



IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No.ZW14P00291

[2015] EWHC ** (Fam)**

Royal Courts of Justice
Monday, 27th July 2015

Before:

MR. JUSTICE PETER JACKSON

BETWEEN:

PATRICK GITAU MUKABI

Applicant

- and -

LILIAN MWIHAKI WARUI

Respondent

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MISS A. HARRIS (instructed by Curwens, Enfield) appeared on behalf of the Applicant.

MISS G. RUSHWORTH (instructed by McMillan Williams) appeared on behalf of the Respondent.

J U D G M E N T

(Approved)

MR. JUSTICE PETER JACKSON:

- 1 This is an application by Patrick Mukabi for the committal to prison of Lilian Warui. The application has been heard in open court. These are allegations to which the criminal standard of proof applies. Accordingly, I cannot and will not find Miss Warui to be in breach of any order unless I am sure of it.
- 2 The background is that Mr. Mukabi, who is 47 years old, and Miss Warui, 43, are Kenyan nationals. Mr. Mukabi has indefinite leave to remain in this country. Miss Warui is a British citizen. They married in 2004. They have two children aged nine and six who were born in this country. I will call them the mother and the father.
- 3 In July 2013 they separated, with the mother and the children moving out of the jointly owned family home in London. In October of that year she obtained an occupation order entitling her to return, and in the same month a restraining order against the father was granted on the basis of allegations of domestic abuse made by the mother.
- 4 The children thereafter lived with the mother and attended school locally. They had regular weekend contact with their father.
- 5 The family's financial situation was not easy, with the mother saying that she did not have sufficient support from the father despite him contributing substantially to the overheads on the family home.
- 6 On 15th December 2014, the father issued proceedings in the local Family Court for an order that the children should live with him and that the mother should be prevented from taking them out of the country. This initiative followed what might be described as threats on the part of the mother to take the children to Africa because of the difficulties that she was experiencing in England.
- 7 The mother says that she did not receive notice of those proceedings until later on in the sequence of events. I am doubtful of that but I cannot be sure that she did. Nevertheless, on 31st December 2014, she and the children left London and went to Botswana where the mother's own mother, Mrs. Esther Warui, lives.
- 8 Whether or not the mother had notice of the proceedings, it is perfectly clear that she made that decision without regard to the views of the father, who she knew did not support any move by the children out of England. The mother says that the father had agreed to the children going during the holidays provided they were back at school in the first week of January. I am doubtful about that but, again, cannot be sure about what might have been said. What

I am sure about is that the mother perfectly well knew that the father did not agree to the children going to stay for any length of time in Botswana – still less to live there. But none of that made any difference to the mother, who considered herself justified in her own lights in planning and executing this trip without reference to the children’s father.

- 9 She now explains her actions on the basis that she was a victim of domestic abuse and/or financial neglect. I am not here to investigate what may have taken place between the parents before they separated in 2013, nor the financial circumstances between them. Suffice it to say that I saw no sign in the mother’s evidence of her being terrified of the father in the way that she claims in her statement.
- 10 Nor am I here to determine the question of whether the children were or were not abducted. For better or for worse there was no order in place. What the mother did might amount to a criminal offence, but it did not amount to the breach of a court order so far as I am aware.
- 11 What these proceedings are about is what happened next, and that is this – having spent three weeks in Botswana, the mother herself returned on 19th January without the children. That left the situation where the children were in Botswana without any right to return to England. Moreover, on the day that she left Botswana the mother applied for residence permits, said to be for six months, to entitle the children to live in Botswana and accordingly to attend school. She did all that without reference to the father.
- 12 Having returned to this country, she says in order to arrange for the sale of the family home, the mother was detained, her passport was removed from her and her plans were therefore brought to a standstill.
- 13 There then followed a sequence of orders (I count seven) with a view to recovering the children and regulating the arrangements on their return. It is the alleged breaches of these orders that found the father’s application for committal.
- 14 The difficulties in achieving the return of the children were so great that it was necessary for the father himself to go out to Botswana on 20th May. Had he not done so it is quite possible that the children would still be there now. It was necessary for him to go out in order to bring them back, as he did on 4th June.
- 15 There are eight allegations of which the first six concern the period when the children were abroad and the last two the period since their return. The orders are there to be read, and there are so many of them that I merely summarise their effects for the purpose of this ruling:

