



**BHMM v BMA (Family Appeal E024 of 2022)  
[2024] KEHC 264 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E024 OF 2022**

**G MUTAI, J  
JANUARY 19, 2024**

**BETWEEN**

**BHMM ..... APPELLANT**

**AND**

**BMA ..... RESPONDENT**

**RULING**

1. The children court, *vide* a ruling delivered on July 20, 2022, ordered the respondent/applicant, “to immediately forthwith all the documentation necessary to allow processing by the respondent (mother). Should the process succeed however, the younger child, DBM, should finish his KCPE before anything is done that would disrupt his studies.”
2. The appellant/respondent was aggrieved by the said decision and filed an appeal in this court. In his Memorandum of Appeal dated August 2, 2022 he raised 7 grounds of appeal and sought to have:-
  1. The appeal allowed;
  2. The Ruling/Order of the court made on July 20, 2022 set aside; and
  3. Costs of the appeal be awarded to him.
3. This appeal was canvassed before this Court by way of Written Submissions. In the judgment I delivered on July 19, 2023, I stated as follows:-

“ 15. Upon consideration of the grounds of appeal, the proceedings and rulings of the trial court it is my view that the appeal is not in the best interest of the children. I agree with the court below that the United States of America has better opportunities than those available in Kenya. As a first-world country, America has leading universities and colleges and better infrastructure. The children will in all likelihood find it easier to get good jobs and to thrive.



16. Accordingly, it is my finding that the appeal lacks merit. The same is hereby dismissed. The ruling of the trial court is upheld. I make no orders as to costs, this being a family matter.”
4. I have found it necessary to reproduce the last two paragraphs of my judgment as the application before me seeks to have the appellant/respondent compelled to produce certain documents. The question that this Court faces is whether having rendered its judgment, the Court has jurisdiction to issue any further orders. To answer this question, I must reproduce the order sought by the respondent/applicant.
5. In her Notice of Motion dated October 12, 2023 (which in her submissions is stated as being dated October 14, 2023), the respondent/applicant sought the following orders:-
1. This application be certified urgent, and service thereof be dispensed with in the first instance;
  2. The applicant be detained in prison for a term not exceeding six months for disobeying the Court orders issued by this honourable Court on the 19<sup>th</sup> of July 2023;
  3. Costs of this application be awarded to the Respondent/applicant.
6. The application was opposed. The appellant/respondent filed a Replying Affidavit sworn on October 23, 2023, *vide* which he argued that as the application was unsigned and also as the Supporting Affidavit was uncommissioned, the same was incompetent and should be struck out. He deposed that he complied with the orders of the trial Court and, in support thereof, attached a copy of the ruling and an inventory, which he identified as exhibit “BHMM-3”. He argued that *vide* its judgment of July 19, 2023, “this court simply dismissed my appeal, and my advocate informed me that that was a negative order that did not require me to do anything,” He accused the respondent/applicant of being vindictive by seeking to have the High Court enforce the judgment of the Court below. In his view, this Court has no jurisdiction to do anything of the sort. He impugned the order that the respondent/applicant had provided and submitted that it did not reflect the decision of the court below.
7. The appellant/respondent also deposed that the court below had not delivered its final decision as what he had appealed against was an order of the trial court, made pursuant to an interlocutory application, not its final decision.
8. The appellant/respondent filed a Preliminary Objection dated 27<sup>th</sup> day of October 2023 in which he raised three grounds to wit:-
- a. That this court lacks jurisdiction to deal with enforcement proceedings of the magistrate Court order in the first instance;
  - b. That this court, having concluded the hearing and determination of the appeal, is *functus officio*;
  - c. That the proceedings herein violate section 34 of the [Civil Procedure Act](#); and
  - d. That the application is incompetent and incurably defective.
9. The respondent/applicant filed what she called opposition to Preliminary Objection dated October 30, 2023 in which she averred that the Preliminary Objection was an abuse of the process of court. She urged that “the applicant having filed an appeal gave powers to this honourable Court to give directions on the lower court ruling”. Together with the said document, she filed a Replying Affidavit sworn on even date *vide* which she argued that there had been non-compliance with the order of the trial Court.



10. On December 7, 2023, I directed that the application be canvassed by way of Written Submissions and issued timelines within which that was to be done. I ordered that the submissions be highlighted on December 15, 2023. The submissions were not highlighted on the said date as both parties opted to rely fully on their written submissions.

