



REPUBLIC OF KENYA



KENYA LAW
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**EWV v ANM (Originating Summons 16 of 2014)
[2022] KEHC 11335 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS 16 OF 2014**

JO NYARANGI, J

JULY 29, 2022

BETWEEN

ESTHER WAMBUI WANJIRU APPLICANT

AND

ALBERT NDERIH MUREITHI RESPONDENT

RULING

1. Through an Originating Summons dated 18th December, 2014 the applicant herein then a wife to the respondent sued the respondent seeking several prayers among them; a declaration that the properties listed in the summons were matrimonial properties acquired jointly by them during the subsistence of their marriage. Besides, the applicant sought interim orders directing maintenance of the status quo obtaining then with regard to the subject properties.
2. On 18th June, 2015, parties appeared before the court for directions whereby they were; directed to file further affidavits and the suit to be canvassed by way of viva voce evidence; warned against disposing any of the suit property and that; in the event the respondent vacated the government property (House) they were occupying upon his official transfer to Nairobi, he was to pay the applicant a monthly sum of Kshs 20,000 to cater for her alternative accommodation.
3. Subsequently, the applicant got transferred to Nairobi as anticipated and the court order for him to pay rent for his family at Kshs Kshs20, 000 took effect. Later, the respondent filed an application for review of the terms for payment of rent. The same was however rejected on 6th October, 2017. It was after this refusal that the respondent started defaulting in remitting rent payment.
4. Consequently, the applicant moved this court vide a notice to show case dated 7th October, 2020 seeking payment of rent arrears to the tune of kshs 922,000 plus costs of the application together with interest making a total of Ksh 926,450 in default attachment of 1/3 of his salary. The notice to show cause was re-issued on 1st April, 2022 demanding a total of Kshs 942,000.



5. In his response, the respondent filed a replying affidavit sworn on 4th November, 2020 stating that; he had failed but not refused to pay the outstanding arrears due to heavy family and financial obligations; he was paying rent for the two issues out of the marriage who are now living independently being adults with Wendy staying in Canada where she is studying; the applicant is staying in her own house hence no rent is being paid.; he is solely bearing the burden of paying school fees for the children; he was willing to pay a sum of Kshs 762,000 in instalments of kshs 20,000 covering up to February 2020 the period the children ceased to stay with the applicant; the applicant is financially stable being a business lady and contractor with KPLC; the applicant has since divorced hence she should pay her own rent now that the children no longer stay with her.
6. It was his position that the only source of income he has is his salary which is spent in paying school fees for their children among them Wendy who is studying in Canada.
7. In her rejoinder, the applicant filed a response to the replying affidavit sworn on 11th November, 2020 stating that; since 6th October, 2017 up to the date of filing the notice to show cause, the respondent has not paid any rent; vide his letter dated 18th March, 2020 the respondent had admitted being in arrears of the amount specified in the notice to show cause; the respondent had frustrated execution by taking large loans from co-operative bank (Kshs 7,278,930), Armed forces Kshs 692,522 and defence Sacco kshs 21,000 out of a gross salary of kshs330,899;
8. She further deposed that the respondent has other sources of income like allowances when serving on missions. She denied having several sources of income through KPLC contracts which the respondent had allegedly interfered with after claiming that she was using fake papers to secure contracts. That the respondent admitted selling three plots at 50 Million and paid school fees for Wendy. She also denied owning an apartment contrary to the respondent's claim.
9. She further averred that the respondent was still bound to pay rent as directed since she was still regarded as his wife taking into account that children do visit her. In response to the applicant's rejoinder, the respondent through his counsel filed another replying affidavit sworn on 4th August, 2021 and filed on 5th May, 2022 in reply to a notice to show cause dated 1st April, 2022 in which the applicant is claiming a total of Kshs 942,000 inclusive of rent arrears of kshs922,000.
10. It was averred that the respondent did make payments for the months of December, 2020 to December, 2021 to the tune of Ksh 260,000 directly to the applicant's advocates. A schedule indicating payments made between August, 2016 to February, 2020 and accrued arrears during the same period was attached.
11. According to the table (schedule) attached, he had made payments for the months of August, 2016 up to the June, 2017 and thereafter defaulted. He admitted being in arrears of kshs 560,000 which money he proposed can be recovered through the sale of matrimonial property.
12. During the hearing, M/s Osino for the applicant adopted the content of the notice to show cause and an affidavit in response to the applicant's replying affidavit. Counsel submitted that there was no dispute that the arrears in question have been outstanding from August, 2016 and that the respondent had admitted and proposed to pay in installments.
13. Counsel submitted that; the respondent had paid Kshs 260,000 from December, 2020 to December, 2021 hence the balance should be paid; the issue of divorce proceedings is immaterial in tabulating the outstanding arrears and; that the respondent had sufficient resources but decided to circumvent the execution process by over loading his pay slip with loans thus leaving a minimal balance of his net salary.