- On 18th February Mr. Justice Mostyn directed Miss Warui to take all necessary steps to secure the return of the children by 4th March;
- On 5th March, that original order having not been complied with, Mr. Justice Roderic Wood ordered Miss Warui to take all necessary steps to cause the children to be returned by 4th April, an extension of a month.
- On 14th March, Mrs. Justice Roberts ordered Miss Warui to take all necessary steps to cause the return of the children by no later than 4th May, an extension of another month.
- On 21st April, Mrs. Justice Pauffley directed the mother to return the children by 4th May and in the meantime to hand them over to their paternal uncle, Mr. James Mukabi, in Botswana no later than 27th April;
- On 7th May, Mr. Justice Wood instructed Miss Warui to instruct her own mother to hand the children into the care of their father upon his arrival in Botswana;
- On 22nd May, I ordered Miss Warui to instruct her mother to give the children to their father no later than 27th May.
- Following the children's return on 8th June, I directed the mother to vacate the family home by 21st June and to send the children to school, and I regulated the time that they would spend with their mother quite closely.
- On 22nd June, the mother not having returned the children to their father, Mrs. Justice Pauffley ordered her to do so immediately. She did not do so until 24th June, and that in controversial circumstances.

16 When a person has been responsible for unilaterally separating children from their home country and their other parent and they are then directed, not once but about five times, to put that situation right that is a serious responsibility. In this case, although Miss Warui was very often unrepresented, the obligations upon her were perfectly clear. The orders were detailed and included a number of obligations to which I have not referred which were supportive of the general intention that the children should be returned. They related to matters such as visas, handovers and the like.

- 17 The court is familiar with situations where, however badly a parent may have behaved, they pass the care of children into the hands of a third party, quite often family members, who then take their own stance and stand in the way of the parent achieving the results that they want to achieve, and I have that possibility in mind in this case.
- 18 So far as these parents are concerned, I reach no judgment about their history. I confine myself to assessing their evidence in the context of this committal application. The evidence of Mr. Mukabi was in my view reliable, whether in writing or given orally. Inevitably there are aspects that he has only second hand because he was not in Botswana, but I saw no reason to doubt what he described as being the history of this matter, and I accept his evidence as being reliable.
- 19 I next consider whether compliance with these orders was within the mother's power. A number of matters have been raised to suggest that she may not have been able to comply with the order and might have been doing her best. I do not accept any of that.
- 20 Firstly, I have seen the mother giving evidence today, and representing herself on the previous occasion, and I am quite clear that she is somebody who has explained the facts when she is able to do so without compromising herself, but that when she is describing the history regarding the children's retention in Botswana, she is an entirely unreliable witness. I had the very strong sense that she considered and still considers herself to have acted in the children's best interests as she sees them to have been; that she made in my estimation little real effort to comply with the court's orders – she paid no more than lip service to the requirements that the orders placed upon her. This is not a case where she was being confounded by the actions of her mother. Her mother was acting on her behalf in all respects. It is interesting that on at least two significant occasions she was actually on the telephone with her mother while the orders were not being complied with. So, those excuses are not accepted.
- 21 Furthermore, the mother says that she was unable to comply with the order because the children needed visas and she could not have afforded them. The mother could perfectly well have afforded to get visas had she wanted to raise the money. She has raised the money for other purposes. It was a sum of I think £300 or thereabouts. She did not make that available because she did not want the children to return. The father had to provide the money. After that point which was an early stage, the excuse vanishes in any event.
- 22 Nor do I accept the mother's last resort which is that the children could not be persuaded to return because they were so distressed. Any distress that these children suffered was due to the promptings of their mother and grandmother.

There is no way, in my view, that they would have offered any resistance to coming back to the country where both their mother and their father live and where their mother and father were living at the time, unless they had been given the message that the maternal family wanted them to stay put.

- 23 Addressing matters overall, then, I propose to make a single finding in relation to the main obligation upon Ms. Lilian Warui. I find that she was in breach of the orders of 18th February, 5th March, 14th April and 21st April, in that she did not take all necessary steps to cause the children to be returned to this jurisdiction on the dates that those orders specified.
- 24 I further find that she was in breach of the orders of 21st April and 7th May in failing to instruct her mother to hand the children over to their paternal uncle. In so far as that issue is concerned, I am quite satisfied that all the difficulties that were thrown in the way of the uncle were entirely self-inflicted by the mother and her own mother.
- 25 In so far as the order of 22nd May is concerned, I find that Ms. Warui did not instruct her mother to hand the children into the father's care by 27th May. It took about a week after that before that handover was achieved.
- 26 In relation to matters since the return to this jurisdiction, I dismiss any allegation arising out of my order of 8th June because I do not think it appropriate for there to be any enforcement of the orders that relate to the vacation of the property by 21st June, or the return of the children to their father when that order was not accompanied by a warning notice; but it is only on that basis that I dismiss that allegation.
- 27 With regard to the order of 22nd June, I find that the defendant failed to comply with that order with no reasonable basis, the order being to return the children immediately into the care of the applicant, Mr. Mukabi. The resistance shown by the children in that case is no more than an outward and visible sign of the inward attitude of their mother; and in relation to the last matter, that Miss Warui was in breach of the order of 22nd June by failing to vacate that property by 22nd June. It was not available to Mr. Mukabi until 24th June.
- 28 Those are my findings.

