FAM v HSS (Civil Appeal 129 of 2007) [2008] KECA 316 (KLR) (25 April 2008) (Judgment)

F.A.M V H.S.S [2008] eKLR

Neutral citation: [2008] KECA 316 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 129 OF 2007

SEO BOSIRE, EO O'KUBASU & EM GITHINJI, JJA

APRIL 25, 2008

BETWEEN

FAM ..... APPELLANT

AND

HSS ..... RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nairobi (Kubo J) dated 22nd November, 2006 in HCCA No 10 of 2005)

An order for return of a child, who is subject of proceedings, to the court's jurisdiction can be issued without hearing all parties.

The case discussed the procedure for committal of a contemnor and whether the High Court sitting as an appellate court had the jurisdiction to enforce the orders of the Children's Court. The court held that an order for return of a child, who was the subject of proceedings, to the court's jurisdiction could be issued without hearing all parties so as not to impede the course of justice.

Reported by Moses Rotich

Family Law *- child custody and maintenance - Children's Court giving custody to child's mother - father ordered to pay maintenance and given right of access to the child - mother taking the child with her on a job transfer to a foreign country while the father's appeal against the decision was pending - father given leave to institute contempt of court proceedings against the mother and mother ordered to return the child into the country - appeal against the orders.*

Civil Practice and Procedure *- contempt of court - procedure in filing contempt of court proceedings - whether the application for leave and the application for committal of the contemnor may be made in one application - whether the High Court sitting as an Appellate Court had the jurisdiction to enforce the orders of the Children's Court - Judicature Act (cap 8) section 5(1).*

Brief facts

The appellant/wife filed a suit against the respondent/husband before the Children's Court seeking maintenance and custody of their child. The court granted custody of the child to the appellant and gave the respondent right of access and the duty to maintain the child. The respondent filed an appeal against the decision.

While the appeal was pending, the appellant's employer transferred her to Uganda where she relocated with the child. The respondent then moved the High Court with an application in which he prayed for leave to commence contempt of court proceedings against the appellant and for the issue of an order requiring her to show cause why she should not be punished for contempt of court. The respondent argued that by taking the child out of the country without his consent, the appellant had breached the court order granting him access to the child and further, that any order issued in the pending appeal would be difficult to enforce if the child remained outside of the court's jurisdiction.

The High Court granted leave to commence contempt of court proceedings and ordered the appellant to return the child to Kenya. The appellant appealed against the decision on the grounds that leave to institute contempt proceedings should not have been granted where there was no court order prohibiting her from taking the child out of the jurisdiction of the court and that it was not proper for the High Court to issue the mandatory injunction for the return of the child *ex parte*.

Issues

i. What was the procedure for committal of a contemnor?
ii. Whether the High Court had jurisdiction to enforce the orders of the subordinate court through an application for committal for contempt.
iii. Whether the application for leave and the application for committal of the contemnor could be made in one application.
iv. Whether the High Court sitting as an appellate court had the jurisdiction to enforce the orders of the Children's Court.
v. Whether an order for return of a child, who was the subject of court proceedings, to the court's jurisdiction could be issued without hearing all parties.

Held

1. In cases of contempt of court, the applicant must first apply *ex parte* for leave to make an application for committal of the alleged contemnor and thereafter upon obtaining leave, make an application for committal by notice of motion.

2. The High Court, sitting as an appellate court, had no jurisdiction to enforce the orders of the subordinate court through an application for committal for contempt. It had no jurisdiction to entertain both the application for leave and the application for committal for contempt.

3. The High Court being seized of the appeal had inherent jurisdiction to make any just order that would prevent the appeal from being rendered futile.

4. The application for the return of the child was an independent and severable application from the application for leave and committal. Regardless of the question whether there existed an order of a court prohibiting the removal of the child from the jurisdiction of the court, the order for the return of the child was proper in so far as an appeal was due for hearing and that the child should be within the jurisdiction so as not to impede the course of justice.

