



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CONSTITUTIONAL APPLICATION NO. 3 OF 2011

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 22 AND 23 OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF SECTION 101(7) OF THE CHILDREN'S ACT OF 2001

AND

IN THE MATTER OF ELDORET CHILDREN'S CASE NO. 63 OF 2009

BETWEEN

**E.N.K.....PLAINTIFF/
RESPONDENT**

AND

**P.K.K ALIAS
D.M.....APPLICANT**

R U L I N G

The application dated 19th March 2011 is by way of an originating notice of motion which should be a summons. The prayer sought at this juncture is prayer (4) i.e that the orders made on 16th March 2011 in Eldoret Children's Case No. 63 of 2011 recommitting the applicant to civil jail beyond the 28 days in

violation of section 101(7) of the Children Act be declared illegal, null and void.

The grounds for the application are that the applicant was committed to civil jail on 15th February 2011 for failing to pay maintenance of Kshs.5,000/- per month and that he served more than four weeks after committal. Despite serving the four weeks, he was recommitted beyond the four weeks in violation of section 101(7) of the Children's Act.

In his supporting affidavit filed on 18th March 2011, the applicant avers that after having been committed to civil jail on the 5th February 2011, he served more than four (4) weeks but on the 16th March 2011 he was committed for a further thirty (30) days imprisonment. He moved the court on the 18th March 2011 but the matter was differed by the learned magistrate to the 23rd March 2011 within which period his right to liberty was violated.

The applicant therefore urges this court to review the orders made on 16th March 2011 and thereby set him at liberty.

Learned counsel **Mr. Korir**, submitted on behalf of the applicant that after being unable to pay for maintenance pursuant to an order of the court, the applicant was committed to civil jail. He was in jail for 28 days prior to appearing in court on 16th March 2011 when he was committed to a further 28 days.

Learned counsel contended that the subsequent detention was unlawful and contrary to section 101(7) of the Children's Act which confers jurisdiction to the Children's Court which jurisdiction indicates that a defaulter cannot be committed to civil jail for more than 28days.

Learned counsel further contended that the applicant was not challenging the propriety of the maintenance order made by the court but only the mode of execution.

In her replying affidavit filed in opposition to the application the respondent avers that the applicant failed to comply with the court order made on 27th October 2009 and later filed an application for stay on the 11th November 2009 thereby prejudicing the welfare of the subject minors such that the maintenance arrears now stand at Kshs.94,000/- and stood at Kshs.45,000/- and Kshs.59,000/- respectively as at July 2010 and October 2010.

The respondent contends that the applicant is a person of means but has registered all his property and businesses in the names of third parties so as to conceal his wealth and avoid taking care of the subject minors.

The respondent avers that rather than setting free the applicant without conditions he should be made to pay a monthly sum of money for the welfare of the subject minors.

Learned Counsel, **M/S Cheptinga**, submitted on behalf of the respondent that the application is defective in that there is no provision in the Civil Procedure Act which provides for originating motion and that there is no inclusion of the footnote in the application as required by Order 51 Rule 13(2) of the Civil Procedure Rules.

Learned counsel submitted that the applicant and respondent were husband and wife between the years 2002 and 2008 and were blessed with three children – all minors. However, the union was severed by the post election violence thereby leaving the respondent with the burden of taking care of the children

although she is not employed.

Learned counsel contends that the applicant has not come to this court with clean hands. He registered all his property in the name of third parties so that the only mode of execution against him was committal to civil jail.

Learned counsel further contends that the applicant is in gainful employment but despite being ordered by the court to pay accrued arrears and a monthly payment of Kshs.5,000/- he rushed to court and asked for a review of that figure which was eventually reduced to Kshs.3,000/- per month.

Referring to Article 53 of the constitution, the learned counsel, M/S Cheptinga, submitted that the rights of a child are of paramount importance and in reference to section 101 of the Children's Act, she submitted that the provision allows committal to civil jail to safeguard the best interest of a minor.