### **Submissions of the Respondent/Applicant**

11. The respondent/applicant filed Written Submissions dated December 10, 2023. In the said submissions, she adverted that the appellant/respondent filed an Application dated October 24, 2023 at the court below with a view to not complying with the orders of this court. She accused the appellant/respondent of always attempting to undermine her by procuring the termination of her employment or luring her to leave work on false pretext that he would open for her a pharmacy in Mombasa, something she argued he knew he couldn't do.
12. The respondent/applicant saw in her travails gender discrimination and inequality in society retrogressive cultures against women, violation of human rights, forced subjection to poverty and enslavement. She submitted that the appellant/respondent was frustrating her and did not provide for the cost of the maintenance of their children.
13. She thus prayed that her application be allowed in its entirety.

### **The Submissions of the Appellant/Respondent**

14. The appellant/respondent filed Written Submissions dated December 7, 2023. In the said submissions, his counsel challenged the competence and merits of the application. It was urged that the application was incompetent and should be dismissed with costs.
15. On the competence of the application, I was referred to the Court of Appeal decision in *Otieno & another versus Independent Electoral & Boundaries Commission & 2 others* (petition E002 of 2022) (2022) KEHC 10054 (KLR) (July 6, 2022) (judgment) for the proposition that as the instant application was neither dated nor commissioned was incompetent and should be dismissed.
16. Regarding the merits counsel submitted that this court had no jurisdiction to hear and determine the application before it. It was urged that what was before me called for a notice to show cause before the trial court and not an application for contempt.
17. It was further urged that even as a contempt application, the respondent/applicant hadn't shown that she was deserving of the orders sought. I was referred to the case of *Vitalis Otiogo Odida versus Martin Chengo* (2022)eKLR and *Alken Connections Ltd versus Safaricom Ltd & 2 others* (2013)eKLR for the proposition that what was being sought was unclear, and the appellant/respondent couldn't be held to have been in contempt.
18. The appellant/respondent argued that the proper court to enforce the judgment was the children's court. He referred me to the decision of the Court in *SAD versus EOO* [2021]eKLR, where the Court stated that:-

“in my view the Applicant ought to have sought execution of the orders for maintenance before the Children’s Court in the first instance. Section 101 of the *Children Act, 2001* sets out elaborate procedures for the enforcement of maintenance orders. The applicant ought to have first applied that notice to show cause issue upon the respondent which Notice ought to be prosecuted in the children’s court at the first instance”



### **Analysis and Determination**

19. I have considered the application, the Preliminary Objection, the Replying Affidavit and the rival Submissions of the parties. In my view, the issues that call for my determination are threefold:-
1. Is the application before me competent?
  2. Does the application have merit? And
  3. Is the Court *functus officio*?

### **Is the Application Competent?**

20. I have looked at the application in the court file and also in the portal. I note that the same was not commissioned. Would an application supported by an affidavit that was not commissioned be considered proper? I think not. Affidavits are solemn pronouncements made by a party under oath. Without commissioning, the solemnity required of the document is absent. What purports to be an affidavit becomes nothing more than a glorified paper with no probative value.

### **Does the Application have Merit?**

21. The application is founded on the belief on the part of the respondent/applicant that the appellant/respondent has disobeyed court orders. Having looked at the ruling of the court below and the decree that was extracted therefrom, it is my view that the two are at variance with each other. In those circumstances, I am unable to find that the terms of the order are clear and unambiguous and that the Appellant had proper notice of its terms.

### **Is the Court *functus officio*?**

22. The judgment of this court merely dismissed the appeal. No positive orders capable of being enforced were issued. By dismissing the appeal, the parties were, in essence, restored to the *status quo ante*. Having made its determination, this court became *functus officio*. The court, therefore, has no jurisdiction to issue enforcement orders.
23. The Court finds that having rendered its decision on the appeal, the court became *functus officio*. The proper court *vide* which the issues raised by the respondent/applicant can be canvassed is the children's court.
24. In the circumstances, this court finds that the application has no merit. The same is dismissed.
25. This being a matter about children, each party shall bear his or her own costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED THIS 19<sup>TH</sup> DAY OF JANUARY 2024 AT MOMBASA VIA MICROSOFT TEAMS**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Mr. Jengo for the Appellant/Respondent;

No appearance for the Respondent/Applicant; and