After further submissions, the following order was made:

**IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION**

Case No. ZW14P00291

Before The Hon. Mr Justice Peter Jackson sitting in Open Court at the Royal Courts of Justice, Strand, London WC2A 2LL

IN THE MATTER OF THE SENIOR COURTS ACT 1981

AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

Claimant PATRICK GITAU MUKABI

Defendant LILIAN MWIHAKI WARUI

AN APPLICATION was made by Counsel for the Claimant and was attended by Counsel for the Defendant

The Judge heard the oral evidence of the Claimant and the Defendant.

And The Judge read the written evidence filed by the Claimant dated 19th January 2015, 21st April 2015, 12th May 2015, 28th May 2015, 22nd June 2015, 23rd June 2015, 29th June 2015 and 2nd July 2015 and the written evidence filed by the Defendant dated 24th July 2015.

And The Judge read the Order of Mr Justice Mostyn dated 18th February 2015, the Order of Mr Justice Roderic Wood dated 5th March 2015, the Order of Mrs Justice Roberts dated 14th April 2015, Mrs Justice Pauffley dated 21st April 2015, the Order of Mr Justice Roderic Wood dated 7th May 2015, the Order of Mr Justice Peter Jackson dated 22nd May 2015, the Orders of Mr Justice Peter Jackson dated 8th June 2015, the Order of Mrs Justice Pauffley dated 22nd June 2015, the Order of Mrs Justice Pauffley dated 23rd June 2015 and the Order of Mr Justice Bodey dated 29th June 2015.

Whereby:

By Paragraph 2 of the Order dated 18th February 2015 the Defendant was ordered to take all necessary steps to cause the children to be returned to the United Kingdom by no later than 4th March 2015.

By Paragraph 4 of the Order dated 5th March 2015 the Defendant was ordered to take all necessary steps to cause the children to be returned to the United Kingdom by 4th April 2015. By Paragraph 1 of the same Order the Defendant was ordered to cooperate in obtaining visas and any other travel documents needed for the children to re-enter the United Kingdom as soon as possible.

By Paragraph 1 of the Order dated 14th April the Defendant was ordered to co-operate in obtaining the visas and any other travel documents needed for the children to re-enter the United Kingdom. By Paragraph 2 of the same Order the time for the return of the children to the United Kingdom was extended and the Defendant was to take all necessary steps to cause the children to be returned to the United Kingdom by no later than 4th May 2015.

By Paragraph 2 of the Order dated 21st April 2015 the Defendant was ordered forthwith to take all necessary steps to cause the children to be returned to the United Kingdom by no later than 4th May 2015. By Paragraph 3 the Defendant was ordered forthwith to co-operate in obtaining the visas and any other travel documents needed for the children to enable them to re-enter the United Kingdom. By Paragraphs 4 and 5 the Defendant was ordered forthwith to instruct the Maternal Grandmother Esther Warui that she shall give the children into the care of the Paternal Uncle Mr James Mukabi no later than 27th April 2015 and to give to the said Paternal Uncle the children's passports and other travel documents.

By Paragraph 4 of the Order dated 7th May 2015 the Defendant was ordered forthwith to instruct the Maternal Grandmother Esther Warui to handover forthwith the children into the care of the Paternal Uncle or the Claimant father on his request upon his arrival in Botswana.

By Paragraph 2 of the Order dated 22nd May 2015 the Defendant was ordered forthwith to take all necessary steps and co-operate with the Claimant father to cause the children to be returned to the United Kingdom no later than 7th June 2015. By Paragraph 3 the Defendant was ordered forthwith to co-operate in obtaining the visas and other travel documents needed for the children to enable them to re-enter the United Kingdom as soon as possible. By Paragraph 4 the Defendant was ordered forthwith to instruct the maternal grandmother Esther Warui to give the children into the care of the Claimant father alternatively the Paternal Uncle no later than 27th May 2015 to enable them to take the children to the United Kingdom. By Paragraph 5 the Defendant was ordered to instruct the maternal grandmother no later than 27th May 2015 to give to the father the children's passports and other identity card, ticket, travel warrant or other document enabling the children to travel internationally together with any residents permits granted for the children in Botswana.

