



**PCK v JWW (Civil Appeal 51 of 2019)  
[2024] KEHC 16807 (KLR) (Family) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 16807 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL 51 OF 2019  
BM MUSYOKI, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**PCK ..... APPELLANT**

**AND**

**JWW ..... RESPONDENT**

**RULING**

1. By a notice of motion dated 19th December 2022 the appellant prayed for the following orders;
  1. Spent.
  2. This Honourable Court be pleased to review its ruling and orders dated 21<sup>st</sup> May 2021 in line with the consent of the parties dated 27<sup>th</sup> March 2021.
  3. This Honourable Court be pleased to stay the operation of the ruling and orders dated 21<sup>st</sup> May 2021 pending adoption of the consent of the parties dated 27<sup>th</sup> May 2021.
  4. The appeal herein be compromised in line with the consent dated 27<sup>th</sup> March 2021 to mark the matter settled with no orders as to costs.
  5. The costs of this application be in the cause.
2. The notice of motion is opposed by the respondent vide replying affidavit dated 5-10-2023.
3. The appellant was dissatisfied with a ruling of the Nairobi children’s court in its case number 351 of 2008 dated 30-04-2019 which found him to have been in contempt of its orders. That ruling is the subject of this appeal. In the said ruling, the lower court made the following orders;



- a. The defendant is in contempt of court orders issued on 12-11-2010, 9-03-2011 and 16-10-2012.
  - b. The warrant of arrest is thus issued against the defendant to show cause why he should not be committed to civil jail.
  - c. The minor to be produced in court on the 11<sup>th</sup> June 2019.
  - d. The defendant to meet the cost of the application.
4. It is on record that the appellant sent the child's step mother who appeared with the child before the children court on 11-06-2019 but still did not hand over the child to the respondent. Instead, she convinced the the court to allow her to go with the child and produce her the following day. After that court attendance, the child was spirited out of the country through facilitation of the appellant.
5. The above was followed by this appeal accompanied by the appellant's application dated 3-06-2019 which sought the following orders.
1. The application be certified urgent and service therein be dispensed with in the first instance.
  2. All the proceedings in Milimani Children's case number 351 of 2008 be stayed pending the hearing and determination of the application.
  3. All proceedings in Milimani Children's Court case number 351 of 2008 be stayed pending hearing and determination of the appeal.
  4. The appellant be granted temporary custody of the minor pending hearing and determination of the application.
  5. The appellant be granted temporary custody of the minor pending hearing and determination of the appeal.
  6. The applicant be granted leave, with assistance of a counselling psychologist, to substantively address the minor's psychological state to ensure a smooth return to the Kenyan jurisdiction.
  7. In the alternative to prayer 6 above, the respondent be ordered to travel to Uganda to substantively address the arising issues with the minor on site, prior to hers and the minors return to the Kenyan jurisdiction.
  8. The costs of the application and this suit be borne by the respondent.
6. I have gone through the proceedings of this court. I note that this matter came before Honourable Justice Maureen Odero on 16-02-2023 when Miss Kyama for the respondent appeared while there was no appearance for the appellant. The Honourable Judge made the following order;
- ‘The appellant filed an application dated 19-12-2022. They are not in court today. The application is dismissed for want of prosecution. Mention on 4-04-2023 for directions on hearing of the appeal. Counsel to serve.’
7. The matter was later to be listed before the same Judge on 21-09-2023 where the court directed parties to file submissions. Nothing was said of the order dated 16-02-2023 which dismissed the application dated 19-12-2022. The proceedings that followed were before the Deputy Registrar where parties kept on asking for more time for filing of submissions. The matter was finally placed before me on 26-06-2024 for hearing of the application dated 19-12-2022. This application having been dismissed and there being no order reinstating the same, I have no basis for me to consider the same.



8. However, I find the issues raised by the respondent on whether the appellant has audience before the court worth of consideration. As the appellant's application dated 19-12-2022 was pending hearing, the respondent brought an application dated 16-06-2022 asking among other prayers that the court orders the appellant to deposit in court a sum of Kshs 3,000,000.00 as security for costs. This application was heard by way of written submissions and ruling reserved for 21-05-2021. Honourable Justice Maureen Odero issued the following orders on 21-0-2021;

- i. The respondent to immediately return the minor to the custody of the applicant as per the court orders made in Nairobi Children's Case number 351 of 2008 on 30-04-2019.
- ii. The respondent to deposit in court the sum of Kshs 1,000,000/- as security for costs within thirty (30) days of the date of this ruling.
- iii. Stay of hearing of the appeal and application dated 3-06-2019 is hereby granted pending deposit of the security of costs.

9. The appellant claims that prior to the ruling dated 21-05-2021, the parties had filed a consent withdrawing the respondent's application dated 16-06-2019 which culminated to the said ruling. I have gone through the record and it is clear to me as it is acknowledged by the parties that, the consent was never adopted as an order of the court. In that case, what is the position of a consent which has not been adopted as an order of the court?

10. My postilion is that until a consent is adopted as an order of the court, it is incapable of being executed and it has no legal effect or force of the law as regards the suit. In *Geoffrey N. Asanyo & 3 Others (2020) eKLR*, the Supreme Court of Kenya held as follows;

'Adoption of a consent by a court is a process, in the course of which a court discharges the duty of evaluating the clarity of the consent placed before it by the parties and giving directions on the manner of adoption. This circumvents the risk of an unlawful order and validates the mode of adoption and compliance. Thus, a consent by parties becomes an order of the court only once it has been formally adopted by the court.'

