



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 98 OF 2010

IN

N K.....PETITIONER

VERSUS

G V K.....RESPONDENT

AND

**IN THE MATTER OF CONTEMPT OF THE ORDERS OF THE HON. LADY JUSTICE R.
NAMBUYE GIVEN ON 12TH JULY, 2011**

RULING

1. The application before court is for an order of committal to imprisonment for a period not exceeding six (6) months for contempt of the orders given by Nambuye J on 12th July, 2011. The application brought by way of a Notice of Motion dated 27th May, 2013, and taken out under **Section 5 of the Judicature Act Cap 8, Section 3A of the Civil Procedure Act, Order 52 of the Rules of the Supreme Court of England and all enabling powers and provisions of the Law.** The Petitioner/Applicant seeks that the Respondent, G V K, be committed and detained in civil jail for a period not exceeding six (6) months for contempt of the orders made by Nambuye J. on 12th July, 2011. The application is supported by the annexed affidavit of N C K the applicant herein and is based on the grounds that: the Respondent has defied orders granted by Nambuye J; the Respondent had been served with the said Orders endorsed with a Penal Notice, the Petitioner/Applicant and the child continue to suffer loss and prejudice at the expense of defiance by the Respondent to comply with the said Order and the Respondent should therefore be punished to uphold the dignity of this Honourable Court, and that leave to apply for contempt of court proceedings against the Respondent was granted to the Petitioner/Applicant by this court on 23rd May, 2013.
2. In opposition to the application, the Respondent filed Grounds of Opposition dated 24th July, 2013. In the Grounds of Opposition the Respondent states that the application is not merited and well- grounded in law; that the orders of court allegedly disobeyed by the Respondent have been subsequently varied by Lenaola J and Njagi J; that the said variations were to the effect that the views of the minor to be sought; that Lenaola J and Njagi J had private sessions with the minor during which the minor's views were sought pursuant to which the minor then visited the Petitioner, an arrangement which has been going on to date; that consequently the Respondent is not in breach of the said Court orders; and that the Respondent has always fully complied with the court orders. It is the Respondent's prayer that this application be dismissed with costs.

3. I have considered the application, the affidavits on record as well as the oral submissions by respective counsel, articulated on 10th October 2013, and I find that the main issue to be determined is whether there was an order made by this court which has been disobeyed by the respondent. I will also have to consider the orders that I should make in the circumstances.
4. Upon perusal of the file, there is no doubt that an order was made by the court which was meant to be obeyed by the parties herein. It must be emphasized that abiding by an order of the court is mandatory and must not be conceded. Njagi J said in *Kanchanben Ramniklal Shah vs. Shamit Shantilal Shah & 6 Others* (2010) eKLR:

“A Court Order is valid and effective from the moment it is made. It is born mature and has no period of infancy, and therefore commands obedience forthwith.”

5. In an application for contempt, an applicant must prove service of the order and show that despite such service, the party sought to be committed has disobeyed that order. In the case of *Ochino & Others vs. Okombo & Others* (1989) KLR 165, the Court of Appeal stated -

“The power to deal with contempt of court is provided for under Section 5 of the Judicature Act (Cap 8) and Order 39 Rules 2(3) of the Civil Procedure Rules. We have to follow the procedure and held that: -the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.”

6. In the instant case the Respondent has not denied service of the said Order, neither has he denied knowledge of the existence of the same. However, service and knowledge of the existence of the order are matters that are not in contention in this matter. The main issue would be whether there has been deliberate and intentional non-compliance of the order by the Respondent herein.
7. The Order given by Lenaola J on the 2nd September, 2011 stated:
 - a. **That the preparation period provided for under clause 12 of the Order given on 12th July, 2012 be and is hereby extended for a further period of fourteen (14) days to run from the date of service thereof.**
 - b. **That the application for review dated 20th July, 2011, be heard on 26th September, 2011 at 11:00AM**
 - c. **That the petitioner to have custody of the child every Friday from Five (5) P.M. to Sunday Five (5) P.M. until further orders of this court...’**
8. It is noted that the Respondent filed a request in Court on 29th May, 2012 to have the court re-interview the said child with a view to ascertaining his wishes in order to minimize his exposure to further traumatic situations. In that request, the Respondent brought to the attention of the Court that his attempt to hand over the said child to the Petitioner/Applicant was unsuccessful because the said child declined to accompany the Petitioner/Applicant and that the Petitioner/Applicant caused disturbances and hurled several insults and threats to the Children’s Officer present, the Respondent’s lawyer and the Respondent himself, thwarting any attempts to counsel the child to accompany the Petitioner/Applicant.
9. Given that contempt proceedings are akin to criminal proceedings, the standards of proof proving that the court order has been disobeyed is beyond reasonable doubt. Besides, the Applicant must prove that the Respondent disobeyed the court order and that he did so willfully and intentionally. This principle was well set in the case of *Hadkinson vs. Hadkinson* (1952) All ER 567, where the court maintained that court ***“orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away is to underestimate and belittle the purpose for which the court is set up.”***

10. *In this matter it must be established that the Respondent is in contempt of the said Court Order, and Court should be alive to the fact that this is a domestic matter and whether committing the Respondent herein to civil jail would serve the interest of justice and whether the same would be in the best interest of the child. In the case of **Betty Thavi Ambundo vs. Jimmy Mabano Ambundo (2013)eKLR, Ougo J.** stated that:*

“...the process of contempt should not be invoked in aid of a civil remedy where some other method of achieving the desired result is available. This is especially so in the context of domestic or family proceedings...”

In the case of *Thomas vs. Thomas (1985) CA 214*, Bush J made a general observation that the -

“Question of punishment for the past behavior on concepts of the damage to the dignity of the court if an order is disobeyed should not enter into consideration in a domestic jurisdiction. The object of the exercise is to enforce the breached order in the sense of getting it working or putting something more workable in its place. Whilst there may be causes where the draconian powers of the court to imprison or fine may have to be invoked they should be regarded as a weapon of last resort.”

11. Taking all the circumstances of this case into consideration, and for the interests of justice, I have come to the conclusion that the application herein is not merited as the Respondent has demonstrated that he did not intentionally and willfully disobey the said court order given that the order was varied by a subsequent order of this court. Furthermore, I also find that the Respondent has demonstrated that he did take steps to hand over the said child to the Applicant but the efforts were defeated by the willful acts of the minor. The said minor is not in my view of tender years and cannot be coerced to be with the applicant against his wishes.

12. The Motion dated 27th May, 2013 is hereby dismissed. I will make no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 25th DAY OF April, 2014.

W. MUSYOKA

JUDGE

In the presence of advocate for the applicant.

In the presence of advocate for the respondent.