By Paragraph 1 of the Order dated 22nd June 2015 the Defendant was ordered to return the children to the care of the Claimant father with immediate effect and that they shall continue to live with the father until the long-term arrangements can be agreed or determined by the Court. By Paragraph 3 the Defendant mother was ordered to vacate the property at 18A Haydon Close, Kingsbury, London NW9 by 8.00pm on 22nd June 2015 and not return thereto until further Order of the Court. By Paragraph 4 the Defendant mother was ordered to permit the father and the children to return to live at 18A Haydon Close from 8.00pm on 22nd June 2015 until further Order of the Court

AND THE COURT being satisfied that **the Defendant Lilian Mwhaki Warui** has been guilty of contempt of court in that the Court found that:

- 1) The Defendant was in breach of the Orders dated 18th February 2015, 5th March 2015, 14th April 2015 and 21st April 2015 in that she did not take all necessary steps to cause the children to be returned to the United Kingdom as ordered.
- 2) The Defendant was in breach of the Orders dated 21st April 2015 and 7th May 2015 in failing to instruct the Maternal grandmother Esther Warui to hand the children to the

Paternal Uncle Mr James Mukabi, the Court finding that the difficulties thrown in the way of James Mukabi were solely of the making of the Defendant and the Maternal Grandmother.

- 3) The Defendant was in breach of paragraph 4 of the Order of 22nd May 2015 in failing to instruct the Maternal Grandmother to hand the children to the Claimant by 27th May 2015, the Court finding that it took until 31st May 2015 for the children to be delivered into the care of the Claimant.
- 4) The Defendant was in breach of paragraph 1 of the Order dated 22nd June 2015 in failing to return the children immediately to the care of the Claimant, the Court finding that any resistance shown by the children was no more than a reflection of the Defendant's views.
- 5) The Defendant was in breach of paragraph 3 of the Order dated 22nd June 2015 in failing to vacate the property at 18A Haydon Close, Kingsbury, London NW9 by 8.00pm on 22nd June 2015.

AND IT IS ORDERED

- (1) That for her contempt in respect of the breaches found in paragraphs 1), 2) and 3) above the Defendant Lilian Mwhaki Warui do stand committed to HM Prison Holloway for a period of three months from the date of this order.
- (2) That for her contempt in respect of the breaches found in paragraphs 4) and 5) above the Defendant Lilian Mwhake Warui do stand committed to HM Prison Holloway for a period of one month and such period is to be consecutive to the period of three months imprisonment ordered above.
- (3) That the warrant of committal remain in the court office at the Royal Courts of Justice and that execution of it be suspended so long as the Defendant Lilian Mwhake Warui
 - (i) Shall comply with all existing and future Court orders that contain a warning that failure to comply may be punished by imprisonment
 - (ii) Shall return the children to the care of the Claimant Patrick Gitau Mukabi at the end of all periods of time that they spend with her by agreement or by direction of the Court
 - (iii) Shall not remove the children from the jurisdiction of England and Wales without an order of the Court or the written permission of the Claimant Patrick Gitau Mukabi
 - (iv) Shall not go to 18A Haydon Close, Kingsbury, London NW9 except as may be permitted by an order of the Court or the consent in writing of the Claimant Patrick Gitau Mukabiuntil 27th July 2016 after which the sentence and warrant of committal shall be discharged.
- (4) The Claimant may obtain a Transcript of the Judgment of the Court given today and the cost of such Transcript shall be shared equally by the parties.

- (5) That the costs of the Claimant of the applications in the Inherent Jurisdiction of the Court shall be the subject of a detailed assessment if not agreed and shall be paid by the Defendant to the Claimant; the amount of the assessed costs shall be secured by way of a Legal Charge upon the Defendant's beneficial interest in the property at 18A Haydon Close, Kingsbury, London NW9.
- (6) That pursuant to undertakings given by the Defendant the costs incurred by the Claimant in respect of travelling expenses and visa applications for the recovery of the children from Botswana assessed in the sum of £1,939.52 shall be paid by the Defendant to the Claimant; the sum shall be secured by way of a Legal Charge upon the Defendant's beneficial interest in the property at 18A Haydon Close, Kingsbury, London NW9 and shall rank above the Legal Charge provided for in paragraph (5) above.

Order Dated 27th July 2015.
