



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 15 OF 2018

KKO.....APPLICANT

V E R S U S

COO.....RESPONDENT

RULING

1. Through an originating Summons dated 5th March 2018 and filed the same date, KKO (hereinafter “**the Applicant**”) moved this Court seeking various declarations and orders against COO her former husband (hereinafter “**the Respondent**”). The orders sought include;

(1) That an order do issue declaring that the Applicant has equal beneficial interest in property, rental income and proceeds from the jointly registered matrimonial properties listed below;

- (a) L.R. No. xxxxx/xx Nyari Estate;**
- (b) Plot adjacent and fenced together with L.R. xxxxx/xx Nyari.**
- (c) Mara Woods Block C Unit Cx on L.R. No. x/xxx (apartment).**
- (d) Mara Gardens Unit No. xxx on L.R. No. xxxx/xx (apartment).**
- (e) Riverside Drive Unit No. xxxx on L.R. No. xxx/xxxxx (apartment)**

(2) That an order do issue declaring that all the under listed properties and finances which are registered in the name of the Respondent are held in trust for the Applicant;

- (a) Matrimonial home in [Particulars withheld] Kisii**
- (b) Land in Kisii at [Particulars withheld]**
- (c) 5 acre land in Molo with an incomplete bungalow**
- (d) [Particulars withheld] apartment in Kilimani Nairobi**
- (e) Proceeds of the Children’s Education policy in Old Mutual**
- (f) Bank Account at the Kenya Commercial Bank being [...]**
- (g) Bank Account in [Particulars withheld] France**
- (h) Pension from World Health Organization (WHO)**

(3) That an order do issue declaring that the Applicant is entitled to 50% of all the rental income that he has been receiving from the joint properties and the properties held in trust for her.

(4) The Court to issue any other relief it may deem fit.

2. Contemporaneously filed with the Originating Summons is a Notice of Motion seeking among other orders; pending hearing and determination of the application an order to issue stopping withdrawal or transfer of funds from Bank Account No. [...] Kenya Commercial Bank and that an order to issue directing that rent from the matrimonial properties be deposited in an escrow or joint account.

3. When the application came up for hearing on 19th March 2018, the Court granted orders freezing operations on the Respondent's aforesaid bank account pending interpartes hearing. On 5th July 2018, parties agreed on lifting the bank freezing orders and recorded a mutual consent as follows;

(1) That the parties will share equally the rental income from the following properties subject to the deduction of agreed upon expenses-

(a) L.R. No. xxxxx/xx Nyari Estate together with L.R. No. xxxxx/xx

(b) Mara Woods Block C unit xx in L.R. xxxxx

(c) Mara Gardens Unit No. xxx on L.R. No. xxx/xx

(d) Riverside Drive Unit No. xx on L.R. No.xxx/xxxx

(2) That the Applicant will also receive her 50% share from the said property from January 2018 to July 2018.

(3) That Order No. 3 of this Court's orders dated 19th March 2018 be lifted.

4. However, despite the above stated clear and unambiguous orders, the Applicant moved to this Court vide a Notice of Motion dated 17th July 2019 seeking orders as hereunder;

(1) Spent

(2) That the Respondent, COO, be cited for contempt of the orders of this Honourable Court issued vide the consent recorded on 5th July 2018 and sentence him to imprisonment for a period of six months or such other duration that the Court may order, until such time that the contempt is fully purged.

(3) That pending the hearing and determination of this application, this Honourable Court be pleased to direct the Respondent to table all expenses charged on KCB Account No. [...] for the period covering 5th July 2018 to date.

(4) That pending the hearing and determination of this application, this Honourable Court be pleased to order the Respondent to provide before this Court and to the Applicant proof of payment of all expenditures incurred on the KCB Account No. [...] for the period commencing 5th July 2018 to date.

(5) That pending the hearing and determination of this application, the Respondent whether by himself, his Advocates or howsoever otherwise be denied the right of audience before this Honourable Court.

(6) That this Honourable Court be pleased to direct the Respondent to pay the Applicant a sum of being arrears in payment of monthly income commencing from 5th July 2018 to date.

