



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. APPLICATION NO. 118 OF 2016

A Z A.....APPLICANT

VERSUS

S B LRESPONDENT

RULING

1. There is a matter before the Children Court at Nairobi concerning a child A.S.L. who is aged about two years and nine months. The child's parents are the applicant (defendant in the lower court) and the respondent (plaintiff in the lower court). The two are wife and husband, respectively. Following their marriage, they set up a matrimonial home in Parklands in Nairobi. When the respondent filed the Cause on 14th November 2014 he complained that the applicant had deserted the matrimonial home and moved to her parents in Old Town Mombasa and taken the child along. He stated that both the applicant and her parents were not working and had exposed the child to conditions that were bad and squalid. He had unsuccessfully tried to get the applicant to bring the child back home to Nairobi. The suit sought an order vesting parental responsibility over the child to the two of them, and to have them awarded legal custody of the child with the applicant having reasonable unlimited access.

2. With the Cause was filed a chamber application seeking that the child be produced into court, an order for shared responsibility be made and an order for interim custody to the respondent, and, in the alternative, an order for unlimited access to the child. The applicant was served but did not respond. On 16th December 2014 an order was made granting joint parental responsibility, and the respondent was allowed unlimited access to the child on mutually agreed terms.

3. On 21st January 2015 the respondent filed a chamber application complaining that he had been refused access to the child and that the applicant was exposing the child to immoral and unlawful behavior. The application was served and heard *interpartes* on 13th February 2015, following which an order was made to have the Children Officer Fort Jesus Mombasa prepare a comprehensive report after carrying out a home visit of where the child was living. In the meantime, the respondent was allowed access on Monday, Tuesday, and Wednesday from noon to 4.00pm. Subsequently, the order was varied on 27th September 2016 to allow access every 1st and 3rd weekend of every month from 9.00am to 5.00pm. On 3rd October 2016 the respondent applied to have the applicant cited for contempt on the allegation that she had disobeyed the order and denied access. On 18th October 2016 the matter came for hearing. The court asked the applicant to first obey the order before being heard. It was ordered that the matter be

mentioned on 1st November 2016 to see if there had been compliance. On that date the respondent's counsel reported that there had been no compliance. The court issued a warrant of arrest against the applicant. On 11th November 2016 the applicant appeared in court to say that she had complied with the order of the court. The execution of the warrant of arrest was suspended until further directions.

4. On 26th September 2016 the applicant filed the present application before this court seeking to have the Cause before the lower court withdrawn and transferred to the Children Court in Mombasa for hearing and disposal. The application was brought on the ground that both the applicant and the child reside in Mombasa, and therefore that the court with the territorial jurisdiction to determine the matter was the Children Court there. She relied on **section 15(a)** of the **Civil Procedure Act (Cap. 21)** which states that a suit shall be instituted in a court within the local limits of whose jurisdiction:-

“(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain.....”

The respondent opposed the application. His case was that the applicant, having disobeyed the orders of the lower court, seeks to circumvent the warrant of arrest issued against her. To grant the orders, it was argued, would be to condone the disobedience of court orders. Mr. Mwangi for the applicant and Mr. Onyango for the respondent filed written submissions on the application.

5. It is notable that, even as the applicant seeks the transfer of this Cause to Mombasa on account of jurisdiction, on 5th October 2016 (after she had filed this application) she filed before the lower court a chamber application seeking to have the orders of 27th September 2016 set aside and/or reviewed on the basis that the same were granted without the participation of her counsel, and therefore were issued without her being accorded an opportunity to be heard. The application has not been heard. Subsequently, on 18th October 2016 she filed before the same court a notice of preliminary objection seeking to have the cause dismissed on the ground that the court lacked jurisdiction to punish for contempt. Again, the objection has not been heard. It is the pendency of these applications that made the respondent to argue that the applicant is merely engaged in forum-shopping with no intention to obey the orders that are in place against her.

6. The applicant and the respondent are a married couple whose matrimonial home is in Parklands in Nairobi. This is the home of the minor. That the applicant and the minor are in Mombasa is, in my view, a temporary arrangement. Secondly, this dispute begun in 14th November 2014. The parties have all along been before the lower court in Nairobi without territorial jurisdiction being objected to. Thirdly, the applicant herself has two applications pending before that court. These applications are an acknowledgement that the court has jurisdiction to hear and determine the dispute. Lastly, the applicant has, before that court, the issue of disobedience of an order. Even if that court did not have jurisdiction, such order has to be obeyed first before other matters can be canvassed by the party. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it (**Hadkinson –v- Hadkinson[1952] C.A. 258, Mawani –v- Mawani 1977] KLR 159**). He has a plain and unqualified obligation to obey such an order until it is discharged, or set aside. It follows that the issue of the alleged disobedience of the order of the lower court issued on 27th September 2016 has to be dealt with by the court.

7. In conclusion, I determine that the Children Court at Milimani in Nairobi has the territorial competence to hear and determine the dispute between the applicant and the respondent regarding their child A.S.L. Consequently, the application dated 26th September 2016 by the applicant before this court is found not merited and is dismissed with costs.

DATED and SIGNED at NAIROBI this 1ST FEBRUARY 2017

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 2ND FEBRUARY 2017

M. MUIGAI

JUDGE