



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 91 OF 2014

S O N.....APPLICANT

V E R S U S

E A O.....RESPONDENT

RULING

1. The application I am called upon to decide is the Motion dated 13th May 2014. It seeks that E A O, hereinafter referred to as the respondent, be cited for contempt of court and thereafter punished in accordance with the law relating to contempt of court.

2. The order said to have been violated or breached was made on 3rd April 2013 in *Nairobi Children's Court Children's Case No. 18 of 2009*, where the parties hereto were litigating over various issues relating the child the subject of these proceedings.

3. The formal order extracted from the ruling delivered by the Children's Court on 3rd April 2013 states the orders made as follows-

- a. That respondent herein was to have actual custody care and control of the child;**
- b. That both parties were to have joint legal custody;**
- c. That the applicant herein was entitled to unlimited but reasonable access to the child, and, in particular, access on alternative weekends and half of school holidays. The significant holidays were to be alternated annually;**
- e. That the parties were to agree on the issue of the school to be attended by the child, failing which the court was to determine the matter; and**
- f. That the applicant herein was granted the right to provide for the child as he had always done, but he was compelled to cater for the child's school fees and related expenses at a school to be agreed upon.**

4. Being dissatisfied with the said orders, the applicant herein filed High Court Civil Appeal No. 25 of 2013, and interim orders were made therein on 2nd May 2013 in the following terms:-

- a. That actual custody of the child be restored to the applicant herein pending hearing and determination of the appeal;**

b. That the child be returned to [particulars withheld] School to continue her education; and

c. That the respondent herein was entitled to unlimited, but reasonable access to the child and in particular access to be on alternative weekends and half of the school holidays.

5. It was the turn of the respondent herein to be dissatisfied. She rushed to the Court of Appeal and filed **Civil Application No. 170 of 2013** (UR 118/2013). The Court of Appeal in a decision rendered on 21st February 2014, allowed the respondent's application in terms of prayer 2 of the said application which had the effect of staying the orders made by the High Court in Nairobi High Court **Civil Appeal No. 25 of 2013** and of grant of actual custody of the child to the respondent herein. The Court of Appeal specifically directed that the child be released to the respondent herein and remain in the custody of the respondent pending hearing and determination of the appeal that was to be filed by the respondent.

6. The applicant herein, in his statutory statement dated 8th May 2014 and the affidavit in verification thereof sworn on 8th May 2014, argues that the respondent herein has breached or violated or contravened the orders made by the Children's Court on 3rd April 2013 in that he has been denied access to the subject child.

7. The respondent herein has stated her position on the matter in her affidavit sworn on 4th December 2014. Her case is that the orders of the Court of Appeal had the effect of staying the orders of the Children's Court and the High Court on the applicant's right to unlimited but reasonable access. She further argues that the Court of Appeal granted her actual custody of the child, and the applicant could only access the child through her.

8. The Motion was argued orally before me on 19th December 2014. Mr. Mungla pleaded for the applicant, while Mr. Odera Obar argued the case for the respondent.

9. Mr. Mungla's position was that knowledge of the order was not disputed and that disobedience of the order had also not been disputed. He pleaded that the Court of Appeal did not take away the applicant's right to access the child. On his part, Mr. Odera Obar submitted that the prerequisites for grant of the orders sought had not been met to the extent that there was no deposition that the order in question had been served nor that a penal notice had been attached to the order if at all the same was served. He also dwelt at length on the standard of proof required to be attained in cases of this nature. In his rejoinder, Mr. Mungla stated that the respondent had knowledge of the order and therefore the issue of service of the order did not arise.

10. The primary factors for consideration in applications of the nature before me is whether the order said to have been disobeyed had been served on the respondent, and whether there was breach of the said order despite service thereof or knowledge of the order.

11. The applicant herein has not dwelt on the issue of service of the order alleged to have been served. Instead, he appears to state that the respondent was aware of the order as the same was made in her presence, she having participated in the proceedings. Yet no material was placed before me, given that the proceedings where the order was made were conducted by another court in other proceedings, as proof that indeed the respondent was aware of the said orders or participated in the proceedings.

12. I hold the view that the mere fact that some order has been made in the presence of parties does not necessarily mean that the parties get to have knowledge of the order. It is imperative that the order be extracted formally from the record and be served personally on the person bound to obey it. It is important to bring to the attention of that person the exact terms of the order that they are expected to obey, particularly where non-compliance is likely to attract criminal sanctions. The order must be placed in the hands of the person expected to comply with it.

13. The order that the respondent herein is said to have disobeyed is that made by the Children's Court. To my mind the order made on 3rd April 2013 by the Children's Court is no longer available for

execution or compliance. An appeal was lodged at the High Court against that order, and the High Court on 2nd May 2012 made orders that had the effect of totally revising the order of the Children's Court of 3rd April 2013. The High Court made its own orders that effectively substituted those of the Children's Court.

14. When the matter went to the Court of Appeal, the said court did not in its orders of 21st February 2014 reinstate the orders of the Children's Court. It revised the High Court's order on custody and substituted it with its own, vesting custody of the child on the respondent herein. The Court of Appeal did not set aside the orders of the High Court on the other matters, instead it merely stayed them. The said orders are therefore still intact but they cannot be executed for they have been suspended or held in abeyance.

15. Quite clearly, the order made by the Children's Court on 3rd April 2013 is no longer available for compliance. It was superceded by the orders made by the High Court and the Court of Appeal. On custody, the operative order is that by the Court of Appeal of 21st February 2014. The operative order on access is that by the High Court, which has been stayed or suspended by the Court of Appeal. The effect of the stay or suspension of the access orders, and the omission by the Court of Appeal to make specific orders on the subject, would mean that the right to access the child is in limbo as there is no court order setting out its terms.

16. In the end, I have come to the conclusion that the orders of the Children's Court of 3rd April 2013 were not capable of compliance after they were superceded by those of the High Court and the Court of Appeal. They were not capable of being disobeyed, and consequently I do find that the respondent has not disobeyed the orders in question. The Motion dated 13th May 2014 is therefore for dismissal and I hereby dismiss the same with costs.

17. The application before me is not in the **Civil Appeal in HCCA NO. 25 of 2013**, but in a miscellaneous cause limited only to the contempt proceedings. There is therefore no basis for me to make orders setting out the terms upon which the applicant may access the subject child. The Court of Appeal is seized of the matter and the access order may be sought from that court.

DATED, SIGNED and DELIVERED at NAIROBI this 23RD DAY OF OCTOBER, 2015.

W MUSYOKA

JUDGE