



REPUBLIC OF KENYA



KENYA LAW
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**Akinyi v Ogenche (Civil Appeal E037 of 2023)
[2024] KEHC 288 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E037 OF 2023**

KW KIARIE, J

JANUARY 24, 2024

BETWEEN

ELIZABETH AKINYI APPELLANT

AND

JOHN CHONYO OGENCHE ALIAS JOHN OCHIENG JONYO .. RESPONDENT

RULING

1. The appellant/applicant moved the court through a Notice of Motion dated the 1⁷th day of August 2023 and amended on the 15th day of January 2024. It was brought under section 5 of the Judicature Act Cap 8 Laws of Kenya, Part 81.4 of the English Civil Procedure (Amendment No. 2) Rules 2012, Sections 1A, 18 and 3A of the Civil Procedure Act, Order 40 of the Civil Procedure Rules, Sections 4 (i), 24, 25, 73(d), 90, 91 and 94 of the Children's Act 2001, Rule 3(1) and (2) of the High Court (Practice and Procedure) Rules. The applicant is seeking the following orders:
 - i. That the application be certified extremely urgently for hearing and disposal during the current High Court vacation.
 - ii. That this honourable court be pleased to order that the respondent herein, John Jonyo, be committed to jail for such a period as this honourable court may deem fit and just but not exceeding six months with a fine for deliberately disobeying the orders given by the Honorable Justice Kiarie, herein on the 18th July 2023 to the detriment of the two stolen children.
 - iii. That the honourable court be pleased to order the officer commanding Ramula Police station to arrest the respondent herein forthwith and avail him before the court with utmost speed for sentencing and committal to jail for disobeying and eroding the dignity and authority of this honourable court.
 - iv. That the honourable court be pleased to direct the officer commanding Ramula police station to assist the honourable court in producing the two stolen children herein before this



honourable court forthwith and/or to arrest and prefer appropriate Criminal charges against the respondent herein and his wife for unlawfully stealing and continuing to have the physical custody of the two stolen children in contravention to the orders given by the honourable court on the 18th July 2023.

- v. That the costs of this application be borne by the respondents herein.
2. The application was premised on the following grounds:
 - a. That the respondent herein had eroded and continues to erode the dignity and authority of this honourable court by deliberately refusing to produce the two stolen children before the Deputy Registrar on the 24th July 2023 as was ordered by the Hon. Justice Kiarie, on the 18th July 2023 to the detriment of the two stolen children.
 - b. That the respondent herein again failed to produce the two children before the Deputy Registrar on the 3rd August 2023 despite service Upon him of the mentioned Notice and/or the penal notice dated 28th July 2023 attached to my affidavit of service on record filed herein on the 28th July 2023.
 - c. That since the respondent herein has disobeyed this court and continues to do so with a lot of impunity, I am praying that (in the best interest of the two stolen children) the officer commanding Ramula Police Station be instead directed to produce the two stolen children before this honourable court and to arrest the respondent and avail him before the court for sentencing and committal to jail for disobeying the said court orders given by this honourable court on the 18th July 2023 with a lot of impunity.
 3. The respondent did not file a response.
 4. The respondent appeared before me virtually on the 18th day of December 2023 from Kisii prison, where he is serving a sentence. He protested that he was not John Ochieng Jonyo but John Jonyo Ogenche. Mr. Ngoge, the advocate for the respondent, sought two days to effect the necessary amendment and serve.
 5. When this matter came up for mention on 18th January 2024, Mr. Ngoge informed the court that he had served the amended Notice of Motion and filed the same with an affidavit of service. I, therefore, gave a date for the ruling since he indicated that the Notice of Motion was unopposed.
 6. When I checked the Notice of Motion, it was amended on 15th January 2024 and not within the two days the advocate sought. Secondly, I also noticed that the mail forwarding the amended Notice of Motion was sent on 15th January 2024 at 02.21 p.m.
 7. The respondent is a prisoner and has no control over the mail sent to prison. The applicant had a month to serve the amended Notice of Motion. I have also noticed that in the amended motion, he is described as John Chonyo Ogenche, contrary to what he informed the court his name was.
 8. I cannot be able to grant the orders sought, for doing so will be tantamount to condemning the respondent unheard.
 9. Instead of the appellant expending energy in seeking committal of the respondent to civil jail, she should set down the appeal for hearing. I am directing that I will not entertain any other application except concerning the disposal of the appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF JANUARY 2024

KIARIE WAWERU KIARIE



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JUDGE.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

