



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 14 OF 2017

E A M APPLICANT

VERSUS

P A A RESPONDENT

RULING

1. This is a ruling in respect of a Preliminary Objection dated 13th March, 2017, wherein the respondent challenged the appellant's Notice of Motion dated 13th March, 2017 on grounds that:

(a) The appellant is in blatant and fragrant contempt and continued disobedience of court orders given on 18th December, 2015 and further confirmed on 17th February, 2017 and therefore has no right of audience before this honourable court and should not be heard until or unless the contempt is purged.

(b) That continuing to hear and entertain the appellant's application, will grossly erode the dignity and honour of this honourable court and puts the court into total disrepute and making any further orders or taking further proceedings will constitute an act in vain as the appellant treats this court with impunity.

(c) That the appellant's application for stay of execution of the orders of this court having been heard vide a similar motion dated 3rd August, 2016 and dismissed on 27th February, 2017, the present application dated 13th March, 2017, is resjudicata and constitute a gross abuse of the court process.

(d) That the appellant is not interested in having the suit which she filed under certificate of urgency in the Children's Court heard and determined on merit and since the case has already been fixed for hearing on 27th April, 2017, this entire appeal and proceedings are only meant to delay, frustrate and stall the hearing and the same should be rejected summarily as being in gross abuse of the court process.

2. The impugned application herein dated 13th March, 2017 was filed pursuant to Order 42 rule 6 and order 51 rules 1 – 3 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking orders as hereunder:

(a) That the application be certified urgent.

(b) That service of application be dispensed with at the first instance owing to the urgency of the matter.

(c) That there be a stay of execution of the ruling delivered herein on 17th February, 2017, by the Children's Court pending the hearing of this application or until further orders of this honourable court.

(d) That there be a stay of execution of the ruling delivered on 17th February, 2017, by the Children's Court pending the lodging, hearing and determination of the appellant/applicant's intended appeal to this honourable court.

(e) That costs be provided for.

3. Application is premised on grounds on the face of it and affidavit in support deponed on the 13/3/2017 by E A M appellant/applicant herein.

4. Before I embark on the substantive issues for determination in respect of the Preliminary Objection, a brief background on this matter would suffice. Pending before Milimani Children's Court is Children Civil Case No. 11/15 in which the appellant/applicant (plaintiff) sued her husband the respondent herein seeking orders among others vesting legal custody of their children B A "M" A born 19th February, 2014 and T M A born 6th October, 2007 pending hearing and determination of the suit.

5. Further to the said custody orders, the appellant/applicant prayed for court orders directing that her father and mother T M and Z B A M respectively be appointed the legal guardians of the minors and that the respondent (defendant) be granted only supervised access pending hearing and determination of the application dated 7th January, 2015 which had been filed simultaneously with the plaint.

6. On 8th January, 2015, the appellant who works for gain and resides in Juba Southern Sudan was granted *ex parte* orders in respect of the said application thus securing temporary custody of the two minors culminating to the children being taken away from their biological father then residing at South B. As per the court order, the children were taken and left under the care and control of their maternal grandparents then residing at Loresho as the applicant who is now separated from the respondent pending divorce proceedings left for her work place at Juba Southern Sudan.

7. Upon *inter partes* hearing, the trial court delivered its ruling on 13th December, 2015 dismissing the application dated 7th January, 2015 on grounds that the appellant was not staying with the children. Consequently, the court directed her to return the children to their father (respondent) who would then assume full parental responsibility as he had done prior to the temporary removal following the orders of 8th January, 2015.

8. Despite service of the court order extracted on 18th December, 2015 directing her to release the children, the appellant/applicant ignored and or disobeyed the same. However, vide application dated 3rd August, 2016, the appellant/applicant sought review of the orders of 18th December, 2015. On 17th February, 2015, the learned Magistrate dismissed the review application and directed the appellant to obey the orders of the court first before seeking any further orders and in default a warrant of arrest to issue for contempt.

9. Aggrieved by the orders of the court, the appellant/applicant rushed to the high court seeking stay orders among other prayers. It is this application which gave rise to the filing of the Preliminary Objection herein challenging the same. On 11th April, 2017, the court made directions that the Preliminary Objection be heard first and a temporary stay order was issued in terms of prayer three pending hearing and determination of the Preliminary Objection. Both counsels agreed to dispose of the Preliminary Objection by way of written submissions.