5. Having regard to the urgency of the matter, the intendment of the order for the return of the child and the fact that the appellant was outside the jurisdiction and there was no sufficient time to serve her with the application, the High Court had properly exercised its discretion to grant an *ex parte* order. The appellant had a right to apply for the discharge of the order.

6. In the circumstances of the case, the interests of justice could have been best served by hearing the appellant on the pending application for discharge of the *ex parte* orders before the orders were enforced.

Appeal allowed in part.

Orders

i. *The order granting leave to the respondent to commence contempt proceedings was set aside.*

ii. *Prayers Nos 3, 4 and 5 of the Notice of Motion dated November 22, 2006 to be heard inter partes.*

iii. *The appellant's notice of motion dated November 27, 2006 for discharge of the ex parte order for return of the child within the jurisdiction to be heard on priority basis before the order for the return of the child to Kenya was enforced.*

iv. *No order as to the costs.*

Citations

Cases

Kenya

1. *Boya Rural Nursing Home Ltd v National Hospital Insurance Fund Board of Management* Civil Appeal (Application) 46 of 2005; [2005] KECA 39 (KLR) - (Mentioned)
2. *Rose Detho v Ratila Automobiles Limited and 6 others* Civil Application 304 of 2006; [2007] KECA 304 (KLR) - (Mentioned)

United Kingdom

1. *Gordon v Gordon* [1904 - 1907] All ER Rep 702 - (Mentioned)
2. *Hadkinson v Hadkinson* [1952] 2 All ER 567 - (Explained)
3. *XLtd v Morgan Grampian (Publishers) Ltd* [1990] 2 All ER 1 - (Mentioned)

Statutes

Kenya

1. Civil Procedure Act (cap 21) sections 3, 3A, 79B- (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order L rule 1 - (Interpreted)
3. Judicature Act (cap 8) section 5(1)- (Interpreted)

United Kingdom

Civil Procedure Rules order 52 - (Interpreted)

Advocates

Mr David Oyatta for the respondent

JUDGMENT

1. This is an interlocutory appeal against orders made by the superior court (Kubo J) on November 22, 2006 in High Court Civil Appeal No 10 of 2005, *S v M* which appeal is still pending for hearing.

2. The said appeal is against the decision of the subordinate court (Children's Court) in Children's Case No 296 of 2003 in which M (wife) sued S (husband) for maintenance and custody of their child SS and for return of the child's birth certificate. By a judgment delivered on September 30, 2004, the Children's Court granted custody of the child of the marriage to the wife but gave access to the husband. The Children's Court further ordered the husband to be paying school fees and other related school expenses and also in addition ordered him to be paying Shs 6,000/= being monthly maintenance for the child. The husband subsequently filed Civil Appeal No 10 of 2005. The appeal was however summarily rejected by the Superior Court under section 79B of *Civil Procedure Act* on May 19, 2005. Thereafter the husband filed Civil Appeal No 120 of 2005 in this Court against the summary rejection of his appeal and on February 10, 2006 this court in allowing the appeal ordered the superior court to admit the appeal and hear and determine it according to law.

3. Meanwhile, the wife who was employed by [particulars withheld] as a Team Leader Integrated Marketing Communication (Kenya) was by a letter dated November 15, 2006 transferred to Uganda Ltd at Jinja Uganda wef November 16, 2006. The wife accepted the transfer and sent an e-mail to the husband on November 18, 2006 informing him that she and the child would be moving to Uganda. By a letter dated November 20, 2006, her advocates informed the husband's advocates of the wife's and the child's relocation to Uganda. That information spurred the husband to file a notice of motion dated November 22, 2006 under certificate of urgency for various orders including leave to commence contempt proceedings against the wife; a finding that the respondent was in breach of the court order dated November 30, 2004 and issued on November 18, 2004; that the contemnor do show cause why she should not be committed to civil jail or to have her properties attached for disobeying the court order; that the child be returned to Kenya before 28th November, 2006 and the appeal be mentioned on November 29, 2006 and that the child should not be removed from the jurisdiction of the court without permission of the court until the appeal is heard and determined. The application was based on two main grounds, namely, that, by taking the child out of the jurisdiction of the court without the consent of the husband or order of the court the wife had breached the court order granting access of the child to the husband which was due on 25th and 26th November, 2006. Secondly, that any order touching on the child which may be given in the appeal which was scheduled for hearing on November 30, 2006 would be in vain and difficult to enforce as the child was outside the jurisdiction. The purpose of the application was to have the child brought within the jurisdiction before the hearing date of the appeal.

