



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Appli 1742 of 2005

CLEMENTINA AORU KABBIS PLAINTIFF

VERSUS

ANDREW BWIRE OBARA..... RESPONDENT

**IN THE MATTER OF AN APPLICATION BY CLEMENTINA AORU KABBIS FOR AN
ORDER OF COMMITTAL AND DETENTION FOR CONTEMPT**

AND

**IN THE MATTER OF CONTEMPT OF THE ORDER OF THE HON. J.E. RAGOT ACTING
SENIOR RESIDENT MAGISTRATE IN NAIROBI CHILDREN'S CASE NO.45 OF 2003 GIVEN
ON 6TH AUGUST, 2003**

BETWEEN

CLEMENTINA AORU KABBISAPPLICANT

VERSUS

ANDREW BWIRE OBARARESPONDENT

RULING

By notice of motion dated 13.12.05 and filed on 14.12.05 brought under section 5 of the judicature Act, Cap. 8 and Order XXXIX rule 2 (3) of the Civil Procedure Rules, the applicant applied for the following orders:-

1. That the application herein be heard *ex-parte* in the first instance on account of its urgency.
2. That the respondent ANDREW BWIRE OBARA be committed and detained in civil jail for a period not exceeding six (6) months for contempt of orders given by the honourable Acting Senior Resident Magistrate J.E. Ragot (Mrs) on 06.08.03 in Nairobi Children's Case No.45 of 2003.
3. That the costs of this application be borne by the respondent.

The grounds upon which the application is based are:-

1. That the respondent has continued to defy the orders given by the honourable Acting Senior Resident Magistrate J.E. Ragot (Mrs) on 06.08.03.
2. That the respondent is aware of the said orders as they were served and received by him together with a Penal Notice.
3. That the respondent has also continued to defy subsequent orders issued for enforcement of the said orders granted on 06.08.03.
4. That the applicant continues to suffer loss and prejudice at the expense of defiance by the respondent to comply with the said orders and the respondent should therefore be punished to uphold the dignity of this honourable court.

The application is supported by the applicant's affidavit sworn on 13.12.05. The applicant was represented by learned counsel, Miss L.A. Machio while the respondent was represented by learned counsel, Mr. N.W. Amolo.

The applicant is maternal grandmother of the children at the center of a wrangle between the parties herein relating to the custody and guardianship of the children ANYANDE OBARA now aged around 13 years and MILIANA AORU OBARA now aged nearly 11 years. The children's mother, who is deceased, was the applicant's daughter. The respondent is the children's paternal uncle, being a brother to the children's father who is also deceased. The respondent has custody of the children.

The court order subject matter of the present contempt proceedings was made on 06.08.03 and is framed in the following terms:-

1. That the children spend the August holidays beginning two days from the closing date with the applicant.
2. That the respondent shall be able to carry out any other plans he has for the children during the remainder of the holidays.
3. From next year (2004) the children will spend every full April holidays with their grandparents/applicant.
4. That the applicant/grandparents will however return the children to the respondent at least five (5) days before the schools open to enable them prepare for school.

It is the applicant's case that the order was served on the respondent on 30.03.05 and that he acknowledged service by signing at the back thereof. An affidavit of service by Stephen K. Muoki, process server sworn on 01.04.05 is to the effect that on 30.03.05 he served upon the respondent a copy of order dated 29.03.05 with a Penal Notice annexed thereto and that the respondent signed the order at the back. There is a copy of the order in the file bearing at the back the name of Andrew Obara (respondent's name) and a signature ascribed to him. The endorsement at the back is to the effect that the said Andrew Obara received a copy of the order dated 29.03.05 at 4.25 p.m. on 30.03.05. That order ("CAK 8") states as under:

'1. That the children officer from Ongata Rongai do assist to bring the children who are the subject matter of this case and who are in custody of Andrew Bwire Obara to this Honourable Court.'

