



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO.313 OF 2013

S N R.....APPELLANT/APPLICANT

-VS-

F M.....RESPONDENT

RULING

[1] Before me is a Notice of Motion Application which is expressed to be brought pursuant to Order 42 Rule 6 (1) (2) and Section 3 and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya in which the Applicant seeks the following orders:

1.*spent*
2. *The Hon court do stay the orders issued on 4th December 2013 committing the Applicant to civil jail for 1 month and order his release forthwith pending the hearing and determination of this application and application dated 17th September 2013 or until further orders of this court.*
3. *The Hon court do make further orders as may meet the ends of justice.*
4. *Costs of this Application be provided for.*

[2] The Application is supported by the affidavit sworn by his counsel on record Esther Gathoni Mwangi and on the grounds set out on the face of the application. In a nutshell, counsel deposed inter alia that despite the Applicant stating that his counsel was in a funeral and he needed to be there to represent him, the Hon trial court seemed to be in a haste to condemn the Applicant to civil jail. She further deposed that the Applicant seemed to have been condemned because of absence of counsel. She was of honest opinion that the court should be aware that most litigants are intimidated by court and in the absence of counsel, they are unable to express themselves and therefore, it was totally unfair to require the Applicant who is represented by counsel to answer to an application that he did not even have at hand. She did not stop there; counsel averred that there existed an Application dated 17th September 2013, which had never been heard and that the most the court could have done in the circumstances was to fix the said application for hearing. She concluded by stating that the Applicant risked being dismissed from work as a teacher if he continued to be incarcerated. In any event counsel stated that this case was coming up for mention and not for notice to show cause; but counsel for the Respondent took advantage of her absence to seek committal orders which were illegal and irregular.

[3] The Respondent filed a Replying Affidavit on 27th March 2014 in opposition to the application. In the affidavit, the Respondent averred that on 13th October 2010, the court made orders requiring the Appellant to be paying Kshs 5,000 per month; that the Applicant duly complied with the said order until

March 2011, when he ignored the orders despite various reminders by her advocates on record. She further contended pursuant to her instructions her advocates filed an application dated 17th September 2013, seeking inter alia an order directing the Applicant to show cause why he should not be committed to civil jail for defying, ignoring, assuming and or refusing to obey a lawful court order dated 13th October 2010 and that the defendant To purge the contempt by paying Kshs 85,000 upfront. The Respondent contended that the said Application came up for hearing on several occasions but despite service it could not proceed on account of adjournment by the Applicant's lawyer and that specifically on 20th November 2013, the Applicant was in court and he said "*I pray for one week to pay maintenance for my children and the purge contempt.*" Again, she contended that on 4th December 2013, they attended court and the Applicant was represented by one Wamache holding brief for Ms Mwangi and that it was against this background that the court made orders which are the subject of challenge in this application.

Submissions by the Applicant

[4] The Applicant submitted substantially reiterating the contents of the supporting affidavit which I need not rehash. But, the submissions laid emphasis on the fact that the Applicant was not given a chance to be represented by counsel before he was committed to civil jail yet there was good reason for absence by counsel, thus, in effect, the court did not give the Applicant a chance to explain the circumstances in which he had stopped payment of the monthly installments ordered by the court. Again, counsel took the view that committal to civil jail could not be issued during mention. Stay was therefore merited as it had been shown that the arguable is appeal. The application was also filed without delay and that he had complied with the conditions set by the Hon court.

Submissions by the Respondent

[5] The Respondent also reiterated the contents in her Replying Affidavit in her submissions except she stressed that this being an appeal emanating from a children's case needs to be determined expeditiously. She submitted that she felt that the main purpose of this appeal was to stall both the lower court case and monthly contributions ordered by the court. She further humbly requested that the money deposited in court i.e. Kshs 50,000 be released immediately to her to pay school fees and upkeep of the children who were in dire need of amenities.

DETERMINATION

[6] After careful consideration of this Application and the rival submissions by the parties, I take the following view of the matter. This is essentially an Application for stay of the orders issued on 4th December 2013 committing the Applicant to civil jail for one month pending the hearing and determination of this Application and the one dated 17th September 2013 or until further orders of the court. From the record stay of committal to civil jail was granted by this court (Lesiit J) on 9th December 2013 subject to the Applicant paying a sum of Kshs 50,000 to court. Both parties have intimated to this court that the Applicant complied with the said order although it is not clear when the money was deposited. The Respondent urged court to order release the money deposited in court to be applied towards payment of school fees and for up keep of the children who are said to be in dire need of better amenities. The reason given is that the money was serving no purpose in court.

[7] I have really agonized over this case as it shall become clearer as I progress with this decision. First and foremost, the issues being canvassed are quite heavy and substantial questions of law on the liberty of the Applicant on the one hand, and the child's best interest on the other hand. I note that this appeal only relates to the order of committal to civil jail made by the trial magistrate. But, that order was effectively stayed by the court vide its orders of 9th December 2013 as the parties have confirmed the conditions thereto were complied with. Therefore, at least going by the record, the liberty of the Applicant is not at risk of being taken away. In any event, I set aside the said committal orders in the interest of justice. Be that as it may, the application dated 17th September 2013 is still pending before the trial court and it relates to compliance with orders of the trial court; relating to matters of the child in question. In the circumstances, the echoes of the command in the constitutional principle in article 53(2) of the

Constitution that *“A child’s best interests are of paramount importance in all matters concerning the child”* rings back to the court in a resounding manner. And, thus, I am of the considered view that I should take a course which serves the best interest of the child in line with the above peremptory command of the Constitution. I hold that the issues in the application dated 17th September, 2013 should be resolved immediately by the trial court. Accordingly, in exercise of the inherent powers of the court, I direct that NKUBU CHILDREN’S COURT CHILDREN CASE NUMBER 1 OF 2010 shall be heard by a magistrate of competent jurisdiction other than the magistrate who issued the orders that had been challenged herein; and specifically shall hear and determine the Application 17th September 2013 on a priority basis but not later than 45 days from today. Second, I order that the sum of money deposited in court pursuant the orders of Lesiit J shall be forthwith released to the NKUBU court to be held by that court until further orders by the said court in the NKUBU CHILDREN’S COURT CASE NO 1 OF 2010 in relation to payment of school fees for, upkeep and maintenance of the child. No order as to costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 28th day of November 2016

F. GIKONYO

JUDGE

In the presence of:

Thangicia advocate for Ondari advocate for respondent.

Kaimenyi advocate holding brief for E. Mwangi advocate for appellant.

F. GIKONYO

JUDGE