4. The application was placed before the superior court on the same day for *ex parte* hearing and the superior court ruled in part:

> " The issue of whether respondent has committed contempt can only be determined *inter - partes*. For that stage to be reached applicant would have to be granted leave to commence the proceedings and serve. The issue of applicant having been denied access seems tricky in that his next access is not due until 25th and November 26, 2006. It seems to me that what may be validly considered now is the issue of the child being brought to Kenya before November 28, 2006 and that the matter be mentioned on November 29, 2006 to ascertain if the child has been brought back".

5. The superior court then proceeded to make two orders, viz: "

> 2. Leave granted to applicant to commence contempt proceedings. Applicant to take a date in the registry for inter-partes hearing of prayers 3, 4, 5 and 8 of the notice of motion and serve the respondent.
>
> 3. Respondent to return the subject child to Kenya by November 28, 2006 and to appear before the High Court on November 29, 2006 when this matter will be mentioned".

6. This appeal is against the two orders. The six grounds of appeal were condensed into two broad grounds, *viz*; that the learned Judge erred in law in granting a mandatory injunction ex parte for the return of the child without any factual or legal basis, and, secondly, the learned Judge erred in law in granting leave to institute contempt proceedings when there was no court order prohibiting the wife from taking the child out ofjurisdiction or any just cause.

7. We will consider the two grounds of appeal together.

8. The notice of motion dated November 22, 2006 on the basis of which the two impugned orders were made was brought under section 3, section 3A of *Civil Procedure Act*, order L rule 1 of *Civil Procedure Rules* and section 5 of the *Judicature Act*. Section 5(1) of *Judicature Act* provides:

> "The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being, possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts".

9. Since the jurisdiction of the High Court and this court to punish for contempt is by reference derived from to the jurisdiction of the High Court for Justice of England the applicable procedure is the *English Procedure* ie order 52 RSC) (see *National Hospital Insurance Fund Board of Management v Boya Rural Nursing Home Ltd*, Kisumu Civil Appeal No 46 of 2005 (unreported). The rules require that where the contempt is not committed in the face of the court, the applicant must first apply ex parte for leave to make application for committal and thereafter upon obtaining leave, make an application for committal by notice of motion. Mrs Thongori, learned counsel for the appellant submitted, inter alia, that the application for leave had to be separate from the application for committal; that the High Court sitting as an appellate court had no jurisdiction to entertain an application for committal; that the provisions under which the application was brought do not give jurisdiction to the court to make the order for the return of the child; that there was no bar to taking the child out of jurisdiction and that the court had no jurisdiction to make the order of return of the child which was final without giving the wife an opportunity to be heard.

10. Mr David Oyatta, learned counsel for the respondent submitted on the other hand, among other things, that there was a consent order made by the subordinate court on November 13, 2003, to the effect that neither of the parties is to leave the Country with the child without the consent of the other; that the child was taken out of the jurisdiction of the court without the consent of the father, and that by making the order for the return of the child within the jurisdiction the superior court was upholding the dignity of the subordinate court and facilitating the hearing of the appeal.

