



REPUBLIC OF KENYA



KENYA LAW
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**CKM v EMM (Family Appeal E026 of 2022)
[2025] KEHC 7844 (KLR) (Family) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7844 (KLR)

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

FAMILY

FAMILY APPEAL E026 OF 2022

HK CHEMITEI, J

JUNE 5, 2025

BETWEEN

CKM APPELLANT

AND

EMM RESPONDENT

*(Being An Appeal From The Ruling And/Or Orders Of Hon. F. Terer
(Rm) Dated 25th February 2022 In Childrens Case No 1239 Of 2017)*

JUDGMENT

1. This appeal is as a result of a long and protracted battle between the Appellant and the Respondent who are wife and husband respectively over their two minor children.
2. The trial court after hearing the parties directed the manner in which they were to have actual custody and other visitation rights over the children as well as their general maintenance and upkeep.
3. The court and in support of a consent between the parties agreed that the Respondent was to have a big share of custody of the children noting their tender ages.
4. In between the proceedings the Appellant filed an application dated 26th September 2019 seeking that the Respondent be restrained from taking the children outside the jurisdiction of the court. On 27th September 2019 the court unilaterally granted temporary orders barring the Respondent from removing the children pending the hearing of the application inter parties.
5. From the courts record it appears that when the matter came up the parties proceeded with the substantive suit where evidence was tendered by the Appellant in her defense as the Respondent had already testified and closed his case.



6. The trial court delivered its judgement and thereafter on 5th May 2021 the Respondent informed the court that the Appellant had taken the children out of the country contrary to the orders of the court.
7. The Respondent sought contempt proceedings against the Appellant which the trial court agreed with it and proceeded to cite the Respondent for contempt. She was given seven days to physically produce the children in court which she could not comply.
8. The court consequently on 25th February 2022 found her in contempt and committed her to six months imprisonment beside issuing warrants for her arrest.
9. The Appellant unhappy with the said ruling filed this appeal citing several grounds. The substantive grounds being that the trial court made orders without any application by the Respondent; the applicant was not granted an opportunity to be heard by refusing to deal with her application dated 27th May 2021; the trial court err in contemning her to six months imprisonment and further issuing an international warrant of arrest against her.
10. When the matter came up for trial the court directed the parties to file their written submissions which they complied.

Appellant's Submissions

11. The Appellant submitted inter alia that the court issued contempt orders without any application being made by the Respondent. She relied among others on Section 5 of Cap 8 Laws of Kenya.
12. She relied also among many other authorities in the case of Econet wireless Kenya Ltd v. Minister of Information and Communication of Kenya & Another (2005) KLR 828.
13. She further argued that the contempt order was never served upon the Appellant as provided and that it was not enough to suggest that she had knowledge of the same. She cited Nyamogo & Another v. KPLC (1994) KLR
14. On the other grounds she submitted that the trial court failed to heed to her application dated 27th May 2021 in which she has sought time to produce the children virtually.
15. She relied on Section 2 of the Children's Act where the issue of the rights of the children was paramount and to this end being of tender age, she was best placed to ensure that they get the best care.
16. She accused the Respondent of being irresponsible and a drunkard and that she could not leave the minors with him while seeking fresh pastures abroad taking into account the meagre Kshs. 5000 which the Respondent contributed every month.
17. She submitted that the children could not be used as pawns in their differences and cited Section 4 of the Children's Act.
18. She argued that should the contempt proceedings be upheld she was likely to lose her job which was a source of livelihood and her bonding with the children shall be greatly affected.
19. She also relied on Section 159 (2) of the Constitution urging this court to consider substantial justice and allow her appeal.

Respondent's Submissions

20. The Respondent on his part agreed with the findings of the trial court. He went at length with the chronology of events leading to the court issuing the said orders of contempt.



21. He relied on Civil Appeal No 169 of 2010 Joseph Kimani & Another v. Dr Luke Musau & Another to demonstrate the discretion and latitude allowed to the courts on the question of interfering with the findings of another court.
22. The Respondent accused the Appellant of blatant disregard of the orders not to take the minors out of the jurisdiction of the court. That the Appellant had full knowledge of the court orders and therefore the appeal ought to be dismissed.

