



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MATRIMONIAL CAUSE NO. 78 OF 2019

GJ..... PLAINTIFF/APPLICANT

VERSUS

SC.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant GJ and the defendant/respondent SC got married at [Particulars Withheld] on 10th December 1994. The marriage was dissolved on 6th December 2019, and decree absolute issued on 6th January 2020.

2. On 3rd December 2019 the applicant filed originating summons to claim that in the course of the marriage the parties had acquired the following property in respect of which she sought determination and declaration that she was entitled to 50% of each:-

- (a) House No. [xx] on LR No. [xxxx] on Kitisuru Road in Nairobi being the matrimonial home;
- (b) 20 acres in Naivasha in Nakuru County;
- (c) 100 acres in Uasin Gishu County;
- (d) 147 acres in Eldoret Town in Uasin Gishu County;
- (e) 70 acres in Uasin Gishu;
- (f) 0.5 acres in Kajiado County;
- (g) NMG Shares;
- (h) property in Thika and Kajiado; and
- (i) all other properties, including farm machinery, motor vehicles and fixtures.

3. On 15th May 2020 Justice Ali-Aroni, following a notice of motion dated 12th May 2020, issued the following order:-

“Temporary injunction be and is hereby issued restraining the defendant/respondent by himself, servants, agents and/or representatives or whosoever from entering into, blocking, denying access and/or disposing of or in any other manner interfering with the plaintiff/applicant’s peaceful and quiet enjoyment of the two properties pending hearing and determination of the application.”

The application was ordered to be mentioned on 26th May 2020 for further directions. The two properties in respect of which the injunction was issued were LR No. [xxxx] Uasin Gishu County and the matrimonial home No. [xx] in Kitisuru in Nairobi.

4. The applicant has filed an application by way of notice of motion dated 4th November 2020 seeking that the respondent be cited for

contempt of the above orders and be detained for 6 months or such period as the court may impose for the contempt. Her case was that the orders were extracted and served on the respondent on 22nd May 2020 by email. On 12th June 2020 the orders were served on the respondent and his advocates, again through email. On 13th June 2020 the respondent erected a permanent wall around the Kitisuru home and thereby denied the applicant access to the underground water tank, servants' quarter and garden which was in disregard of the court orders. The respondent then hired goons whom he put in the guest house and the servants' quarter of the home. They reside here to date. On 14th June 2020 the applicant wrote to the respondent urging him to respect the order of the court. He instead continued to put up new structures on the property and has denied her access to the home through the main gate. On 25th September 2020 the respondent brought a group of people on the Uasin Gishu property (LR No. [xxxx]) and took away all the cows thereon. The people camped there until the applicant got the Police Commander of Uasin Gishu County to intervene. Photographs had been taken of the respondent and his men taking away the cattle. On 31st October 2020 the respondent and some men came on the property, broke into the house and conducted a search, took assorted property and left promising to mete out violence on her and her children. The incident was reported at Naibery Police Station. Those are the acts that she states constitute contempt of the court orders.

5. The respondent swore a replying affidavit dated 26th November 2020 to oppose the application. He denied that he had disobeyed any orders issued by the court. He stated that immediately after the divorce the applicant remarried, and since then she vowed to make his life and that of the children miserable. It was with that intention that the application had been brought, he stated. Regarding the orders in question, the respondent deponed as follows:-

“6(iv)The consent was clear and unequivocal that I would not enter the matrimonial houses both in Kitisuru and Eldoret but I had unlimited access to the rest of the compounds to do as I wished and to continue with my projects.

(v) I am advised by my advocate on record, which advice I verily believe to be sound, that being an interlocutory order, the consent was to last the life of the Divorce cause and ceased being effective the day the Divorce Cause was determined.

(vi) The ruling by Justice Abida Aroni on 15th May 2020 sought to maintain the *status quo* in terms of the consent order pending hearing and determination of the plaintiff's application interpartes.

7. THAT I am advised by my advocates on record, which advice I verily believe to be sound that under the Civil Procedure Rules 2010, an *ex parte* order can only last for a maximum of 14 days unless extended by consent of the parties or by court.