Learned counsel contends that this application is tailored to suit the interest of the applicant and not the subject minors and should therefore be dismissed.

Having considered the supporting grounds and those in opposition in the light of the rival submissions by the learned counsel, the view of this court is that indeed the manner in which the application is brought is defective. However the defect is not incurable as it relates to form rather than substance of the application.

Be that as it may, it is obvious that the application is factored to suit the interest of the applicant rather than the subject minors. However, this court would not give consideration to the applicant's interest at the expense of a child's interest and right.

Much as this application involves Articles 22 and 23 of the Constitution which deal with enforcement of Bill of Rights and the authority of courts to uphold and enforce the Bill of Rights, the same Constitution in Article 53 provides that a child's best interest are of paramount importance in every matter concerning the child.

This matter concerns children born out of a husband and wife relationship between the applicant and the respondent. The interest of the said children is of paramount importance. This position is reiterated in section 4 of the Children Act No. 8 of 2001.

Section 4(2) of the said Act provides that;-

“In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of Law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”

Under section 6(1) of the same Children Act, a child has a right to live with and to be cared for by his parents.

Herein, the parents of the subject children (i.e. the applicant and the respondent) have since separated such that the children now live with their mother (the respondent). However, the separation would not deny the children their right to be cared for by their father (the applicant). Therefore, the applicant cannot run away from the legal responsibility bestowed upon him. That is why he was ordered by the court to provide a monthly allowance towards the maintenance and welfare of his children. He cannot be allowed

to escape his parental responsibility without good and reasonable cause. In that regard, he cannot be heard to put his own interest above that of his children by invoking the Bill of Rights.

Under Article 24 of the Constitution a right or fundamental freedom in the Bill of Rights may be limited by law to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including “inter alia.” The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Section 101 of the Children Act provides for enforcement of maintenance and contribution orders made by the Children’s Act.

The operation of the provision may necessarily occasion limitation of the right to liberty. The limitation was herein exercised when the applicant failed to comply with lawful court orders.

Section 101(7) of the Children Act provides that;-

“The Court shall have power under this section to issue a warrant committing the respondent to imprisonment for a period of not less than five days nor more than four weeks.”

However, a warrant for imprisonment shall not issue unless the court is satisfied that the respondent has persistently and willfully refused or neglected to make payment of all or any part of the monies ordered to be paid under a maintenance order or a contribution order without reasonable cause or an order for attachment of earning would not be appropriate (see, section 101(7) (a) and (c) of the Children Act).

The committal to civil jail of the applicant was apparently due to the aforementioned factors. It has been contended herein that the applicant has persistently and willfully refused or neglected to make payments ordered by the court and that he has registered his property and business in the names of third parties such that attachment would be in-effective.

The applicant has argued that he has no problem with the propriety of the order made by the court. His only fear is that he should not be committed to civil jail any longer.

What the applicant needs to be told at his juncture is that the court order made against him was proper and lawful and would be enforced as long as he continues to defy it. If he does not want to return to civil jail then he has to comply with the order which was made in the interest of his children and not the respondent. If he thinks that he has good and reasonable cause for failing to comply with the order or that circumstances have changed then he should return to the same court for a variation or modification of the order.

For now, his application is devoid of merit and is hereby dismissed with costs.

In conclusion, may it be noted that although section 101(7) of the Children Act provides for a minimal imprisonment for five days and a maximum imprisonment for four weeks, it does not state that the imprisonment will be effected only once. In the opinion of this court, this would mean that the minimum or maximum term of imprisonment may be imposed in intervals as long as there is non-compliance with the court order and non-existence of less restrictive means to achieve the purpose of the order. Otherwise, court orders would be made in vain much to the detriment of the child.

J. R. KARANJA

JUDGE

(Read and signed this 28th day of June 2011 in the presence of Mr. Ngala holding brief for M/S Cheptinga for the Respondent)