5. The application is premised upon grounds that;

(a) The aggregate rental income from the properties subject of the consent order of 5th July 2018 amount to Kshs. 920,000/- per month.

(b) That despite the express provision of the order on equal sharing of rent upon deducting mutually agreed expenses, the Respondent unilaterally decided to spend the rental income without including the Applicant thus drawing a standing order of Kshs. 178,000/- payable to the Applicant as her monthly rental income share.

(c) That the said fixed amount of Kshs. 178,000/- is not reflective of her monthly entitlement and share emanating from rent out of the joint properties.

(d) That following their divorce proceedings in France, the applicant is likely to be rendered homeless by 31st July 2019 as she is currently not employed as opposed to the Respondent who is salaried earning a combined monthly income inclusive of rental income to the tune of Kshs. 4,819,000/-.

6. In further support of the application, the Applicant swore an affidavit on 17th July 2019 amplifying the fact that the Respondent has persistently ignored the Court order by unilaterally spending rental income from the joint properties without involving the her thus

disobeying the court order.

7. She averred that despite her protestation through her Advocate vide a letter dated 13th November 2018 seeking for a breakdown of expenditure from the Respondent, he only responded on 8th November 2019 giving a breakdown of expenses as follows;

(a) Mortgage for KCB/xxx – Kshs. 35,376/-

(b) Mortgage for KCB/Axx– Kshs. 160,000/-

(c) Service Charge Kshs. 26,857/-

(d) Insurance Kshs. 26,837/-

(e) Jimmy’s allowance – Kshs. 200,000/-

(f) Jimmy’s fees – Kshs. 100,000/-

8. She contended that despite stating the above expenditure on paper, the Respondent did not submit any proof of such expenditure. To controvert the same items like January’s school fees, she claimed that $\frac{3}{4}$ of J’s school fees is paid by [Particulars withheld] organization the Respondent’s employer. She attached a school fees bank statement grant from the WHO for the period 2018 (annexture KO-3).

9. That the mortgage expenses were concluded as at May 2019 hence that item does not apply meaning that, the Kshs. 178,000/- to her should have increased by half margin of the mortgage expenses.

10. In response, the Respondent filed a replying affidavit sworn on 25th October 2019 admitting the existence of the Court order and denied any breach of the said order. He further admitted spending unilaterally rental income from the affected properties after the Applicant allegedly became difficult while looking for a ground to fix him for contempt. He stated that the order did not state that the properties were jointly owned.

11. He averred that on 18th October 2018 both parties met in company of their Advocates and agreed on tentative expenses and the amount to be remitted to the Applicant monthly at Kshs. 178,000/-. He attached an unsigned copy of the said tentative agreement dated 19th October 2018 (Ex. 2).

12. That her response to the Applicant’s letter seeking a breakdown of expenditure, was responded to through a letter dated 8th February 2019 explaining the details of expenditure. He averred that the KCB Account No. [...] is his personal account and not a joint account hence cannot give all expenditure accounts passing through this account.

13. He stated that the tentative agreement could not be signed as the Applicant introduced new demands. In his view, by holding a meeting and drafting a tentative agreement, the applicant had consented. The Respondent went further to explain how he spent part of the rental income paying their son’s school fees exclusive of the employer’s contribution.

14. He went further to state that due to the breakdown of the negotiations to fine tune the detailed expenses, he went ahead and spent the money based on the tentative agreement. He further sought Court’s intervention and guidance on how to handle expenses on mortgage repayment for Riverside Axx KCB, Service Charge for Riarra, Woods Cx, River Gardens No. xxx, Riverside Drive No. xx, rates, J’s school fees and maintenance operational costs.

15. He contended that after deducting the expenses, the legitimate shared amount was Kshs. 178,000/-. Commenting on the Applicant’s claim that she is suffering in France as she is not employed, he stated that he was ordered by a France Court on 13th June 2019 to pay the Applicant a maintenance sum of Kshs. 170,864/- monthly which together with a sum of Kshs. 178,000/- makes a total of Kshs. 348,864/- per month. In her rejoinder, the Applicant filed a further affidavit admitting that they had meeting on 18th October 2018 but denied there was any agreement on expenditure. She simply stated that the expenditure indicated was not substantiated.

