matter came up for inter-partes hearing on 25th January 2017, and was argued on behalf of the appellant by the learned counsel, **Mr. Nyagwencha**, in the absence of the respondent who failed to appear despite having been duly served with the application and the requisite hearing notice as demonstrated in the affidavit of service filed herein on 23rd January 2017.

8. Upon due consideration of the application in the light of the supporting grounds and in view of what has been stated hereinabove regarding the unavailability of evidence to show that the respondent was actually served with the material stay order of the 7th June 2016 but declined to comply, this court is unable to allow the application in as much as it seeks drastic orders against the respondent.

Again, the source of the court's jurisdiction to punish for contempt is S.5 (1) of the Judicature Act, which provides that:-

> *"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 upholding the authority and dignity of subordinate courts."*

9. Undoubtedly, an order of the court may be enforced by an order of committal against any person. However, an application for such an order must be preceded by an application for leave to make the application for committal.

Herein, the substantive application was made prior to grant of leave by the court to make it. Therefore, the application is premature for grant of the orders sought.

Besides, even if the application was properly commenced, the appellant was obliged to show that a copy of the subject court order was served upon the respondent who was the person to be bound by it. In the English case of **Hadkinson Vs Hadkinson (1952)2 ALL ER 567**, it was stated that:-

"Disregard of an order of the court is a matter of sufficient gravity whatever the order may be. Where, however, the order relates to a child, the court is (or should be) adamant on its due observance……..

Such an order is made in the interest of welfare of the child, and that the court will not tolerate any interference with or disregard of its decisions in these matters."

10. Disobedience of court orders and in particular those involving children is a grave matter which should not go unpunished. However, punishment can only be inflicted if it is shown that the person alleged to be in disobedience of the order was notified accordingly and was thus aware of the order but chose to deliberately ignore it (see, **Ochino & Another Vs. Okombo & Others (1989)KLR)**.

The appellant herein has failed to establish that the respondent was served with the subject order and therefore well aware of it. The appellant also failed to seek leave of the court prior to bringing this application.

It is for all the foregoing reasons that the application is hereby disallowed and dismissed.

What the appellant should do is to strive to have his appeal heard on the merits in the shortest time possible if only to safeguard the interests of the affected minors.

[Delivered and signed this 31st day of January 2017].

J.R. KARANJAH

JUDGE

In the presence of

Mr. Ndege holding brief for Nyagwencha for Applicant

Njoroge CC