Applicant's counsel also referred this court to another affidavit of service by the same process server, Stephen K. Muoki sworn on 21.04.05 ("CAK 10") which according to the applicant's counsel also confirms that the respondent was served with the order in question. Muoki's affidavit of service sworn on 21.04.05 is to the effect that on 21.04.05 he served Andrew Bwire Obara, the defendant in the Nairobi Children's Court Case No. 45 of 2003 who is the respondent in the present proceedings, with a court

order dated 20.04.05; that the said Andrew Bwire Obara accepted service but declined to sign the same. The order dated 20.04.05 states as follows:-

- ‘1. That this matter be mentioned on 22nd April 2005 at 2.30 p.m.**
- 2. That the Kibera Children’s Officer assist in bringing the children who are in custody of the defendant to this court.**
- 3. That the summons to issue to the defendant to attend court personally on that date of 22nd April 2005.’**

Applicant’s counsel maintains that the respondent was aware of the order issued by the Nairobi Children’s Court on 06.08.03 but chose to disobey it and that he should be punished by this court for such disobedience/contempt.

On the other hand, respondent’s counsel opposed the application. He challenged the said application on the principal ground that there was no personal service of the subject order, i.e. of 06.08.03, upon the respondent.

In the course of arguments and counter-arguments relating to the application now under consideration, reference was made to correspondence between the parties’ advocates as constituting evidence of service of the order in question. Among such correspondence is letter dated 11.08.03 addressed by V.K. Mavisi apparently of Wekesa & Co. Advocates then acting for the applicant to Amolo & Co. Advocates for the respondent whose purport is that the order of 06.08.03 was served on respondent’s advocates and the respondent himself; that the applicant was supposed to pick the children that day; and that the applicant’s advocates wished to know from respondent’s advocates as to when the applicant could pick the children. Amolo & Co. Advocates for the respondent replied on 13.08.03 to say the applicant in person could collect the children from the respondent’s Ongata Rongai residence. It was contended by applicant’s counsel in effect that such correspondence went to show that the respondent was aware of the order of 06.08.03 and that such knowledge should be enough to form a basis for the respondent’s committal to civil jail for contempt of the order in question. Respondent’s counsel’s rejoinder is that service on the respondent is a crucial matter if the respondent is to be found guilty of contempt of the order in question.

I have given anxious consideration to the arguments and counter arguments of the parties to the application before me.

Section 5 of the Judicature Act provides:

‘5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in exercise of the ordinary original criminal jurisdiction of the High Court.’

The message here is that although the court order said to have been disobeyed arises in civil proceedings, its disobedience is taken sufficiently seriously as to bring it within the realm of criminal law for purposes of punishment. The standard of proof in criminal law is beyond reasonable doubt. That is the standard to be discharged in this case before the respondent can legitimately be committed to civil jail for contempt of the court order issued on 06.08.03. To the extent that the contemnor incurs personal criminal sanctions, personal service of the order on him is a condition precedent. This position is clear to me from general principles and from case law. It was, for instance, stated by the Kenya Court of Appeal in Civil Appeal No.198 of 1998, Loise Margaret Waweru –vs- Stephen Njuguna Githuri that:

‘If the order is to refrain from doing an act or requires a positive act to be done, evidence must be

led to prove service on the respondent of the order alleged to have been disobeyed along with a penal notice.'

The survey I did regarding service in the present case does not establish actual service of the court order of 06.08.03 upon the respondent. There is no doubt in my mind that court orders are sacrosanct and must be obeyed. For disobedience of such orders to warrant the committal of a contemnor to civil jail, it must be proved beyond reasonable doubt that the contemnor was personally served with the order in question. In my view that has not been done to the requisite standard in the present case.

The upshot is that the notice of motion application dated 13.12.05 and filed on 14.12.05 must be and is hereby dismissed. I make no order as to costs.

Orders accordingly.

Delivered at Nairobi this 25th day of October, 2006.

B.P. KUBO

JUDGE