



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
Civil Appli 313 of 2006 (175/06 UR)**

**FATIMA ALI MOHAMED ..... APPLICANT**

**AND**

**HARBANS SINGH SOOR ..... RESPONDENT**

**(Application for stay of execution and for stay of further proceedings in H.C.C.A No. 10  
of 2005 pending the hearing and determination of an intended appeal from the ruling  
and order of the High Court of Kenya**

**Nairobi (Kubo, J.) dated 22<sup>nd</sup> November, 2006 in H.C.C.APP. NO. 10 OF 2005)**

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**RULING OF THE COURT**

The short matter that is brought before us is to determine, as sought by the applicant, whether we should make the following orders: -

- 1) *a stay of execution of the order and ruling of the Hon. Justice Kubo issued on 22<sup>nd</sup> November, 2006 in H.C.C.A No. 10 of 2005 and all consequential orders pending the hearing and final determination of the intended appeal.*
- 2) *An order staying all further proceedings in the superior court in H.C.C.A No. 10/05 pending the hearing and final determination of the intended appeal.*

The orders are sought under *rule 5(2) (b)* of the rules of this Court and the principles that guide the court in considering such applications are now well settled. The applicant in order to succeed must satisfy the court that the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal. Secondly that if an order of stay or injunction, as the case may be, is not granted, the appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction - see **Reliance Bank Ltd (in liquidation) v Norlake Investments Ltd – Civil Appl. No. Nai. 93/02 (ur)**.

The brief background to the application, as far as we can gather from the record, is this: -

The applicant, ***Fatima Ali Mohamed*** (Fatima) was a young girl professing the Muslim religion when she met the respondent, ***Harbans Singh Soor*** (Harbans), a member of the Sikh community, and they were married in the year 2000. Their respective parents did not apparently approve of their union and that is why the two contracted a civil marriage under the Marriage Act in Sheria House. In June 2002 the two

were blessed with a daughter, **Simran Soor** or as Harbans prefers to call her, **Simran Kaur Soor** (Simran). Within the year however, serious matrimonial differences, centred mainly on religion, culture, economics and personal conduct arose between the two and Fatima moved out of the matrimonial home to return to her parents in February, 2003, effectively separating herself from the marriage. She contemplated filing for divorce but changed her mind. Instead she went before the Children's Court in September 2003 and sought orders for: -

- a) maintenance for the child, Simran
- b) custody of the child
- c) return of the child's birth certificate.

Harbans responded to the claim with a counterclaim of his own that the custody, care and control of the child should be given to him, and that Fatima should contribute to the child's maintenance. The matter was heard before Mrs. J.E. Ragot, Resident Magistrate, who on 30<sup>th</sup> September, 2004 found for Fatima and made the following orders: -

**“(1) THAT the custody of the child Simran Soor be and is hereby granted to the Plaintiff with reasonable access allowed to the defendant as shall be agreed between the parties and if such agreement cannot be reached, each party is granted leave to apply. Access to be as earlier agreed on with leave to apply to either party.**

**(2) THAT the defendant do pay the school fees and all school related expenses for the child Simran Soor.**

**(3) THAT the defendant do pay to the plaintiff a sum of Kshs.6,000.00 every month towards the child's expenses”**

Reference made in the order to “*access to be as earlier agreed*” was an interim order made in the course of hearing of the suit whereby Harbans would have access to the child on alternate weekends on Saturday and Sunday, and on the other weekends to have access on Fridays, between 1 p.m. to 6 p.m. The venues for access were also agreed on.

Harbans was aggrieved by the ruling of Mrs. Ragot and so preferred an appeal to the superior court being **High Court Civil Appeal No. 10/05**. That appeal was however summarily dismissed by Koome J. on 18<sup>th</sup> May, 2005 but, still undaunted, Harbans sought a reversal of the decision before this Court. He succeeded in doing so, and on 10<sup>th</sup> February, 2006, this Court made an order that the memorandum of appeal before the superior court be admitted and the appeal be heard on its merits. There were also other skirmishes between the parties, which need not concern us here, relating to execution process, the propriety of the Children's Court proceedings and a review of the access order, but the main appeal was eventually set down for hearing on 30<sup>th</sup> November, 2006.

