



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO.48 OF 2010

A A O.....APPELLANT

VERSUS

N O B.....RESPONDENT

RULING

The dispute between the Appellant and the Respondent relates to custody of a child. In a judgment delivered on 12th July 2011, Nambuye J (as she then was) ordered the Respondent to deliver the physical custody of the child, the subject of the proceedings, to the Appellant. The learned judge further gave a timetable by which the Respondent was to deliver the actual custody of the child to the Appellant. The Respondent did not abide by this timetable. As correctly observed by Musyoka J in his ruling delivered on 17th July 2013:

“It would appear to me that the Respondent after the delivery of the judgment resorted to various tactics to delay the implementation of the said principal order...this court’s judgment of 27th July 2011 remains intact. No appeal has been filed against it and it would appear to me that no efforts are being made at all to file one. An attempt to impeach it by way of review has failed. In the common law system, under which we operate, a judgment of the court stands until it is varied or set aside. It is also a principle in that system that court orders are there to be obeyed. My view of events after 27th July 2011 is that there a spirited effort to either disobey or evade obeying the orders made in the judgment delivered on 12th July 2011.”

On 29th July 2013, Musyoka J, *inter alia*, directed the Appellant and the Respondent to attend sessions with a view to preparing the handover of the child’s physical custody to the Appellant. The Judge further ordered the Respondent to handover the custody of the child to the Appellant on 29th August 2013. The Respondent disobeyed this order. He failed to handover the custody of the child to the Appellant. When the matter was mentioned before this court on 2nd September 2013, this court directed the Respondent to avail the child before court for the purposes of court ensuring compliance with the said order of the court. The child was to be availed on 3rd September 2013. The Respondent did comply with this order and brought the child to court. The court ordered the Respondent to hand over the child to the Appellant in compliance with the order of the court. It was apparent to the court that the Respondent had influenced the child not to accept the Appellant (the mother) by giving the child obvious false information. During

the hand over, the court heard the child scream that the Appellant was going to kill him and further that the Appellant was going to deny him food. A child of such a tender age has no concept of death except where such a child has been influenced by an adult. In this court's considered opinion, this was a deliberate attempt by the Respondent to frustrate the giving effect of the order of this court by using the child as some form of pawn. This conduct is not only despicable but contrary to the principle of the best interest of the child.

One would have thought that after the handover of the custody of the child, the Respondent would accept the position and abide by the other conditions that were contained in the order of 12th July 2011 in relation to the upbringing and the education of the child. That was not to be. The Respondent, with a view to circumventing the order of this court, made a report to the police to the effect that the Appellant had kidnapped the child. This was a blatant falsehood. In fact, prima facie, the Respondent manipulated the criminal justice system with a view to defeating the very order that this court had issued delivering the physical custody of the child to the Appellant. The Respondent was able to obtain custody of the child with the help of the police. This was clearly subversion of the course of justice. The Respondent took the child to Thomas Barnado Children Home and then immediately filed an application before this court seeking the setting aside of the orders that this court had issued on 3rd September 2013. This order had granted custody of the child to the Appellant.

As part of this litigation strategy, the Respondent refused to accept the fact that the court had made an order granting custody of the child to the Appellant in enforcement of the earlier order issued by this court. The order required the Respondent to handover custody of the child to the Appellant. The Respondent referred the handover "**as a very violent handover**" which was not in compliance with the best interest of the child. To add spice to his application, the Respondent sought the disqualification of this court from handling this case on the ground that this court did not take into account the best interest of the child when witnessing the handover of the child from the Respondent to the Appellant. The Respondent argued that he had no faith in this court. In her response, the Appellant submitted that the Respondent has taken issue with the court because of the court's firmness in enforcing the order of this court. She urged the court to uphold the dignity of the court by restoring the child to her custody.

During the hearing of the application by the Respondent, this court heard oral rival submission made by Mrs. Mbanya counsel for the Respondent and Mr. Ongoya counsel for the Appellant. This court has carefully considered the said submissions. It has also read the pleadings filed by the parties to the application. There are two issues for determination: the first issue for determination is whether the Respondent established sufficient grounds to enable this court recuse itself from further hearing this case. The principles to be considered by this court in determining whether or not to disqualify itself from hearing this case are well settled. In **Republic –Vs- Mwalulu & 8 Others [2005] 1KLR 1 at p.4**, the Court of Appeal held thus:

“In the Makali case Tunoi JA who dealt with the issue of disqualification in his judgment, having cited the well-known proposition of Lord Denning, MR in the English case of Metropolitan Properties Co (FGC) Ltd vs Lannon & others [1969] 1 QB 577, proceeded to summarize the legal position in Kenya as follows:-

“That being the position as I see it when the Courts, in this country are faced with such proceedings as these, [ie proceedings for the disqualification of a judge] it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a Court or quasi-judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the judge, magistrate or tribunal.”

