



**Kimani v Gaiti (Miscellaneous Civil Application 26 of 2023)
[2024] KEHC 6786 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL APPLICATION 26 OF 2023**

AK NDUNG’U, J

MAY 30, 2024

BETWEEN

ANN NJERI KIMANI APPLICANT

AND

ELIJAH GAITI RESPONDENT

RULING

1. The Applicant, Ann Njeri Kimani through her Advocate Ms. Wangechi Wangare moved this court through a Notice of Motion dated 2nd October, 2023 and filed in court on the same day, premised on Article 53(2) (e) of the Constitution, Section 18(1) (b) (i) of the Civil Procedure Code, Section 83 of the Children Act, 2001 and Section 362 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya seeking the following orders;

1. Spent
2. Spent
3. That this honourable court be pleased to exercise its powers under Section 362 of the Criminal Procedure Code and its supervisory jurisdiction over subordinate courts and call for Nyahururu Children’s Case No. E003 of 2022 for purposes of satisfying itself as to the correctness of the orders issued by Hon. C. Muhoro SRM issued on 4th August, 2023 convicting the Applicant of contempt of court and order her to hand over custody of the subjects; and the orders made on 29th September, 2023 sentencing the Applicant to six (6) months imprisonment and proceed to revise the said orders in the interest of justice.



4. That a Children's Officer's Report be prepared and filed in court to ascertain the best interest of the subjects.
 5. That the matter be re-opened to allow the Applicant to testify and the matter be re-allocated and heard by a different court.
 6. That costs of this application be provided for.
2. The application is supported by the Applicant's affidavit sworn on 2nd October, 2023 and based on the following grounds;
 1. That the Applicant is the Defendant in Nyahururu Children's Case No. E003 of 2022 as the biological mother of the subjects, KK and AWG children of tender years and who she has had custody over throughout their lives.
 2. That the Respondent filed Nyahururu Children's Case No. E003 of 2022 *Elijah Gaiti -v- Ann Njeri Kimani* seeking custody of the subjects.
 3. That the Respondent testified and even before the Applicant herein could testify, the trial court closed the defence case and denied the Applicant an opportunity to be heard.
 4. That the Applicant filed an application to re-open the Defence case but the same was disregarded and/or ignored and the court proceeded to deliver judgment granting the both parties joint custody and shared parental responsibilities. There was no communication between the Applicant and the Respondent from November, 2022 when the Judgment was delivered until 15th May, 2023 when the Respondent files an application that the Applicant herein be found in contempt of court. Noting that the Respondent had also never discharged any parental responsibility under the judgment that he sought to enforce.
 5. That the Applicant was found to be in contempt of court despite highlighting the fact that there was no request by the Defendant to enforce the judgment and that she still wished to be heard and a children's officer's report be called for.
 6. That the Respondent has never made any attempts to have access to the subjects and has not been discharging his parental responsibilities at all. The Respondent has been using the process of the honourable court to punish the Applicant where the said court has continued to side with the Respondent and fail to call for any evidence.
 7. That the subjects have no relationship with the Respondent who is a stranger to them. The Respondent is not the biological father of the 1st Respondent.
 8. That judgment by the trial court and the subsequent conviction of the Applicant of contempt of court are a blatant violation of the rules of natural justice and the Applicant's right to be heard and are not in any way in the best interest of the subjects.
 9. That it is obvious that this Children's Case has been misconducted and the best interest of the subjects violated thereby necessitating the intervention of



this honourable court in invoking its supervisory jurisdiction over subordinate court.