On the 22<sup>nd</sup> November, 2006, one week before the hearing date, Harbans filed a “notice of motion” within the appeal which was expressed to be “*ex-parte*” seeking leave to cite Fatima for contempt of court and to commence proceedings for her commitment to civil jail for 6 months. The application was expressed to have been brought under “*section 3 and 3A of the civil Procedure Act, Order L Rule 1 of the Civil Procedure Rules, Section 5 of the Judicature Act.*” The rubric “*all other enabling provisions of the Law*” was also thrown in. Further orders were sought in the application as follows: -

**“6. THAT the child Simran Kaur Soor be returned to Kenya within the jurisdiction of this Honourable Court before the 28<sup>th</sup> November, 2006.**

**7. THAT this case be mentioned on the 29<sup>th</sup> November, 2006 to ascertain whether the Respondent has complied with the Court Order.**

8. **THAT the child Simran Kaur Soor shall not be removed from the jurisdiction of this Honourable Court until the Civil appeal herein is fully heard and determined, without the permission and/or authority of this Honourable Court.**

9. **THAT this Honourable Court be pleased to issue any other or further Order as it deems fit, to ensure and/or enforce compliance with the Court Order dated 30<sup>th</sup> September, 2004 and issued on the 18<sup>th</sup> of November, 2004.”**

It is common ground that the application was placed before Kubo J. on the same day and that the following orders were issued *ex parte*: -

“1. **Matter certified urgent.**

2. **Leave granted to the 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 28.11.2006 and to appear before the High Court on 29.11.2006 when this matter will be mentioned.”**

Upon being served with the orders Fatima was alarmed. She protested that the orders were improperly made and made without giving her an opportunity of being heard. She filed a notice of motion of her own on 27<sup>th</sup> November, 2006 seeking to have the orders discharged, set aside or stayed pending the hearing of the notice of motion *inter partes*. The matter was then placed before Kubo J. for directions on the hearing of Fatima’s application and the learned Judge directed that the application and any other arguments be considered at the scheduled hearing of the main appeal on 30<sup>th</sup> November, 2006. On that day however, the respondent’s counsel objected to the hearing of the appeal or any other matter on the ground that the child was out of the jurisdiction of the court and that Fatima was in contempt of court and could not be heard on any matter before compliance with the orders issued on 22<sup>nd</sup> November, 2006. In a reserved ruling made on 4<sup>th</sup> December, 2006 Kubo J. agreed with the respondent and held that Fatima and her advocate could not be heard before she complied with the orders of 22<sup>nd</sup> November, 2006. Warrants of arrest were issued three days later, on 7<sup>th</sup> December, 2006 and were handed over to the International Police Organisation (Interpol) for execution in Uganda. Fatima had hit a dead end and that is when she came running to this Court, as stated earlier, on 14<sup>th</sup> December, 2006.

We have already restated the principles which obtain in applications under **rule 5 (2) (b)**. In order to satisfy us on the first test, learned counsel for Fatima, Mrs. Thongori informed us that the intended appeal will raise issues of jurisdiction and other issues of constitutional nature. She submitted in the first place that the orders issued by the superior court were without jurisdiction since the complaint was against disobedience of an order of a Magistrate’s Court. As such leave under **section 5** of the **Judicature Act** could only have been sought in the High Court through an *ex parte* Miscellaneous Application but not through a notice of motion filed before an appellate court. At all events, a notice of motion by its nature can only be heard with notice to the other side or *inter partes*, and again there was no jurisdiction to issue *ex parte* orders without giving any reasons for dispensing with the respondent’s presence. As it is, leave was given on the same motion that seeks committal for contempt and other orders. It will further be argued on appeal that there was no legal basis for making *ex parte* mandatory orders since the decree issued by the Magistrate’s Court did not bar Fatima from taking the child outside the jurisdiction of any court. The Children’s Act itself, in her view, was not averse to emigration of children. In point of fact Fatima had no choice in the matter. That is because she was in full time employment with M/S. Bidco Oil Refineries Ltd since February, 2003 where she handled the company’s marketing and communications docket throughout East Africa. On 15<sup>th</sup> November, 2006, she was transferred to Bidco Uganda Ltd and had to report forthwith. She could not therefore leave behind the 4-year old daughter whose custody and primary care the court had reposed on her subject only to limited access by the respondent. It was in the best interests of the child as the Children Act provides. On previous occasions, she stated, she had travelled with the child abroad without objections from the respondent whose rights of

access were subsequently compensated. It was partly due to such difficulties that the applicant had sought a variation of the access order from the Children's Court but the matter was still pending. In Mrs. Thongori's view, the rights of the applicant to a hearing before the drastic orders were issued were flouted and the superior court acted in excess of its powers or without jurisdiction. The intended appeal was therefore not frivolous.

As to the nugatory aspect, Mrs. Thongori submitted that there was a warrant for the arrest of Fatima which may be executed anytime in which case she will lose her liberty before the appeal is heard thus rendering any subsequent success of it fatuous. She also submitted that the applicant would lose her job upon being incarcerated and consequently the child would lose her primary source of support.

For his part, learned counsel for the respondent Mr. Oseko did not see any difficulty with jurisdiction. According to him, once a suit, whether original or at appellate stage, was in the superior court, that court had the jurisdiction to punish for contempt under **section 5** of the Judicature Act. As to whether the court acted in excess of its power by issuing mandatory orders, Mr. Oseko submitted that there was sufficient legal basis for the orders issued. That is because the decree issued by the Children's Court was not absolute and the applicant could not therefore make unilateral decisions on access to the child by the respondent. There was therefore no arguable appeal and the case was on all fours with **Hadkinson v Hadkinson [1952] 2 All R. 567**, a decision of the Court of Appeal in England. The best the applicant could do was return to the superior court and explain herself there instead of pursuing a worthless appeal.

