



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CASE NO. 31 of 2019

LYDIAH IZA MWAMBURI.....APPLICANT

VERSUS

PATRICK NJOKA NDWIGA.....RESPONDENT

RULING

1. By an Application dated 16.3.2020, Lydiah Iza Mwamburi, the Applicant seeks in the main, orders that Patrick Njoka Ndwiga the Respondent, be found to be in contempt of the orders of this Court of 25.2.2020 (the Orders). She also seeks the committal to civil jail of the Respondent, for a period not exceeding 6 months or such other period as the Court may direct for disobeying the Orders.

2. The Application is predicated upon the grounds as set out in the Application and further in the Applicant's affidavit sworn on even date. The grounds are that by her application dated 7.11.19 the Applicant sought physical custody of the parties' 2 children, pending the hearing and determination of the main matter. This Court did issue the Orders, directing the Applicant to have access to the children on alternate weekends as well as attend counselling with the children every Saturday, with effect from 29.2.2020, in the absence of the Respondent. The Orders were served upon the Respondent's advocates on 28.2.2020 who acknowledged receipt. The Respondent has however blatantly refused to allow the Applicant access to the children or allow the counselling sessions to be conducted.

3. The Applicant avers that on 28.2.2020, the Respondent took the children to Amani Counselling Centre (Amani) but refused to leave the children with the counsellor, for their counselling with the Applicant. Their daughter Patricia, was willing to stay behind with the Applicant. Their son Mark however, wanted to leave with the Respondent who did not do anything to help. The counsellor attempted to talk to the Respondent, but he declined and instead drove off with the children. The counsellor wrote a letter to Court dated 4.3.2020, explaining what transpired. The Applicant went for counselling on 7.3.2020 at 9.30 am. The Respondent walked in with the children but was harsh to the counsellor because of the letter he had written. He then said goodbye to Mark who stood and followed him. The counsellor tried to convince Mark to stay behind but he refused. Shortly after, Mark came back and signalled Patricia, who stood up and left with him. The counsellor wrote another letter to the Court dated 10.3.2020, explaining what transpired. The Applicant contends that despite the Respondent and his advocate acknowledging the Orders, the Respondent has blatantly ignored and refused the Applicant to have access to the children on alternative weekends. He has also refused to allow the children to have counselling sessions despite the Applicant's efforts to avail herself. The Respondent has no intention of obeying Court orders and has acted in a manner undermining, disrespecting and mocking the dignity of the Court. The Respondent has denied the Applicant access to the children which is not in their best interest as they are in need of maternal care, love and nurture. The Respondent does not respect the allocated counselling sessions of the Applicant and the children which are for mending the rift between them.

4. The Applicant further averred that the Orders have not been discharged or set aside and the Respondent ought to obey them. The dignity of this Court must be respected, and unless the orders sought are granted, the course of justice herein will be subverted and prejudiced by the conduct of the Respondent. She further averred that the Application is in the best interests of the children who are of tender age and need their mother.

5. The Application is opposed by the Respondent's grounds of opposition and replying affidavit, both dated 11.5.2020. The grounds are that the Applicant has failed to comply with mandatory statutory provisions relating to filing contempt proceedings; that the Application is fatally defective, having been filed under a statute that has been nullified; that the Application offends the law and relevant rules of procedure and that the same is misconceived, mischievous, frivolous and in bad faith.

6. In his replying affidavit, the Respondent reiterated the contents of the grounds of opposition. He denied the allegations by the Applicant. He averred that he drove the children to Amani as ordered by the Court; that the children have consistently refused to remain alone with the Applicant even for the counselling session; that he remained in the session to enable the children participate in the same; that when the counsellor protested, he decided to leave but Mark insisted on going with him with Patricia joining him later; that he came to learn from the counsellor's report that neither he nor the Applicant could convince her to stay; that 10.3.202 was a school day and the Orders were clear that counselling should take place on Saturdays and there was therefore no basis for attendance on that day; that he has not disobeyed the Orders and has done everything the Court required him to do; that the Applicant blames him for refusing to help in the situation and that alone should not amount to contempt.