Submissions

Applicant’s Submission

16. Through the firm of Rachier and Amollo Advocates, the Applicant filed her submissions dated 26th June 2020 basically reiterating the averments contained in the affidavit in support.

17. Counsel submitted that despite having entered into a clear consent agreement, the Respondent has not shown any reason why he did not consent and agree on the expenses due and payable from the account out of rental income from the agreed joint property. According to learned counsel, any attempt geared towards securing an agreement on accruing expenditure did not amount to an agreement capable of enforcement.

18. That a tentative agreement was not an agreement. He contended that the unilateral expenditure was intended to defeat the purpose and objective of those consent orders. That a consent order with the consent of counsel is binding to all parties and cannot be varied unless obtained through fraud, collusion or an agreement against public policy. To urge on this position reliance was placed on the case of **Ismail**

Sunderji Hirani Vs. Hirani vs. Noorali Esmail Kassam (1952)19 EACA 131 in which the court of Appeal held that a consent order made in the presence and with the consent of counsel is binding on all parties.

19. To emphasize on the proposition that Court orders must be obeyed and willful disobedience to a Court order is punishable as a contempt of a court order unless the same is varied, counsel referred to the case of **Kenya Tea Growers Association vs. Atwoli and 5 Others (2012)eKLR and Sam Nyamweya & 3 Others Vs. Kenya Premier League Limited and 2 Others (2015)eKLR**.

20. According to learned counsel, no valid reason was advanced for non-compliance of the Court order. Counsel opined that if any party is dissatisfied with an order, the avenue is to challenge it and not resort to defiance which is not an option. To fortify this position, the Court was referred to the decision in the case of **Teachers Service Commission Vs. Kenya National Union of Teachers and 2 Others Petition No. 23/2013**.

Respondent's Submissions

21. Through the firm of Oronga Esonga and Co Advocates, the Respondent filed his submissions dated 16th July 2020 urging that he had fully complied with the Court order and if there was any deficiency in compliance, there is an alternative remedy. Counsel fully adopted the averments contained in the replying affidavit.

22. Counsel submitted that the Court ought to ask itself what the legitimate deductible expenses were. How were those expenses to be agreed upon and how they were to be treated in the absence of an agreement.

23. According to Esonga, before a person is punished, the Court must be satisfied that the disobedience complained of was unlawful. That where there is a remedy, one cannot seek to enforce contempt proceedings.

24. Counsel further submitted that, with the consultative meeting held on 18th October 2018, it was tentatively agreed on the expenses to be incurred. That the frequent engagement held through correspondence and meetings implies that the Respondent did not deliberately or willfully disobey the Court order. That by paying the Respondent Kshs. 178,000/- per month is sufficient proof of the willingness to honour the order. To support this position, Counsel referred to the case of **Lewis Vs. The Great Western Railway Company (1877)3QBD195** where the Court stated that;

“Willful misconduct means misconduct to which the will is a party, something opposed to accident or negligence.”

25. Counsel further made reference to the case of **Mutika Vs. Baharini Farm Ltd (1985)KLR 227** to fortify the point that contempt of Court is a drastic measure which is only available if there is no alternative remedy. In buttressing the same position, Counsel relied on the holding in the case of **Advan Investments PTY Ltd Vs. Dean Gleeson Motor Sales PTY Ltd (2003)VSC 201** where the Court held that contempt proceedings should be the last resort. Further reliance was placed in the case of **Marshall Vs. Marshall (1966)110 S016** where the Court held that committal proceedings should not need be treated by parties as a weapon in the cause of warfare.

Determination

26. I have considered the application herein, response thereto and rival submissions by both Counsel. The only issue that arise for determination is whether the Respondent has acted in breach of the consent order of 5th July 2018.

