



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

DIVORCE CAUSE NO. 1 OF 2019

GDM.....PETITIONER

VERSUS

CMM.....RESPONDENT

RULING

1. Vide a Ruling made on 19/9/2019 by this court directed there be an inhibition against any dealings in the suit properties related to this cause. It also ordered the Respondent to pay to the petitioner Kshs. 150,000/= per month with effect from the date of this suit for the upkeep, shelter, fuel, electricity, water and sundry expenses pending the hearing and determination of the suit.

2. The Respondent failed to comply with the above orders and in particular the monthly payment of Kshs.150, 000/= to the Petitioner . The petitioner filed notice to show cause dated 25/10/2019.

3. The Notice to show cause was however compromised by the consent entered by the parties dated 13/11/2019 where they agreed as follows;

**a. That the Notice to show cause is hereby stayed on condition listed a follows in paragraphs 2 & 3.**

**b. That the Respondent is hereby ordered to deposit Kshs.130,000/= in the petitioners account held at Kenya Commercial Bank within seven days.**

**c. That the rental income from the properties proposed by the Respondent of Kshs. 130,000/= shall also be deposited in the petitioner's account held at Kenya commercial Bank with effect from 10<sup>th</sup> December 2019 and subsequently thereafter on every 10<sup>th</sup> day of the month until payment in full.**

4. The Respondent complied with paragraph b of the consent order. He however failed to comply with paragraph c of the order. As at 25/11/2019 the outstanding amount owing to the petitioner stood at Kshs. 920,000/=. As noted by this court on 16/12/2019 and 18/12/2019 the Respondent became evasive and by his conduct and non-attendance sought to halt the court process and the orders made. It therefore issued a warrant for his arrest to be enforced by the Director of Criminal investigations.

5. Summons were reissued to the Director of Criminal Investigation to show cause why the Respondent had not been availed to court. The same were effected on 17/7/2020 where the court considered the application made by the Respondent to be released on bond terms. He was subsequently granted bond terms of Kshs. 100,000/= with one contact person.

6. On 22/7/2020 the Respondent appearing before court addressed the court on his unavailability. He was apologetic that he had disobeyed the court order and admitted to "have gone underground" due to his non-compliance. That his businesses have since failed and he has a second family which he has to take care of. That he is 61 years old and on medication. His resources have also depleted a fact well known by the petitioner.

7. The petitioner replied to the Respondent's averments and stated that the Respondent charged all the properties and there is no other means of execution other than civil jail. That the appeal filed by the Respondent against the orders made by this court on 19<sup>th</sup> September 2019 is still pending. There are no subsisting stay of execution or stay of the court proceeding from the appellate court. That the petitioner is equally struggling at the behest of the Respondent. The respondent is adamant and is not making any offers.

**Analysis and Determination**

8. The main issue for determination is whether the respondent herein ought to be committed to civil jail. In **EKK V PKM[2009] eKLR** the court held that;

**“It cannot be disputed that the Matrimonial Act with its Rules is a code by itself and the all relevant procedural laws have been specified in the Matrimonial Causes Rules. Wherever it was sought to apply the Civil Procedure Rules, the said rules make specific mention of the application of particular part of Civil Procedure Rules. I can cite Rule 9 (service out of time), Rule 25(3) (appointment of Examiner) and Rule 62 (pauper). I may note that otherwise the Rules are very specific in the provisions as regards procedure to be adopted in matrimonial proceedings...”**

9. Rule 58 deals with Attachment and committal and Rule 59 deals with Enforcement. They stipulate:

**“58. An application for attachment or committal shall be made to a judge, and any person attached or committed may apply to a judge for his discharge.**

**59. (1) In default of payment to any person of any sum of money at the time appointed for the payment thereof, an application may be made to a judge in chambers supported by affidavit (of service of the order and of non-payment), and the judge may make such order as to attachment of the person or of the property of the person so failing to pay as in the circumstances may seem expedient.**

10. In **R.P.M v P.K.M [2012] eKLR** a case of similar proportions to this case the court in issuing an a Order for committal to civil jail held as follows;

**“...Civil jail is resorted to because the creditor is unable to trace or lay his hands on assets of the debtor that can be attached. There would be no need to send a debtor to civil jail if one can attach his property and recover the debt owed. Civil jail is a measure taken as a matter of final resort. In this case, the Petitioner has resorted to civil jail ostensibly because she is unable to identify any property belonging to the Respondent which she can attach. She cannot be blamed. It is regrettable that the Respondent has failed to shoulder his obligation as a husband and a father and has allowed the matter to drift to this level. It is the duty of this court to ensure that the rights of the Petitioner and her children are enforced and redress obtained. The law shall be enforced without fear or favour against all regardless of their social status. Kenya is governed in accordance with the rule of law. All are equal in the eyes of the law. The law shall be blind to trappings of power influence, and social status. It is my duty to enforce the law. I grant the application.....”**

11. The Respondent herein has not only been evasive but has not presented justifiable reasons why he did not comply with the orders made by this court. The same have not been challenged as to have been made fraudulently or bearing a mistake. The orders were clear, he pays Kshs 130,000/= and deliver properties to the petitioner from which the petitioner would ostensibly raise the aforesaid Kshs. 130,000/= it is the second part of the Order that he has failed to abide by. In turn he charged the aforesaid properties, a fact uncontroverted. This clearly speaks disdain of the court orders.

12. Committal to civil jail is a measure of last resort. The actions of the respondent have been best explained as “seems to be playing cat and mouse game with the court”. I have also considered the age of the respondent. His allegation of suffering from various medical conditions was not supported by any documentary evidence. He also does not offer any amends and/or offers to settle the amounts due to the Petitioner .The same is spanning to be a colossal amount. At the end there is nothing else that recommends other than to issue the orders sought by the petitioner and I therefore make the following orders;

**(1) I order that the Respondent be detained in Civil Jail at Meru GK Prison for a period of one month unless he pays in full amounts due for maintenance of the petitioner as per the consent order entered into on 13<sup>th</sup> November 2019.**

**(2) Before being committed to the Civil jail, the Officer in Charge of Meru Police Station to ensure the Respondent is examined and tested for Covid-19 and confirmed to be negative.**

**(3) The Petitioner shall furnish the requisite charges and/or resources to the Prison Authorities for the maintenance of the Respondent in civil jail for one month or until the Respondent pays in full the outstanding maintenance amounts and subsequently complies with the consent Orders.**

**(4) In the meantime, the Petitioner and her Advocate to establish the particulars of the tenants that are occupying residential premises from which the Respondent had earlier proposed to get Ksh. 130,000/= per month for the maintenance of the petitioner so that they can be served directly with the orders to remit the rents due to the court directly.**

HON.ANNE ADWERA ONG'INJO

JUDGE

DATED AND DELIVERED THROUGH MICROSOFT TEAM AT MERU ON THIS 29<sup>TH</sup> DAY OF JULY 2020.

HON.ANNE ADWERA ONG'INJO

JUDGE