



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 450 OF 2009**

**IN THE MATTER OF THE SALE OF MORTGAGE PROPERTY, L.R. NO. KITISURU 101/C101**

**AND**

**IN THE MATTER OF THE SHARING OF THE PROCEEDS OF THE SALE OF L.R. NO.**

**KITISURU 101/C101 ALSO KNOWN AS KITISURU 101/101**

**BETWEEN**

**JANE W. GAKUNGU.....PLAINTIFF**

**AND**

**MICHAEL M. GAKUNGU.....DEFENDANT**

**RULING**

The Plaintiff filed the application dated 21/9/2020 seeking to commit the Defendant to civil jail for six months for non-compliance with the orders issued by this court on 18/11/2019. She seeks to have the order enforced by the Officer Commanding the Central Police Station. The application was made on the grounds that vide its ruling of 18/11/2019, the court directed the Defendant to deposit half the proceeds from the sale of the land known as Kitisuru 101/C101 (“the Suit Property”) in court within 60 days and that the Defendant disobeyed the court order by failing to deposit that money in court.

The Plaintiff swore the affidavit in support of the application in which she deponed that the Defendant had failed to deposit the sum ordered by the court and yet he had not sought review or the setting aside of the court’s order. She pointed out that the Defendant filed a Notice of Appeal indicating that he intended to appeal against the court’s decision made on 18/11/2019 but he had not made any efforts to file and prosecute his appeal.

The Defendant opposed the application through the replying affidavit which he swore on 10/12/2020. He explained that it had become difficult for him to comply with the court’s ruling because the net proceeds from the sale of the Suit Property had long been expended on the welfare of the Plaintiff, their children and himself in repaying debts which accrued during the purchase and construction of the Suit Property. He stated that he wished to lodge an appeal against this court’s ruling but after appreciating the challenges facing the Court of Appeal which was understaffed, he opted to seek review of the court’s judgement. He blamed the Plaintiff for filing the application for contempt yet the suit was scheduled for full hearing on 29/9/2020. He denied being served with a court order containing a penal notice. He pointed out that the sale proceeds had been expended and depleted substantially towards the repayment of debts and on the welfare of the parties to the case and their children. He added that after the court dismissed the suit in May 2017 the sale proceeds were released to him and that the application for the deposit of half the sale proceeds in court was issued 20 months after the case had been dismissed. He made reference to a dispute settlement proposal between him and the Plaintiff dated 9/1/2012.

He maintained that it was his funds that were applied towards the purchase of the Suit Property. He clarified that when he bought the Suit Property it was 30% complete and that he was only able to complete it through funds obtained from bank loans, advances from his employer and money borrowed from close friends and family. On his retirement and loss of regular income, he was forced to sell the Suit Property. He claimed that the Plaintiff frustrated his efforts to raise funds to pay off the debt to the National Social Security Fund. He urged the court to dismiss the Plaintiff’s application while pointing out that there were other ways of implementing the court order. He urged that the proper way to proceed was for the suit to be heard so that the issues can be determined.

The Plaintiff filed a further affidavit in which she reiterated that the Suit Property was acquired jointly and that the Defendant’s application seeking review of the orders of this court was an afterthought. She pointed out that the issue of the contribution which the Defendant made to

the development of the Suit Property should be dealt with at the main hearing of the suit. She stated that an agreement had been reached between her and the Defendant following a meeting with elders on how the proceeds of the sale of the Suit Property would be shared out but the Defendant failed to honour that agreement.

The court directed parties to file submissions which they did. The Plaintiff submitted that the Defendant was in contempt of the orders made on 18/11/2019 which had directed him to deposit half the sale proceeds for the Suit Property in court within 60 days. She submitted that the 60 days lapsed on 18/1/2020 but to date the Defendant had not deposited the sum. She maintained that the Defendant was aware of the court orders and that he had willfully disobeyed those orders. She added that a reminder was sent to the Defendant through his advocate 29/7/2020 but he did not comply with the court order.

The Defendant submitted that the law required that the contemnor should have been served with the order so that he knows with clear certainty the accusations of breach of the court order that he is accused of. He submitted that he should have been personally served. He denied that he had willfully denied the court order and added that by the time this court gave the ruling requiring half of the sale proceeds realised from the Suit Property to be deposited in court the money had already been disbursed and depleted. The Defendant argued that the Plaintiff had failed to prove that he had the money and was only deliberately refusing to pay. The Defendant relied on an English decision which unfortunately he did not avail to the court in support of the position that if there was an alternative in ensuring the court order was obeyed then that alternative should be pursued.

The issue for determination is whether the court should cite the Defendant for contempt of the orders it issued on 18/11/2019. The background to this dispute is that the Plaintiff and the Defendant were husband and wife. When their relationship went south it would seem that a decision was taken to sell the Suit Property.

The suit was dismissed on 18/5/2017 when it came up for hearing and the Plaintiff failed to attend court. The Plaintiff filed the application dated 4/12/2018 seeking to set aside the orders of dismissal and for the Defendant to deposit half the proceeds from the sale of the Suit Property in court. The court delivered its ruling on 18/11/2019 and reinstated the suit. That ruling formed the substratum of this application. The Plaintiff contended that the Defendant disobeyed the orders made in that ruling. The Defendant explained that the proceeds from the sale of the Suit Property were disbursed and utilised in the repayment of debts and on the welfare of both parties and their children.

The Plaintiff did not prove that the Defendant had deliberately disobeyed the orders made by the court on 18/11/2019. The court notes from the Originating Summons that one of the determinations that the Plaintiff seeks is an account of all the funds realised as the sale proceeds from the Suit Property and for those funds to be deposited in court. It would serve the interest of justice and the overriding objective of expeditious disposal of disputes if the parties were to proceed to have this case which was filed in 2009 heard so that all the outstanding issues relating to the proceeds realised from the sale of the Suit Property can be determined without further delay.

The court declines to grant the orders sought in the application dated 21/9/2020. Each party will bear its own costs.

**DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF AUGUST 2021.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Theophilus Kamwaro for the Plaintiff

Ms. W. Njuru holding brief for Mr. C.N. Kihara for the Defendant

Mr. V. Owuor- Court Assistant