14. Ms Osino submitted that the orders directing rent payment have never been reviewed hence the respondent was bound to pay. In her view, the court can recover the outstanding amount from his salary which stands at the net pay of Kshs 130,000 per month. To support the position that salary of a judgment debtor can be attached, counsel referred to the holding in the case of *SWN Vs LNB*(2019) eKLR and *ESL Vs GMB* (2013) e KLR
15. Ms Musyoki holding brief for M/S Kipsang for the respondent adopted the averments contained in the affidavit in reply to the application. Counsel submitted that the arrears sought are exaggerated and that the amount due is only Kshs 560,000 taking into account that Kshs 260,000 for the period of December, 2020 - December, 2021 has been paid. Counsel submitted that the amount outstanding can be recovered from the sale of matrimonial property.
16. I have considered the application herein, response thereto and oral submissions by both counsel. There is no dispute that there is a subsisting order made on 9th June, 2013 directing the respondent to pay rent worth Kshs 20,000 to the respondent per month. It is also not in dispute that the said order has not been reviewed nor set aside.
17. According to the applicant, the amount due is for the period August, 2016 to October, 2020. That the amount of kshs 260,000 paid which is not in dispute is for the period December, 2020 to December, 2021 which fact was admitted by Ms. Muysoki for the respondent.
18. From the schedule of payment attached in the replying affidavit sworn by Kipsang in response to the notice to show cause of 1st April, 2022, the respondent had made payment up to July, 2017 and that he had only defaulted for the period August 2017 to February, 2020 translating to a sum of kshs 560,000 which should be recovered from the sale of matrimonial property.
19. From the facts of this case and parties' own admission, the order directing payment of rent was open ended. They did not allege any condition made as to when the order was to lapse. In other words, until set aside or reviewed, the order is deemed to be valid. The rent payable for the period August, 2016 to February, 2020 is not in dispute.
20. The respondent through an affidavit sworn by M/s Kipsang tabulated the amount paid as from July, 2016 up to June, 2017, and that the period not paid is July, 2017-February 2020 (rent arrears). The contested period therefore is March, 2020 - October, 2020 and August, 2016 to May, 2020. As stated, the order directing payment of rent is still subsisting until reviewed or set aside. Accordingly, the period March, 2020 to October, 2020 is relevant hence outstanding rent. Why would the respondent pay rent for December, 2020 to December 2021 yet dispute the period March 2020 - October 2020 on grounds of divorce. I do not find any convincing reason.
21. Was rent paid for the months of July, 2016 to May, 2017? Ms Kipsang swore an affidavit attaching a schedule of payment including payment made via M pesa for the months of;
 - a. 2nd July, 2016, Kshs60-200 catering for July, August and September 2016 payment through M/s Kipsang
 - b. 15th September, 2016- Kshs 20,600 through M/s Kipsang for the month of October 2016.
 - c. 6th October, 2016- kshs 20,500 though M/s Kipsang for November 2016
 - d. 23rd December, 2016- kshs20,000 to Wnjiru for the month of December 2016
 - e. 4th April, 2017- kshs60,500 to Kipsang for January, February March 2017
 - f. 27th May, 2017- kshs60,500 catering for January, February March, 2017 to Ibrahim



- g. 28th June, 2017- kshs40,000 May, June 2017 to Kipsang
22. From the above tabulation, there is no evidence that the money paid via M Pesa reached the applicant. No M-pesa account statement was attached to show that the money for the period July, 2016 to May, 2017 was paid. Accordingly, I do hold that the amount is outstanding. It is no wonder that the respondent had admitted in paragraph 12 of his replying affidavit that he was in arrears of Kshs722,00 covering up to February, 2020 and made a proposal to pay in installments.
23. From the respondent's admission, he was in arrears from August, 2016 up to February, 2020. In the circumstances, I do hold that the respondent is in arrears of rent from August 2016 to October, 2020 translating to 40 months making a total of Kshs 820,000 plus interest at court rates (12%) and costs making a total of kshs 926,000 as the outstanding amount.
24. Having resolved the disputed amount, the next question will be how to recover the amount. The respondent claimed that the only source of income he has is his salary of kshs 130,000 net salary. He claimed that he is not refusing to pay but rather, the means of payment is the issue. The respondent has had more than enough time to pay the debt. He should come up with a reasonable proposal to pay the outstanding amount without further delay. Should he convince the court that he did pay for the period July, 2016 to May, 2017 and that the applicant did receive the money, the same shall be deducted from the total amount. Otherwise, as it stands now, the amount of Kshs 926,450 should be paid within 30 days in default 1/3 of his salary shall be attached to recover the debt. Mention on 20th September, 2022 to confirm payment.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF JULY, 2022

J. N. ONYIEGO

JUDGE

