



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MATRIMONIAL CAUSE NUMBER 6 OF 2018

RWN.....APPLICANT

VERSUS

JNM.....RESPONDENT

R U L I N G

1. The parties' herein entered into a mediated consent dated 4th October 2019 which was adopted as an order of this court on 25th January 2021 was as follows;

- 1) *The Applicant to return to the matrimonial home without any conditions and the respondent not to interfere with the Applicant's quiet and peaceful enjoyment of the matrimonial home.*
- 2) *The respondent shall pay a sum of Kshs.27, 000/= to the Applicant as monthly maintenance with effect from October 2019.*
- 3) *The payment above to be made on or before 5th of every month.*
- 4) *The applicant shall continue enjoying the respondent's NHIF medical cover.*
- 5) *The Applicant shall have the exclusive use of the shop adjacent to the matrimonial home.*
- 6) *The parties agree to maintain the current estate, agent to collect rent on their behalf.*
- 7) *The estate agent upon collection of the rent shall remit a sum of Kshs.27,000/= being maintenance amount to the applicant before any deduction.*

2. On 2nd June 2021 the Applicant filed an application dated 31st May 2021 under **Order 40 Rule 3 of the Civil Procedure Rules** and **Section 1A and 3A of the Civil Procedure Act and section 5 of the Judicature Act** seeking the following orders:-

1) ...spent

2) That this Honourable Court be pleased to cite JNM, the respondent herein for contempt and proceed to detain him in prison for a term of six months or punish him as the court may deem fit for being in contempt of the court orders of 25th January 2021 which adopted the consent agreement entered into on 4th October 2019.

3) That costs of this Application be provided for.

3. The position of the applicant as supported by her affidavits is that the respondent has not complied with the consent order. She averred that the respondent did not remit any monies to her for the months of April and May despite collecting rent from all the rental houses numbering 38 units/houses and when she visited the offices of the rent agents Pata Commercial Agencies, with a copy of the settlement agreement they informed her that they had express instructions from the respondent not to remit any monies to her.

4. That in total contravention of the agreement to grant her quiet and peaceful possession and the use of the matrimonial home and exclusive use of adjacent shop, the respondent has continually harassed her and prevented peaceful and quiet living through use of the police who constantly arrest her on unfounded charges most of which are still pending in court.

5. She stated that her attempts to seek redress from the police force have borne no fruits as all she gets are OB numbers but no investigations

have been conducted thus she lives in constant fear of the next police visit.

6. That in further contempt the respondent has maliciously demolished a garage and room that forms part of the matrimonial home so as to prevent her use of them and chased away her children from home and unless this court stamps its authority by punishing him, she shall continue to suffer prejudice.

7. In his Replying Affidavit filed on 7th June 2021 the respondent opposes the application on various grounds: the application is wrongly brought under **order 40 of the Civil Procedure Rules** which deals with injunctions; that there is no decree or any court orders with penal notice extracted, issued and served on him following the mediation settlement of 4th October 2019; that without prejudice if there exists a decree in this matter, the appropriate way to go about execution is through execution proceedings and not through an application such as this one

8. He contended that according to the consent the sum of Kshs.27,000/= was payable to the Applicant by the estate agent as stated in **clause 4(ii) of the mediation agreement** of 4th October 2019.

9. That the Applicant was the architect of her own misery as she had made it practically impossible for the estate agent to manage and run various rental units by evicting and chasing away the tenants and replacing them with her grown up children who have families and do not pay any rent.

10. He deponed that in fact on 28th August 2020 his advocate had to write a letter to the Applicant's advocate and subsequently filed a case in **Nakuru CM ELC No. 158 Of 2020 James Ngaruiya Mungai vs Elias Mungai Ngaruiya** for the eviction from rental premises of their son.

11. He stated that the applicant has since restored EMN (her son) into the very same premises making it difficult for recovery of any rent yet it was a condition precedent that the applicant shall not interfere with the rental premises so that the estate agent can safely run and manage the same in order to make funds available.

12. He deposed that the application dated 29th October 2019 has not been prosecuted to date hence Kipruto Gitau & Co. Advocates is the firm on record for the applicant as there is no notice to act in person after judgment hence the present application filed by the applicant in person is incompetent and unavailable. He prayed that the instant application be dismissed with costs to him.

13. The applicant swore a Further Affidavit on 10th June 2021. She deponed that the leave to file the instant application was granted by this court and application was brought under **Order 51 of the Civil Procedure Rules** and that citing of **Order 41** of the said rules was an error which does not affect the application.

14. She averred that the application arose out of a consent order and same need not be extracted and served on the respondent who was part of the consent and even signed it and as such he is aware of his obligation.

15. That in fact the respondent had been paying the money decreed in the consent settlement up to a point when he stopped altogether which conduct shows mischief on his part to frustrate the consent by use of technicalities which do not apply in this case.

16. She deponed that none of the children of his marriage reside in the rental units or within the home as the respondent has made it a habit to harass, threaten and falsely prosecute them and the court order that is attached to the respondent's Supporting Affidavit and marked **JNM11** is actually an injunction and not an eviction order which is neither here nor there as the alleged EMN does not live in any of the rental units or even at home.

17. That it is in fact the respondent who interferes with the rental units by arbitrarily chasing them away and breaking doors of the rental units so as to frustrate the tenants to the extent that they leave.