In the present application, the Respondent is not saying that this court exhibited actual or apparent bias. It is a fact that this court did not hear the merits of the appeal. The appeal was heard by another judge. The order enforcing the judgment of the first judge was issued by Musyoka J. What this court did was to witness the handover of the child to the Appellant by the Respondent in compliance with the order of this court. It was apparent to this court that the only reason why the Respondent made an application for this court to recuse itself from hearing this application was because of the fact that this court, after two years of prevarication by the Respondent, finally enforced the order of the court by compelling the Respondent to handover the custody of the child to the Appellant.

This court did not hear the Respondent make any allegation that this court was biased either by the fact that it was known to one of the parties in the proceedings or that in its past conduct in this particular case there were reasons to believe that there was likelihood the court would be biased. Maybe the Respondent had this in mind as another delaying tactic. When he was thwarted in his designs to further show contempt to the orders of the court, he now directs his ire to the court. It was clear to this court that the Respondent presented no ground before this court that would persuade this court to recuse itself from enforcing the order of this court. The Respondent has been treated with kid gloves by the court in the past two years in the vain hope that he would willingly comply with the orders of the court. That was not to be. The Respondent has used all tactics in the book to avoid the day of reckoning. Unfortunately for him, that day finally arrived. The Respondent has no option but to obey the order of this court. That was the reason why this court, immediately after the application was argued, ruled that it could not disqualify itself from hearing this matter.

As regard the second issue for determination, whether the Respondent is entitled to keep custody of the child, as earlier stated in this ruling, it was clear from the proceedings on record that the Respondent used all means to avoid complying with the order that required him to handover the child to the Appellant. In the course of doing so, the Respondent, unfortunately, has used the child as a bargaining tool. In fact, the Respondent *'recruited'* the child to his cause. The Respondent did not take into consideration the fact that he was harming the psychological wellbeing of the child. He did take into account the best interest of the child. It appeared to the court that the Respondent was prepared to do anything under the sun to avoid compliance with the order of this court. In the course of doing so, the Respondent crossed the line of being a responsible parent to being an irresponsible and cruel one. He has become a negative influence on the child. This is the reason why the Respondent was prepared to make false report to the police that the Appellant had kidnapped the child (a day after this court had witnessed the handover of the custody of the child to the Appellant) so that he could regain the custody of the child from the Appellant. The Respondent did not spare any expense. He flew several police officers from Nairobi to Kisumu (the rural home of the Appellant) to secure the removal of custody of the child from the Appellant. This is an act of a person who has no respect for the law. It is a surprise that such a person can now assume the moral high ground and state that he has no confidence with this court. For this irresponsible behaviour, this court issued an order barring the Respondent from accessing the child for three (3) months pending further orders of this court. During this period, the Appellant will have the opportunity to bond with the child without the disruptive influence of the Respondent. Of course, the Respondent shall be at liberty to make an appropriate application to this court after three (3) months has elapsed so that this court may consider whether he

Before concluding this ruling, this court will make a comment on the behaviour of Mrs. Mbanya, counsel for the Respondent. She recently came on record. Cub lawyers are always advised not to act in a case where a lawyer is emotionally involved. Mrs. Mbanya is a senior advocate. She is an officer of this court. She has previously conducted herself in an exemplary manner prior to acting on behalf of the Respondent in this case. It was clear to this court that it was Mrs. Mbanya who advised her client to persist in his disobedience of the orders of this court. Her conduct in court was not befitting an advocate of her stature. She was the one who encouraged her client to become unruly before the court by refusing to abide by directions issued by the court. Her conduct was unprofessional and deserves a reprimand from this court. It is a tragedy that an advocate of Mrs. Mbanya's repute is prepared to put her reputation on line in aid of a litigant who has persistently been in contempt of the orders of this court. Learned counsel even had the temerity to advise his client to ignore the order issued by this court when it ordered the Respondent to handover the custody of the child to the Appellant because in her view the handover of custody of the

child did not conform to the law. Mrs. Mbanya is aware that the hallmark of any legal system is respect for the law and specifically orders issued by the court. Where an advocate encourages her client to disobey the law under the guise that such order can be disobeyed because it does not conform to what the advocate interprets as the correct position of the law, is evidence of how learned counsel ceased to be a professional and reduced herself to be a mouthpiece of her client. She became emotionally entangled with her client's case. For her information, it is not open for an advocate to interpret an order issued by this court to suit the client's point of view. If counsel had difficulty in understanding the order issued by the court, she was required to seek appropriate interpretation from the court. This court was minded to report Mrs. Mbanya to the disciplinary committee for her unprofessional conduct in this particular case. Her past exemplary conduct has persuaded the court to be lenient. It is the hope of this court that the reprimand issued by the court is appropriate under the circumstance of this case.

Enough said. The application filed by the Respondent dated 9th September 2013 lacks merit and is hereby dismissed with costs to the Appellant. The orders issued by this court on 3rd September 2013 regarding the custody of the child shall be complied in full under the supervision of the OCPD Kilimani. It is so ordered. This court further directs the Director of Criminal Investigations (CID) to investigate the Respondent with a view to establishing whether criminal offences were committed between the 3rd September 2013 and 17th September 2013 in relation to the report of "*alleged kidnapping and assault*" made to the police.

DATED AT NAIROBI THIS 17th DAY OF SEPTEMBER, 2013

L. KIMARU

JUDGE