

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE 219 OF 1976

F.B.S.M.....APPLICANT

VERSUS

S.B.H.M.....RESPONDENT

JUDGMENT

This is an application by way of chamber summons to set aside the award of an arbitrator. The application is made by an attorney of the defendant in the suit in which the matters in dispute were referred to arbitration. The defendant himself is out of the country.

In another suit, between the same parties (Nairobi High Court Civil Case 1545 of 1970), the respondent to the present application was awarded the custody of the two children of her marriage to the applicant's principal. In defiance of the court order he removed the children from her flat in Nairobi and took them that night by air to Pakistan. The children have not yet been returned. The applicant's principal is accordingly in contempt of court and, by appointing an attorney, is avoiding a return within the jurisdiction of the court. The respondent submits that the application ought not be heard until the applicant's principal has purged his contempt and complied with the court's order.

The only point argued before me was whether it is open to me in the circumstances to refuse to hear the applicant. Mr Robson, who appeared for the applicant, submitted that since the contempt was committed in another cause the Court should not refuse to hear the applicant. He referred to *Hadkinson v Hadkinson* [1952] 2 All ER 567, 575, in which Denning LJ said:

I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reasons is shown why it should not be removed.

Mr Satish Gautama for the respondent contended that this matter was a continuation of a dispute between husband and wife and that the case cited reinforced the respondent's submission.

In the *Hadkinson* case, a wife's petition for divorce, she was given custody of the child of the marriage but directed not to remove the child from the jurisdiction without the sanction of the court. This she proceeded to do. The father obtained an order directing her to return the child within the jurisdiction. She appealed and the Court of Appeal held that she was not entitled to be heard until she had purged her contempt by returning the child within the jurisdiction. The disobedience of the mother impeded the course of justice since it was impossible for the Court to enforce its orders in respect of the child.

The present case relates to disputes as to assets and savings of the parties accumulated from their joint earnings during the period of cohabitation. The defendant's contempt does not impede the course of justice in this cause but the principles set out by Denning LJ were not, I think, intended to be comprehensive and exclusive. As he said elsewhere in his judgment (at page 574), "it is a matter for the discretion of the court dependent on the circumstances of the case".

In the present case the father (the applicant's principal) kidnapped the children whose custody had been given to the mother. This occurred some four months after the submission to arbitration. Efforts to have

the children returned to the mother have been unsuccessful. Now the father, through the medium of an attorney, has the effrontery to seek the assistance of this Court which he has defied while he himself and the children remain out of the jurisdiction. It is another cause; but it is a continuation of the dispute between him and the mother of the children.

In my opinion he should not be permitted to do so. I rule that this application shall not be heard until the applicant's principal has purged his contempt by returning the children to Kenya.

Application dismissed with costs.

Dated and Delivered at Nairobi this 27th day of September 1977.

A.H.SIMPSON

JUDGE