11. In the current situation, the respondent is opposed to the adoption of the consent and the court cannot force a party to adopt a consent. The respondent claims to have been tricked into signing the consent on understanding that the appellant would comply with the court orders. I believe this is one of the scenarios the Supreme Court in the *Asanyo* case cited above had in mind. Where one of the parties objects to adoption of a consent, the court has no basis to adopt it as in such situation, there is no meeting of mind by the parties. In *Non- Governmental Organisation Coordination Board vs EG & 5 Others (2023) KESC 102 (KLR)*, the scenario was the same as in the case before me. The parties had executed a consent which had not been adopted by the court and faced with that, the Honourable Justice W. Ouko SCJ held that;

'Noting that both the Executive Director of the applicant and counsel for the 1<sup>st</sup> respondent executed the consent dated June 29, 2023; that subsequently, the applicant's counsel contested the manner in which it was entered insisting that the applicant's Executive Director was coerced into signing it and that the applicant's Board did not sanction it. But of significance is the fact that the consent had not been formally adopted by the court as an order and therefore serves no useful purpose in these proceedings. It could not per se have settled the issue of costs between the parties.'



12. It is the position in law that a consent by the parties cannot be used to pursue matters which are against public policy or interest. A consent which takes the path of circumventing the rule of law and administration of justice is obviously against public policy as it goes against the democratic principle of the rule of law.
13. If I understand the appellant, he takes position that parties can execute a consent order compromising a ruling of the court in contempt proceedings. In my view, this is a dangerous position. It is my position that contempt proceedings are special. An application for contempt of court has nothing to do with the stand, ego or position of the parties. Contempt of court is an offence committed against the court and indeed a court can issue orders even where there is no application by either party. The applicant remains a prosecutor of the offence and does not take benefit of the findings. I would refuse to adopt a consent which promotes disobedience of court orders or promotes a culture of impunity. In *Serah Nyambura T/A Crayfish Camp vs Karuturi Limited & Another* (2014) eKLR, Honourable Justice L.N. Waithaka cited with approval a holding by Honourable Justice M. Warsame in *Bedrock Holdings vs Erick Okeyo Kisumu HCC number 23 of 2004* thus;

‘The issue of contempt is against the judicial process, and the court would ensure it protects and preserves its dignity and stamp its authority against such disobedience, for it is dangerous to willfully decide what to do with a court order. It is not within the province of the parties and their advocates to decide and determine what to obey, when to obey and how to enforce court orders.

14. The appellant has disobeyed, violated and breached six court orders in these proceedings without suffering any consequences. These are the following;
  - a. The lower court’s orders dated 12-11-2010.
  - b. The lower court’s orders dated 9-03-2011.
  - c. The lower court’s orders dated 16-10-2012.
  - d. The lower court’s orders dated 11-06-2019.
  - e. The lower court’s orders dated 30-04-2019.
  - f. This court’s orders dated 21-05-2022.
15. The appellant is in essence telling the court that it was okay for him to thrash the above court orders without attracting penalty for the same. I find and hold that giving the applicant another forum to address the court on why the orders should be set aside despite his contemptuous conduct will not only go against public policy and interest but also promote lawlessness and bring disrepute to the court. Celebrated Lord Denning in *Hadkinson v Hadkinson* (1952) 2ALL E.R. 567 at page 575 held the following;

‘I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continued it impedes the cause of justice making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then, the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.’

16. In the instant case, the appellant has in addition to willfully disobeying six valid court orders continued to make applications and place obstacles on the path of execution of the court orders. He does not



deny disobeying the court orders neither has he shown intention of complying. He has no intention of removing the impediments and clearly has no respect for this court's orders and the judicial process. He cannot be allowed to seek refuge in the same courts he has no respect for.

- 17 I therefore decline to consider the appellant's plea until he obeys and abides by the court orders he has breached over a period of five years. I am alive to the fact that the child may have attained the age of majority and so able to make her own decisions but that does not sanitise or cleanse the appellant's conduct towards the court.
18. In conclusion, I hereby make the following orders;
1. This matter is stayed until such time as the appellant shall personally appear physically before this court and show cause why he should not be committed to civil jail for disobedience of the lower court orders dated 12-11-2010, 9-03-2011, 16-10-2012, 11-06-2019 and 30-04-2019 and this court's orders dated 21-05-2022.
  2. The appellant shall comply with this court's order dated 21-05-2021 in respect of depositing Kshs 1,000,000.00 as security for costs within thirty (30) days from the date of this ruling.
  3. In default of compliance with order 2 above, the entire appeal herein shall be deemed dismissed with costs to the respondent without any further reference to the court.
  4. In the event the appeal is dismissed pursuant to order 3 above, the execution of the court warrants issued by the children court on 30-04-2019 shall be pursued and executed before the said court.
  5. This matter shall be mentioned before the Deputy Registrar on a date to be given after delivery of this ruling for confirmation of compliance with the court orders herein and fixing a date for the appellant to appear in court for the notice to show cause.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Judgment delivered virtually in presence of Miss Magotsi for Miss Kethi Kilonzo for the appellant and in absence of the counsel for the respondent.