7. The Respondent accused the counsellor of depicting him as uncooperative, yet the counsellor has failed to remark on Mark's persistent refusal to be with the Applicant. The Respondent claims that the sessions with the counsellor have not achieved the intended purpose and the Respondent is being blamed. The Respondent stated that the counsellor filed his report on 4.3.2020 and 10.3.2020 instead of 1.4.2020 as directed by the Court. This to the Respondent, is indicative that the Applicant and the counsellor are not giving the process a chance to yield the required results. The Respondent further stated that he has lost confidence in the counsellor's competence and impartiality and asked the Court to replace him. The counsellor and the Applicant have both taken an adversarial and antagonistic stance and that the best interests have taken a back seat. The Respondent urged the Court to dismiss the Application and make such orders as uphold and protect the best interest of the children.

8. The parties filed their written submissions which I have considered. The issues that fall for determination are:

- i) Whether the Application is defective.
- ii) Whether the Respondent is in contempt.
- iii) Whether the Respondent should be committed to civil jail.

Whether the Application is defective

9. The Respondent contended that the Application is defective as the same was filed under a nullified statute, the Contempt of Court Act No. 46 of 2016. The said Act in its entirety was declared unconstitutional in the case of Kenya Human Rights Commission v Attorney General & another [2018] eKLR. It was further submitted for the Respondent that the Applicant invoked the Civil Procedure Act on the inherent jurisdiction of the Court yet where there is an express provision of the law. Further, that where a Court's jurisdiction is predicated by statute, it can only be invoked and exercised as provided by the statute. The Respondent further submitted that the appropriate procedure for invoking the jurisdiction of the Court to punish for contempt is under Section 5 of the Judicature Act. Additionally, Section 63 of the Civil Procedure Act is also not applicable as the same deals with disobedience of a temporary injunction, which is not the case herein.

10. To counter this challenge to the Application, the Applicant submitted that the Court has unlimited jurisdiction and ought to administer substantive justice without undue emphasis on procedural technicalities. The Application is brought under Sections 3A and 63 of the Civil Procedure Act. To the Applicant, any procedural defect that does not affect the substance of the Application can be cured by Article 159(2) (d) of the Constitution. The Applicant further submitted that Section 1A and 1B of the Civil Procedure Act can also be considered in emphasizing the importance of furthering the overriding objective.

11. The Application is expressed to be brought under Sections 3, 4(a), 6 and 28 of the Contempt of Court Act, No. 46 of 2016, Sections 1A, 1B, 3, 3A and 63 of the Civil Procedure Act as well as Orders 40 and 15 of the Civil Procedure Rules. In a bid to give this Country its own law to punish for contempt of Court, Parliament did enact the Contempt of Court Act in 2016. It was assented to on 23.12.16 and came into force on 13.1.17. However, on 9.11.18, the Contempt of Court Act was declared to be unconstitutional by the Court in Kenya Human Rights Commission v Attorney General & another [2018] eKLR. Mwita, J. stated:

Having considered the petition, the response, submissions, the constitution and the law, I am persuaded that sections, 30 and 35 of the Contempt of court Act are unconstitutional. I, however, find that the entire fails the constitutional test of validity for lack of public participation and for encroaching on the independence of the judiciary. Consequently and for the above reasons, this petition succeeds and I make the following orders.

1. A declaration is hereby issued that Sections 30, and 35 of the impugned contempt of court Act No 46 of 2010 are inconsistent with the constitution and are therefore null void.

2. A declaration is hereby issued that the entire contempt of court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and encroaches on the independence of the Judiciary.

12. For about a year and a half prior to the filing of the Application, the Contempt of Court Act had been inoperative. The Applicant knew, or ought to have been aware of this fact. It is trite law that a Court's jurisdiction is conferred and not inferred. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

13. A Court therefore, may not exercise jurisdiction not conferred upon it by the Constitution or statute, but only that which has been conferred upon it by the Constitution, statute or both. Accordingly, filing an application under a law that has been nullified, is asking the Court to exercise jurisdiction that it does not have.

