



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC.CIVIL APPLICATION NO.321 OF 2002

IN THE MATTER: OF AN APPLICATION FOR CONTEMPT

PROCEEDINGS AND BY APPLICATION

BY AGNESS WAIRIMU

AND

IN THE MATTER: OF MISCELLANEOUS APPLICATION

NO.432 OF 2001 NAIROBI

VERSUS

JOSEPETE NYAMOHANGA MUSIMO

.....RESPONDENT

AND

EXPARTE - AGNESS WAIRUMU KUIBITA..... APPLICANT

RULING

Application by way of Notice of Motion dated 13th January 2003 is seeking mainly an order that orders dated 16th July 2002 granting leave to the Respondent/Applicant to be cited for contempt herein and all subsequent orders made thereafter be set aside. The main ground for the same application is that there is an error apparent on the face of the record as the order of 3rd May 2001 issued in CMCC No.51 of 2000 (Kisii) of which the Respondent/applicant have disobeyed was set aside on 17th May 2000 and it was therefore no longer in force. The Respondent opposed the Application and filed a replying affidavit. I have considered the same application.

First the exparte Chamber Summons the orders of which are sought to be set aside was dated 9th July 2002 and the reasons that were given for that exparte application were:

1. That the Respondent was in contempt of court orders issued in the Chief Magistrate's Court Kisii in Divorce No.15 of 2000 which orders were served with a Penal Code;
2. That the Respondent was in further breach and in contempt of orders of the High Court issued in Misc. Civ. Application No.432 of 2001 at Nairobi;
3. That the respondent had taken away the minor child from the applicant's custody in complete

disregard and contempt of orders in force.

It will be clear from the above that the reasons that necessitated the ex parte order to be given were two and not one, and thus even if the order of the Magistrate at Kisii had been set aside as alleged on 17th May 2001 there is no evidence that the order of the High Court at Nairobi in Misc. Application No.432/01 had been also set aside. I therefore cannot set aside the ex parte order because one reason that necessitated it may itself still be valid.

Lastly I also agree with the learned counsel for the Respondent that once the ex parte order had been given and contempt proceedings had commenced as they had, then whatever were the weaknesses of the case including the challenges on the basis upon which the ex parte order was given should be visited within the main application for contempt but not by way of another application as has been done here. Thus while not deciding on the merits of the contempt application I observe that these matters should be raised during the hearing of the full contempt case and not at this stage for to do so at this stage may very well end up in duplicating the arguments which should come up at the main hearing.

The application dated 14th 2003 is hereby dismissed with costs to the Respondent. I do not need to say that the orders of the High Court in Nairobi which ordered the child to be given to the applicant in the main contempt application must be honoured. So let the child be forthwith handed over to the mother as was ordered in that application. Orders accordingly.

Dated at Mombasa this 28th Day of January, 2003.

J.W. ONYANGO OTIENO

JUDGE