27. There is no dispute that on 5th July 2018 this Court adopted a written consent duly signed by Counsel representing both parties to the effect that-

(a) Parties were to share equally rental income from the properties listed below subject to deduction of agreed upon expenses;

(a) L.R. xxxxx/xx Nyari Estate together with L.R. xxxxx/xx

(b) Mara Woods Block C Unit Cx on L.R. x/xxx

(c) River Garden Unit No. xxx on L.R. xxxx/xx

(d) Riverside Drive Unit No. Axx on L.R. No. xxx/xxxxx

(e) The applicant will receive 50% share from the said property from January 2018 to July 2018.

28. Besides the adoption of that order, the Court made further directions regarding filing of witness statements in preparation for viva voce hearing.

29. The crux of the application herein is the alleged disobedience of the court order by the Respondent by unilaterally deducting expenses not mutually agreed from the rental income thus reducing the 50% shareable rental income to the disadvantage of the Applicant who receives Kshs. 178,000/- monthly out of a total of Kshs. 910,000/- being the total monthly rent collected from the properties in question.

30. The Respondent does not deny the fact that he has been receiving rental income through KCB Bank Account No. [...]. He also does not

deny that he has been collecting an average of Kshs. 910,000/- rental income monthly. Equally, he avers that he has been paying Kshs. 178,000/- to the Applicant which according to him is the 50% share after deducting the requisite expenses among them; service charge for the affected properties, mortgage expenses; Insurance policies; their son's monthly upkeep and school fees expenses.

31. It is these expenses that the Applicant disputes that they were not agreed upon as per the Court order and therefore the Respondent's unilateral decision to expend part of the rental income on those expenses some of which are non-existent or exaggerated as a blatant violation and disobedience of the Court order hence the need to commit him to Civil jail.

32. It is now settled that the law governing contempt proceedings is intended to promote the integrity of Court's authority and enforcement of the rule of law so as to restore confidence in the justice system. See Econet Wireless Kenya Ltd Vs. Minister for Information & Communication of Kenya (2005)IKLR 828 where the Court held that:-

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

33. However, it must be born in mind that, committal to Civil jail is not a mechanical or ritualistic procedure. It is subject to proof of certain conditions or factors.

34. Among the conditions to be satisfied before committal are; that the orders must be clear and unambiguous (See Amos Mathenge Kabuthu Vs. Simon Peter Mwangi (2015)KLR and Michael Sistu Kamau Vs. Director of Public Prosecutions and 4 Others (2018)KLR where the Court of Appeal citing with approval the case of A. B. & Another Vs. R.B (2016)KLR stated that:-

“To sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt.”

35. Further, the Applicant is duty bound to prove that the terms of the order were clear and known to the Respondent and that the Respondent willfully disobeyed the order. These conditions were succinctly stated in the case of Christine Wangari Wachege Vs. Elizabeth Wanjiru Evans and 11 Others Civil App. No. 33 of 2013 where the Court stated that, a person who knowing of the existence of an order of injunction or stay but willfully does an act that violates the terms of an injunction or stay is liable to be committed for contempt: that a party directed by an order of Court to do or to refrain from doing any act must comply with the direction until its discharge, irrespective of that party's view or opinion over the order; that contempt of Court proceedings are intended not to protect personal dignity of the individual Judge or the private rights of any litigant, but are meant to protect the fundamental supremacy of the law and the rule of law; and that leave to convene contempt of Court proceedings is no longer required in view of the 1999 Civil Procedure Rules of England and the Civil Procedure (Amendment No. 2) Rules 2012 (of England).

36. Similar position as above was held in the case of Woburn Estate Limited Vs. Margaret Bashforth (2016)KLR.

37. The questions that the Court is bound to answer are; was the consent order the subject of this application clear and unambiguous? Has the Respondent complied? If not, is non-compliance willful or deliberate? If so, can the Court punish for contempt? Is there any remedy other than committal?