11. The appellant did not return the child within the jurisdiction by November 28, 2006 as ordered by the superior court. Instead the applicant on November 27, 2006 filed an application seeking, among other things, the discharge of the order of November 22, 2006. That application was listed for mention before Kubo J on November 29, 2006 but the learned Judge declined to hear the application on that date stating:

> " Since the appeal is coming tomorrow, 30.11.06, I shall wait to hear the appeal and any other relevant arguments, then."

12. On November 30, 2007 Mrs Thongori informed the superior court that the child had not been brought within the jurisdiction. Mr Oseko, counsel then on record for the husband submitted that the appeal could not proceed as any orders the court could make upon hearing the appeal would be in vain and that by taking the child out of jurisdiction the husband's right of access to the child which was due on 25th and 26th November, 2006 was affected. Mr Oseko asked the court to enforce the orders of November 22, 2006 by issuing warrant of arrest against the wife.

13. The court reserved ruling on whether the counsel for the wife could be heard for December 4, 2006. It seems that the superior court delivered the ruling thereafter to the effect that the wife being in contempt had no audience until she purges the contempt. However, the ruling has not been made part

of the record of this appeal although part of the decision of the superior court can be gleaned from the superior court's observation dated December 7, 2007, partly, thus:

> " The reason the court ordered the child to be brought by respondent was that the child is at the centre of the appeal which was due for hearing next day, 30.11.06. The respondent had not complied with the order. The court found that that was *ex-facie* contemptuous. The court then gave respondent's counsel the option of either presenting the respondent before the court together with the child; failing which the court would resort to other means of securing the respondent's attendance before the court and that she must bring the subject child along with her and purge her *ex-facie* contempt ".

14. The court continued:

> " It was important for the child to be presented at the appeal but she was not. I re-affirm the court's ruling that unless the respondent purges her *ex-facie* contempt and presents herself before court and explains her impugned conduct, this court will not hear her in her absence through counsel, which respondent's counsel has attempted to do through the purported application for stay".

15. The superior court ultimately issued a warrant of arrest.

16. This court, subsequently allowed the wife's application - Civil Application No Nai 313 of 2006 and granted a stay of execution of the orders of November 22, 2006 and all consequential orders and a stay of further proceedings in the superior court pending the determination of the present appeal.

17. The case of *Hadkinson v Hadkinson* [1952] 2 All ER 567, although it was mainly discussing the question of the right of contemnor to be heard before purging the contempt, unlike the present case, is nevertheless relevant. In that case, on a petition by the wife a decree nisi was granted and the custody of the child given to the wife. The court, however, ordered that the child should not be removed out of the jurisdiction without the sanction of the court. On the decree nisi being made absolute, the mother re-married and without the sanction of the court removed the child to Australia to live with her new husband. On summons by the father an order was made directing the mother to return the child within the jurisdiction. The mother appealed and at the hearing of the appeal a preliminary objection was raised that the mother was not entitled to be heard as she was in contempt. The preliminary objection was upheld. Romer LJ who delivered the leading judgment reiterated the uncompromising general rule requiring obedience of an order made a court of competent jurisdiction until the order discharged whether the person affected by the order believes to be irregular or even void and continued at page 571 paragraphs D - H.

> " Disregard of an order of the court is a matter of sufficient gravity whatever the order may be. Where, however, the order relates to a child, the court is (or should be) adamant on its due observance Such an order is made in the interest of welfare of the child, and that the court will not tolerate any interference with or disregard of its decisions in these matters. Least of all will the court permit disobedience of an order that a child shall not be removed outside its jurisdiction. The reason for this is obvious. The court cannot exercise its quasi - parental powers in relation to a child unless effect can be given to its orders and it cannot enforce its orders if the child is taken abroad. Once a child is removed from the jurisdiction no satisfactory means have ever been devised of ensuring or enforcing its return. It is because of this that the application for leave to take an infant even temporarily out of the country are jealously scrutinized and are only granted subject to every guarantee that is reasonably

possible being exacted for the return of the child at the end of the authorised period. There is always the danger that a parent will be able, by wrongly taking a child abroad, or by keeping him there after the sanctioned period has expired, to present the court with a fait accompli and to argue that the child having become firmly established outside the jurisdiction, it would be against his interests to bring him back within it. Indeed, an argument to this effect was foreshadowed during the discussion before us on the present appeal. It follows from what I have said, that the mother's conduct in removing her son to Australia without the permission of the court and against its express order constituted in my view, a contempt of the grossest kind".