18. She stated that she filed a notice of intention to act in person and served it on the respondent and that this court has the inherent jurisdiction under the constitution to hear and expedite matters without undue regard to procedural technicalities.

19. Parties made oral arguments to augment their pleadings. The applicant appeared in person. She relied on her application and affidavits. She urged the court to direct the respondent to give her the money as agreed. She denied that any of her children were living in the rental houses.

20. Mr. Karanja Mbugua appeared for the respondent. He argued that from the agreement it was the Pata Commercial Agencies who were to pay the applicant the Kshs. 27,000/= per month from proceeds from the rental properties and not his client. That the applicant had made it impossible to collect the said rent.

21. In her rejoinder she told the court that her son was not living in those houses. That the Commercial Agency was collecting rent from the thirty eight (38) houses but had instruction not to pay her from the respondent.

22. No authorities were cited.

23. The issues arising for determination are:

Whether the applicant required leave of this court to institute contempt proceedings.

24. It is noteworthy that the respondent did not cite any authorities or the legal provision requiring the applicant to seek leave. Suffice it to say that in **Christine Wangari Wachege vs Elizabeth Wanjiru Evans and 11 Others Civil App. No. 33 of 2013** the Court of Appeal pointed out that leave is not required where committal proceedings relate to a breach of a judgement, order, or undertaking.

Whether there was need to extract court order and serve it upon the Respondent.

25. For the respondent to seek to be served with an order to which he appended his own signature and had complied with for some time can only be termed as mischievous and an attempt to abuse the process of court. The short of it is that this was not necessary. The words of *Lenaola J (as he then was)* speak to this clearly in **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** where the Judge stated that :-

“...the law has changed and as it stands today knowledge supercedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary.”

Whether the Respondent is in contempt of the Consent order dated 4th October 2019 that was adopted by this court on 25th January 2021.

26. Civil contempt is defined at **Section 4 (1) of the Contempt of Court Act 2016** to mean the **“willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court;”**

27. In **Katsuri Limited vs Kapurchand Depor Shah [2016] eKLR**, citing **Kristen Carla Burchell vs Barry Grant Burchell (Eastern Cape Division case No 364 of 2005)**, it was stated that **“in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order.”**

28. The orders must be clear and unambiguous in order to succeed in contempt proceedings. In **Amos Mathenge Kabuthu vs Simon Peter Mwangi (2015) eKLR** and **Michael Sistu Kamau vs Director of Public Prosecutions and 4 Others (2018)eKLR** where the Court of Appeal citing with approval the case of **A. B. & Another Vs. R.B (2016) eKLR** 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.”

29. It is not in any doubt that in this case the respondent was well aware of the terms of the consent because he participated negotiating the same and agreed to the terms.

30. It is true that the last part of the consent states that the rent collection agency is to deposit Kshs. 27,000/= in the applicant's account before any deductions. However a reading of the consent clearly shows it was the respondent who was to pay the money. It clearly states that **the respondent shall pay a sum of Ksh.27,000/= to the Applicant as monthly maintenance with effect from October 2019.** The duty to pay is with the respondent. He cannot shift the duty to maintain his wife to a third party who was not a party to the proceedings and whom he has not to the proceedings. The inclusion of an estate agent into the consent did not in my view shift the burden to the rent collection agency. It is clearly evident that the primary duty to pay is with the respondent and the rent collection agency was simply to facilitate the payment. In any event it is the respondent who appointed the said agency to collect the rent as per his affidavit sworn on the 28th October 2018. This is agency was not a party to the proceedings, no estate agency was named in the consent and the naming of Pata Commercial Agencies is on no consequence in these contempt proceedings.

31. The respondent does not deny failing to pay. He blames a 3rd party and the applicant. However it is clear that the respondent is the one obligated to pay maintenance to the applicant. For failing to do so he is in contempt of the orders of this court as adopted on 25th January 2021.

32. With regard to the other issues appertaining to the term of the consent binding the respondent to allow the quiet enjoyment of the matrimonial home by the applicant, these are issues under investigations and this court is not in a position to ascertain who between the parties has done what.

33. Having found that the respondent in contempt for failing to pay the Kshs. 27,000/= per month as per the consent order, the question is what is the consequence?

34. Taking into consideration the nature of the contempt it is my view that it is only in order to give him the opportunity to purge the contempt in default of which the peal consequences will fall into place.

35. An order be and is hereby issued that the contemnor to pay the applicant her monthly upkeep of Kshs. 27,000/= per month with effect from the end of this month (August 2021) and not later than the 5th day of (September) and other the subsequent months. He is to pay all the unpaid areas within three (3) months hereof and not later than 5th December 2021.

36. In default of the payment of the monthly upkeep and payment of the arrears whichever comes first a warrant of arrest to issue to be executed by the OCS Nakuru Central Police Station for his committal to prison for six (6) months for contempt.

37. The applicant will have the costs of this application.

38. Orders Accordingly.

DATED, SIGNED AND DELIVERED THIS 16TH AUGUST 2021 VIA ZOOM

MUMBUA T MATHEKA

JUDGE

In the presence of:

Edna Court Assistant

Applicant present in person

N/A for respondent

N/A for K. Mbugua for the respondent