

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 91 OF 2014

S O N.....APPLICANT

VERSUS

E A O.....RESPONDENT

RULING

1. A preliminary objection was raised to the Motion dated 13th May 2014. It is founded on two grounds - that the mandatory provisions of the Supreme Court Practice Rules have not been complied with and that the applicant should not have right of audience for he has breached the orders of the Court of Appeal set out in the judgment delivered on 21st February 2014.
2. The objection was disposed of by way of oral arguments on 4th July 2014. Mr. Obar for the respondent and Mr. Mungla for the applicant addressed me at length. Mr. Obar stated that the application was an abuse of the process for he had not seen the order granting leave and that the statutory statement and replying affidavit had not been filed. The rest of his arguments appear to challenge the applicants' right to access the child.
3. In his reply, Mr. Mungla asserted that he had complied to the letter with the Supreme Court Practice Rules. He had sought leave and filed the requisite statutory statement and verifying affidavit. He stated that leave was granted and subsequently he had initiated the substantive application as his required in law. On the matter of access, he argued that after the Court of Appeal reverted physical custody of the child to the respondent, it became imperative for the respondent to allow the applicant access to the child in terms of the orders of the lower court.
4. It is a matter of notoriety that a preliminary objection ought to be founded on pure points of law – want of jurisdiction, in defects in the process, the like. It should never turn on matters of fact.
5. The preliminary objection raised by the respondent is entertainable on its first limb – on the question of the non-compliance with the Supreme Court Practice Rules. It is a matter of law that leave be obtained before the filing of the substantive motion, and that a statutory statement and verifying affidavit be filed with the summons for leave. If the said rules are not complied with, then the process becomes incurably defective and the application incompetent and liable to striking out.
6. With regard to the present application, an application was filed on 19th May 2014 seeking leave to commence contempt proceedings. The leave application was accompanied by a statutory statement and a verifying affidavit. Leave was granted on 9th May 2014 for 21 days. The substantive motion then followed on 31st May 2014. Quite clearly, the applicant was in full compliance with the Supreme Court Practice Rules.
7. The respondent did not address me on the second limb of the Notice of Preliminary Objection dated 16th June 2014. Mr. Obar did not at all in his address talk about the issue. Instead, he dealt on matters of access to the subject child by the applicant and appeared to justify denial of access on the basis that the applicant is not the biological parent of the child. That is neither here nor there so far the preliminary objection is concerned.

8. I find that there is no merit in the objection raised by the respondent to the Motion dated 13th May 2014. The same is disallowed with costs to the applicant.

DATED, SIGNED and DELIVERED at NAIROBI this 21st DAY OF November 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Munjira advocate for the applicant.