



**Kinyua v Mutegi & another (Civil Case 6 of 2017)
[2024] KEHC 10750 (KLR) (29 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL CASE 6 OF 2017
LW GITARI, J
AUGUST 29, 2024**

BETWEEN

ESTHER MUTHONI KINYUA APPELLANT

AND

FREDRICK KINYUA MUTEGI 1ST RESPONDENT

NANCY GATUNE IRERI 2ND RESPONDENT

RULING

1. The application pending before this court is the one dated 30/5/2024 which was filed under a certificate of urgency. The court granted orders in prayers 1, 2, 3, 4& 5 in the interim. This ruling relates to prayers 6, 7, & 8. The applicant is seeking an order that the 1st defendant/respondent be cited for contempt for disobeying court orders issued on 20/12/2018, 9th June 2021 and 12/8/2021. That the respondent be committed to civil jail for period of six months for contempt of court orders. The application is based on the grounds on the face of the record which are mainly that the respondent has disobeyed orders issued by this court on various dates as listed above.
2. The application is supported by the affidavit of the Grace Karendi sworn on 30/5/2024 and that of Esther Muthoni Kinyua sworn on the same date.
3. They have highlighted on how the 1st respondent went to the premises and threatened then with violence. The respondent has opposed the application and stated that he was at no time restrained from going to his matrimonial home which is at Karingani/Mugirirwa/2072. He submits that the notice of motion is not competently before court as it is supported by the affidavit of Esther Muthoni sworn at Meru on 30/5/2024 whereas the applicant was in the U.S.A. That the affidavits offends The Oath and Statutory Declarations Act (Cap 15 Laws of Kenya) and ought to be dismissed. It is further submitted that the respondent has not disobeyed any court orders. That the applicant was seeking access to her matrimonial home and the order was granted on 20/12/2018. That the order did not



give the applicant the exclusive use of the matrimonial home, only access. He submits that the order was misunderstood. That the affidavit of Grace Kendi and the annexed photographs do not support the allegation that goons were hired. It was further contended that there was none compliance with procedures for production of electronic evidence. That the annexed OB reports do not show what was annexed. That the status is maintained until the matter is determined. Counsel relies on *Viginia Wambui Otieno-v- Otieno Ougo*. That the standard of proof is that of beyond any reasonable doubts. In response, the applicant submits that the burden of proof that the applicant was not in the Country shifted. That the status quo still stands. That the electronic evidence was not relied on as photographs were not produced, that the application is properly before the court.

4. I have considered the application and the submissions. The issue which arises for determination is whether the respondent should be cited for contempt of court and to be committed to Civil Jail.
5. The genesis of this matter is that the applicant and the 1st respondents are husband and wife who contracted a Christian Marriage on 8/8/1998. The applicant filed a notice of motion dated 17/8/2017 seeking orders inter-alia that the respondent be ordered to grant full access, user occupation and or other or any other dealing in regard to the proprietary interest pertaining thereto to all matrimonial properties known as Karingani/Muiru/4324, 2072, 1653 plus several other properties listed on the application. It also sought restraining orders against the respondent from disposing the said properties and denying the applicant access to the said properties among other prayers. Justice Limo gave ruling in the application on 1/3/2018 and ordered that Status Quo be maintained in respect to Karingani/Muiru/4324 and Karingani/Mugirirwa/2072, Karingani/Muiru/1653 and motor vehicle registration KCJ 431 T. The Judge further ordered that, “The plaintiff shall have access and use of the matrimonial home in Karingani/Mugirirwa/2072 while the 1st defendant shall continue utilizing or occupying Karingani/Muiru/4324 and motor vehicle registration number KCJ 431 T pending hearing and determination of the suit herein.”
6. It is clear from this order that the applicant was granted access and use of the matrimonial home in the interim pending the hearing and determination of the suit. The court further ordered that the status quo be maintained. On 19/12/2018 The Judge maintained that the order giving access to the plaintiff to the matrimonial home on Parcel No.2072 still stands and has not been set aside. The court further stated that, there is no evidence that access by the plaintiff “has been denied or frustrated.” Again the court reiterated that what was given to the applicant was access to the matrimonial home. The order issued on 9/6/2021 also ordered that the applicant be granted access. No order was issued restraining the respondent from visiting the said matrimonial home. On 29/7/2021 he was restrained from interfering with the house and the workers of the applicant. The respondent has denied that he has violated court orders. In the case of *Gathenia K. Mutikika –v- Baharini Farm Ltd (1985) KLR 227* it was held-

