

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 69 of 2012

CLAIRE ADAMBA OKANGA.....APPELLANT

VERSUS

GODFREY GICHUHI WAIHARO.....RESPONDENT

RULING

The motion dated 6th February 2012, seeks two orders to facilitate execution of the order of 30th January 2012. An order had been made giving interim custody of the two issues of the marriage, the subject of these proceedings, pending *inter parties* hearing of two applications dated 3rd October 2012 and 23rd January 2013.

The application dated 6th February 2013 is supported by the affidavit of the appellant. She deposes that after the court granted the order on 30th January 2013 the respondent has not obeyed the said order, hence the need for the orders sought in this application. She sought assistance by the police to enforce the order but the police were reluctant to assist, citing the ground that there no order directing to assist in enforcing the said order. She now seeks an order that the Officer Commanding the Ongata Rongai Police Station be directed to facilitate and assist in the enforcement of the said order. She would also like orders allowing the police to break in to the premises where the children are as she has been denied access to the premises.

Although the application is expressed to be *ex parte*, I had directed that the same be served. The orders sought are coercive. They require the exercise of police powers in a purely civil matter. The application was served and the respondent has filed a replying affidavit. This affidavit does not reply to that sworn by the applicant on 6th February, 2013 in support of the application dated 6th February 2013, instead it replies to the applicants affidavit sworn on 23rd February 2013 in support of the application dated 23rd January 2013. The respondent's affidavit does not respond at all to the allegations made in the affidavit of 6th February 2013 – that he has not obeyed the order made on 30th January 2013, that he has done everything to frustrate the enforcement of the said order and that it has now become necessary to involve the police.

At the hearing of the application on 26th February 2013, Mrs. Arwa argued that although the respondent was aware of the said order, he has chosen to disobey it. In reply, Mr. Omari attacked the integrity of the order saying that the same were granted without the respondent being heard as he was not served with the application. He also emphasized on the principle of considering the best interests of the children.

The issue raised in this application is whether the court should direct to police to facilitate the enforcement of the order made on 30th January 2013. The application was meant to be *ex parte*, but I directed that it be served on the respondent. This was meant to alert them of the said order in case they had not been served. It was expected that the respondent would take steps to either obey the order or to have it set aside. His effort to set the order aside was not successful as his application was dismissed on 18th February 2013. After this dismissal, I note that the respondent has not taken steps to obey the order. Court orders have to be obeyed if we are to uphold the rule of law and to obviate impunity and anarchy Even if a party is aggrieved by a court order, he or she must still obey it.

It has been argued that the best interests of the children ought to be taken into account in determining this application. In children's matter the primary consideration is the welfare of the children. When the court made the order on 30th January 2013 this consideration must have been prime in its mind as it had before it a children's case. It has not been demonstrated that the court did not take into account the children's welfare when it made the order on 30th January 2013.

The respondent has not in my view effectively responded to the application dated 6th February 2013. He has not given any reasons why he has not complied with the order as the same has not been set aside or vacated. The order is still in force. I have not been given any reason why I should not grant the orders sought in view of the respondent non-compliance. I therefore hereby grant the orders sought in the application dated 6th February 2013. Costs of the application shall be borne by the respondent.

W. Musyoka

Judge

DATED, SIGNED and DELIVERED at NAIROBI this 11th DAY OF MARCH, 2013.