8. THAT I am informed by the said advocates, which information I verily believe to be true that the orders of Lady Justice Abida Aroni have never been extended either by consent of parties or by the court and therefore automatically lapsed on the 14th day after issuance thereof.”

6. The respondent further stated that all constructions on the Kitisuru home stopped and none was going on. The alleged goons were his three employees who have always been on the premises, and they tend to the compound and garden outside the main compound and have not at all interfered with the applicant's peaceful enjoyment of the home. He stated that after the consent order the applicant refused him access to electricity at the main house –

“for purposes of modifying the gate to allow the plaintiff to the area of the said water tank and all any attempts to reach out to the plaintiff were met with unprintable abuses.”

Regarding the events of 20th September 2020, he stated that he executed them –

“to deal with a problem created by plaintiff from January 2020 and which she perpetuated and designed to destroy completely a successful Dairy Project that I have built over the past 15 years and in which I have spent more than Kshs.100 million.

19. THAT I wish to state that I did not steal or violently rob the plaintiff or any other person of cows but that I only relocated the animals from the farm to another to mitigate the losses and the havoc that the animals were causing on the farm.

20. THAT moreover most of the cows that initially numbered several hundreds were brought to the farm by the plaintiff after the dissolution of the marriage.

21. THAT I have filed a civil suit in Eldoret being High Court Civil Case No. 26 of 2020 against the plaintiff and her partner (a Mr. KB) in the cow project claiming damages running into tens of millions of shillings.”

7. On the allegations by the applicant that on 31st October 2020 the respondent and some men went to the Eldoret home, broke into the house, conducted a search and stole some property, the respondent stated that he came here to his elder son's house hoping to see the son. When he did not find him he sent the farm manager to the main house compound to check for the son. He was not there. He went into the son's house and therein found a stranger. The respondent checked his son's house and found it required to be painted.

8. When the court was issuing the orders of 15th May 2020, it acknowledged that the Chief Magistrate's Court in **CMCC No. 797 of 2019** had recorded a consent on 11th November 2019 over the properties in question. The consent orders stated the following, in part:

“4. The petitioner/applicant agrees to refrain from entering and/or accessing the only residential House No. [xx] in Kitisuru and the residential house on the farm house located at Uasin Gishu County being LR. No. [xxxx] on Naibery-Chepkongony Road, Plateau Area.

5. For avoidance of doubt, the petitioner/respondent shall have unlimited access to the compound surrounding the residential House No. [xx] Kitisuru for purposes of carrying out his projects and visiting with the issues to the marriage. In relation to the vast land located at Uasin Gishu County being LR No. [xxxx] on Naibery-Chepkongony Road, Plateau Area, the petitioner/respondent shall have unlimited access to the whole parcel of land save for the residential farm house.”

9. When the two orders (the one of 11th November 2019 and the one of 15th May 2020) are considered together, it is clear that the temporary injunction related to the residential house on No. [xx] Kitisuru in Nairobi and the residential house on LR No. [xxxx] in Uasin Gishu County. The applicant was to have peaceful and quiet enjoyment of the two houses without being blocked from entering them by the respondent or his agents. The respondent was restrained from selling them, or in any way disposing them. The orders were to remain in place until the application was heard and determined.

10. The application had not been heard and determined on the dates the applicant is complaining about. The claim by the respondent that the orders were to last for 14 days, unless extended by the consent of the parties or by a court order, is not supported by the express wording of the orders of the judge.

11. A further reading of the orders of 11th November 2019 and 15th May 2020 shows that the respondent was to have unlimited access to the compound surrounding the residential house Number [xx] Kitisuru in Nairobi and to carry out his projects in the compound and to visit his children. In respect of the residential house on Loc. [xxxx] in Uasin Gishu, he was to have unlimited access to the whole parcel. What he was not to interfere with was the residential house.

12. I have gone to some length to consider the orders in question. This is because it is trite that to form the basis of contempt of court, the order in question must be clear and unambiguous. Where the order is ambiguous or unintelligible, the application cannot succeed (**National Housing Hospital Insurance Fund Board of Management –v- Boya Rural Nursing Home Ltd, Civil Appeal No. 46 of 2005**). The Court of Appeal in **Michael Sistu Mwaura Kamau –v- DPP & 4 Others [2018]eKLR**, reiterated 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. In **Gatharia K. Mutitika & Others –v- Baharini Farm Limited [1982 – 1988] IKAR 863**, it was held that in cases of alleged contempt, the breach of which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. The standard is this high because the offence of contempt of court is quasi-criminal, and, like in this case, it is being sought that the contemnor be sent to jail for up to 6 months. Yet, this is still a civil application.

