



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL APPEAL NO. 99 OF 2016**

**N N M NA.....APPLICANT**

**VERSUS**

**S N O.....RESPONDENT**

**RULING**

**Introduction**

1. The matter came before the Court on the Application of Mr. N N. The Application seeks a Supervision Order of the Children's Court (the Lower Court) in **Case Number 621 of 2016**. That matter concerned the custody and access arrangements relating to a young child known as L M N. The Respondent is S N O. The Parties are the Parents of the Child.

2. The Application was brought under a Certificate of Urgency and filed on 14<sup>th</sup> February, 2017. It was placed before the Duty Judge who certified it as Urgent and came before this Court for Hearing on 16<sup>th</sup> February, 2017. The Applicant was seeking a number of orders additional to the supervision<sup>[1]</sup>. The First was that the Application be heard ex-parte. That prayer was dealt with by the Learned Duty Judge who ordered that the Application be served and proceed inter-partes on 16<sup>th</sup> February, 2017, when it came before the Court. The Applicant was represented by Mr. Gibson Kamau Kuria, Senior Counsel. The Respondent was represented by Mr. Danson Omari. Mr. Omari's first application through counsel holding brief was ~~that~~ for the file be placed aside. He then asked for an adjournment on the basis that the Respondent had not been served. His attendance suggested that she had been served through her Advocates, as agreed on behalf of the Respondent. Mr. Omari then sought an adjournment on the basis that he needed more time to take Instructions. The Court took the view that any adjournment should be purposive and therefore it was necessary to hear from the Applicant before any directions were given, including the filing of any responses by the Respondent.

3. The Application in the main seeks Orders for the issuing of search warrants for various residential addresses for the maternal family of the Child. The complaint being that the child has been hidden away from the Father thereby obstructing the Father's access to the Child. Prayer 4 specifically sought an Order restraining the mother from removing the child from the jurisdiction of the Court without its leave.

4. It should be mentioned that the Lower Court has made final orders relating to Custody, care and control of the Child as well as for access. It is obvious that, that Court made its decision

on the evidence before it at the instance. The Applicant's case is that such evidence included an assertion by introducing an email saying the mother would not be returning to Denmark for work. The suggestion being that she would be remaining within the jurisdiction of the Court. Against that background the Court's Order for unlimited access to the Father made sense. However, since 28<sup>th</sup> October, 2016, no access at all has, in fact, taken place.

5. The Court expressed the view that it may not be in the interests of a Child to be subjected to the type of intrusive orders that the Applicant seeks. The Opening Submissions of Counsel for the Applicant were interrupted by Counsel for the Respondent to inform the Court that the Applicant had sought various methods to stay and review the Order of the Lower Court. The matter was now pending for Appeal. He made clear that there was an order in place that had not been successfully challenged.

6. Acting that Submission, the Court **suo motto** made an order for enforcement of the order of the Lower Court. That order provided for contact/ access between the Father and Child. The Trial Court was of the view that was in the best interests of a Child. The Court also ordered that the file of the Lower court be placed before the Court for consideration.

7. Counsel for the Respondent far from being happy with an order that maintained the status quo in favour of his client demonstrated signs of being enraged by such an Order. He sought to impress and/or assert the following facts upon the Court.

- i. The matter was previously heard by Hon. Lady Justice Achode and should continue being heard by her.
- ii. That the mother is being accused of contempt but the Court should know she was granted actual custody and the Father was given legal custody and unlimited access.
- iii. The modalities were to be arranged between the Parties.
- iv. There was no contempt, real or implied.
- v. Parties have sought enforcement of the Order.
- vi. The Application before the Court is for a search warrant to be issued, not removal of the child.
- vii. It is trite law that a non-compliance should be followed with a show cause.
- viii. What is before the Court is for it to exercise its Supervisory jurisdiction.
- ix. Therefore the Court cannot force enforcement of the earlier order.

There is an element of inconsistency in those arguments.

8. In the course of his submissions the Respondent's Counsel informed the Court that "*the Mother and Child were in Denmark because that is where the Applicant had taken them*". However, Counsel was unable to confirm to the Court whether or not the Child was born in this Country or abroad. He was similarly unable and/or unwilling to confirm whether or not the decision of the Lower court was made on the basis that the mother and child would remain within the jurisdiction. He equally refused to provide contact details to enable arrangements to be made.

9. A Court will not act in vain. In the circumstances the Court would not make an order which is intrusive and could be perceived to be High handed without being satisfied there was a higher purpose, namely the best interests of the child being involved. In the circumstances counsel for the Applicant was requested to inform the Court whether the Respondent and child were in

the jurisdiction or not. He declined to do so. The Court takes the view that such refusal is not consistent with the overriding objective and/or his duties as an Officer of the Court.

10. The serious point is that the Court **must** know whether or not the Child is in or even will return to the jurisdiction of the Court. The Court would have to adopt a different approach for enforcement for a child who is within the jurisdiction and one who is outside the jurisdiction. That notwithstanding, the extensive and wide ranging powers of the High Court aimed at protecting and furthering the best interests of the child. Although counsel refused to tell the Court where the child is, he did make statements that the Father should go to Denmark to see the child because *“he provides nothing for the child”*, therefore he should pay, Again that would make sense in the right circumstances which brings us back to the point of the whereabouts of the Child. In particular where the Father did not agree to any travel plans.

11. The only way out of the impasse, is to start with a certainty as to the whereabouts of the child. Although, Counsel has not raised the argument of legal professional privilege, that does not lie because it is a very fundamental precept of litigation that the whereabouts or address of Parties and/or address for service are disclosed to the Court.

12. In the circumstances the Court made an order for the Respondent through her counsel to disclose her whereabouts and those of the child to the court. At that stage there is no mention of service on the Applicant. Counsel refused to comply and was given until 1400 to do so. His retort was that he *“would be making an application for the Judge to recuse herself.”*

13. The Court adjourned to allow him to do so. A formal application was filed under a Certificate alleging that his client’s right to a fair hearing is under threat. He did not ask for reasons and/or a review and/or leave to appeal the order. In the circumstances that order stands.

14. The Court therefore is in the invidious position that it has before it a Party that refuses to comply with an Order it has made. That Party now wishes to make a new application. Whether or not the non compliance ~~that~~ amounts to contempt of court, in the legal sense or not is not before the Court to decide and does not progress matters. At the very least the Respondent through her Counsel has demonstrated that she will not be bound by court orders. Her counsel has demonstrated by his conduct that he is contemptuous, of the Court and its Coram. In the circumstances can and should the court hear a further application which is an exercise in futility given the foregoing?

15. This Court is of the view that by reason of the breach of its Order, the Application is brought by a Party that lacks clear hands ( at the very least) and seeks to caste around to either delay proceedings or find a more amenable forum. In the circumstances, it is ordered that the file be placed before the Presiding Judge of the Division to give guidance.

**Order accordingly,**

**FARAH S. M. AMIN**

**JUDGE**

**Signed and Delivered on the 20<sup>th</sup> day of February 2017.**

In the Presence of:

Court Assistant: Mr Keplalah

Applicant: Mr Gibson Kamau Kuria

Defendants/Respondents: Mr Danson Omari

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[\[1\]](#) Correction made pursuant to Section 100 to aid understanding