Analysis and Determination

23. The duty of the court at this juncture is to reevaluate the trials courts finding and come up with an independent decision noting that it did not have the advantage of hearing the parties in the first instance. See *Peters v. Sunday Post Limited* 1958 E A 424
24. What is not disputed herein is the relationship between the parties. Despite their sore relationship the minors are theirs.
25. Secondly the Appellant was already out of this court's jurisdiction with the minors by the time the ruling was delivered.
26. The main issue and the sticking one for that matter is whether she was aware of the orders stopping her from leaving the jurisdiction of this court with the children.
27. I think the chronology of the events ought to be considered so as to answer this question. More importantly is whether she was served or whether she had knowledge of the orders and if so whether she blatantly disobeyed.
28. I have looked at the application dated 26th September 2019 and prayer 2 specifically asked the court to restrain her from taking the children outside the jurisdiction of the court.
29. On 27th September 2019 the trial court unilaterally issued orders in terms of prayers 1 and 2 effectively and temporarily barring the Appellant from leaving the country with the minors.
30. The matter then proceeded to final phase of the hearing where she testified and the parties closed their case and proceeded to file their submissions.
31. The record shows that on 28 October 2019 court recorded that;

 "We can get an undertaking that the children will not be removed.

 Defendant in person. I have no intention of leaving the country with the children."
32. The parties told the court that the application which I think is the one dated 26th September 2019 was to be dealt with after the judgement had been delivered.
33. The judgement was indeed delivered and on 5th May 2021 the counsel for the Respondent notified the court that the Appellant had left the country with the children without the court's permission.
34. What followed thereafter was flurry of activities which led to the court making the impugned ruling. The court found the Appellant in contempt and despite granting her the opportunity to purge her contempt she failed hence this appeal.
35. In my view therefore the substantive question is whether the Appellant had knowledge of the orders and deliberately disobeyed.



36. It is granted, she was never personally served with the same. There is no affidavit of service to that effect. The argument that must surmounted is whether she was consciously aware of the order.
37. Looking at the history of the matter and the above quote I think she knew. This is buttressed by the application she filed dated 24th March 2021 in which she sought for orders that:-
- “Leave be and is hereby given to the defendant to take the children namely JMM (9 years old) and FMM (5 years old) with her to Kinshasa, Democratic Republic of Congo and to live with them there as they pursue their education.”
38. Under the supporting grounds on the face of the motion she stated that:-
- “The defendant requires leave to take the children out of court’s jurisdiction hence the application.”
39. It appears that before her application was heard she left the country with the minors.
40. The replying affidavit of Jimmy Nyikuli the immigration officer dated 13th May 2021 indicates that the Appellant left with the children on 22nd April 2021 aboard Ethiopian Airways and the...;
- “Two minors were cleared to depart by one of our immigration officers stationed despite an existing stop order that the directorate had issued on the 25th April 2019 in the Directorates Border Management System (PISCES) pursuant to an order of this honorable court.,”
41. Cumulatively therefore I find that despite the order not being physically served upon her she was all through aware that she was not to leave the jurisdiction of the court without its leave. She chose to disobey.
42. I have gone through the Appellant’s lengthy submissions and the several portions of the law cited. I however think that the law cannot aid a deliberate abuse of the court orders. If she was not aware, why did she seek the leave of the court in her unprosecuted application?
43. In the case of Basil Criticos -VRS- Attorney General this court (Lenaola Judge) had this to say,
- “.....the law has changed. And as it stands today knowledge supersedes personal service. where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”
44. In any case she chose to file this appeal instead of purging her contempt at the said court. All that she needed to do was perhaps to appear before court and explain herself. Seeking greener pastures outside the country is not unique in my view. However not at the expense of breaking the law through disobedience of the lawful orders.
45. I find that the trials court finding was sound despite the argument that there was no formal application for contempt.
46. The court in Shimmers Plaza Limited v. National Bank of Kenya Limited (2015) eKLR when faced with the same scenario had this to say.

We reiterate here that Court orders must be obeyed. Parties to whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather it is mandatory and a person does not chose whether to obey a court order or not. For



as Theodore Roosevelt, the 26th President of the United States of America once said “no man is above the law and no man is below it; nor do we seek any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”

47. Based solely on the above authority which I find it in all fours with this matter I do not think there is merit in this appeal. The issues of the children’s rights being paramount is not disputed. However, their mother (the Appellant) cannot be allowed to disobey the court orders willfully and hide under the umbrella of those rights.
48. It is also noted that the Respondent is a parent just like the Appellant. The consent on record speaks on both of them consulting each other for the sake of the children. Her efforts deliberately were meant to scuttle the rights of the Respondent over his children.
49. Finally, I find that all through the Appellant has had the advantage of a counsel. It would have been probably a mitigating factor if the Appellant was acting in person. However, the record indicates that all along she has sought counsel advice and for this reason she cannot deny knowing the ramification of her breach.
50. Consequently, I do not find any merit in the appeal and dismiss it with costs to the Respondent.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 5TH DAY OF JUNE 2025.

H K CHEMITEI

JUDGE