14. The Applicant sought solace in the unlimited jurisdiction and inherent power of the Court in response to the challenge to the jurisdiction of the Court to entertain the Application. She relied on the case of Africa Management Communication International Limited v Joseph Mathenge Mugo & another [2016] eKLR in which, Mabeya, J. stated that 2 legal regimes exist with regard to punishment for contempt of Court, namely Section 5 of the Judicature Act and Section 63 of the Civil Procedure Act. The application therein was for punishment for contempt relating to injunctive orders. The respondent challenged the same on the basis that the correct procedure was not followed. The learned Judge stated:

The Defendants on their part have challenged the application first on the basis that it has been wrongly brought. According to Mr. Wanyaga, learned Counsel for the Defendants, the Plaintiff failed to take steps to fulfill the conditions precedent before or on filing the motion. Mr. Wanyaga argued that leave was not obtained before commencing the contempt proceedings; that there was no notice to the Registrar and the Attorney General within the prescribed timelines. It was therefore contended that failure to adhere to these procedures rendered the Plaintiff's application incompetent and the same should therefore be dismissed... In this regard, my view is and I so hold that an application under order 40 Rule 3 (1) of the Civil Procedure Rules does not require leave or service of notice to the Attorney General. One cannot read into the law that which is not expressed therein.

15. It is to be noted that the foregoing case relates to contempt of injunctive orders. This is not the case herein. For this reason, the Application has run into headwinds for being brought under provisions of Section 63 of the Civil Procedure Act and Order 40 of the Civil Procedure Rules, which relate to punishment for disobedience of injunctive orders. Section 63 of the Civil Procedure Act which provides:

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

(a) ...

(b) ...

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold

Order 40 Rule 3 (1) provides:

In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

16. It is also noted that the case cited, was filed and determined in 2013, long before the enactment and nullification of the Contempt of Court Act. As such, although the case stipulates the correct legal position with regard to contempt of Court, the same is not useful in countering the jurisdictional challenge raised by the Respondent.

17. Article 159(2)(d) of the Constitution of Kenya, 2010 emphasises substance over form, and requires Courts to administer justice without undue regard to procedural technicalities. However, this provision does not mean that all procedural deficiencies are to be overlooked by the Court. Some procedural deficiencies, such as bringing an application under a nullified law, cannot be remedied by Article 159(2)(d) as they go to the jurisdiction of the Court. In Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR, the Supreme Court stated:

Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls.

18. Similarly, Section 3A of the Civil Procedure Act is not a panacea for all procedural pitfalls. It provides:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

19. In the case of Apa Insurance Company v Vincent Nthuka [2018] eKLR, the applicant therein cited the wrong provisions of law in its application and relied on the inherent jurisdiction of the law as set out in Section 3A of the Civil Procedure Act. Odunga, J. had this to say, and I concur:

As regards section 3A of the Civil Procedure Act, the provision simply reserves the Court's inherent jurisdiction. It must however be noted that the Court's inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. The Court's inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process. As was held in Industrial & Commercial Development Corporation vs. Otachi [1977] KLR 101; [1976-80] 1 KLR 529, section 3A is not a panacea for all ills. It was therefore held in Elephant Soap Factory Ltd vs. Nahashon Mwangi & Sons Nairobi HCCC No. 913 of 1971 that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers.

20. Section 5 of the Judicature Act gives the Court a general power to punish for contempt of Court. This section was repealed by section 38 of the Contempt of Court Act of 2016. Following the nullifying by the Court of the Contempt of Court Act however, Section 5 of the Judicature Act remains in our statute books. Accordingly, the Applicant herein ought to have brought the Application under the express provisions of Section 5 of the Judicature Act and not the provisions of the nullified Act. As found by Odunga, J., the Court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter. The disregard by the Applicant of Section 5 of the Judicature Act, which confers jurisdiction upon this Court to punish for contempt, has resulted in a jurisdictional impediment, which has rendered the Application incompetent and a non-starter.

21. In the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR, the Supreme Court has this to say about an incompetent appeal that was before it:

An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant

issues.

The Court went on to cite the Nigerian Supreme Court case of Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others, SC. 11/2012, in which Judge Bode Rhodes-Vivour, JSC stated that a court is competent and has jurisdiction when *inter alia*, **“the case comes before the court initiated by the due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction”**.

22. Duly guided I find that the Application being incompetent, has divested the Court of the jurisdiction to delve into the factual or legal controversies herein. Accordingly, my view is, and I so hold that to consider the remaining issues in the Application, which I have found to be incompetent, is to expend judicial time on an exercise that is academic and unnecessary.

23. In the result, the Application dated 16.3.2020, being incompetent is hereby struck out, but with no order as to costs. The Applicant is at liberty to file a fresh application, to be heard on merit.

DATED, SIGNED and DELIVERED in MOMBASA this 10th day of July 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**