As to the nugatory aspect, Mr. Oseko submitted that the appeal could not be rendered nugatory whether it succeeded or not because the applicant has nothing to lose since the child is outside the jurisdiction of the court.

We have carefully weighed the respective positions taken by the parties in this matter and we think, with respect, that the issue of jurisdiction which is intended to be argued in the appeal is not a frivolous one. Jurisdiction as this Court has stated before, is everything. Without it no court or tribunal can make any valid orders. In a similar matter decided recently by this Court; **National Hospital Insurance Fund Board of Management vs. Boya Rural Nursing Home Ltd, Civil Appeal No. 46/05 (ur)**, the court stated: -

**“The respondent had invoked the jurisdiction of the superior court under section 5 of the Judicature Act to punish for contempt. Under that section the superior court exercises jurisdiction as for the time being is possessed by the High Court of Justice of England. Thus, the applicable procedure is the English procedure. By Order 52 Rule 3(1) of English RSC (Supreme Court Practice 1997 – vol. I part 1) an application for committal is made by motion after leave is granted which notice of motion must be served personally on the respondent even when he is legally represented. The Rule provides:**

**“ 3. (1) When leave has been granted under rule 2 for an order of committal, the application for the order must be made by motion to a Divisional court and unless the Court or judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.**

**(2) Unless within 14 days after leave was granted the motion is entered for hearing the leave shall lapse.**

**(3) Subject to paragraph (4) the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.**

**(4) Without prejudice to the powers of the Court or judge under Order 65, rule 4, the Court or Judge may dispense with service of the notice of motion under this rule if it or he thinks it just to do so.”**

That procedure does not appear to have been strictly followed in this matter with the result that the applicant appears to have been condemned unheard. As this Court further stated in the *NHIF Board* case (supra): -

**“The consequence of failure to file a formal application for committal is that the appellant and its officers were denied an opportunity to know what they were accused of and the supporting evidence and more fundamentally an opportunity to reply to the accusations through a replying affidavit or oral submissions at the hearing. The denial of an opportunity to be heard is a serious breach of the rules of natural justice.”**

We are fully aware of the decision in the *Hadkinson Case* (supra) and the profound dicta propounded therein which go to the very root of the administration of justice. The alleged contemnor in that case had flouted an express order of the court that she should not remove the child, the subject matter of the dispute, outside the jurisdiction of the court. It is a case which has been followed and applied in this country in several decisions where similar orders were flouted. However, we are told there was no express order made in the case before the Children’s court about the child, Simran, leaving the court’s jurisdiction.

It is apparent in this case that the learned Judge was of the view that the alleged contemnor who had made an application to set aside the order alleged to have been disobeyed could not be heard on such application unless and until she obeyed the order first then question it later. With respect, the learned judge does not appear to have appreciated the full import of the *Hadkinson Case* or that he was seized of any discretion in the matter. In that case Lord Denning L.J. stated: -

**“It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance.”** .....

And later at page 575: -

**“I am of the 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 reason is shown why it should not be removed.”**

Mr. Oseko was indeed of similar view before the commencement of the hearing of the application before us and intended to raise a preliminary point of law. We were in no doubt however that a contemnor who appeals against an order committing him for contempt on the ground of lack of jurisdiction in the court to make the original order, has a right to be heard – see **Gordon v Gordon [1904] P. 163, CA.**

Finally we observe that the Children Act under which the original case was heard and determined is a relatively new and special enactment whose provisions have yet to be subjected to extensive judicial interpretation. That is why this court deprecated the summary rejection of the appeal before the superior court and ordered that it be heard on its merits.

We need not express ourselves further on the issue of jurisdiction as we are of the view that it is arguable in the intended appeal. Nor do we wish to explore the other issues raised in that regard by the applicant since, as we have stated before, one favourable issue is sufficient to avail the applicant. The second hurdle must however be surmounted. Will the intended appeal be rendered nugatory if we do not grant the order sought at this stage?

We think undoubtedly it would. The warrant issued for arrest of the applicant could in all probability have been executed by now if we did not grant interim orders suspending it. The warrant directs that the

applicant be arrested and brought to court “together with the Child Simran Kaur Soor”. The fate of the mother and child is intertwined. Both will lose their liberty and it is irretrievable once lost whether or not the intended appeal succeeds. There is no certainty when the intended appeal is likely to be heard. It is also not unfounded that the applicant may lose her employment and the very source of support for herself and child.

For those reasons we think the application before us is well merited. Orders shall be and are hereby granted as prayed. Costs of the application shall be in the intended appeal.

*Dated and delivered at Nairobi this 16<sup>th</sup> day of March, 2007.*

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR