



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APEAL NO. HCFA/E E078 OF 2021

SAD.....APPELLANT

VERSUS

EOO.....RESPONDENT

RULING

1. Before this Court is the notice of motion application dated 12th August 2021 by which SAD (the Applicant) seeks the following orders: -

“1. Spent.

2. THAT the respondent herein be rebuked and/or committed to civil jail for a period of time not exceeding 6 months for deliberately disobeying the orders given by the Children’s court in the Children’s Case No. E308 of 2021 on the 8th April 2021.

3. THAT the Human Resources Manager – [particulars Withheld] be compelled by a mandatory injunction to attach the sum of 107,000/- every month from the Respondents salary and allowances in strict compliance with the orders of the Children’s Court as was given in the Children’s Case No. E308 of 2021 on the 8th April 2021 effective from the month of April 2021.

4. THAT the costs of this Application be borne by the respondent herein.

2. The Application was premised upon section 1A and 3A of the Civil Procedure Act, Articles 10,19,20,21,23,25,27,29,48 and 50 of the Constitution of Kenya 2010, and section 2,4,82,8,91,98,113 and 114 of the Children Act 2001 and all other enabling provisions of the law. The Application was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent EOO did not file any reply to the application and as such, the same was unopposed. The Applicant filed written submissions dated 22nd September 2021.

BACKGROUND

4. The Plaintiff filed the Children’s Court in Nairobi Suit No. E308 of 2021 vide a Plaint dated 25th August 2021 in which the Applicant sought *inter alia* the following orders against the Defendant, (the Respondent herein).

“(a) THAT the Defendant herein be compelled to pay a modest monthly upkeep for the children at Kshs 107,000/-.

(b) THAT actual custody of the 4 children be given to the Plaintiff.

(c) THAT the Defendant be compelled to pay all school fees and other school related expenses on time and to cater for the Children’s medical cover, clothing and food on time.

(d) THAT the Defendant be restrained from threatening the life of the Plaintiff and from evicting the 4 children mentioned above and the Plaintiff from the couple’s matrimonial home situated at [Particulars Withheld] Estate within Nairobi.

(e)”.

5. After hearing the matter the learned trial magistrate **Hon M.W. KIBE** on **8th April 2021** made the following orders: -

“1. THAT the Defendant is hereby ordered to pay a monthly upkeep for the minors at Kshs 107,000/- pending hearing and determination of this suit.

2. THAT the Defendant is ordered to pay school fees and school related expenses for the minors and to provide them with Medical cover, clothing and food on time, pending hearing and determination of this suit.

3. THAT the Defendant is restricted from evicting the minors and the Plaintiff from the couple’s Matrimonial Property in [Particulars Withheld] Estate in the best interest of the children, pending hearing and determination of this suit”.

6. The Plaintiff states that despite the existence of said orders, the Respondent has failed and/or declined to pay the monthly maintenance of **Kshs 107,000/-** as ordered by the court. Hence the present application.

ANALYSIS AND DETERMINATION

7. I have considered the application before this court, the Affidavit in support as well as the written submissions filed by the Applicant.

8. As stated earlier the Respondent did not file any reply to the application. I have perused the Affidavit of service dated **31st August 2021** sworn by **Peter O. Ngoge** an advocate of the High Court. The same indicates that the Application was duly served upon the Respondent through his email address. I am therefore satisfied that the Respondent had notice of the application. Given that the Respondent failed to file any Replying Affidavit, the application is unopposed.

9. The Applicant submits that the failure and/or refusal by the Respondent to pay the monthly maintenance as ordered by the trial court has prejudiced the **four (4)** minors. That one of the minors has had to drop out of school due to lack of school fees. The Applicant prays that the Applicant be committed to Civil Jail for a period not exceeding **six (6)** months for being in contempt of court orders.

10. The question that arises for determination is whether the Respondent is in fact in contempt of court orders. Contempt proceedings in Kenya have been governed by **section 5 (h)** of the **Judicature Act** which section gives to the **High Court** and the **Court of Appeal** powers to punish for contempt of court orders.

11. In the case of **CHRISTINE WANGARI GACHEGE – VS – ELIZABETH WANJIRU EVANS & 11 OTHERS [2014] eKLR** , the **Court of Appeal** sitting in Nakuru in ‘**Obiter dictum**’ stated as follows:-

“The emphasis imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application is brought”.

