



J.N.M.....PETITIONER

VERSUS

A.W.K.....RESPONDENT

J U D G M E N T

1. The Notice of Motion dated 2nd March 2010 is premised on the provisions of **Section 5** of the **Judicature Act**, the **High Court Practice and Procedure Rules, Order L Rule 1** of the **Civil Procedure Rules** and **Section 34** of the **Civil Procedure Rules**. The specific Prayers sought are that;

- i) *The honourable Court be pleased to cite for contempt of Court the Respondent herein, A.W.K for having disobeyed lawful Court order made by consent on the 4th day of May, 2004 in Misc Appl. No.[...] in the High Court of Kenya at Nairobi and confirmed by consent in D.C No.[...], and in particular as it relates to the access during school holidays of the minor child, one F.R.*
- ii) *The honourable Court be pleased to issue a warrant of arrest of the Respondent A.W.K and her subsequent committal to jail for contempt of Court, for a period that this Court may deem fit and appropriate.*
- iii) *The Officer Commanding Central Police Station in Nairobi do facilitate the arrest and presentation to Court of the Respondent herein A.W.K.*
- iv) *The costs of this Application be provided for.*

2. For avoidance of doubt the Court Order that was allegedly disobeyed reads as follows;

- “i) *That F.R (the child) be and is released into the custody of her mother A.W.K.*
- ii) *The child shall stay with the mother, and shall continue schooling there. However, the mother is required to enroll her at a school where the child will be most comfortable. It at a later date, it should transpire that the child was not happy with either the school at which she was enrolled, or the place at which she is resident that would be the basis for reviewing this order.*
- iii) *That the mother be and is hereby directed to grant access to the child’s father at least two times every month, provided that the father will have given advance notice of his intention to visit the child. This arrangement shall only remain in force until the further orders either of the High Court or the Children’s Court.*
- iv) *That the parties have agreed, and this Court grants an order, in line with that agreement, that during school holidays, the child will spent 50% of her time with each of the two parents, in turn. It will be the responsibility of the parent then staying with the child to ensure that she is delivered to the other parent.*
- v) *That it be and is hereby ordered, that none of the parties herein shall file any other Applications*

either in this Court or in Mombasa Misc. No[.....]. Or in any other new proceedings, touching on the issue of custody of the child; save only that the parties may move either the Children's Court or the Divorce Court in the DC No.[...] A.W.K vs. J.N.M at Milimani.

vi) That for the avoidance of doubt, the orders herein are interlocutory. The same shall give way to final orders for custody, may be issued either by the Divorce Court, or the Children's Court.

vii) The Application cost shall abide the final decision."

3. According to the Petitioner/Applicant, the said Orders were later confirmed on 24th April 2007 in the following terms;

"i) That unless within a period of three months from the 24th day of April, 2007 an appearance is entered in this Court by any person to show cause to the contrary, or to intervene, the marriage between the above mentioned Petitioner and the said Respondent solemnized in April 1995 at the Registrar's office in Nairobi within the Republic of Kenya, SHALL ON APPLICATION BE DISSOLVED.

ii) The issue regarding custody and maintenance of the minor child herein be in terms of the consent Order made on the 4th day of May, 2004 by the Hon Mr. Justice Ochieng in Misc. Appl. No[....] in the High Court of Kenya at Nairobi.

iii) There shall be orders at to costs."

4. The Applicant's complaint is that inspite of the clarity of the said orders, the Respondent proceeded to the child's school on 24th November 2009 and picked her up and stayed with her for the entire Christmas Holiday period without allowing the Applicant access for half that period as was ordered by this Court. That the Respondent has previously disobeyed the Court Orders and was only let off when she apologized for her actions and that unless she is punished for her alleged contemptuous actions above, the dignity of the Court will be diminished and the child will also suffer prejudice and detriment.

5. In a Replying Affidavit sworn on 26th April 2010, the Respondent has deponed that she did not refuse to hand over the child to the Applicant because on 15th December 2009, she made contact with him to pick the child but he refused to pick her telephone call. When she asked the child to go to the Applicant's house, the child declined to do so. She returned to her house and stayed with the child for the entire holiday period.

6. She added that on 4th January 2010, the Applicant called her and spoke with the child who said that she did not want to go and stay with him. When they met on 13th February 2010 at the school, the Applicant insulted her, took the child by force, beat the child and the child told him to go away and leave her alone.

7. The Respondent has also urged the point that the child at that time was fourteen (14) years of age and could speak for herself and can express her wishes as to where she wants to stay during school holidays.

8. That she has not disobeyed the Court order and so the Application should be dismissed with costs.

9. I agree with learned Advocate for the Applicant that the statement of Romer, L.J. in Hadkinson vs. Hadkinson (1952) A.C.P. 285 sums up the Law on the subject of contempt of Court. The learned Judge had stated as follows;

"It is the plain and unqualified obligation of every person against, or in respect of whom, an Order is made by a Court of competent jurisdiction, to obey it unless and until that Order is discharged. The uncompromising nature of this obligation is shown by the act that it extends event to cases where the

person affected by an Order believes it to be irregular or void.”

10. Karanja J. in Macharia vs. Dr. Munyua Gachuhi H.C. Misc No.68/2004 (Kitale) also found that expression to be suitable and added as follows;

“The issue here really is very simple. Has the Respondent deliberately and blatantly refused to comply with the Court order? If the Court finds beyond reasonable doubt that he has done so, then he should be cited for contempt and punished accordingly.”

11. Taking the same approach as Karanja, J. it must be noted that contempt proceedings are akin to criminal proceedings because the risk of incarceration is real. The threshold of proof must therefore be beyond reasonable doubt as opposed to merely on a balance of probability or even a preponderance of doubt.

12. In the instant case, it is **Order No. (iv)** in the Orders issued on 4th May 2004 that is the subject of the contempt proceedings. It was the responsibility of the Respondent to ensure that the child was delivered to the Applicant half-way through the school holiday. **But what does she do instead?** She makes one call, allegedly to the Applicant and when he did not pick the call, she **“requested”** the thirteen (13) year old child to go to where the Respondent resided and of course the child declined to do so. It was never the expectation of the Court Order that the child would ferry herself from one parent to the other but it was the obligation of each parent to do so.

13. The Respondent knew the contents of the Court Order but chose to play dumb and shift all blame to the child; that the child did not want to stay with her father and so she was unable to comply. Had she made an attempt to take the child to Nyeri but at Nyeri the child threw a tantrum and they both returned to Athi River or wherever else she resided, I would have taken the excuse seriously. Sadly, I think the Respondent’s excuse cannot meet this Court’s favour.

14. It has not been argued that the Order was never served on the Respondent nor has it been argued that she was unaware of it. Her actions were therefore contemptuous and I find that this Court, in order to maintain its dignity and in order to stop parties from flagrant disobedience of orders that they were aware of and understood, must cite her for contempt.

15. Having done so, I will reserve punishment until she is before the Court. She will however and in any event pay the costs of this Application.

16. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2012.

10/2/2012

CORAM

BEFORE LENAOLA – JUDGE

MIRON – COURT CLERK

MR. ONJORO HOLD BRIEF FOR MR.MWANGI FOR PETITIONER

NO APPEARANCE FOR RESPONDENT

ORDER

JUDGMENT DELIVERED.

RESPONDENT TO APPEAR BEFORE ME ON 16TH MARCH, 2012

SUMMONS TO ISSUE

ISAAC LENAOLA
JUDGE

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