13. It is now accepted that it is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by the court of competent jurisdiction to obey it until the order is vacated or discharged (**Hadkinson –v- Hadkinson [1952] 2 All ER 211**). Any willful disobedience of an injunction or court order is not only a contempt of court but also an illegal and invalid act that should be frowned upon and punished (**Wendano Matuu Co. Ltd & Others –v- Joshua Kimeu Kioko & Others HCCC No. 2 of 2014 at Machakos**).

14. In **Econet Wireless Kenya Ltd –v- Minister for Information & Communication of Kenya [2005]IKLR 828**, it was observed 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.”

Court orders are issued to be obeyed if people have to have confidence in the administration of justice. That confidence is essential for the maintenance of the rule of law and the proper functioning of a democratic society.

15. I am satisfied that the orders subject of the application at hand were precise and clear. The question is whether the respondent disobeyed them, and did so deliberately.

16. In respect of Number [xx] Kitisuru house, the applicant alleged that the respondent had erected a permanent wall around the house, and in so doing he had denied her access to the underground water tank, servants’ quarter and garden. Secondly, he hired goons and put them in the guest house and servants’ quarter where they live to date. Thirdly, that he had been constructing new structures on the property. The respondent stated that the alleged goons were his servants who had always been here to tend the compound and outside garden. Regarding the water tank, he stated that reference to it was a red herring since it was its capacity was less than 20000 liters and was only used in emergency situations. He stated that the applicant had refused him access to the electricity at the main house for the purposes of modifying the gate to allow her access the water tank. As for the construction of the perimeter wall, he stated that this had been going on even before the orders in question. He stated that the compound on which the house is is one acre. Then there is the construction of new structures in the compound.

17. I reiterate that the respondent was to have unlimited access to the compound on which the residential house is. He was to have unlimited access to the surrounding of the residential house for the purposes of carrying out his projects. It is clear that the erection of a wall around the compound and structures in the compound were not enjoined. It is not clear whether the consent orders of 11th November 2019 or the orders of 5th May 2020 were definitive on whether the residential house included the servants’ quarters, guesthouse and the underground water tank. It is not clear whether it was the applicant or the respondent who was supposed to secure the area beyond the residential house.

18. The result is that the applicant has not proved to the required standard that the respondent committed acts that constituted contempt of the orders that were issued on 5th May 2020 in relation to House No. [xx] at Kitisuru in Nairobi.

19. In relation to LR No. [xxxx] in Uasin Gishu, the applicant complained that the respondent and other people broke into the residential house and took property from here. This happened on 31st October 2020. On 25th September 2020 he had come here with people and taken away cows from the home. Regarding the taking away of the cows, the respondent admitted and said he was relocating them to his other farm. The respondent had been ordered to have unlimited access to the whole parcel of the land save for the residential house. According to the orders, what happened outside the residential house was not covered by the injunction. The parties did not discuss cows or agree on what would happen to them.

20. In relation to the events of 31st October 2020, the respondent accepts he came to the home. However, he stated that he came to his son's house within the homestead. He was hoping to see his son. He did not find him. He sent the farm manager to the main house. He denied that he entered the residential house, or stole anything from there. It is not disputed that the events of 31st October 2020 were reported to Naibery Police Station. The Police took no action. The respondent stated that no action was taken because the report was not true. The applicant stated that the police offered no assistance to her. Did the police not believe her regarding the claim that the respondent had come with men and broken into the house and stole goods from it?

21. have anxiously considered the rival versions regarding the incident of 31st October 2020. Considering the standard of proof required in a contempt matter, I do not find that the burden was discharged.

22. The consequence is that the application lacks merits and is dismissed.

23. Considering that this is a family dispute, I ask each side to pay own costs.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2021.

A.O. MUCHELULE

JUDGE