



**JOO v AJW (Civil Appeal E148 of 2021)  
[2024] KEHC 15507 (KLR) (Family) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 15507 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPEAL E148 OF 2021  
EKO OGOLA, J  
MARCH 19, 2024**

**BETWEEN**

**JOO ..... APPELLANT**

**AND**

**AJW ..... RESPONDENT**

**RULING**

1. The application before the court is dated 24<sup>th</sup> August 2023. The applicant prays for the following orders:-
  - a. Spent
  - b. That this Honorable court be pleased to find the respondent herein in contempt of this honourable court's order issued on 4<sup>th</sup> July 2023.
  - c. That this Honourable court be pleased to grant legal and actual custody of the minor children to the applicant herein pending hearing and determination of the application.
  - d. That this Honourable court be pleased to order that the Respondent is estopped from removing the minor children from school once enrolled by the Applicant herein.
  - e. That in view of the urgency of this matter, the Respondent herein, JOO be arrested and committed to civil jail and be appropriately punished for blatantly refusing and/or failing to comply with and being in contempt of the orders of this Honourable court issued on the 4<sup>th</sup> July 2023 for such terms as the court may deem just.
  - f. That this Honorable court be pleased to order that the Children Protection Unit and the Officer-in-Charge of the Kileleshwa Police Station do assist in retrieving the minor children for



purposes of placing them in the applicant's custody, pending hearing of all suits pertaining to the said minor children.

- g. That the costs of this application be borne by the Respondent.
  - h. Any other order that this court will be pleased to issue in the circumstances.
2. The application is based on the grounds set out therein and the applicant's supporting affidavit.
  3. The applicant and the respondent are the biological parents of the minors and have been separated since 2018 due to irreconcilable differences between them. The respondent sued the applicant in Milimani Chief Magistrate Court in Children Cause No. E1372/2021, seeking custody and control of the minor children. On 15<sup>th</sup> December 2021, the lower court issued interim orders granting the applicant custody of the minors and the respondent was granted access rights pending the hearing and determination of the suit. According to the applicant, the respondent in a blatant violation and disregard of the court orders and forcefully took custody of the minors from the applicant on 26<sup>th</sup> November 2021.
  4. On 20<sup>th</sup> December 2021 the respondent filed an appeal and by a Ruling of this court dated 4<sup>th</sup> July 2023, the respondent was ordered to comply with the lower court's order.
  5. The respondent was served with the court orders personally and via his advocates on record. However, despite being aware of the court's order, the respondent has failed to surrender custody of the minors. It is for this reason that the applicant prays for the orders sought be granted.
  6. The respondent was duly served with the application but has not responded. The application stands unopposed.

### **Determination**

7. I have considered the application and the entire record of the court. The application before me seeks the committal of the respondent to civil jail for disobedience of this Court's orders granting her custody over the minors. The respondent was directed to return the minors to the applicant. The said has not been complied with.
8. So, is the respondent in contempt of court orders? The court in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR stated that,

“... the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the *Judicature Act* which provided that:...

This section was repealed by section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.”

9. I agree with the above reasoning that since the *Contempt of Court Act* that repealed section 5 of the *Judicature Act* has been declared unconstitutional, the effect is that section 5 of the *Judicature Act* still



stands. Having concluded as aforesaid, I find it fit to examine the procedure for instituting contempt of court proceedings under section 5 of the *Judicature Act* which provides as follows:-

“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.”

10. Accordingly, I also agree with the reasoning of the court and find that the applicable law in this case is section 5 of the *Judicature Act* and the provisions of the England Civil Procedure Rules.
11. The court in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* (supra) further stated that,

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii) Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.”

..... Two principals emerge. The first is liberty:- it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. In this regard, I am not satisfied that willful disregard of the court order has been established.

The second reason is coherence. It is practically difficult and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond a reasonable doubt. In such a prosecution the alleged contemnor is plainly an ‘accused person.

Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.



It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established.

12. From the above citation it is clear there are four elements to be proved beyond reasonable doubt in contempt of court proceedings;
  - a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
  - b. the defendant had knowledge of or proper notice of the terms of the order;
  - c. the defendant has acted in breach of the terms of the order; and
  - d. the defendant's conduct was deliberate.
13. The ruling and order of 4<sup>th</sup> July 2023 was clear, unambiguous and binding to all parties. The said ruling and order were served to the respondent's advocate on record. Therefore, the respondent knows about the court's orders. Having knowledge of the court order, the respondent has acted in contravention of the said order by not returning the minors to the custody of the applicant. This conduct is deliberate, since, the respondent also contravened the orders of the lower court to return the minors to the applicant. The respondent has shown a consistent contempt of court orders. There has been willful and bad faith on the part of the respondent.
14. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest
15. From the foregoing, I am satisfied that the applicant has sufficiently proved that the respondent is guilty of contempt of this court's orders dated 4<sup>th</sup> July 2023.
16. For that reason, I hereby issue a Notice to Show Cause, to be served upon the respondent by the applicant, why the respondent should not be punished for disobedience of the court order dated 4<sup>th</sup> July 2023.
17. The Notice to Show Cause shall be heard on 16<sup>th</sup> April 2024.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MARCH 2024**

**E.K. OGOLA**

**JUDGE**

In the presence of:

N/A for the Applicant

Ms. Wainaina h/b for Mr. Nduma for the Respondent

Gisiele Muthoni Court Assistant

