



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**DIVORCE CASE NO.4 OF 2011**

**M E W.....PETITIONER**

**VERSUS**

**J L L.....1ST RESPONDENT**

**R L.....2ND RESPONDENT**

**RULING**

1. Two (2) applications form the subject matter of this ruling. These are:

- a) The Notice of Motion dated 7th February, 2014 (pursuant to **Section 5** of the **Judicature Act, Order 52 rule 2(1) and (2)** of the **Supreme Court of England Rules, Sections 1A, 1B and 3A** of the **Civil Procedure Act**).
- b) The Notice of Motion dated 7th February, 2014 pursuant to the inherent powers of the court (and I note also indicated as pursuant to **Section 5** of the **Judicature Act** which I think is in error).

**The Notice of Motion dated 7th February, 2014 (The contempt application)**

2. By way of Notice of Motion M E W (hereinafter the applicant) seeks orders:

- 1) That the 1st respondent herein J L L and 2nd respondent R L be cited for being in contempt of this honourable court's orders issued on the 27th day of February, 2013 and they be consequently committed to civil jail for a period not exceeding six (6) months without the option of a fine.
- 2) That the said J L L and R L be summoned to appear before this honourable court to show cause why they should not be cited for being in contempt of this honourable court's orders dated the 27th day of February, 2013, failure of which, orders to issue accordingly.
- 3) That this honourable court be pleased to direct the Officer Commanding Station, Maralal Police Station to enforce the orders of this honourable Court issued on the 27th day of February, 2013.
- 4) That the costs of this Application be provided for.

3. The application is supported by the annexed affidavit of the applicant and grounds set out on the face thereof including the statutory statement and the accompanying verifying affidavit of the applicant on record.

The gist of the application is that the court issued orders dated 27th February, 2013 by which the respondent was restrained by orders of this court by way of an injunction restraining him, his servants, agents, employees, assigns, licensees and/or other persons claiming under him from in any way interfering, selling or in any way disposing the properties forming part of matrimonial properties being:

- Plot [particulars withheld] Maralal Township (Next to Law Courts)
- Plot [particulars withheld] Maralal Township (Next to Law Courts)
- Plot [particulars withheld] (Near AIC Grounds)
- Plot No.[particulars withheld] Maralal Township (Milimani Area)
- Plot No.[particulars withheld] Maralal Township (Opposite Show Grounds)
- Plot No.[particulars withheld] Maralal Township (Opposite Show Grounds)
- Plot No.[particulars withheld] Maralal Township (Opposite Show Grounds) - Plot with matrimonial house
- Parcel of land at Porro
- Parcel of land at Seketet with Semi-permanent house
- Cattle. Sheep, Goats and Camels

4. The said orders were duly served upon the respondent on the 13th March, 2013 by a process server, one R L. Despite such service, the respondents have engaged in acts of adverse interference with the said matrimonial property in total defiance of the said orders of this court.

5. Such acts are particularized in the statutory statement and verifying affidavit as follows:

(i) The 1st Respondent has allowed his friends, agents, invitees, strangers and other people who have invaded certain parcels of land forming the matrimonial property and have purported to stay thereon in total defiance of the orders of this court in blatant disobedience of the said orders.

(ii) The 2nd Respondent R L and other persons unknown to the applicant herein are living at the house forming part of the matrimonial property situated at Seketet.

(iii) One S L holder of ID card No.[particulars withheld] an agent of the respondent, has trespassed and continued to occupy one of the rooms of semi-permanent buildings standing on plot Nos. [particulars withheld] and [particulars withheld] in Maralal Township (next to Law Courts) and continues to utilize the said plot to the exclusion of the applicant.

(iv) On the 22nd December, 2013, the 1st Respondent took away cows and calves from plot No. [particulars withheld] Maralal Township (Milimani Area). This incident was reported to Maralal Police Station and recorded as OB number 29/23/12/13.

(vi) The 1st Respondent has further stolen personal and other official documents which rightfully belong to the applicant.

6. It is the applicant's case that all the above actions are in breach of the orders of this court of 27th February, 2013.

**The notice of motion dated 7th February, 2014 (Application in regard to Lorry Registration No.KAS 354T)**

7. Vide a Notice of Motion dated 7th February, 2014, M E W (hereinafter, the applicant) seeks orders:

1) Spent

2) That this honourable Court's orders dated the 27th day of February, 2013 be applied *mutatis mutandis* in respect of the Lorry Registration No.[particulars withheld].

3) That this Honourable court be pleased to order the 1st respondent herein to remit income and proceeds derived from lorry registration No. [Particulars withheld ] to the Applicant herein at the rate and sum of Kshs.1,500/= per day to be backdated from the 1st of January, 2013.

4) That in the alternative and without prejudice to No.3 above, this Honourable court be pleased to order that the Lorry Registration No. [Particulars withheld] to be grounded and parked at plot [particulars withheld] Maralal Township (opposite Show Ground), being the plot where the matrimonial house is situated, with immediate effect pending the hearing and determination of the petition herewith and/or the distribution of the matrimonial properties herewith

5) That the cost of this application be provided for.

8. The application is supported by the annexed affidavit of the applicant and on grounds:

1. That this Honourable court issued orders dated the 27th February, 2013 by which the Respondent was restrained by orders of this honourable court by way of an injunction restraining him, his servants, agents, employees, assigns, licensees and/or other persons claiming under him from in any way interfering, selling, or in any way disposing the properties forming part and parcel of matrimonial properties being:

- Plot [particulars withheld] Maralal Township (Next to Law Courts)
- Plot No. [particulars withheld] Maralal Township (Next to Law Courts)
- Plot No. [particulars withheld] (Near AIC Grounds)
- Plot No. [particulars withheld] Maralal Township (Milimani Area)
- Plot No. [particulars withheld] Maralal Township (Opposite Show Grounds)
- Plot No. [particulars withheld] Maralal Township (Opposite Show Grounds)
- Plot No. [particulars withheld] Maralal Township (Opposite Show Grounds) - Plot with matrimonial house.
- Parcel of land at Porro
- Parcel of land at Seketet with Semi-permanent house
- Cattle. Sheep, Goats and Camels.

9. That the said orders were premised on the understanding that the said properties constituted matrimonial property and as such there was need to issue orders to preserve the said properties pending the hearing and determination of the petition filed herewith.

10. That the Respondent is also in possession of the lorry registration No. . [particulars withheld] That the said lorry constitutes matrimonial property and was through inadvertent mistake omitted from the application giving rise to the grant of the said orders dated the 27th of February, 2013.

11. That the Petitioner/Applicant seeks to have the orders issued herein on the 27th of February, 2013 apply *mutatis mutandis* in respect of the said lorry so as to preserve the same pending the finalization of the suit herein.
12. That the said lorry was purchased during the time of the marriage and the said lorry is considered matrimonial property.
13. That the said lorry was purchased through the applicant's sole financial contributions as particularized on the face of the accompanying Affidavit.
14. That since December, 2012 up till today the Respondent has been utilizing the said lorry and earning income with the said lorry to the total exclusion of the Applicant.
15. That the Applicant herein has lost income that would ordinarily accrue from the use of the said the lorry during the whole year of 2013 and the month of January, 2014.
16. That the Respondent has been exclusively earning from the income derived from the said lorry in total disregard of the applicant's interest therein.
17. That Article 45 of the Constitution anchors the right of parties to a marriage to be equal during and after dissolution of marriage and as such owing to the prevailing circumstances the applicant is entitled to the proceeds of financial income derived from the said lorry especially owing to her vast and/or sole financial contribution in the acquisition of the same.
18. The gist of the application is that the respondent is in possession of lorry registration No. [particulars withheld] which lorry constitutes matrimonial property and was inadvertently omitted from the application giving rise to the orders of 27/2/2013. It is sought that those orders should apply *mutatis mutandis* in respect of the said lorry.
19. It is urged that the lorry was purchased during the time of the marriage and is thus matrimonial property.
20. The applicant depones that the lorry was purchased through her sole financial contribution some time on the 5/4/2011 or thereabout. She deposited Kshs.2,150,000/= in the bank Account of the respondent for the purchase of the said lorry. A copy of the relevant bank deposit slip is annexed. On the 12/4/11, the respondent transferred Kshs.1,500,000/= to the then seller and previous owner one K N J. (A bank statement of the respondent is annexed).
21. The lorry was registered in the names of the Respondent whom the applicant trusted as a husband whom she loved at the time (A copy of the log book is exhibited).
22. The respondent is accused of using the said lorry without the applicant's permission since December, 2012 and to the applicant's total exclusion. The lorry should thus be grounded through injunctory orders and the responded ordered to share out the income accruing between him and the applicant. It is urged that the estimated income of Shs.3,000/= per day should be shared out equally.

## **THE RESPONSES**

23. In response to both applications, J L L has sworn a replying affidavit on 5/5/2014 in which he opposes both applications.
24. It is urged that the orders of 27/2/2013 were *ex parte* orders which were substantially varied by orders made by the same court and issued on 2/5/2013 when the applicant's application dated 25/2/2013 was heard *inter-partes*. The application is said to have been brought in bad faith as the facts now alluded to as grounds for contempt were in existence and in her knowledge long before the commencement of the divorce proceedings and she did not raise any concern let alone an objection to the same. The particulars

are given as hereinunder:

**a) SL**

Simon has always occupied one of the rooms on plot No.[particulars withheld] and [particulars withheld] Maralal township (next to the Law Courts) even prior to the proceedings herein as he doubles up as the caretaker and the 1st respondent's transport manager.

**b) RL**

The 1st respondent denies permitting R L to occupy the semi permanent house at Seketet. He denies any relationship with the said R. Again, he said property is communal land which does not constitute matrimonial property.

**c) Dairy Cows and Calf**

The cows and calf have been under the 1st respondent's care. It became necessary to remove them from plot No.[particulars withheld] Maralal for reasons that there was a looming drought in the area and the applicant chased away the watchman who the 1st respondent had employed to look after the cows and as such there was no one to take care of the cows as the 1st respondent would have wished.

d) As regards the altercation that arose when the 1st respondent was taking away the cows, he avers that he reported the matter at Maralal police station under O.B. No.39/24/12/13 as he was a victim of an attack by the applicant.

25. As regards the lorry No. [particulars withheld], it is urged that it is not true that the applicant inadvertently omitted the same from the list of what she considered matrimonial property. She has failed to demonstrate that the information was not in her knowledge.

It had been agreed between the two that the applicant was to use motor vehicle . [particulars withheld], belonging to the 1st respondent while the 1st respondent was to use the lorry as he was engaged in transport business then.

26. The alleged income of the lorry is not substantiated. The earnings from the lorry are not constant and there are many overheads. In any event, the applicant is still using the Toyota Hilux. The 1st respondent further states that he has been forced to incur more expenses seeking alternative accommodation in the interim following the court's orders evicting him from the matrimonial home.

**Submissions**

27. Both parties filed written submissions which I have considered in depth even on points that I may not necessarily recap herein.

**Analysis and determination**

28. I have had the occasion to consider both applications herein, the affidavit evidence and submissions by learned counsels for the respective parties.

Suffice it to note that there has been some considerable delay in the prosecution of this matter. The record shows that this has been occasioned by the intervening transfer of 2 judges who handled the matter earlier on the one hand, and, the respondents and/or their counsel cannot entirely escape blame seeing that their submissions were only lodged this year.

Such a delay is regrettable in an application of the nature before court which ordinarily would call for a prompt hearing and disposal.

29. I will dispose off the application regarding lorry No. [particulars withheld], seeking to include it in the list of matrimonial property and to subject the same to the orders of court of 27/2/2013 first.

30. The applicant is candid that the omission of the lorry was inadvertent. The 1st respondent's mainstay in the response is that the applicant has not shown that the facts were not in her knowledge. Again, there was an agreement as to the use of the lorry by the 1st respondent while the applicant was to use motor vehicle [particulars withheld] .

31. I hasten to point out that in issue now is what matrimonial property needs to be preserved pending the final determination of this matter. What the applicant needs to do and which she has *prima facie* ably demonstrated is that the property forms part of the matrimonial property. It is not about who is using what now or who needs it more.

The applicant has established a *prima facie* case that the lorry was purchased through monies deposited by herself in the 1st respondent's bank account. The fact that she deposited Kshs.2,150,000/= in the account of the 1st respondent and that Kshs.1,500,000/= was subsequently transferred to one K N J (former owner of lorry) on 12/4/2011 by the 1st respondent is not challenged or controverted at all.

The interest or contribution to the purchase of the lorry by the applicant is thus demonstrable and at this stage, it would be necessary that the said property be preserved pending the final outcome of these proceedings after thorough interrogation of all the facts at the main hearing.

The applicant seeks to get some share of the income. In my considered view, and in the circumstances that the parties find themselves in, it would be a logistical nightmare to manage, control and share out the income as between parties who by now cannot see eye to eye.

In the circumstances, the practical and appropriate order would be to ground lorry registration No. [particulars withheld] and have it stored safely awaiting the outcome of this case. Should, however, the parties find sense in mutually agreeing to continue running the lorry for the benefit of both, then I open a window for the parties to register such a consent before the court.

As regards the application for contempt, the issue of service of the court orders is not contested. Indeed the existence of the orders is acknowledged.

The question that this court needs to delve into is whether there is breach of the court's order of 27/2/2013 and, should there be breach, the attendant consequences.

As held in the case of **Teacher Service Commission V. Kenya National Union of Teachers & 2 Others**, [2013] eKLR, the court must punish for contempt of court to safeguard the rule of law which is fundamental in the administration of justice. This has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it to placate the applicant who moves to court by taking out contempt proceedings.

Failure to safeguard the rule of law is a sure recipe for anarchy and disorder in society.

32. Having noted that the service or knowledge of the orders is not in issue, the court must now answer the question of whether there was a breach/disobedience of the orders of court of 27th February, 2013. The extract of the order reads as follows:

33. That pending the hearing and determination of the Divorce Petition herewith and/or the Interparties hearing hereof and/or until further orders of this honourable court, an order of injunction be and is hereby issued restraining the 1st respondent herein, his servants, agents, employees, assigns, licensees and/or other persons claiming under him from in any way interfering, selling, or in any way disposing the following properties constituting the matrimonial property:

a) Plot No. [particulars withheld] Maralal Township (Next to Law Courts)

- b) Plot No. [particulars withheld] Maralal Township (Next to Law Courts)
- c) Plot No. [particulars withheld] (Near AIC Grounds)
- d) Plot No. [particulars withheld] Maralal Township (Milimani Area)
- e) Plot No. [particulars withheld] Maralal Township (Opposite Show Grounds)
- f) Plot No. [particulars withheld] Maralal Township (Opposite Show Grounds)
- g) Plot No. [particulars withheld] Maralal Township (Opposite Show Grounds) - Plot with matrimonial house.
- h) Parcel of land at Porro
- i) Parcel of land at Seketet with Semi-permanent house
- j) Cattle. Sheep, Goats and Camels.

34. A reading of those orders shows no ambiguity. There is no issue of interpretation or doubts as to the import of the orders.

35. By his own admission, the 1st respondent indicates that S L occupies one of the rooms on plot No. [particulars withheld] as a caretaker and and the 1st respondent's transport manager. The defence put up by the 1st respondent is that indeed, the said Simon was in occupation even before the divorce proceedings commenced.

The position held by the 1st respondent on this issue apparently arises from misapprehension of the order of court. Plot No. [particulars withheld] Maralal township (next to Law Courts) is listed as number (a) in the order among the properties where the 1st respondent, his servants, agents, employees, assigns, licensees and/or other persons claiming under him were restrained from interfering, selling, or in any way disposing.

36. The moment the orders were issued, S L, an acknowledged servant of the 1st respondent, had no business being on plot No. [Particulars withheld] a minute longer. By keeping him on the premises for whatever reason, the 1st respondent is in breach of clause (a) of the orders of court dated 27/2/2013.

37. On the land at Seketet with a semi-permanent house, it is noteworthy that the parcel is within the orders of 27/2/2013 and is listed as 1(i) in the extracted order.

The protestations by the 1st respondent that this is communal land cannot hold at this stage. That was material that ought to have been placed before the court during the hearing of the subject application which gave rise to the orders of 27/2/2013. The court made a finding that that was land the 1st respondent, his agents, servants, assignees or persons claiming under him should not interfere with.

38. I note that the 1st respondent denies any relationship with R L thus indicating that he has not permitted her to be on the land at Seketet. If that be so, then the said K L should be evicted from this land unless she moves to court to establish what claim she lays on the land if at all.

39. On the removal of the cows and calf from plot No. [particulars withheld] Maralal township, the 1st respondent gives an explanation which in the face of the existing orders makes no legal sense.

The order extracted at clause 1(i) clearly stated that the 1st respondent was not to interfere, sell, or in any way dispose of cattle, sheep, goats and camels.

40. By his own admission, the 1st respondent acknowledges removing the cows and calf stating that he

was in search of grazing fields as there was a looming drought and that the applicant had chased away a watchman whom the 1st respondent had employed. Of note is that the 1st respondent had no right to vary the orders of the court to suit whatever circumstances that arose.

If a need arose, for example, to secure the welfare of the cows, the only available remedy was to move to court for variation or setting aside of the orders. By removing the cows, the 1st respondent was clearly in breach of the orders of court of 27/2/2013

**Determination.**

41. From the foregoing, it is my considered finding that the two (2) applications herein are wholly successful. With the result that orders shall issue as follows:

- a) I find the 1st respondent J L L in contempt of this court's orders issued on the 27/2/2013. He is fined Kshs.50,000/- in default of which he is to serve six (6) months imprisonment.
- b) Any agent, servant, employee, assignee, licensee or any other person claiming under the 1st respondent who is in any way interfering with the subject properties shall be evicted forthwith.
- c) Lorry registration No. [Particulars withheld] be grounded and parked at Plot No.[ [particulars withheld]] Maralal Township (opposite Show Ground) with immediate effect pending the final determination of this cause.
- d) Costs of both applications to the applicant.

**Dated, Signed and Delivered at Nakuru this 21st day of June, 2017**

**A. K. NDUNG'U**

**JUDGE**