10. In his submissions filed on 24th April, 2017, learned counsel Mr. Kopere for the respondent submitted that, although the court had granted a temporary stay against execution of warrant of arrest issued against the appellant as ordered on 17th February, 2017, the original orders issued on 18th December, 2015 are

still in force. Counsel submitted that, the appellant cannot be heard on her appeal before the first and essential step towards purging the contempt is done by returning the children to the father within the jurisdiction of the court.

11. In an effort to bolster his argument, counsel quoted the case of Hadkinson vs Hadkinson(1952) ALL ER in which their Lordship Justices Somervell and Romer held as follows:

“it was the unqualified obligation of every person against, or in respect of whom, an order had been made by court of competent jurisdiction, to obey it unless and until that order(s) was discharged”.

12. Mr. Kopere quoted several authorities all dealing with consequences of a contemnor not being heard before purging the contempt (See Mawani vs Mawani (1977), Ramesh Popatlal and 2 others vs NIC Bank (2005)EKRL, Clarke and others vs Chadburn and others (1985)ALL ER, Leah Agao Onguto vs Cotu (2004))Ekrl. In Pharmacy and Poisons Board vs Sipri Pharmaceuticals Ltd. Misc appeal No.103/98, Court of appeal refused to entertain an applicant for stay on grounds that the appellant had not complied with the lower court’s orders and therefore directed the applicant to purge the contempt first before being heard.

13. Lastly, learned counsel opined that, the applicant having filed an application for review and subsequently another application for stay which were all dismissed before the trial court, she cannot again come to the high court with similar application hence doctrine of resjudicata applies.

14. In response to the respondent’s submission, senior counsel Gibson Kamau Kuria filed his submissions on 5th May, 2017 wherein he submitted that, the orders issued by the trial court suo motto against the appellant in case she failed to release the children to the respondent within 21 days was contrary to the rule of law. Counsel referred the court to the case of Provincial Insurance Company of East Africa Ltd. vs Nandwa (1995 to 1998)IEA 288) in which the court referred to the words of LJ Scrutton LG in Blay v Pollard and Marris (1930)IKB 682 where it was held:

“cases must be decided on the issues on record and if it is desired to raise other issues they must be made on the record by amendment”. In the present case, the issue on which the Judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.

15. The learned counsel asserted that, the trial magistrate’s order contravened the appellant/applicant’s right to a fair trial under Article 50 of the Constitution as he was not given the right to be heard and the ruling directing release of the children to the respondent does not advance the best interests of the child as required by Article 53(2) of the Constitution as interpreted in Atwal vs Amrit (2011) EA 20.

16. Counsel contended that unless the application is heard and stay orders granted, the intended appeal will be rendered nugatory and the subject matter must be preserved. To that extent, he referred the court to the case of African Safari Club vs Safe Rentals Ltd, Nairobi Court of Appeal Civil Appeal No. 53/2010.

17. In reply to the respondent’s submissions that a contemnor cannot be given a hearing before purging the contempt, Senior counsel Kamau Kuria cited the case of Rose Detho vs Ratilal Automobiles Ltd and 6 Others (2007) EKRL in which the court departed from the general rule articulated in the case of Hadkinson vs Hadkinson (1952) 2 ALL ER 567 thereby exercising discretion and stayed the high court orders threatening to imprison the contemnor pending hearing and determination of the appeal.

18. I have considered submissions by both learned counsels and several authorities quoted. I have perused the lower court proceedings which are clear on the face of it. Issues for determination are:

(a) Can this court accord the appellant a hearing before purging the contempt against the lower court orders issued on 18th December, 2015;

(b) What injustice or prejudice would the respondent suffer if the orders for stay were granted;

(c) Alternatively, what prejudice will the applicant suffer if the orders for stay were not granted.

19. It is settled law that grant of stay orders is purely a discretionary act to which a court is clothed with unfettered powers. The rationale for grant of stay orders pending appeal is articulated clearly under Order 42 rule 6 which sets out grounds inter alia: whether the applicant is likely to suffer substantial loss: whether application is made without inordinate delay and whether provision for security as the court may impose has been made.

