



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**PETITION NO. 18 OF 2015**

**IN THE MATTER OF ARTICLES 3(1), 22, 23(3), 43(f), 47(1) and 53(2) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 4(2) OF THE CHILDREN ACT, 2001**

**AND**

**IN THE MATTER OF SECTIONS 28 AND 35 OF THE BASIC EDUCATION ACT, 2013**

**BETWEEN**

**E. K (A child suing through his**

**Father and next friend E.K.K.)..... 1<sup>ST</sup> PETITIONER**

**C.S.C (A child suing through his**

**Mother and next friend E.M.S)..... 2<sup>ND</sup> PETITIONER**

**E.E.K. (A child suing through his**

**Mother and next friend R.P) ..... 3<sup>RD</sup> PETITIONER**

**M.I (A child suing through his**

**Mother and next friend N.C.T) ..... 4<sup>TH</sup> PETITIONER**

**L.K.C. (A child suing through his**

**Mother and next friend R.K) ..... 5<sup>TH</sup> PETITIONER**

**A.M (A child suing through his**

**Mother and next friend A.W.N) .....6<sup>TH</sup> PETITIONER**

**AND**

**RICHARD C. MOINDI ..... 1<sup>ST</sup> RESPONDENT**

**THE REGISTERED TRUSTEE OF S.H.S..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The contempt of Court Application before me is dated 20/05/2015. It seeks, in the main, to commit and detain the 1<sup>st</sup> Respondent, Mr. Richard Moindi, to prison for a term not exceeding six months for allegedly willfully disobeying and/or breaching the Court's orders given on 05/05/2015. Mr. Moindi is the Chief Principal of the Respondent School ("School").
2. There is a second Application dated 30/05/2016. This is one is by Mr. Moindi and the School. This one seeks to have the Contempt Application dismissed for, among other reasons, having been overtaken by events.
3. A brief rehash of the history and procedural posture of the case is necessary to understand the two Applications.
4. The Petitioners approached Court *vide* a constitutional Petition seeking for orders that they be re-admitted to the School following their earlier expulsion by the School Board. In a judgment delivered on 05/05/2015, the Learned Trial Judge returned a verdict in favour of the Petitioners directing Mr. Moindi and the School to re-admit five of the Petitioners to the school immediately and to pay the sixth Petitioner Kshs. 150,000/- as compensation.
5. On that same day, upon an informal application for stay pending intended appeal, the Learned Judge granted conditional stay pending hearing of the formal application for stay *inter partes*. The condition was that the School re-admits the five Petitioners as day scholars pending *inter partes* hearing.
6. The Application for stay was argued *inter partes* on 11/05/2015. Ruling was reserved for 15/05/2015. In the meanwhile, the Court granted stay on condition that the School provides transport, accommodation, food and security for the five Petitioners so that they could continue as day scholars.
7. Ruling was delivered on 15/05/2015. The application for stay was dismissed meaning that the School was now obliged to re-admit the five students even as it litigated its appeal at the Court of Appeal.
8. On 20/05/2015, the Petitioners brought the present Application under Certificate of Urgency. The Application has four prayers as follows:
  1. *That Mr. Richard C. Moindi the Chief Principal of the Respondent School, be committed and detained in prison for a term not exceeding six (6) months for willfully disobeying and/or breaching this court's order given on 5<sup>th</sup> May, 2015.*
  2. *That the Respondent School and its said Chief Principal be ordered, jointly and severally, to pay Kenya shillings One Million (KShs, 1,000,000/=) or such other sum the court will find reasonable to compensate the Petitioners for the loss and damage occasioned to the Petitioners by the Respondent's refusal to obey the court orders given on 5<sup>th</sup> May, 2015 and, in default, their properties be attached and sold in execution.*
  3. *Costs of this application be borne by the Respondents jointly and severally.*
  4. *That such further or other order(s) be granted as this Honourable Court will deem fit and expedient in the circumstances of this application.*
9. The Petitioners insist that Mr. Moindi was present in Court when the Court order was given, and that, in any case, he was served with the Court order but that he refused to comply with the Court order exhibiting an attitude of impunity and contempt towards the Court.
10. Mr. Moindi filed a Replying Affidavit on 29/05/2015 in reply to the Contempt Application. He denied being in contempt indicating to the Court that the School has every intention to comply with the Court orders fully. He explained the following in his affidavit:
  - a. That he had to await for the School Board to make a decision following the Court order;
  - b. That, in turn, that decision had to await for the ruling on formal stay since the School had a temporary stay that lasted until 15/05/2015.
  - c. That in compliance with the conditional stay, the School had granted the students access to the School as day scholars.
  - d. That the School wrote a letter dated 16/05/2015 to each of the five students re-admitting them to the school.
  - e. That three of the students had committed fresh infractions namely to put "perm" on their hair while they were day scholars leading to fresh disciplinary proceedings against them by the School.
  - f. As such, Mr. Moindi's affidavit says, for those students, they were advised to report to School for re-admission on 02/06/2015 after serving two weeks suspensions for the new infraction.
11. It is noteworthy that Mr. Moindi does not deny knowledge of the Court order in his affidavit but explains the delays and re-scheduled days in re-admitting the students.
12. Mr. Eric Koech, a next friend to one of the Petitioners, filed a further affidavit on 10/06/2015 refuting most of the information in Mr. Moindi's affidavit. Of note, Mr. Koech depones as follows:

- a. That Mr. Moindi called a special meeting with parents of the School where he announced that he had no intention to comply with the Court order. Mr. Koech says that the press was present at the meeting and a footage of the meeting was captured.
- b. That he believes that the first three Petitioners did not breach any school rules leading to a second independent punishment but that these were trumped up charges to circumvent the Court orders to re-admit the students.
- c. That he (Mr. Koech) himself called Mr. Moindi on 28/05/2015 when he realized time was running out. Mr. Koech depones that Mr. Moindi told him that he had no plans to comply with the Court orders.
- d. That since the time for registration for transfers for Kenya National Examination Council centres was to expire on 31/05/2015, Mr. Koech and the other parents elected to ask for transfer letters from the School rather than risk their children not booking a spot to do their examination.

13. This is the necessary factual background for the determination of the two Applications.

14. I will begin with the Application dated 30/05/2016 by Mr. Moindi and the School. It seeks the following prayers:

- 1. *That the application filed herewith be certified as urgent and its service be dispensed with in the first instance.*
- 2. *That this Honourable Court be pleased to declare that the application dated 20<sup>th</sup> May 2015 for contempt proceedings is moot and an abuse of the Honourable court's process.*
- 3. *That this Honourable Court be pleased to declare that the application dated 20<sup>th</sup> May, 2015 has been overtaken by events and this dismiss the same.*
- 4. *That costs of the application be provided for.*

15. The two substantive prayers by Mr. Moindi and the School are really the same: that the contempt proceedings are moot and/or overtaken by events. It is a clever and interesting argument but ultimately futile. The controversy between the parties (whether the Petitioners should have been expelled from school or not) might be moot; but the controversy whether Mr. Moindi and the School disobeyed valid Court orders hence putting the Court into contempt or disrepute is very much alive. I do not need to belabor this point. However, if one were beholden to legal authority and they needed one for the point, perhaps the words of Ibrahim J. (as he then was) in ***Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828*** should be sufficient:

*It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. 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 void.*

16. Consequently, I must now turn to the Application dated 20/05/2015 and determine if Mr. Moindi and the School are guilty of committing contempt of Court. Differently put, did Mr. Moindi and the School disobey existing Court orders sufficiently to warrant the visitation by the Court of committal for contempt?

17. In making this assessment, courts begin by considering the meaning of contempt as described in the Contempt of Court Act 2016 provides as follows:

*Section 4 (1): "Contempt of Court includes civil contempt which means willful disobedience of any judgment, decree, direction, order or other process of a court or willful breach of an undertaking given to a court."*

*Section 4(2): "In any case not related to civil or criminal proceedings as contemplated under subsection (1), an act that is willfully committed to interfere, obstruct or interrupt the due process of the administration of justice in relation to any court, or to lower the authority of a court, or to scandalize a judge, judicial officer in relation to any proceedings before the court, or on any other manner constitutes contempt of court."*

18. Flowing from this definition and our case law, to establish contempt of court, there must be sufficient evidence to establish the following four elements:

- a. The order in question must be definite, clear, specific and leave no doubt or uncertainty in the mind of the person to whom it was addressed of the conduct prohibited or required of them. See: ***Amos Mathenge Kabuthu v Simon Peter Mwangi [2015] eKLR*** ("Before finding whether or not there was contempt of court order, this court has to be satisfied that: There was a court order issued by this court; The order was proper; There was service of the said order upon the alleged contemnor or that the alleged contemnor had knowledge actual or constructive of the order and what it commanded him to do or to refrain from doing; The order was clear and unambiguous; and there was breach of the said order.");
- b. The alleged contemnor must have had notice or knowledge of the specific order or decree. See ***Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2014] eKLR*** (where the Court of Appeal held that "...the law as it stands today is that knowledge of an order is sufficient for purposes of contempt proceedings" and ***Basil Criticos Vs Attorney General and 8***

*Others [2012] eKLR* where the Court stated that “...the law has changed and as it stands today: knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary.”

c. The act constituting the violation must have been willful or volitional. See *Republic v Ahmad Abolfathi Mohammed & another*; and

d. The contemnor must have acted with wrongful intent. *Republic v Ahmad Abolfathi Mohammed & another*.

19. An analysis of the factual background provided above reveals the following:

a. The Order which was served on Mr. Moindi and which he was aware of is the order arising from the judgment of 05/05/2015. That order was first stayed on 05/05/2015 and again on 11/05/2015. It was re-activated vide the dismissal of the formal application for stay on 15/05/2015. It is not clear to me if the original orders of 05/05/2015 were served again on Mr. Moindi and the School. However, it is clear from their replies that they became aware of the dismissal and its effect: to order the immediate re-admission of the five Petitioners into the School. To this extent, it is possible to say that the Court order was definite, clear, specific and left no doubt or uncertainty in the mind of Mr. Moindi and the School of the conduct required of them: to re-admit the Petitioners to the School.

b. There is no question from the affidavits filed by Mr. Moindi (including the affidavits in support of his application for Stay of Execution both at the High Court and the Court of Appeal) that Mr. Moindi and the School knew about the Court order. The factual summary given above makes this clear as well.

c. The 64-Billion question in my mind is whether Mr. Moindi and the School willfully and volitionally disobeyed the Court Order. I have outlined above that the order was varied on 05/05/2015 and again on 11/05/2015 and was only again re-activated on 15/05/2015. When, then, should Mr. Moindi have re-admitted the students? On the same day? Two days later? Three days later? I note that the Application for contempt was drawn up four days after the Court order was re-activated. The Court Order itself, while crystal clear on what needed to be done, was not categorical on when it ought to have been done. The Petitioners scoff at Mr. Moindi's explanation that he needed guidance from the School Board on how to proceed after the Court order was re-activated. I would not so off-handedly dismiss that explanation. Mr. Moindi runs the School on behalf of the Board. Neither Mr. Moindi nor the School Board had any right to ignore a valid Court order; but it would be foolhardy to say they had no right or prudence to determine how to obey the Court order. Indeed, in his affidavits, Mr. Moindi has attached letters to show that there were further infractions by some of the Petitioners that needed to be dealt with.

d. There is another reason why I would not be too quick to declare that there was willful and volitional disobedience of a Court order in this case. Mr. Moindi has attached letters showing that he communicated with the students informing them of the new dates they would report. The Petitioners say that no such letters were actually sent. Who is telling the truth? I am unable to tell conclusively from the material before me whether the letters attached to the affidavits of Mr. Moindi are pre-text or not. As the matter had been contemplated earlier, perhaps only a cross-examination of the deponents would have brought out the veracity of the matter. As it is, committal for contempt requires a higher standard of proof than the run-off-the mill civil case – and on the material before me I am unable to conclude that there was willful and volitional disobedience of the Court order.

e. Lastly, for the reasons discussed in (c) and (d) above, I am unable to say that Mr. Moindi and/or the School disobeyed any Court Orders with wrongful intent.

20. **Having committed myself to the above analysis, it is obvious that my findings are that the Application dated 20/05/2015 cannot be granted. I hereby dismiss it in its entirety as I earlier dismissed the Respondent's Application dated 30/05/2016. Given the nature of this case, however, I find it eminently prudent to ask each party to bear its own costs respecting the two Applications considered in this ruling.**

21. Orders accordingly.

**Dated and delivered in Nakuru this 15<sup>th</sup> day of January, 2019**

**JOEL NGUGI**

**JUDGE**