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.....it must be higher than proof on a balance of probabilities, almost and not exactly, beyond any reasonable doubt, ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi criminal. However the guilt has to be proved with such strictness of proof as it is considered with the gravity of the charge. Recourse ought not to be heard to process contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction for committing for contempt being practically arbitrary and unlimited should be most jealousy and carefully watched and exercised with the greatest reluctance and greatest anxiety on the part of the Judge to see whether there is no other mode which is open to the objection of arbitrariness and which can be brought to bear upon the subject.....



applying the test that the standard of proof should be consistent with the gravity of the alleged contempt.”

7. The court went on to say that where contempt is alleged, the court can grant an injunction or instead of making an order for committal or sequestration- The gravity flows from the fund of contempt; The court requires proof that the order in question was brought to the attention of the alleged contemnor as proof that he/she had knowledge of the said order. In this case the respondent was aware of the orders as they were made in his presence. The court is primarily concerned with enquiring whether the contemnor is guilty of intentional or willful violation of the order of the court to constitute a civil contempt. Every party before the court is supposed to obey court orders.
8. In this case I note that the alleged contempt is in the affidavit of Grace Karendi who has annexed pictures of the respondent at the home with two other people. In my view the photographs do not prove the allegation of violence and hired goons. Secondly the annexed OB reports do not show who reported or what was reported. The affidavit sworn by Esther Muthoni Kinyua has doubts have been cast as to whether she signed the affidavit as she is out of the Country. The affidavit contravenes Section 4 of the Oaths and Statutory Jurisdiction Act which provides for Oath to be administered with Kenya. The burden was on the applicant to prove that she signed the agreement. The burden of proof did not shift, its applicant’s document and he had the burden to prove the authenticity. The applicant did not produce adequate evidence to prove that the deponent was in Kenya when she took Oath. The affidavit is defective, null and void. It follows that the application is not supported by an affidavit and is fatally defective. The respondent has deponed that he has not violated the court orders as the orders did not bar him from visiting the matrimonial home.
9. I note from the record that the respondent was not barred from visiting the matrimonial home. The court expressly stated that the applicant was to have access to the matrimonial home. The court further ordered that the status quo be maintained.
10. In *Joash Ochieng Ougo and another – Viginia Edith Wambui Otieno (1987) eKLR*. The court stated that;

“The general principle which has been applied by this court is that where there are serious conflicts of fact the trial court should maintain the status quo until the dispute has been decided in a trial.”
11. The Judge granted the applicant access to the matrimonial home ordered that status quo be maintained. It did not bar the respondent from stepping on the matrimonial. If he used to have access to the matrimonial home before the order was issued, the court held that such status be maintained. The dispute has not been determined. The order is interim pending the hearing and determination. I am inclined to agree with the counsel for the respondent that the applicant has misconstrued the order. It appears from the many incidents reported that applicant is not comfortable with the respondent visiting the matrimonial home. The order did not bar him from visiting the home. Contempt of court orders is a serious matter as the respondent can end up being committed to civil jail. There must be adequate proof of violation of the orders of the court. It is my view that the evidence relied on falls short of proving that the respondent had caused violence and hired goons. The photographs relied on do not support allegation of violence and hired goons.

Conclusion:

12. Having considered the orders issued by this court, I come to the conclusion that the allegation of contempt of court orders has not been proved. I dismiss the application.



I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF AUGUST 2024.

L.W. GITARI

JUDGE

