



**JNK v BKK (Matrimonial Cause E038 of 2023)  
[2024] KEHC 7453 (KLR) (Family) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7453 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MATRIMONIAL CAUSE E038 OF 2023  
HK CHEMITEI, J  
JUNE 20, 2024**

**BETWEEN**

**JNK ..... APPLICANT**

**AND**

**BKK ..... RESPONDENT**

**RULING**

1. This ruling relates to the application dated 12<sup>th</sup> September, 2023 filed by the Applicant, JNK, seeking for orders that:
  - (a) Notice to show cause do issue to the Respondent to show cause why he should not be committed to civil jail and ordered to pay a sum of monies as penalty for being in contempt of court orders given on 2<sup>nd</sup> June, 2023.
  - (b) This honourable court be pleased to issue an order for committal to prison against the respondent for a period of six months for disobeying the court order made on 2<sup>nd</sup> June, 2023.
  - (c) This honourable court be pleased to make such orders and or give directions as it may deem fit and just.
2. The application is supported by uncommissioned and undated affidavit sworn by JNK and supplementary affidavit sworn by JNK on 27<sup>th</sup> November, 2023. She states inter alia that this court adopted the consent dated 31<sup>st</sup> May, 2023, on 2<sup>nd</sup> June, 2023 as an order of the court in respect of usage and application of the income generated from the property known as LR [Particluars withheld] situated at Mavoko Municipality. The respondent however has been frustrating and disobeying the consent order since the adoption of the same on account that she is employed and should contribute to some



family expenses, yet the sole purpose of the income was for purposes of sustaining the family financially in line with the terms of the consent.

3. She said that the consent is also very clear on what the income is supposed to be used for and it does not suggest anywhere that she is supposed to utilize her own income. She went on to accuse the respondent of failing to sign the cheques as and when he was required. She attached the copies of the said cheques.
4. As a result of this their children have been unable to go to school as expected and there are other liabilities which have fallen in arrears rendering the applicant to suffer loss and damage.
5. The application is opposed by BKK vide replying affidavit sworn on 22<sup>nd</sup> September, 2023. He avers inter alia that he has fully complied with the terms of the consent dated 31<sup>st</sup> May, 2023 as there was no child whose school fees is unpaid. All of them are continuing with their studies uninterrupted at their respective institutions of learning.
6. He went on to deposed that on 14<sup>th</sup> September, 2023, he had a meeting with the applicant in town and after discussing the payments due they signed cheques in her name to go and cash them to meet the expenses which include food and others for the month of September, 2023. He was taken aback when she alleged in the instant application that the expenses for September, 2023 have not been paid.
7. That after they signed the consent letter, they agreed to open another account at the Co-Operative Bank of Kenya Limited other than the one stated in the consent at Diamond Trust bank Limited where tenants would be paying the money to and they did so and tenants remit money therein and procure a cheque book for purposes of operating the account and keep it with the claimant, which they did. They further agreed that JNK would be writing the cheques in her name (other than the cheque for payment to KRA dues) after discussing and agreeing on the monthly expenses.
8. She accused the applicant of writing cheques in total disregard of the agreement they entered separately after the consent.
9. The applicant has filed submissions dated 15<sup>th</sup> January, 2024 and placed reliance on the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR where the court of appeal stated as follows:

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt of proceedings?” We hold the view that it does. This is more so in a case such as this one where the advocate was in court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/ her to report back to the client all that transpired in court that has a bearing on the client’s case.

This is the position in other jurisdictions within and outside the commonwealth.

In addressing the issue whether services of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in *Bhatnager v Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at p. 226, LJ Sopinka, held that: -

“In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Minister’s crown who administer



large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in such a case there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister.”

The court went on to state that, “On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as pre – condition to liability in contempt... Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved. (See *Avery v. Andrews* (1882) 51Lj Ch. 414)

We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26<sup>th</sup> President of the United States of America once said: -

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour.”

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the *Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

10. BKK has filed submissions dated 31<sup>st</sup> January, 2024.

### **Background:**

11. The genesis of this matter is the consent dated 31<sup>st</sup> May, 2023 that was adopted as an order of this court on 2<sup>nd</sup> June, 2023 in which they agreed that:

- “ 1. The rental income from the property known as LR [Particulars withheld] at Mavoko Municipality Machakos be deposited at Diamond Trust Bank Kenya Ltd A/C No. [Particulars withheld], Capital Centre Branch, A/C Name Tinka Investments Ltd where both the Claimant and the Respondents are Directors.
2. The income in clause one (1) above be applied and utilized for settling the following expenses:
  - a) Their children’s needs which include education and related expenses, food, medication, clothing and entertainment.
  - b. Maintenance of the property including payment of statutory dues, utilities, salary for caretaker, exhausting the septic tank and salaries for the workers at the parties Malili home and maintenance of the home.



- c) Once the expenses in (a) and (b) above have been fully catered for the claimant and respondent to share the remainder/ surplus equally.
3. The Claimant and Respondent do sign cheques promptly whenever the expenses in 2 (a) and (b) above arise.”

### **Analysis and Determination**

12. I have carefully considered the application, the responses thereto and the written submissions filed by the parties and address them as below.
13. In *Charles Kiptarbei Birech v Paul Waweru Mbugua & another* [2021] eKLR, the court stated as follows:

- “36. In *M & E. Consulting Engineers Limited v Lake Basin Development Authority & Another* [2015] eKLR the Court of Appeal stated as follows:

“We re-affirm the dicta in the High Court case of *Kenya Commercial Bank Ltd. v Specialized Engineering Company Ltd.*, 1982 KLR 485 as was upheld by this Court in Civil Appeal No. 43 of 1980 thereof where it was stated as follows:

1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.
3. An advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.
4. The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes he would not have given his consent had he known these facts.



5. The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.”
14. There is no doubt that the above cited authorities clearly spell out the import and the importance of a consent order. In this case there is no evidence that the consent order entered by the parties has been set aside. All that I find is each party and the respondent specifically trying to run away from it.
15. The Applicant in some way has also contributed to the same and this is exemplified by the opening of another account at Cooperative Bank of Kenya which did not form part of the consent. If there was such a scenario then they ought to have cancelled the existing consent on record or at least modify, amend or set it aside by another consent.
16. It is not also true for the Respondent to state that he was not aware of the consent order yet he was fully represented in court by his counsel. That reason is too flimsy and at worst pedestrian.
17. The sum total of my finding is that both parties subjected themselves to the consent. They must live by it. They made the bed and must therefore lie on it.
18. Consequently, I direct that the terms of the consent must be complied with by both parties and specifically the respondent within 14 days from the date herein and must continue so as long as the consent dated 2<sup>nd</sup> June 2023 is subsisting.
19. For now, I shall grant the Respondent the benefit of doubt based on the issues raised in his replying affidavit.
20. Costs shall be in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 20<sup>th</sup> day of June 2024.**

**H. K. CHEMITEI**

**JUDGE**