10. That it is obvious there is a miscarriage of justice which has greatly prejudiced the Applicant and violated the best interests of the subjects.
3. In her supporting affidavit dated 2nd October, 2023 she states that she is the biological mother of the subjects therein. That this has been a protracted children's case between the Applicant and the Respondent over the custody of KK and AWG. The Respondent is the biological father of AWG and has no relationship whatsoever with the subjects as they have never been married.
4. That the Respondent has never taken responsibility for the Applicant and the two subjects. That the Respondent attempted to strangle the Applicant sometime in November, 2021. The same was reported at Ol Kalou Police Station. Later the Applicant moved houses and has been providing for the subjects single-handedly and will continue to do so.
5. The Respondent has never made any attempts to have access to the subjects and has not been discharging his parental responsibilities at all. That the Respondent has been using the court process to punish the Applicant where the said court has continued to side with the Respondent and has failed to call for any evidence.
6. That the subjects have no relationship with the Respondent who is a stranger to them. The Respondent is not the biological father of KK.
7. That the judgment by the trial court and the subsequent conviction of the Applicant of contempt are a blatant violation of the rules of natural justice and the Applicant's right to be heard and are not in any way in the best interest of the subjects. That the Applicant is in custody at Nyahururu G.K. Prison as a result of the sentencing issued on 29th September, 2023. The Respondent never made any attempts at accessing the subjects over the holidays and the applicant is certainly not guilty and has been condemned unheard. That the children's case has been misconducted and the best interest of the subjects violated thereby necessitating the intervention of this honourable court in invoking its supervisory jurisdiction over subordinate court.
8. That there is a miscarriage of justice which has greatly prejudiced the Applicant and violated their best interests. The court delivered a judgment granting the both parties joint custody and shared parental responsibilities. The Respondent has never discharged any parental responsibility under the judgment that he sought to enforce.
9. The Respondent filed grounds of opposition dated 23rd October, 2023;
 1. The procedure commenced by the Applicant herein is alien to the *Civil Procedure Rules*.
 2. The court therefore lacks the jurisdiction to entertain the instant application.
 3. The Applicant lacks merit and is an abuse of the court process.
 4. The application is totally defective.
10. The application was canvassed by way of written submissions.
11. It is the Applicant's case that the fundamental principle of natural justice of the right to be heard before condemnation was violated by the trial court rendering the proceedings a nullity. The principle of the



- best interests of the child was also departed from by the failure to call evidence to ascertain the best interests of the subjects.
12. It is urged that by sending the Applicant to jail the court exposed the subjects to being in need of care and protection as they were in the sole custody of the Applicant. The contempt for which the Applicant was convicted is denied.
 13. For the Respondent, it is submitted that the procedure adopted by the Applicant is alien to the *Civil Procedure Rules* and secondly that the court has no jurisdiction to entertain the application. The Respondent's take is that Article 53(2)(e) of the *Constitution* does not exist and that the reliance on Section 18(b)(i) of the *Civil Procedure Code* which mandates this court to transfer matters in Subordinate courts is not applicable herein as there is already judgement in the matter.
 14. Further, that there being a judgement in place, this court has no jurisdiction to entertain the matter.
 15. I have had occasion to consider the application, the affidavit evidence and submissions on record. The issue for determination is whether the Applicant has established the legal threshold for the exercise of this court's revisionary jurisdiction and if in the affirmative what orders should issue.
 16. I wish to at the outset get out of the way the technical aspect of the inclusion of Article 53(2)(e) as one of the laws that the application is anchored on and the assertion that the said Article does not exist. The inclusion of sub article (e) in the enabling law is in my view an omission curable under Article 159(2)(d) of the *Constitution* and does not vitiate the application.
 17. As I understand it, the application before court is one seeking revision of the subordinate court's orders. Am not persuaded that Section 362 of the Criminal Procedure Code is applicable in the matter as the former clearly relates to matters coming under the criminal jurisdiction of the court and even though an order of conviction to serve a jail term has a tinge of criminal element therein, contempt orders like the one before court arise purely in regard to civil proceedings and recourse cannot be had in the criminal jurisdiction for remedies. The civil process is not lacking in legal mechanisms for redress.
 18. What is trite is that the court's supervisory jurisdiction over subordinate courts extends over all judicial and quasi-judicial proceedings. It is not correct therefore as submitted by the Respondent that the court cannot review the impugned orders since there is a judgement in place.
 19. The High Court has jurisdiction under Article 165 (6) to supervise subordinate courts and any person, body or authority exercising a judicial or quasi-judicial functions.
 20. Days are long gone by when applications would be dismissed for citation of the wrong sections of the law as the anchor of an application. The court's primary duty is to do justice to the parties and where no prejudice is occasioned by an omission of the above nature, the court will proceed to dispense substantive justice.
 21. More particularly, this being a children matter the best interest of the subjects is pivotal and the interests of the Applicant and the respondent is secondary. The notion by wrangling men and women that a litigation regarding the rights of children is their personal fight to be clouded by discernable emotional hurts, revenge and personal aggrandizement must be cast away in very clear terms. Such a litigation must remain what it is; a suit to determine and protect the rights of the child. Should wrangling parents wish to settle their legal scores, the law is not deficient of mechanisms so to do. However, where the matter relates to the welfare and custody of the children, the protagonists are just agents in the matter whose interests and rights come second and the best interest of the subjects should prevail.



