



REPUBLIC OF KENYA



**KJH v TWW (Civil Appeal E104 of 2022)
[2023] KEHC 3279 (KLR) (Family) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 3279 (KLR)

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

**FAMILY
CIVIL APPEAL E104 OF 2022**

**EKO OGOLA, J
FEBRUARY 16, 2023**

BETWEEN

KJH APPELLANT

AND

TWW RESPONDENT

RULING

1. The Appellant moved the Court by way of an Amended Notice of Motion dated 9th November 2022. He prays for the following: -
 - a. Spent;
 - b. Pending the hearing and determination of the Motion herein, the Respondent TWW strictly and forthwith complies with the Children’s Court Order of 27th April 2022 as varied on 13th May 2022 in Nairobi Children’s Court Case No. E.039 of 2021 subject of the Appeal herein until further court orders.
 - c. Pending the hearing and determination of this motion the Respondent be ordered to forthwith socially and emotionally prepare the minor JHH aka JH.II subject of these proceedings adequately for the forthwith resume access/contact of the minor with the Appellant paternal parent in furtherance of the access terms as per the Children’s Court Order of 27th April 2022 as varied on 13th May 2022 in Nairobi Children’s Court Case No. E.039 of 2021 subject of the Appeal herein until further court orders.

Alternative to prayer (c) above
 - d. Pending the hearing and determination of this Motion the Respondent be ordered to (not later than 7 days from the making of this order) take the minor JHH aka JH.II for the minor’s



psychological treatment by a child psychologist of repute at her expense, to emotionally and adequately prepare the said minor for the forthwith resume access/contact with the Appellant in furtherance of the access terms as per the Children's Court Order of 27th April 2022 as varied on 13th May 2022 in Nairobi Children's Court Case No. E.039 of 2021.

- e. Pending the hearing and determination of the Appeal herein, the Respondent be ordered to (not later than 7 days from the making of this Order) take the minor JHH aka JH.II for the minor's psychological treatment by a psychologist of repute at her expense, to emotionally and adequately prepare the said minor for the forthwith resume access/contact with the Appellant in furtherance of the access terms as per the Children's Court Order of 27th April 2022 as varied on 13th May 2022 in Nairobi Children's Court Case No. E.039 of 2021.
- f. A warrant of arrest of the Respondent TWW do forthwith issue for her being and acting in Contempt of court on October 26th of the Order dated 27th April 2022 as varied on 13th May 2022 in Nairobi Children's Court Case No. E.039 of 2021, during the pendency of these proceedings and immediate upon the arrest of the Respondent TWW she be forthwith brought before this court for her sentencing, and thereupon she be committed to prison for a term not exceeding 6 months pursuant to section 35 (1), (3) and (6) of the *High Court (Organisation and Administration) Act*, or such period as this Honorable Court shall determine.
- g. The inspector general of police do cause the immediate enforcement of the warrant of arrest issued by this Honorable Court for the forthwith arrest of TWW and in liaison with the Deputy Registrar, High Court of Kenya at Nairobi Family Division to ensure that the Respondent TWW is forthwith brought before this Honorable Court with haste for sentencing, and as such expedient sentence be imposed on her as this Honorable shall deem fit.
- h. The cited Respondent herein TWW be personally presented in Court on all dates appointed for the hearing of this Application.
- i. This Honorable Court be pleased to direct that:
 - i. In purging her contempt, and only in lieu of sentencing the said TWW under Order Number 6 above, she forthwith, and not later than 7 days of the making of this Order issues a written undertaking to this Honorable Court, to the Appellant herein, and to the Riaru Group of Schools, that she will strictly and faithfully comply with, adhere to the terms and scope of all Orders issued by this honourable court and particularly as relates to the access terms of the minor JHH aka JH. II so issued, containing a default clause therein that in any default of her compliance with such lawful Orders as relates to the access terms of the minor JHH aka JH. II, a warrant of arrest of the Respondent TWW will issue against her forthwith upon this Court being furnished with evidence on oath of her stated defiance of the Court's Orders relating to the said minor, and the Respondent be thereupon dealt with as this Honorable Court shall order and direct; and
 - ii. The Respondent shall additionally issue a separate written apology to the Judiciary of Kenya (or in such manner as this Honorable Court may direct, and as approved by the Appellant), lodged in these proceedings and copied to the Nairobi Children's Court Administrator in Nairobi Children's Case No. E.039 of 2021, such being a formal apology for her continued contempt of court during the pendency of the proceedings



before this Honorable High Court and as already held against her in the said Children's Court case.

