



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION NO. 31 OF 2015

IN THE MATTER OF S W M (A MINOR)

S W M (MINOR)..... APPLICANT

(A child suing through his mother and next friend

W R N)

VERSUS

EPHRAIM MUNENE NJERU..... RESPONDENT

R U L I N G

1. This is the application dated 9/11/2015 seeking a declaration that the respondent has continued disobeying the court order issued on 10/12/2014 which he is fully aware of and that the respondent be cited for contempt. The application is supported by the affidavit of W R N.
2. In the affidavit it is stated that the respondent has continued to defy the court orders and that warrants of arrest have numerously been issued against him. The respondent's wife has been bonded by court to attend court for sending offensive text messages to the applicant. The court order of 10/12/2015 ordered the respondent to pay Kshs.165,000/= to maintain the minor. The respondent paid Kshs.32,000/= leaving a balance of Kshs.133,000/=. The said minor has continued to suffer.
3. Counsel for the respondent filed grounds of opposition in which he stated that no leave was sought to bring the application for contempt as per Section 5 of the Judicature Act. An application for contempt for committal to enforce an order to pay money is not appropriate as the applicant has not exhausted the provisions for execution of decrees under Order 22 of the Civil Procedure Code. It was argued that the applicant has been paid over Kshs.132,000/= by the respondent but no evidence was produced.
4. The law applicable in contempt proceedings is provided for in Section 5 of the Judicature Act provides that;

5(1)The High Court and the Court of Appeal shall have the same power to punish for contempt of court as 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.

5(2) An order of the High Court made by way of punishment for contempt of court shall be applicable as if it were a conviction and sentence made in exercise of the original criminal

jurisdiction of the High Court.

81.4 of Rules the English Civil Procedure Rules provides that;

Enforcement of judgment, order or undertaking to do or abstain from doing an act

(1) *If a person –*

(a) *required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or*

(b) *disobeys a judgment or order not to do an act, then, subject to the Debtors Acts 1869² and 1878³ and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.*

(2) *If the time fixed by the judgment or order for doing an act has been varied by a subsequent order or agreement of the parties under rule 2.11, then references in paragraph (1)(a) to the time fixed are references to the time fixed by that subsequent order or agreement.*

(3) *If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation.*

(4) *So far as applicable, and with the necessary modifications, this Section applies to undertakings given by a party as it applies to judgments or orders.*

(Rules 81.17(3) and (4) make provision for cases in which both this Section and Section 6 (Committal for making a false statement of truth or disclosure statement) may be relevant.)

(5) *If a judgment or order requires a person to deliver goods or pay their value –*

(a) *the judgment or order may not be enforced by a committal order under paragraph (1);*

(b) *the person entitled to enforce the judgment or order may apply to the court for an order requiring that the goods be delivered within a specified time; and*

(c) *where the court grants such an order, that order may be enforced under paragraph (1)*

5. It was held in the case of **CHRISTINE WANGARI GACHEGE VS ELIZABETH WANJIRU EVANS & 11 OTHERS [2014] eKLR** Rules.

Following the implementation of the famous Lord Woolf’s “Access to Justice Report, 1996”, The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently, on 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and PART 81 thereof effectively replaced Order 52 RSC in its entirety. PART 81 (Applications and Proceedings in Relation to Contempt of Court) provides different procedures for four different forms of violations.

Rules 81.4 relates to committal for “breach of a judgment, order or undertaking to do or abstain from doing an act.”

Rule 81.11 - Committal for “interference with the due administration of justice” (applicable only in criminal proceedings).

Rule 81.16 – Committal for contempt “in the face of the court”, and

Rule 81.17 - Committal for “making false statement of truth or disclosure statement.” It is clear from

*this summary that leave, now called “permission” is not required where committal proceedings relate to a breach of a judgment, order or undertaking.....We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the **Second Supplement to the 2012 White Book** that no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court’s order. The application is for that reason, incompetent and is struck out with costs.....”*

6. The Court of Appeal decision on Section 81:4 of the English Civil Procedure Rules, clearly demonstrate that leave to institute contempt proceedings is not required where the committal relates to breach of a judgment or order or undertaking to do or abstain from doing an action. The applicant did not therefore require the leave of the court to institute these proceedings.

7. The second issue raised by the respondent in his grounds of opposition that the applicant did not exhaust the provisions of execution of Order 22 of the Civil Procedure Act Cap. 21. He did not swear an affidavit to explain what part of Order 22 was not complied with. Neither did the respondent attend court to argue his grounds of opposition.

8. Assuming that the respondent is referring to engaging the powers of the court in execution of a decree, it is noted that the applicant has claimed that several warrants of arrests have been issued against the respondent to show cause for default of complying with the orders of the court to pay the maintenance as ordered by the court. This was one of the ways of execution provided for under Order 22 Rule 38(d). These averments were not disputed by the respondents.

9. The respondent has not explained to the court what efforts he has made to settle the arrears of which have been outstanding since 2014 and which were not in dispute on 10/12/14 when the parties appeared in court. He admitted through his counsel in court in an earlier submission that he owes arrears in respect of the decree and tried to justify himself that he has been paying monthly installments of Shs.15,000/= per month without defaulting. He also explained that the arrears were as a result of non-payment during the initial period after the order was made.

10. The applicant has annexed correspondence showing that on 6/12/2013, in Embu Chief Magistrates Courts Children case No. 1 of 2013, the respondent was ordered to pay monthly maintenance of Shs.15,000/= in favour of child M. The parties have been to court severally in attempts for execution of the decree. The arrears which accrued before the respondent started paying the monthly sums regularly are admitted by both parties save some difference in the amount owing.

11. The court made a further order on 10/12/2014 that the parties agree on the mode of payment of the arrears of Shs.165,000/= outstanding for the month of February to April 2014. The applicant avers on oath that the respondent has been uncooperative and has adamantly refused to obey the order of the court and that numerous warrants of arrest have been issued against him. There was no denial of these allegations.

12. The applicant is only required to show that there is an existing and valid court order made by a competent court and that the respondent is aware of the order through service or by having participated in the proceedings. It has to be shown that the applicant has made attempts to have the respondent be ordered to comply with the order.

13. There is no doubt that the order of the court for payment of monthly sums of Shs.15,000/= is in existence and of which the respondent is aware. The respondent has appeared before the magistrate's court on notice to show cause. Warrants of arrests have been issued and a salary attachment order has been issued against the respondent though not executed for reasons not given herein.

14. On 10/12/2014, the court in one of the appearances before the court to show cause made an order that execution be put on hold and that parties agree on the payment of the arrears.

15. The applicant has explained in her evidence which was not denied that the respondent has failed to co-

operate in order to have an amicable settlement of the debt.

16. It is my finding that the applicant has established the main requirements in this application. The application is merited and is hereby allowed with costs to the applicant.

17. Summons requiring attendance to issue against the respondent, if not present in court during delivery of this ruling.

18. The court will make further orders regarding the period of committal after the respondent has been presented or has appeared before it.

DATED, DELIVERED AND SIGNED AT EMBU THIS 26TH DAY OF JULY, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

1. Applicant in person

2. Ms Kiragu for Gitonga for the respondent