12. It is trite law that orders made by a properly constituted court of law must be obeyed. In the case of **HADKINSON – VS – HADKINSON [1952] ALL ER** it was held: -

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

13. Nearer home, in the case of **ECONET WIRELESS KENYA LTD – VS – MINISTER FOR INFORMATION OF KENYA & ANOTHER [2005] eKLR**, the Court relying on the decision of the **Court of Appeal** in **GILLAB CHAND PUPATLAL SHAH & another – vs -Civil Application No. 39 of 1990** stated that:-

“It is essential for the maintenance of the Rule of Law and order that the authority and dignity of our courts are upheld at all time. The Court will not condone deliberately disobedience of its orders and will not shy away from its responsibilities to deal firmly with proved contemnors.”

14. Finally, on the point in **TEACHERS SERVICE COMMISISON – VS – KENYA UNION OF TEACHERS & 2 OTHERS [2013]eKLR** the court stated as follows: -

“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed”.

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the

case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

15. In order to succeed on an application for contempt of Court the Applicant must satisfy the court of the following:-

- a) That the terms of the order (or injunction or undertaking) are clear and unambiguous and are binding on the Defendant.**
- b) That the Defendant has knowledge of or proper notice of the terms of the order.**
- c) The Defendant has acted in breach of the order.**
- d) The Defendant’s conduct is deliberate.**

16. Contempt proceedings are *quasi-criminal* in nature and the penalty may involve a loss of liberty for the contemnor. In the circumstances, the legal standards required to prove contempt are higher than that required in civil cases but lower than the standard required to prove a criminal case. **In KATSURI LTD – VS KAPURCHAND DEPAR SHALI [2016] eKLR** the Court held thus:-

“the courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved ----- it must be higher than proof on a balance of probability, almost but not exactly, beyond reasonable doubt.”

17. There is no doubt that the court orders issued by the **Children Court** on **8th April 2021** were both clear and unambiguous. The orders stated in plain and simple language what was required of the Respondent.

18. From the record it is clear that the order was communicated to the Respondent. All the pleadings filed in the **Children’s Court** were served upon the Respondent but he opted not to reply to the suit. The Affidavit of service dated **31st August 2021**, the Memorandum of Appeal dated **12th August 2021**, filed by the Applicant herein was served upon the Respondent by email. That Memorandum of Appeal contained a copy of the courts orders of **8th April 2021**. The order contains a Penal Notice indicating as follows:-

“PENAL NOTICE TAKE NOTICE that any persons served with the above order of the court and disobeys its terms will be liable to prosecution for contempt of court under provisions of section 5 of the Judiciary Act Cap 8 of the Laws of Kenya.”

In the circumstances, I am satisfied that the order was served on the Respondent.

19. The Applicant told the court that the Respondent has totally failed to comply with the court Orders. That no amount at all has been remitted by the Respondent toward the maintenance of the minors. Courts do not make orders in vain. In the Canadian Case of **CANADIAN METAL COMPANY LTD – VS – CANADIAN BROADCASTING CORPORATION [1975] 48 DLR**, it was held –

“To allow court orders to be disobeyed would be to tread the road towards anarchy. If orders of the Court can be treated with disrespect, the whole administration of justice is brought into scorn. If the remedies that the courts grant to correct wrongs can be ignored, then there will be nothing left for each person but to take the Law into his own hands. Loss of confidence in the courts will quickly result in the destruction of our society.” (own emphasis)

20. The Respondents action in disobeying valid court orders is clearly deliberate and can only be deemed contemptuous. I have no hesitation in finding that the Respondent herein is in contempt of court orders.

21. The Applicant has sought for orders committing the Respondent to civil jail. She further seeks orders directed to the Respondent’s employer for the attachment of **Kshs 107,000** per month from the salary due to the Respondent each month.

22. In my view, the Applicant ought to have sought execution of the orders for maintenance before the **Children’s Court** on the first instance. **Sections 101** of the **Children Act, 2001** sets out an elaborate procedure 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 Court** at the first instance. Therefore, I direct that this matter be referred back to the **Children Court** for enforcement of the orders of maintenance made on **8th April 2021**.

23. It is so ordered.

DATED IN NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

.....

MAUREEN A. ODERO

JUDGE