



REPUBLIC OF KENYA

IN THE KADHI'S COURT AT NAIROBI

CIVIL CASE NO. 68 OF 2018

IK.....PLAINTIFF/APPLICANT

VERSUS

RMS.....DEFENDANT/RESPONDENT

R U L I N G

This application by Notice of Motion brought under section 5 and 8 of the Kadhis' Court Act and Sections 3, 3A and 63(c) and (e) of the Civil Procedure Act seeking inter alia for the following orders: -

1. That the defendant/respondent herein be committed to civil jail.
2. That the respondent be compelled to carry out her mandate as per the orders of this honorable court issued on 3rd September 2018 and or in the alternative the court be pleased to reverse review its order and of custody be granted to the applicant with visitation of the children being granted to the mother/respondent as before and prior to the 3rd September 2018 in the best interest of the children.
3. That costs of this application be provided for.

The grounds of application are set out in the Notice of Motion as follows: -

1. That on the 3rd September 2018 this honorable court after a contracted hearing gave orders inter alia granting custody to the defendant, respondent and the applicant/plaintiff granted legal custody and access the children during holidays and alternate weekends and the defendant to provide shelter and clothing.
2. That despite the knowledge of the court order the defendant has refused, denied and or declined to give the applicant access to the children during holidays and alternate weekends and the defendant to provide shelter and clothing.
3. That despite knowledge of the court order the defendant has refused, denied and declined to give access to the applicant to meet, see and interact with the subject matter herein.
4. That the respondent has blatantly displayed brazen contempt of this court and has clearly violated the orders as issued by this honorable court on the 3rd September 2018.

The application is supported by the affidavits of Mr. IK (the applicant) and Mr. Billy Amendi (the applicant's advocate). The application was opposed vide the replying affidavit of one RMS, the respondent sworn on 14th March 2019.

The respondent contended that ever since the orders of 3rd September 2018 granted by this honorable court the applicant has never made a point to come and pick the minors and that she haven't at any point denied the applicant from accessing the minors. She further submitted that the applicant has never communicated to her since the judgment was issued and that in fact, it's the respondent who has been forcing the children to visit their father in some instance. Lastly, she submitted that the application is brought in bad faith and the same should be dismissed with cost for lack of merit.

I have given due consideration to the submission by the learned counsel representing the parties herein. The issues for determination are: -

- I. Whether the respondent is in contempt of the orders of this court issued on 30th September 2018.
- II. Whether there are grounds for the court to grant review.

Issue: 1

In *Central Bank of Kenya & Anor v Ratilal Automobiles Limited & others* Civil Application No. Nai. 247 of 2006, the Court of Appeal held that:

“Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.”

In the Scottish case of *STEWART ROBERTSON VS HER MAJESTY’S ADVOCATE*, 2007 HCAC63, (which has been cited in various cases including *Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others* [2015] eKLR) Lord Justice Clerk stated that:

“ Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”

The purpose of contempt jurisdiction is to uphold the dignity of the temple of justice since the perception of the image of the temple of justice in the mind of the citizenry cannot be tarnished. The admiration and power commanded by the temple of justice are the greatest guarantee to the ordinary citizen and the entire democratic fabric of the society will crash down if the respect of the temple of justice is undermined.

It is, therefore, evident that not only do contemnors demean the integrity of the courts and rule of law and if this is not discouraged the society is bound to lose confidence and faith in the judiciary and courts.

As a judicial officer I shouldn’t be hypersensitive and I must be guided by the ruling of the Supreme Court of Kenya in *Republic v Ahmad Abolfathi Mohammed & another* [2018] eKLR wherein the learned bench held that:

*“We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:*

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

[29] The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”

Reverting back to the instant case the question that requires anxious consideration is did the respondent willfully disobeyed or neglected to comply with the court’s order on access? It’s not in dispute that on 30th September 2018 this court granted orders inter alia granting the physical custody of the minors to the respondent, applicant granted legal custody and access of the children during holidays and alternate weekends and the defendant to provide shelter and clothing. The onus of proof lies with the applicant to satisfy this court that despite his attempt to access the minors, the respondent willfully and deliberately refused, denied and declined to give him access to the children of the marriage.

Our judicial system would never allow the respondent to face penalty without any court having considered the burden of proof; where the onus of proof lies with the applicant he must discharge. I am unconvinced that the failed to convince the court on the allegation of the contempt to the required standard.

Issue: 2

It is trite law that just like the right of appeal, an order in review is a creature of statute, which must be provided for expressly. In considering an application for review, court exercises its discretion judicially as was held in the case of *Catherine Njuguini Kenya & 2 others v Commercial Bank of Africa Limited* [2015] eKLR

The law under which review is provided is Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

The grounds for review are clearly provided for and were outlined in *Eco Bank Ltd v David Njoroge Njogu & Ann Wanjiru Njogu* (2016) eKLR. These are:

1. That there is discovery of new and important evidence, which after exercise of due diligence was not within the applicant’s knowledge or could not be produced by him or her at the time when the decree was passed or the order made.

2. That there is a mistake or manifest mistake or error apparent on the face of the record.

3. That any other sufficient reason exists.

The applicant appears not relying on any of the grounds provided for by Order 45 of the Civil Procedure Rules. Therefore, a failure by the applicant in enjoying the fruit of the court's judgment cannot be a ground for review.

To grant the said order would mean that this court would be going beyond the purview and scope of the powers of review under Order 45 Rule 1 and 2 of the Civil Procedure Rules. Further, if I concede granting this orders my findings will be wholly contrary, arbitrary and capricious based on no evidence, which a reasonable person would have ever arrived at. Consequently I order that this application be dismissed with cost.

DELIVERED and SIGNED at Nairobi this 3rd day of May 2019.

Ishaq AJ

Senior Resident Kadhi

In the presence of;

Mr. Timon – C/A