



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 48 OF 2010**

A A O.....APPELLANT

VERSUS

1. N O B.....1<sup>ST</sup> RESPONDENT  
2. C O ..... 2<sup>ND</sup> RESPONDENT

*(Being an appeal from the Judgment and Decree of the Hon. Mr. Kassan, RM delivered on the 16<sup>th</sup> August, 2010 in Nairobi Children's Case No. 565 of 2009)*

**RULING**

1. This matter has become a circus. Unfortunately, it revolves around the life of a child, whose everyday living since 2009 has been turned into the theatre of the absurd by his parents.
2. It arrived here at the High Court in 2010 by way of an appeal from a decision of the Children's Court made in **Children's Case No. 565 of 2009**. Custody had been granted to the father by the lower court. In a decision herein dated 12<sup>th</sup> July 2011 custody was awarded to the mother. There were secondary orders relating to the child's schooling and access to him by the father.
3. The decision of 12<sup>th</sup> July 2011 was not complied with until 3<sup>rd</sup> September 2013 when the court compelled the father to handover the child. The father had engaged in manouvres that were clearly designed to frustrate the judgment of 12<sup>th</sup> July 2011 by filing numerous applications before this court to delay its implementation.
4. The shoe is now in the other foot. It is the mother who is now having custody of the child. She has adopted the very same manouvres to ensure that the judgment of 12<sup>th</sup> July 2011 is not fully implemented.
5. When I made orders on 31<sup>st</sup> July 2015 to facilitate access by the father to the child during the August 2015 school holidays, the orders were not complied with, the mother instead choose to ignore them and to move the court instead for review thereof *vide* her application dated 3<sup>rd</sup> August 2015.
6. Strung by the non-compliance of the said order, the father came to court with his own application dated 18<sup>th</sup> August 2015, principally seeking contempt of court orders for the mother's alleged contempt of the said orders of 31<sup>st</sup> July 2015.

7. The parties appeared before Ougo J. on 27<sup>th</sup> August 2015, who; after hearing counsel, the parties and the child, directed that the father do have access to the child as from 28<sup>th</sup> August 2015. He was to pick the child from the mother's house on 28<sup>th</sup> August 2015, spent time with him within the Kisumu area and return the minor to the mother on 30<sup>th</sup> August 2015 at 5.15pm. It would appear, from the material before me, and contrary to the orders of 27<sup>th</sup> August 2015, once the child came into the custody of the father he was removed to Nairobi.
8. The applications, that is to say that dated 3<sup>rd</sup> August 2015 and that dated 15<sup>th</sup> August 2015, were urged before me on 1<sup>st</sup> October 2015. Counsel appearing before addressed me at length on the matter. It appeared evidently that positions are hardening on both sides and the interests of the subject child appear to have been thrown out of the window as the parties battle to settle scores.
9. I am invited in the application dated 3<sup>rd</sup> August 2015 to review the orders of 31<sup>st</sup> July 2015. I am not convinced that there exist good grounds for review of the said orders. The application dated 3<sup>rd</sup> August 2015 is tailored, to my mind, to frustrate the said orders.
10. The application dated 18<sup>th</sup> August 2015 asks me to cite the mother of the child for contempt of court. Obviously there was non-compliance, and no grounds exist at all to justify the non-compliance. The father himself is also guilty of failing to comply fully with the order of 27<sup>th</sup> August 2015. Both sides are guilty of impunity, and none of them appear to me to mind at all about the welfare of the child in question. I doubt whether citing any of the two parents for contempt of court will advance the interests of the subject child.
11. In view of what I have said in paragraphs 9 and 10 hereinabove, I find no reason at all to grant the two applications. I do hereby dismiss the applications dated 3<sup>rd</sup> August 2015 and 18<sup>th</sup> August 2015. Each party shall bear their own costs.
12. It is unfortunate that since 12<sup>th</sup> July 2011, the orders made in the judgment of Nambuye J. have not been complied with fully to date. The parties have had sufficient time to come to terms with the orders made in that judgment. It is about time that the said orders are fully complied with. The circus must now get out town. Litigation must come to an end. The subject child should be allowed to settle to a familiar routine within which, hopefully, he should enjoy some peace.
13. I believe the best way forward in this matter lies with full compliance of the judgment of 12<sup>th</sup> July 2011, particularly in terms of Clauses 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 thereof.
14. To facilitate implementation of the said judgment in full, the orders made herein on 13<sup>th</sup> February 2015 and 31<sup>st</sup> July 2015 are hereby vacated.
15. The Children's Officer responsible for Kisumu County is hereby directed to assess the subject child on a monthly basis and to file a report thereon by the 5<sup>th</sup> day of each succeeding month. The said assessment shall span over a period of six (6) months from the date of this ruling or until further orders of the court.
16. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 6<sup>TH</sup> DAY OF NOVEMBER, 2015.**

**W. MUSYOKA**

**JUDGE**