18. On his part, Denning LJ said in the same case at page 575, paragraph C:

> "The present case is a good example of a case where the disobedience of the party impedes the cause of justice.
>
> So long as the boy remains in Australia it is impossible for this court to enforce its orders in respect of him. No good reason is shown why he should not be returned to this Country so as to be within the jurisdiction of the court. He should be returned before counsel is heard on the merits of the case, so that whatever order is made, this court will be able to enforce it".

19. In that case, the child was returned to England and the court heard and allowed the appeal on the merits.

20. Turning to the present appeal, it is clear that unlike in the Hadkison S case there was no objection raised at the hearing of the appeal that the wife was not entitled to be heard on the ground that she had disobeyed the order of the superior court requiring her to return the child within the jurisdiction. Thus, the wife's appeal has been fully heard on the merits.

21. The notice of motion dated November 22, 2006 on the basis of which the orders appealed from were made is somewhat confusing. It is made ex parte and it seeks both leave to commence contempt of court proceedings and at the same time seeks punishment of the wife for contempt of the court.

22. The application further seeks, what is seemingly an independent order for the return of the child within the jurisdiction. It seems from the application that the applicant did not intend to file a subsequent application for committal of the wife for contempt after obtaining leave. Indeed, the learned Judge understood that to be so for he ordered the husband to take a hearing date at the registry for the hearing of the prayer relating to the allegation of breach of court order, punishment for the alleged breach and the prayer that the child should not be removed from the jurisdiction of the court without permission of the court until the appeal is heard and determined.

23. By combinating the application for leave and the application for committal in one application, the application was brought in contravention of the applicable rules of procedure and could not lie.

24. Secondly, the orders that were allegedly breached by the wife were not made by the superior court either in its original or appellate jurisdiction. They were made by the Children's Court and were the subject matter of the appeal. It is submitted that the superior court sitting as an appellate court had no jurisdiction to enforce the orders of the subordinate court through an application for committal for contempt. We respectfully agree. The orders of the children's court could only have been enforced by the superior court through independent proceedings and not through interlocutory proceedings in the appeal against the same orders. We are satisfied that the superior court sitting as an appellate court lacked jurisdiction to entertain both the application for leave and the application for committal for contempt.

25. However, it seems that the application for the return of the child within the jurisdiction was an independent and severable application from the application for leave and committal which were based on section 5 of the *Judicature Act*. The application for return of the child within the jurisdiction was based on sections 3 and 3A of the *Civil Procedure Act* - the inherent jurisdiction of the court. The application for return of the child was based on the ground that the wife had taken the child out of the jurisdiction of the appellate court about 2 weeks before the scheduled hearing of the appeal on November 30, 2006.

26. This is clear from paragraphs 25, 26, 27, 28 of the husband's supporting affidavit where he deposes.

> "25. That the respondent has therefore removed the child from the jurisdiction of the court and without my consent and therefore breached the court order which granted me access rights.
>
> 26. That considering that the child SS, the subject matter of the appeal No 10 of 2005 and which appeal has now been fixed for hearing on November 30, 2006, is currently out of jurisdiction of the court any order touching on the child will be in vain since it will be difficult to enforce the same while the child is still out of the jurisdiction of the court.
>
> 27. That it is therefore in the interest of justice and fairness that the child, the subject matter of this suit be brought back to the country before Appeal No 10 of 2005 can be heard and determined.
>
> 28. That in order that the hearing Civil Appeal No 10 of 2005 which was fixed for hearing on a priority basis on November 30, 2006 proceeds without a hitch, the child should be brought back to the Country before that date and this matter should be mentioned on the November 29, 2006 to confirm if the child is within the jurisdiction".

