



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 44 OF 2009

MNM.....PLAINTIFF

VERSUS

DMN.....RESPONDENT

RULING

1. The applicant in the Notice of Motion dated 12th April 2012, is the plaintiff in the Originating Summons dated 16th December 2008 brought under Section 17 of the Married Women's Property Act, 1882.
2. Pending the hearing of the Originating Summons, the plaintiff/applicant herein applied and obtained orders restraining the defendant/respondent, inter alia, from any adverse dealing with the matrimonial property, L.R. No. Nairobi/Block 109/891/1127 and ordering that all rental proceeds and profits from the said property be placed in an escrow account in the joint names of the parties' advocates.
3. Pursuant to the said order, made on 24th September 2010, a further order was recorded on 19th May 2011 requiring the respondent to file a rental valuation report within 15 days and for the escrow account also to be opened within 15 days with the Deputy Registrar of the High Court being made a signatory thereto, alongside the plaintiff/applicants' advocates' firm.
4. Of essence, respondent, who maintains control of the rental income was mandated by the court to remit all such rents into the said account and only access the same with the court's approval, upon application by either party, as the need for apportionment and application of rental income arose. This was captured in order No. 3 of the court orders of 24th September 2010.
5. The escrow account was duly opened with Prime Bank, Hurlingham Branch but the respondent has failed to pay the rents collected into the said account, hence the filing of these contempt proceedings by the applicant, praying inter alia, that:-

(i) The respondent be cited for contempt of court.

(ii) The respondent be committed to civil jail for a period of six months or such other period as this court may determine.

(iii) The court makes such other or further orders as may seem just and expedient.

Copies of the court orders are annexed to the applicant's supporting affidavit of 17th April 2012.

6. To oppose the application, the respondent filed a 17 paragraph replying affidavit in which he admits the existence of the orders and concedes their binding effect. He also admits his failure to deposit into the escrow account the rent collected but stating that he uses the money for the upkeep of three issues of marriage over whom he has custody.

7. The respondent depones that he has not intentionally disobeyed the court orders and that his failure to deposit the rental income realized from the subject property is due to unemployment, a collapsed business and the ever present needs of the children under his care.

8. The respondent takes the view that to imprison him for his disobedience would negatively impact on the interests of the said children. He also holds the view that the court should vary the court order so that the rent, which he claims to be only Kshs.10,000/= be shared equally between himself and the applicant, whom he says earns a salary of Kshs.200,000/= per month in any event.

9. Oral submissions were made at the hearing of the Notice of Motion. Counsel for the applicant submitted that the Notice of Motion should be allowed as matter of course and orders granted as prayed, since the court orders were clear and have not been varied. The respondent repeated his deposition that the applicant is well to do and that he alone together with the children under his care stand to suffer if the said orders were to be enforced or complied with, compelling him to deposit the rental income into the escrow account.

10. That the respondent has custody and is taking care of three issues of marriage is not rivalled by means of an affidavit or otherwise. It is true that the said children would be affected by the imprisonment of their father and the applicant has not offered an alternative as would take care of their interests while respondent does his term in jail.

11. The applicant may not be aware that she would be responsible for the respondent's upkeep while he is in jail, a condition she may not be able to fulfil, given that she complains of being short of funds due to the mortgage repayments she has to bear alone.

12. The above notwithstanding, the respondent has no right to disobey the orders of the court and the financial position of the applicant is quite irrelevant at this stage, since this court is not dealing with an application to vary the orders complained about. The respondent has conceded his disobedience and is clearly in contempt. The order for the operation of the escrow account clearly spelt out that funds deposited therein could be withdrawn with the approval of the court as and when the need to utilize them arose.

12. In view of the above, the respondent has no excuse not to have complied with the orders. Applying the best interests principle as regards the children under the respondent's care, I would hesitate to commit him to prison. Instead, I order that the respondent do furnish the court with an accurate account as to the value of the rental income and how he has applied the same since the date he was ordered to deposit the same. An affidavit in this regard shall be filed and served on or before close of business on 30th July 2012.

13. The matter shall be mentioned on 31st July 2012 to confirm compliance and for the respondent to show cause why he should not be denied the responsibility of collecting the rental income henceforth, or be subjected to a suitable punishment at the discretion of the court.

DATED, SIGNED and DELIVERED at NAIROBI this 27th DAY OF JULY, 2012.

M.G. MUGO

JUDGE

In the presence of :

for the plaintiff.

The respondent