20. Essentially, the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal is safeguarded and the appeal if successful is not rendered nugatory. However, in doing so, the court should weigh against the success of a litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. **(See M/S Portreitz Maternity vs James Karanja Kabia Civil Appeal No. 63/1997).**

21. In the instant case, there is no dispute that there is a court order issued by a competent court on 18th December, 2015 directing the appellant to return the minors back to their father after it had given temporary custody to the appellant their mother on 8th January, 2015 who then left them under the care and control of her parents and left for Southern Sudan where she resides and works for gain contrary to the court order.

22. Did the appellant's failure to honour the court order of 18th December, 2015 border on contempt of court to which she does not deserve a hearing before the lower court nor the high court?

23. Both parties are in agreement that, the order of 18th December, 2015 is still in force and the same has not been reviewed, set aside nor stayed. It is also admitted that the children are still with the appellant's parents despite a release order being in force.

24. Does the appellant deserve a hearing before this court without first purging the contempt? Several authorities were quoted by the respondent's learned counsel Mr. K'opere and more particularly the celebrated decision in the case of **Hadkinson vs Hadkinson (Supra)** in which the court held that;

“the fact that a party to a case has disobeyed an order of the court, is not of itself a bar to his being heard, but if the contempt impedes the course of justice, then the court may use its discretion and refuse to hear him”. This position has been applied in several cases among them **Mawani vs Mawani (Supra)**.

25. Although the general rule is as stated in the **Hadkinson vs Hadknison and Mawani vs Mawani**, Senior Counsel Gibson Kamau Kuria submitted that there are exceptions to that rule as laid out in the case of**Detto vs Ratalal Automobile Ltd (Supra)**. In this case, the court entertained the applicant and granted stay despite the existence of a contempt order in force on grounds that the stay would not impede the course of justice in the circumstances.

26. There is no doubt that the instant application was filed within reasonable time and that if the Preliminary Objection herein is allowed, the appeal will be rendered nugatory. It is however a delicate Act in which the court must balance between individual rights and that of upholding the dignity of the court. Obviously the later will take precedence.

27. I am therefore left with the issue whether the appellant should purge contempt first before hearing her application for.

28. A court order is a sacrosanct tool through which courts communicate and exert its authority and therefore non compliance thereof will erode the authority, dignity, confidence and integrity bestowed upon our judicial system hence undermine the rule of law. To encourage defiance will be a kin to perpetuating impunity, anarchy and the law of the jungle in which people will be at liberty to conveniently choose which court orders to obey or not to.

29. Can one say that the continuing act of contempt herein will impede the course of justice? It is clear from the lower court order and proceedings that the court was safeguarding the interest of the minors who have been left at the care and control of their grandparents instead of their parents who are alive and who ranks first in the order of priority. It is in the best interests of the minor to get parental love, protection and guidance (See Article 19 of the African Charter on the rights and welfare of the child and Article 18 of the Convention on the rights of a child).

30. It will amount to an impediment to justice and a gross violation of the constitutional and statutory right to deny the minors herein parental care, love, guidance and protection. The appellant has abdicated her parental responsibility by abandoning the children with her parents contrary to a court order. In any event, she had a right to challenge the order of the court dated 18th December, 2015 rather than disobey the same. She was fully represented before the trial court issued the order and she cannot therefore claim that she had been condemned unheard.

31. To that extent, the facts in the case of Rose Detto above quoted by Dr. Kamau Kuria are clearly distinguishable from the facts in this case. I do agree with Mr. Kopere that, the appellant should purge the contempt first before seeking court intervention.

32. As to whether the matter is Resjudicata, the same is not applicable as similar application has not been heard and determined before this court. The denial of a stay order before a trial court is not a bar to filing a similar application before the high court. This position is clearly taken care of by Order 42 rule 6 of the Civil Procedure Rules.

33. For the above reasons stated, the Preliminary Objection herein is upheld and the temporary stay orders issued on 11th April, 2017 set aside. The applicant's application dated 13th March, 2017 be held in abeyance as the same shall not be heard until the applicant has purged her contempt by returning the children to the respondent as directed by the Children's Court on 18th December, 2015. This being a family matter, each party will bear his or her own costs.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of:

Dr. Kamau Kuria Counsel for appellant

Mr. K'opere Counsel for respondent

Edwin Court Assistant