27. As the learned judge explained on December 7, 2007 in the portion of his observation we have quoted above, the justification for making the order for the return of the child is that the child was at the centre of the appeal. There is a dispute as to whether or not there was any order of the court in existence restricting the removal of the child from the jurisdiction without the sanction of the court or consent of the husband. Certainly, there was no such order from the superior court before November 22, 2006. However, we do not find it necessary to investigate whether such an order existed for it is clear to us that the order for the return of the child was not based on a finding of breach of any court order but rather on the fact that an appeal was due for hearing and that the child should be within the jurisdiction so as not to impede the cause of justice. The portion of the judgment of Romer LJ in *Hadkinsons* case quoted earlier shows why the order for return of the child before the hearing of the appeal was fully justified in the circumstances of this case.

28. We are satisfied that the superior court being seized of the appeal had inherent jurisdiction to make any just order that would prevent the appeal from being rendered futile.

29. The husband became aware that the wife and the child had moved to Uganda on November 20, 2006 - about 10 days before the scheduled date for the hearing of the appeal.

30. It is contended that the order for the return of the child within the jurisdiction being a mandatory order should not have been made without hearing the appellant. It is our view, however, that having regard to the urgency of the matter, the intendment of the order for the return of the child and the fact

that the appellant was outside the jurisdiction there was no sufficient time to serve the appellant and superior court exercised its discretion to grant an *ex parte* order quite properly.

31. Nevertheless, the appellant had a right to apply to the superior court to discharge the *ex parte* order if she so wished. Indeed, upon being informed of the *ex parte* order by his advocate on November 23, 2006 she instructed her advocate to apply for discharge of the *ex parte* order which application was filed on November 27, 2006. That application was filed two days before the date scheduled for the hearing of the appeal and has not been heard to date. While the application was pending, the superior court ruled on December 7, 2006 that the appellant's failure to return the child within the jurisdiction on November 30, 2006 or thereafter constituted a contempt of the court which disentitled her from being heard until she purges the contempt.

32. The appellant's application dated November 27, 2007 for the discharge of *ex parte* orders of November 22, 2006 was brought under certificate of urgency. We think that in the circumstances, the superior court should have made every effort to dispose of the application at least before the scheduled hearing date of the appeal for failure to do so could result, as happened in this case, the appellant being held in contempt of the court order before she was heard.

33. Moreover, even if the appellant was in contempt of the order for return of the child within the jurisdiction, the superior court nevertheless could in its discretion hear her application before the orders are enforced as she was challenging the legality of the *ex parte* orders (see *Gordon v Gordon* [1904 - 1907] All ER Rep 702; *XLtd v Morgan Grampian (Publishers) Ltd* [1990] 2 All ER 1; *Rose Detho v Ratila Automobiles Limited and Six Others* - Civil Application No Nai 304 of 2006 - majority ruling dated May 25, 2007 (unreported).

34. In this case, the interest of justice could have been best served by hearing the appellant on the pending application for discharge of *ex parte* orders before the orders were enforced.

35. For those reasons, we partially allow the appeal to the extent that we set aside the order granting leave to the respondent to commence contempt proceedings and the further order that prayers Nos 3, 4 and 5 of the notice of motion dated November 22, 2006 be heard inter partes.

36. We dismiss the appeal against the order for the return of the child SS to Kenya. We however, order that the appellant's notice of motion dated November 27, 2006 for discharge of the *ex parte* order for return of the child within the jurisdiction be heard on priority basis before the order for the return of the child to Kenya is enforced.

37. We make no orders as to the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL, 2008.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR