



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION NO. 31 OF 2015

IN THE MATTER OF S W M (A MINOR)

S W M (MINOR)..... APPLICANT

(A child suing through his mother and next friend W R

N)

VERSUS

E M N..... RESPONDENT

RULING

This is the application dated 20/2/15 seeking *inter alia* that;

1. *The court be pleased to grant leave to the applicant to institute contempt proceedings against the respondent.*
2. *The respondent be condemned to pay costs for the application.*

The application is supported by the affidavit of W R N. In the affidavit the applicant stated that by court orders issued on 6/12/2014, the respondent was ordered to pay KShs.15,000/= each month for January, February and March 2013 as special maintenance contribution. On 10/12/2014, the respondent was ordered to pay KShs.165,000/= being cumulative outstanding arrears from April 2013 to February 2014 as per the orders of 10/12/2014. The orders were duly served upon the respondent in time and almost two years down the line has failed to abide by the said order even after having unsuccessfully appealed against the said orders in Embu HCCA 20 OF 2013. The conduct of the respondent undermines the dignity of the court. Court orders must be obeyed.

The respondent in the grounds of objection stated that the application is not for the benefit of the child but for the sole selfish gain of the applicant who is the mother. The respondent has been attending court in civil appeal no 20 of 2013 and has never been served. The respondent has been attending Children Case No. 1 of 2013 and has never been served. The applicant's ill motive should not be allowed. The respondent has been paying a sum of KShs.15,000/= per month to the applicant from his salary deduction. A copy of the payslip was attached. The respondent further paid KShs.16,500/= and lastly on 9/3/2015 paid KShs.10,000/= by cheque. The cheques were attached to the replying affidavit. The issues raised in this application are attributed in Children Case No. 1 of 2013 which is coming up for hearing on 13/4/2015 where the matters in this application shall be argued. Nothing has been attached to show that the applicant is entitled to the orders. The respondent has not been personally served as the law requires.

The law applicable in contempt proceedings is provided for in Section 5 of the Judicature Act which empowers the High Court and the Court of Appeal to punish for contempt.

The applicant seeks for leave to institute contempt proceedings against the respondent for failure to comply with a judgment or a court order. The law applicable is Rule 81(4) of the English Civil Procedure Rules which provides:-

Enforcement of judgment, order or undertaking to do or abstain from doing an act

(1) *If a person –*

(a) *required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or*

(b) *disobeys a judgment or order not to do an act,*

then, subject to the Debtors Acts 18692 and 18783 and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.

(2) *If the time fixed by the judgment or order for doing an act has been varied by a subsequent order or agreement of the parties under rule 2.11, then references in paragraph (1)(a) to the time fixed are references to the time fixed by that subsequent order or agreement.*

(3) *If the person referred to in paragraph (1) is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation.*

(4) *So far as applicable, and with the necessary modifications, this Section applies to undertakings given by a party as it applies to judgments or orders.*

(Rules 81.17(3) and (4) make provision for cases in which both this Section and Section 6 (Committal for making a false statement of truth or disclosure statement) may be relevant.)

(5) *If a judgment or order requires a person to deliver goods or pay their value –*

(a) *the judgment or order may not be enforced by a committal order under paragraph (1);*

(b) *the person entitled to enforce the judgment or order may apply to the court for an order requiring that the goods be delivered within a specified time; and*

(c) *where the court grants such an order, that order may be enforced under paragraph (1)*

It was held in the Court of Appeal case of ***CHIRSTINE WANGARI GACHEGE VS ELIZABETH WANJIRU EVANS & 11 OTHERS [2014] eKLR*** that:-

Rule 81.4 relates to committal for “breach of a judgment, order or undertaking to do or abstain from doing an act”.

It is clear from this summary that leave, now called “permission” is not required where committal proceedings relate to a breach of a judgment, order or undertaking. That position must be contrasted with the requirement in Rules 81.12 – committal “for interference with the due administration of justice” and 81.17 – committal “for making a false statement of Truth or disclosure statement” where, in the former it is expressly provided that:-

The said new rules of procedure (of England) contained in the **Second Supplement to 2012 White Book** are clear that no leave is required to institute contempt proceedings in a case of breach of court judgment or order.

This application is not necessary and the applicant should go ahead and file an application for contempt against the respondent. The orders sought cannot therefore be granted.

Each party to meet its own costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 4TH DAY OF NOVEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Kahuthu for Respondent

Applicant present