22. Where a party is found in disobedience of court orders in a matter involving children, an order for committal to jail will issue if the same in furtherance of the welfare of the children. Court orders in children matters, like all orders of court, must be obeyed by all and sundry.
23. I have reviewed the record of the subordinate court. It is obvious that the application before court as drawn is a mongrel of a revision application and an appeal. Suffice it to note that revision is not available where the merits of a court's finding is under challenge. That is the preserve of an appellate court.
24. That notwithstanding, and this being a children matter, I refuse to be bogged down by any technicalities noting that the winners in the matter are the subjects and not the protagonists.
25. Was there any irregularities in the main trial or in the proceedings for contempt?
26. As regards the proceedings in the main trial, I note that the judgement was entered before the Applicant testified. There is on record an application dated 2/9/22 seeking to re-open the Applicant's case and allow her to testify. The case had been closed on 19/8/22 when the Applicant failed to appear in court for hearing, the date having been taken in court in the presence of both parties.
27. On the face of it, the Applicant had only herself to blame for failing to appear for hearing on 19/8/22. She has not made any attempt to explain her absence even in the application dated 2/9/22 seeking to testify.
28. That said, this being a children matter, it behoved on the trial court in my view, to allow and receive the testimony of the Applicant so as to be in apposition to reach a balanced judgement in the interests of the children. As it is, the court in the end visited the omissions of the Applicant on the children thereby relegating their best interest to the back seat.
29. The matter herein concerns children. The Court is mindful of the provisions of the Constitution of Kenya, 2010 and of the Children Act which require the Court to give paramount importance to the best interest of the child. Article 53(2) of the Constitution provides:

“ A child's best interests are of paramount importance in every matter concerning the child.

The Children Act on the other hand provides at Section 4(3) that:

“ In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

As the Court considers the matter and makes its decision that will impact the child herein all circumstances affecting the child must be taken into account. The overriding focus must be a solution that will be in the child's best interests.
30. There exists legal mechanisms for re-opening a suit and the court in this matter ought to have, in the best interests of the children, received the evidence that was to be offered.
31. In respect of the proceedings for contempt, I note that there were orders of court subsisting. When a ruling was delivered, the Applicant was granted the opportunity to purge the contempt. She never did and went ahead to even block the Respondent with whom they were to make arrangements for the shared custody of the children.
32. It is not for a party to determine the correctness or otherwise of court orders or to choose which orders to obey. One must obey a court order and if aggrieved challenge the same through due process.



33. The proceedings in respect of the contempt proceedings had no legal flaw. I have no ground upon which to review the same.
34. Am satisfied that the application succeeds to the extent that it is in the best interest of the children that the subordinate court ought to re-open the case and allow the Applicant to testify, receive any expert reports that may be tendered and if need be, interview the subjects.
35. With the result that I set aside the judgement of the trial court and substitute thereof an order that the matter be placed before any other magistrate other than C.M. Muhoro SRM to take defence evidence as indicated hereinabove and make a determination thereto.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF MAY 2024

A.K.NDUNG’U

JUDGE