- j. This Honorable court issues such further directions on the determination of this Application as may be expedient.
 - k. The Respondent pays the Applicant's costs of these proceedings in any event.
2. To put matters into context, I will give a brief background of this case. This Appeal was instituted vide a Memorandum of Appeal dated 21st October 2022. The Appellant is aggrieved by the Ruling and Order of Hon. C.C Oluoch, Chief Magistrates made on 23rd September 2022 in Nairobi Children's Court Case No. E.039 of 2021. The said Ruling dismissed the Appellant's Application dated 19th May 2022 seeking orders of a warrant of arrest to issue against the Respondent for acting and being in continuing contempt of the Court's order of access terms to the minor JHH. At this juncture, I will not seek to address the merits or lack thereof of the Appeal.
3. Before the Appellant's Application that was the subject of the Ruling dated 23rd September 2022 was delivered, the Appellant herein had filed an Application dated 19th November 2021 on the basis that the Respondent had denied him access to the minor. The Appellant prayed to the court to issue arrest orders and for the Respondent to be committed to civil jail. On 27th April 2022 the Court delivered its Ruling as follows: -
- a. The defendant is found to be in contempt of court but is given an opportunity to purge it.
 - b. Pending the hearing and determination of the suit, the plaintiff shall have access to the minor on alternate Saturdays from 2.00pm-4pm, the first one being 30th April 2022. The parties shall agree on picking up and dropping off points through their advocates on record. If no agreement is reached, they are at liberty to move the court for directions.
 - c. Pending the hearing and determination of the suit, the plaintiff shall have access to the minor in school every Wednesday from 3:30pm to 5:00pm.
 - d. In default of compliance with the Orders granted herein, the plaintiff shall be at liberty to move the court for issuance of a warrant of arrest against the defendant.
4. On 13th May 2022, the Court issued further orders as follows:
- a. That the plaintiff shall have access to the minor every Wednesday from 3:30pm to 5:00pm. The plaintiff shall pick the child from school at 3:30pm and drop him at Impala club at 5:00pm for collection by the mother.
5. After issuance of the aforementioned Order, the Appellant filed an Application dated 19th May 2022 seeking warrants of arrest to be issued against the Respondent herein for Contempt of Court order.
6. Simultaneously with the appeal, the Appellant filed a notice of Motion Application dated 27th October 2022. This is the Application that was then amended on 9th November 2022, which is the subject of this Ruling. On 19th December 2022, this Court issued interim Orders pending the delivery of this Ruling. The Orders were as follows:-
- a. Spent
 - b. That pending the delivery of the Ruling, the father of the minor of the subject matter of the proceedings-The Applicant herein shall have access to, and custody of the said minor



every alternating weekend from Friday 2pm to Sunday 2pm commencing from the weekend pursuant to these proceedings until the Ruling herein is delivered.

- c. That the said access shall, if need be, be supervised by the Children's Office at Westlands, and shall, as much as possible be facilitated by the mother of the said minor, the Respondent herein.
7. Now back to the Application at hand. It was premised on the grounds set therein and the Appellant's Supporting Affidavit dated 27th October 2022 and his Supplementary Affidavit dated 13th December 2022. He averred that the Respondent through parental alienation of the minor has caused the said minor grave harm and emotional injury. It is not disputed that the parties are the biological parents of the minor and that the Appellant terminated their on-off relationship in 2018. The Respondent has been living with the minor since then and the Appellant only accessed the minor at his school, where according to the Appellant, they spent happy moments together. According to the Appellant, the Respondent denied him access to the minor during the COVID-19 pandemic and that is the reason he sort redress from the Children's Court for orders of access to the minor. He stated that the said court issued interim orders of access and he resumed his visits at the minor's school. However, the Respondent since 18th March 2021, started limiting this access by cutting phone conversations. His access has been restricted and the Respondent had even reported to the police that the Appellant had abducted the minor despite the Court Order. He has no access to the minor, he has not been able to celebrate birthdays with the minor; he does not participate in the minor's schoolwork; and he is unable to enjoy fatherhood.
8. The Appellant states that any attempts to access the child have been met with violence and animosity from the Respondent which is against the interim orders granting him access to the minor.
9. According to the Appellant, the minor is at a critical stage of growth that requires contact with his father. He added that the childhood of the minor is being irreparably injured with every denied opportunity of access. Therefore, the Respondent should be punished for contempt of court to coerce the Respondent to obey the orders of the court.
10. The Appellant deposed that the Respondent has 'poisoned' the minor against him. The Respondent was well aware of the Orders of the Court but still chose to defy them. He stated that the said orders still stand as there was no Appeal preferred against them.
11. The Appellant has explained how his attempt to pick up the minor from school was botched by the Respondent who drove ahead of him and signaled the minor to enter her car. He stated that the Respondent's Counsel gave a professional undertaking that the Respondent would comply with court orders. However, the said advocate has failed in ensuring the Court orders have been complied with.
12. He averred that the Child Welfare Report that was filed demonstrated that the Respondent was poisoning the minor against the Appellant. Therefore, the Respondent has no justification to deny access to the Appellant.

The Response

13. In response to the Application, the Respondent filed her Replying Affidavit dated 28th November 2022. She deposed that the Application is frivolous and misleading in an attempt to delay the hearing and determination of the trial in the Children's Court. She deposed that she has the custody of the minor and the Appellant's school access affects the child. According to her, the minor should be accorded an opportunity to express his opinion on how the Appellant's access affects him. She added that on several occasions, the Appellant has been going to the minor's school outside the court's directed hours hence disrupting the minor's study schedule.



14. According to the Respondent, this Application seeks orders as prayed in the Memorandum of Appeal and the Application dated 19th May 2022 filed in the Children’s Court.
15. She deposed that the Appellant does not have the best interest of the minor as he has always disregarded the minor’s wishes on matters of access; that the Children’s officer categorically stated that the minor did not want anything to do with the Appellant. She deposed that at one point during the Appellant’s access, the Appellant kept the minor out at night up to around midnight and for him to later deliver him to a police station. She further deposed that the Appellant is telling a lie when he averred that she had ‘poisoned’ the minor; that she has no role on how the minor behaves towards the Appellant. She stated that justice will only be achieved if the parties herein together with the witnesses are heard and cross-examined and the wishes of the minor are considered.
16. The court directed counsel to canvass the matter by way of written submissions.

Appellant’s Submissions

17. Mr. Mbichiri learned counsel for the Appellant filed Submissions dated 22nd November 2022 and Supplementary submissions dated 14th December 2022. Counsel submitted that the Appellant cannot wait forever to access his son and exercise parental rights over the minor while he is still growing. In addressing the contempt jurisdiction of the Appellate Court, counsel cited the case of *JWN v MN* (2019) eKLR and submitted that this court is tasked with re-evaluating the evidence tendered in the subordinate court both on points of law and facts and coming up with findings and conclusions.
18. Counsel relied on several decisions such as *Mobanned Yeslam Awadh v Peter Wilbur Marumbu* (2004) eKLR to emphasise that court orders must be always obeyed to maintain the Rule of Law and good order.
19. In addressing the issue that contemptuous denial of access has negative lasting implications on the minor, counsel submitted that it cannot be in the best interest of the child to deny him access to his father to shape his spiritual, moral, educational, social, or even physical life. To buttress his argument, counsel relied on the case of *DMM v PMN & another* (2020) eKLR and submitted that there is no definition of the best interest of the child. The best interest of the child is determined on the circumstances of the case as it specifically relates to the child.
20. On contempt of court, counsel cited the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* (2005) eKLR. He further submitted that if an application for committal for contempt of court orders is made, the court should treat the same with a lot of seriousness and urgency. Counsel argued that unpurged contempt cannot go unpunished. He cited the case of *Trust Bank Limited v Shanzu Villas Limited & 3 others* (2004) 2 KLR, 299 to further buttress his claim.

Respondent’s Submissions

21. Mr. Muchiri learned counsel for the Respondent submitted that the Appellant is acting in the best interest of the minor and that the minor must be protected as he is vulnerable. He further submitted that the Children’s Officer’s report indicated that the minor stated that he did not want anything to do with the Appellant. Hence, the minor should be accorded an opportunity to express his opinion, and this should be taken into account.
22. Counsel submitted that the relationship between the minor and the Appellant has since broken down and this has been fueled by the Appellant’s incessant demands of having the Respondent committed to civil jail an action which the minor is apprehensive will be prejudicial to him.



23. On the issue of whether warrants of arrest should issue against the Respondent for contempt of court orders, counsel submitted that the standard of proof in contempt proceedings was higher than proof on the balance of probabilities. Counsel placed reliance on the case of *Mutitika v Baharini Farm Limited* (1985) KLR 229. Counsel submitted that the Appellant must prove willful and deliberate disobedience of the court order. Counsel submitted that the evidence should not be admitted as the respondent did not get an opportunity to respond on the issue and it defeats the principle of a fair trial.

Determination

24. I have considered the pleadings filed, the submissions of counsel, and the vast precedents cited in support of each claim. The issues that emerge for determination are as follows:-
- i. Whether these are committal proceedings to warrant an arrest warrant to issue.
 - ii. What is the best interest of the minor?
25. The Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others*, [2014] eKLR found that the English law on committal for contempt of court was under rule 81.4 of the *English Civil Procedure Rules*, which deals with breach of judgment, order or undertakings. This is the root of section 5(1) of the *Judicature Act*. This section was repealed by section 38 of the *Contempt of Act of 2016*, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the *Judicature Act*.
26. This Court is in this regard guided by the applicable English Law which is part 81 of the *English Civil Procedure Rules* of 1998 as variously amended.
27. Having concluded as aforesaid, I find it fit to examine the procedure for instituting contempt of court proceedings under section 5 of the *Judicature Act* which provides as follows:-
- “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.”
28. The law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed.
29. Rule 81.4 of the *English Civil Procedure Rules* (Amendment No. 3) Rules, 2020 provides for the requirements of a contempt application; rule 81.5 deals with the manner of service of the application; rule 81.7 then deals with directions for hearing of contempt application; and rule 81.8 then deals with hearings of such applications.
30. In my view, considering the seriousness with which the Court takes contempt of court proceedings, every stage of the proceedings from service to hearing must be expressly clear to the Defendant and any ambiguity must be resolved in favour of the Defendant since such proceedings are quasi-criminal in nature. All in all, having considered the submissions made by learned counsel in this matter, It is clear that these are not contempt of court proceedings and therefore prayer 6, 7, and 8(i) and (ii) as prayed cannot be granted.



31. What is the best interest of the child? The Children's Officer filed a report dated 29th March 2022. During her interview with the child, the child had the following to say about his relationship with his father, the Appellant.

“That he does not like being with his father because he is bad and selfish to his siblings. He does not greet them and he does not like them.

He also said that the plaintiff embarrasses him when he sits with him in the classroom or plays with him at school.

That the plaintiff likes buying him bubbles and asks him to blow them something he does not like.

That the plaintiff forces him to enter his car, takes several pictures of him and even asks him to remove his masks and forces him to smile as he takes photos.

The plaintiff has never participated in his birthdays and he has never bought him a cake but the defendant does and she invites his cousins and friends.

That at the plaintiff's place there is no good food but the defendant knows how to cook good food.”

