



AYK v PNE (Civil Suit E064 of 2023) [2024] KEHC 11631 (KLR) (Family) (5 July 2024) (Ruling)

Neutral citation: [2024] KEHC 11631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT E064 OF 2023
PM NYAUNDI, J
JULY 5, 2024**

BETWEEN

AYK APPLICANT

AND

PNE RESPONDENT

RULING

1. What is for determination are the two applications dated 8th December 2023 and both 14th December 2023 presented by the Applicant and intended interest party respectively. The Applicant seeks to cite the respondents for contempt, while the interested party seeks leave to be enjoined as a party. Earlier the Applicant vide Application dated 23rd August 2023 sought interim orders pending determination of the main suit. On 27th August 2023 the Court granted interim orders and on 11TH October directed that parties proceed to the hearing of the Originating Summons by way of viva voce evidence with leave granted to the respondent to file replying affidavit before then.

Application Dated 8th December 2023.

2. This application has brought pursuant to Order 40 and 51 of the Civil Procedure Rules 2010; Section 5 of the Judicature Act Cap 8 Laws of Kenya, Order 52 of the Rules of the Supreme Court of England 1965 Practice and Procedure Rules; Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of law and the court’s inherent powers to punish for contempt of court. The applicant seeks the following orders;
 1. Spent.
 2. That PNE, being the respondent herein, be held to be in contempt of court due to his wilful disobedience of the orders issued on the 27th day of August 2023.



3. That consequent to the grant of prayer 2 above, the contemnor be committed to civil jail for a duration not exceeding six (6) months and/or such other duration as this Honourable Court may deem fit and expedient and in addition to or in the alternative to this, this Honourable Court do impose an appropriate penalty/fine upon the contemnor.
 4. That this Honourable court do impose such other sanctions as it deems fit until the said contempt is purged.
 5. THAT the costs of this application be in the cause.
 6. That such further and/or other orders be made as this Honourable Court may deem just and expedient in the circumstances.
3. The application was supported by the affidavit of the applicant of even date. She averred that the court issued orders on 27th August 2023 restraining the respondent from evicting her from their matrimonial home. That despite the Respondent being served with the said orders he has threatened to evict the applicant from the home and is therefore in contempt of the court orders of 27th August 2023.
 4. The Respondent opposed the application by filing the following grounds of opposition dated 31st October 2023;
 1. That the Respondent categorically denies that the properties listed by the applicant in her application are matrimonial properties within the meaning of the Matrimonial Property Act and Section 6 of the Act.
 2. That in view of the foregoing, this Honourable Court lacks jurisdiction to entertain the applicant's application, part of the applicant's claim relates to land and therefore, the dispute ought to be adjudicated by the Environment and Land Court which is mandated under Section 13 of the Environment and Land Court Act and Section 150 of the Land Act, 2012.
 3. That it is trite law that a limited liability is a legal entity capable of suing or being sued and that division or distribution of its known assets can only be done under the Companies Act. Since the shares are clearly identifiable which is not in dispute, this court has no business making a declaration that the properties held by [Particulars Withheld] Limited, [Particulars Withheld] Dairies, [Particulars Withheld] Solutions and [Particulars Withheld] Barbershop are matrimonial properties.
 4. That the division of matrimonial property does not include the sharing nor properties owned by a company as a company is separate legal entity and that the court with jurisdiction is the commercial division of the High Court.
 5. That the application is frivolous, vexatious, and incurable in law for failing to observe the Civil Procedure Rules.

Application Dated 14th December 2023.

5. The application was brought pursuant to Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) and all enabling provisions of law. The interested party seeks the following orders;
 1. Spent.
 2. That this Honourable Court be pleased to issue an order to join the applicant in the instant suit as the interested party.



3. That this Honourable Court be pleased to stay its orders made on 27th August 2023 and all other consequential orders thereto pending the hearing and determination of this application.
4. That this Honourable Court be pleased to set aside the Ex-Parte Orders issued against the Respondent on 27th August 2023 and all other consequential orders thereto.
5. That the court be pleased to issue any other order or further orders.
6. The application was supported by an affidavit of even date sworn by LL, the General Manager of [Particulars Withheld] Limited. She averred that the injunctive orders issued on 27th August 2023 are in respect of Villa Number x erected on Land Reference Number 209/8XX6 which belongs to the interested party (company). That a suit should have been instituted under the *Companies Act* because a company is a legal entity which can sue and be sued. She challenged the jurisdiction of this court to declare that company properties constitute matrimonial properties.
7. The application was opposed by the applicant vide a replying affidavit sworn on 8th April 2024. She depones that she and the Respondent are shareholders and directors of [Particulars Withheld] Limited. That the properties she listed were acquired by their joint efforts. She averred that the Respondent seeks stay of the orders issued on 27th August 2023 in an attempt to evict her from their matrimonial home and remove her as a shareholder in the company. She argued that the Respondent will not suffer any prejudice if the application is dismissed.
8. The applications were disposed of by way of written submissions. The applicant filed written submissions dated 8th April 2024 whilst the Interested Party filed submissions dated 12th March 2024.

Analysis and Determination.

9. The issues for determination are;
 - i. Whether the respondent is in contempt of orders issued on 27th August 2023. And if so, how should he be punished?
 - ii. Whether the interested party should be enjoined in this suit.
 - iii. Whether the orders of 27th August 2023 should be stayed.
10. The Intended Interested Party raised the issue of the jurisdiction of this court to deal with properties registered under [Particulars Withheld] Company. According to the Company, these properties do not form part of matrimonial property and should be dealt with under the Company Act and such a claim should be filed in a different court.
11. This in my view is a matter that will be determined at trial. The Interested party has attached the CR12, but not proof of ownership of LR 209/8XX6, Villa No. x. It is not disputed that the family is currently residing here. The orders are sought against the Respondent and not the intended interested party.
12. This court therefore has jurisdiction to entertain this Suit. Whether the properties form part of matrimonial property will be determined during the hearing of the Originating Summons.