38. There is no dispute that the consent order does exist and it is binding on both parties. It is also not in dispute that the order is clear. However, the born of contention is compliance. The Respondent admits that, he did remit Kshs. 178,000/- to the Applicant being her 50% share out of the monthly rental income. He also admits that the Applicant did not agree to the expenses deducted from the total monthly income. According to the Respondent, despite having meetings and exchange through correspondences, the Applicant was un-cooperative and therefore refused to sign a tentative agreement arrived on 18th October 2019.

39. With the explanation given by the Respondent, he did not comply with consent order No. 1 regarding sharing rent after deducting mutually agreed (required) expenses. Although the consent order did not explain the modalities upon which parties who are estranged and sworn enemies were to meet, it was prudent to use their legal representatives or approach the Court to settle the stalemate. The tentative agreement which was not ratified by appending signatures cannot be a ground for the Respondent to have gone ahead solely to create expenses which are disputed. In my view, he did not comply with the Court order deliberately so as to avoid involving his counterpart in agreeing on genuine expenses.

40. Parties exchanged counter elaborate expenses proposals which have were at variance. It is not for this Court in this application to determine whether the expenses alleged to have been incurred are genuine or not. That is the work of an accountant or an auditor to perform. My duty is to find out whether the expenses involved the agreement of the two parties and if not, that is non-compliance or disobedience to the Court order.

41. If the parties were not in agreement, they were at liberty to approach the Court for further directions. To that extent, the Respondent is to blame for non-compliance of the Court order which was very clear and unambiguous. Having held him liable, is committal to civil jail the best option?

42. The Respondent seemed to urge the Court to consider the fact that what he did was reasonably possible in the circumstances given that the Respondent had refused to co-operate. To me, this is a mitigating factor. Indeed, he did pay some share of rental income to the tune of Kshs. 178,000/- which the Applicant acknowledged and continued to receive. It will also appear that some of the expenses were inevitable though the actual figure is disputed.

43. As stated above, both parties had tried to reach an agreement and part of the order fulfilled. Save for the mistrust and bad blood, the Applicant tried to meet part of the agreement which mitigates his actions. What alternative remedy is available?

44. The alternative remedy could be parties meeting in the presence of their Counsel or a Mediator and agree on the reasonable expenses with documentary proof and then deduct the same from the rental income. Secondly, parties could submit their necessary expenses attaching proof for the Court to determine. Thirdly, parties can open a joint account or an account jointly operated by their lawyers in which the relevant income is deposited by a mutually agreed estate or property Manager or agent and then the amount withdrawn subject to the agreement by both parties in default the money to stay in the account until such a time that parties shall agree. The 4th ancillary remedy, is for the hearing of the case to be expedited to determine the controversy once and for all.

45. In the current scenario, I am convinced that the Respondent did deliberately disobey a Court order with the sole intention of manipulating expenditure so as to reduce the Applicant's share. A Court order is sacrosanct and must be obeyed to the letter. It cannot be amended through the back door by one party to suit his ulterior personal interest. To uphold Court's dignity and authority, the Respondent must be held liable for contempt of Court orders of 5th July 2018. To that extent, he is liable to punishment for contempt of court orders.

46. Given the mitigating factors aforementioned, committal to civil jail will be the most drastic and unwarranted action in the circumstances of this case. As stated, the Respondent did mitigate his actions by honouring part of the consent order though with an ulterior motive by paying a lesser sharable amount. On that ground, I will give him an option and lenient punishment. Accordingly, the Respondent is sentenced to a fine of Kshs. 100,000/- payable within 30days in default serve one (1) month imprisonment.

47. Further, the Applicant and Respondent shall sit down in the presence of their lawyers physically or virtually and a mutually agreed Accountant or Auditor to work out on the reasonable expenses incurred during the period in question and if there be any difference over and above Kshs. 178,000/- applicant's monthly entitlement, then she shall be paid the balance by the respondent to meet the deficit.

48. Further, parties shall henceforth strictly adhere to the Court order and where not possible, they shall be at liberty to seek Court's intervention or guidance. To avoid further delay of this matter, parties should move with speed and fix the same for hearing on priority basis.

49. Regarding costs, the same is awarded to the Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF JANUARY, 2021.

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J. N. ONYIEGO

JUDGE