32. From the report, the Children's officer states that the minor maintained his answers and denies being influenced by anyone. However, the minor did not mention any abuse or harm that has been caused by the Appellant apart from the above-mentioned sentiments.

33. In the summary of findings, the children's officer stated that the child's refusal to see the father could be as a result of the negative comments about the Appellant that are said in his presence resulting in him forming hatred towards the Appellant. She stated that the relationship between the Appellant and the minor is already damaged and the Appellant needs to make a deliberate move to form a friendship with the minor and his siblings to enable him to access the child with ease.

34. The children's officer's recommendation was inter alia for the Appellant to have access to the minor without the Respondent's interference and for the Respondent to make it her responsibility to encourage the minor on the importance of spending time with his father.

35. Article 53 (1) (d) of the Constitution provides that every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. It is also a constitutional imperative that in matters concerning a child, the interests of the child are paramount. To that extent, article 53 (2) provides that a child's best interests are of paramount importance in every matter concerning the child. This is emphasized in the children's Act which also recognizes the fact that the welfare of the child is paramount. Section 4(3) of the Act provides as follows:-

“All judicial and administrative institutions and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration

to the extent that this is consistent with adopting a course of action calculated to—

- (a) Safeguard and promote the rights and welfare of the child;
- (b) Conserve and promote the welfare of the child;



- (c) Secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.”

36. There is no expressed definition of the best interest of the child. The best interest of a child varies in different cases. However, there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. In M.A v R.O.O [2013] eKLR the Court listed a few of these rights as shelter, food, clothing and education. The child is entitled to medical care. The child’s welfare should be taken care of under the best possible circumstances. The child is also entitled to parental guidance. This guidance shall where possible, be provided by both parents. The child is further entitled to be given a suitable, conducive and loving environment in which to grow up.
37. The report from the Children’s Officer was clear that both parents want to actively be part of the minor’s life in one way or the other. The constitution and the law are clear that the best interest of the child should dictate the decisions the courts make with regard to matters affecting children. At the age of the minor, he needs the company of both parents for a proper upbringing. From the Respondent’s averments, the appellant’s access has been limited because the minor doesn’t want to see and interact with the father. The idea of parents doing exactly what the child says can ruin the child’s future. The adults in this situation are the parties. They are the ones to guide the minor in his life. Specifically, the Respondent who has custody should encourage the minor and inform the importance of having his father in his life. Parenting is not always taking the easier way out. Tough decisions must be made when the time arises. It would be so unfortunate if the child grows up to resent his father for things, he himself cannot understand. A father is an important figure in a young boy’s life. According to the Children’s Officer, the Appellant has no history of violence towards the minor; he has no history of abusing drugs or alcohol, and the Appellant confesses being a Christian. The Appellant and the Respondent should treat each other with respect for the benefit of the minor.
38. I am also persuaded by the minor’s sentiments about not wanting to interact with the Appellant. The minor young as he maybe is entitled to his opinions and feelings. However, he needs guidance from his mother, the Respondent, so the minor’s relationship with the Appellant can improve. The Appellant should also take into consideration his son’s sentiments. He should therefore tread with caution.
39. It is for these reasons that I make the following orders:-
- a. Prayers (b) and (c) are granted.
 - b. Respondent to comply with the Children’s Court Order dated 27th April 2022 as varied on 13th May 2022.
 - c. The said access shall be supervised by the Children’s Officer and shall as much as possible be facilitated by the mother.
 - d. The Children’s Officer is hereby directed to file reports on each visit between the Appellant and the minor.
 - e. The child to be taken for psychological treatment at the expense of both parents and the Children’s Officer to choose the hospital and further facilitate the hospital visits.
 - f. Prayer (f), (g), and h(i) and (ii) dismissed.
 - g. Parties should bear their own costs.
- It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY 2023



E.K. OGOLA

JUDGE

In the presence of:

Ms. Ndiritu h/b for Mr. Mbichire for the Appellant

Ms. Omuoyo h/b for Messr. Omari & Muchiri for the Respondent

Gisiele Muthoni Court Assistant.