Whether the Respondent is in Contempt of Court orders of 27th August 2023.

13. Contempt proceedings in Kenya are governed by Section 5 (h) of the *Judicature Act* which gives to the High Court and the Court of Appeal powers to punish for contempt of court.



14. In the case of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR, the Court of Appeal sitting in Nakuru in Obiter dictum stated as follows:-

“The emphasis imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application is brought”.

15. It is trite law that orders made by a properly constituted court of law must be obeyed. In the case of *Hadkinson v Hadkinson* [1952] ALL ER it was held:-

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

16. In the case of *Econet Wireless Kenya Ltd v Minister for Information of Kenya & Another* [2005] eKLR, the Court relying on the decision of the Court of Appeal in *Gillab Chand Papatlal Shah & Another Civil Application no. 39 of 1990* stated that:-

“It is essential for the maintenance of the Rule of Law and order that the authority and dignity of our courts are upheld at all time. The Court will not condone deliberately disobedience of its orders and will not shy away from its responsibilities to deal firmly with proved contemnors.”

17. In *Teachers Service Commission v Kenya Union of Teachers & 2 Others* [2013]eKLR the court stated as follows: -

“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It 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 about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed”.

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

18. In order to succeed on an application for contempt of Court the Applicant must satisfy the court of the following:-

- a) That the terms of the order (or injunction or undertaking) are clear and unambiguous and are binding on the Defendant.
- b) That the Defendant has knowledge of or proper notice of the terms of the order.



- c) The Defendant has acted in breach of the order.
- d) The Defendant's conduct is deliberate.
19. The Respondent did not respond to the allegations of contempt.
20. The standard of proof required in cases of contempt is higher than that required in an ordinary civil case. Before a finding of contempt can be made, there must a demonstration of wilful and deliberate disobedience of a court order.
21. In *Gatharia K. Mutikika v Baharini Farm Ltd* [1985] KLR 227 it was held that-
- “A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily..... it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.
- However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be heard to process contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject..... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.” (own emphasis)
22. In *Oilfield Movers Ltd v Zahara Oil & Gas Limited* [2020]eKLR the court stated –
- “It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty.....”
23. The Applicant was required to prove beyond reasonable doubt that the Respondent is in wilful and deliberate breach of the court orders of 27th August 2023.
24. There is no issue of service of the said court order or lack of awareness of its existence. The only issue for determination in this motion is whether the Respondent is in contempt or put another way whether the Applicant has proved that the Respondent is guilty of contempt of court for which he deserves to be punished.
25. The Applicant has claimed that the Respondent has threatened to evict her from the matrimonial home. She has availed to Court excerpts of a conversation between her and the respondent. The Respondent has not controverted this averment. It is safe to assume therefore that the Respondent did utter these words and is therefore in contempt of the Court orders issued on 27th August 2023. At this stage I am of the view that a stern warning to the respondent will suffice. Accordingly, the



Respondent is duly warned and advised that if he persists in this conduct the Court will take more punitive measures.

Whether [Particulars Withheld] Limited should be enjoined as an Interested Party.

26. Who is an interested party? According to the Black's Law Dictionary, 9th Edition a "Necessary Party" is defined as;

"A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings"

27. The Black Law Dictionary, 9th Edition at page 1232 further defines an interested party as;

"A party who has a recognizable stake (and therefore standing) in the matter".

28. Whereas the Civil Procedure Act, Cap 21 is silent on the subject as to who is an "interested party", Order 41 Rule 5 of the Civil Procedure Rules 2010, does make a reference to the term "interested party" and states as follows;

"The court may either on its own motion or on application by any interested party, remove a receiver appointed pursuant to this order on such terms as it thinks fit"

29. Besides, reference to the word "interested party" can also be traced to the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, Legal Notice No. 117 of 2013, which defines an interested party as;

"A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation"

30. In *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR, Mativo. J. explained circumstances when an interested party ought to be enjoined in a proceeding. He stated thus;

"A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty".

31. In the case of *Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* [2014] eKLR, the Supreme Court of Kenya held that;

"(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the *Mumo Matemo* case where the Court (at paragraphs 14 and 18) held:

"[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she



is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

32. Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

33. The substratum of the Originating Summons is whether or not the subject properties are matrimonial assets and if they are, the respective shares of the Applicant and the respondent, the participation of the intended interested party is not necessary for the determination of that question. For this reason, I find that the application by the intended interested party must fail.

34. In the end, these are the final orders

1. The Respondent is in contempt of the orders of 27th August 2023 and a warning issued that if he persists the Court will issue a sterner order
2. The Application dated 14th December 2023 is dismissed with no order as to costs.
3. The Respondent to file Reply to originating summons within 14 days. The Applicant granted leave to file further affidavit within 14 days of service. The Originating Summons to proceed by way of Viva Voce evidence. The parties to exchange witness statements within 45 days. Mention before the Deputy Registrar, Family Division on 3rd September 2024 to confirm compliance and take directions.

It is so ordered

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 5th DAY of July, 2024.

P. NYAUNDI

JUDGE

In presence of: -

Fardosa Court Assistant

MS Angiela h/b for Okach for Applicant

Ms Korir h/b Mr. Mingo for Respondent

