



**FNM v JAM (Matrimonial Cause E001 of 2022)  
[2024] KEHC 15341 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 15341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MATRIMONIAL CAUSE E001 OF 2022**

**G MUTAI, J**

**OCTOBER 4, 2024**

**BETWEEN**

**FNM ..... CLAIMANT**

**AND**

**JAM ..... RESPONDENT**

**RULING**

1. Before this court is a Notice of Motion application dated 24<sup>th</sup> May 2024 vide which the Claimant/Applicant seeks the following orders:
  - a. Spent;
  - b. That this honourable court be pleased to order the arrest of the respondent and commit him to civil jail for six months or be punished in any other manner that the court may deem fit and expedient for disobeying /breaching the judgement of the court-issued on the 4th September 2023 by Justice Gregory Mutai; and
  - c. That the costs of this application be provided.
2. The application is premised on the grounds therein and the affidavit of Florence Ndinda Manyara sworn on 24<sup>th</sup> May 2024. She referred to the judgement of this court delivered on 4<sup>th</sup> September 2023 and stated that motor vehicle registration number KBK 778C TOYOTA PREMIO was valued at Kes.550,000/- and that the Respondent issued her with a cheque of Kes.200,000/- leaving a balance of Kes.75,000/-. The Respondent has been collecting monthly rent from the premises on Title Nos. Kwale/Ukunda/4808 and Kwale/Ukunda/4809 all totalling to Kes. 264,000/- and has refused to give her share of Kes.132,000/-. She urged the court to cite the Respondent for contempt of court.
3. In response, the respondent filed a Replying Affidavit dated 19th June 2024 in which he stated that he had, through his advocates, written to the Claimant’s advocates via letter dated 17th January 2024 with



proposals on how to resolve the matter. Via email dated 23<sup>rd</sup> January 2024, the Claimant, through her advocates, declined his proposal and stated that they were going back to court for further directions. The parties hereto agreed to appoint Amazon Valuers to value the Ukunda matrimonial properties, and his advocates got Regent Auto Valuers for the motor vehicle and Adomag for the matrimonial property in Narok. All valuation reports were forwarded to the Claimant via a letter dated 19<sup>th</sup> March 2024.

4. Further, they both agreed that Oliver Family Agency would collect rent and share it equally between him and the Claimant, which was done for June 2024. The Claimant, however, collected the rent from the date of judgment to February 2024.
5. He averred that the sale of the Ukunda property did not realise any potential purchasers, with Amazon Valuer withdrawing from acting for them. As for the motor vehicle registration number KBK 778C, the same was valued at Kes.550,000/-, out of which they agreed with the Claimant that he would buy her out at Kes.250,000; he then issued her with a cheque of Kes.200,000/-, with an agreement to pay the balance in July 2024. They were still looking for a purchaser for the Narok property.
6. He deponed that with the above it is unfair for the Claimant to accuse him of being in contempt of court and urged the court to dismiss the application with costs.
7. The application was disposed of by way of written submissions. Subsequently, the Claimant filed her written submissions on 11<sup>th</sup> July 2024. She submitted two issues, namely, whether the Respondent is in contempt of court and what the available legal recourse is for contempt of court.
8. On the first issue, the Claimant submitted that contempt of court is a deliberate failure to honour a valid court order without any valid justification. And that a court should not condone deliberate disobedience of its orders. The applicant relied on the case of SAD vs EOO[2021]eKLR on the requirements a party has to satisfy when arguing in favour of a contempt application. These are that the terms of the order (or injunction or undertaking) are clear and unambiguous and are binding on the defendant; that the defendant has knowledge of or proper notice of the terms of the order; the defendant has acted in breach of the order; the defendant's conduct is deliberate. She submitted that the court's judgement was clear and unambiguous, the respondent was presented by an advocate throughout the proceedings, the respondent was aware of the judgement of the court, and he acted in breach of the same.
9. In conclusion, she submitted that the respondent failed to comply with the requirements of a valid judgment and should not go unpunished.
10. The Respondent, on the other hand, through his advocates, C. Katisya & Co. Advocates, filed his written submissions dated 19<sup>th</sup> July 2024. Counsel submitted that the Claimant failed to prove that the Respondent wilfully disobeyed court orders. She urged that the Claimant failed to discharge the burden of proof on contempt of court. Counsel urged the court to dismiss the application with costs.
11. The court in the case of Sheila Cassatt Issenberg & Watoto World Centre vs Antony Machatha Kinyanjui [2021] KEHC 5692 (KLR) stated:-

“The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him...



Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order... The emphasis as shown in the above cases is that there must be “willful and deliberate disobedience of court orders.” There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it... But even as courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind that the power to punish for contempt is a discretionary one and should be used sparingly.”

12. The court in the case of Samuel Mweru & others vs National Land Commission & others [2020] KEHC 9233 (KLR) stated that:-

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove

- (i) the terms of the order,
- (ii) Knowledge of these terms by the Respondent,
- (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements, the presence of wilfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*, who succinctly stated:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b. the defendant had knowledge of or proper notice of the terms of the order;
- c. the defendant has acted in breach of the terms of the order; and
- d. the defendant’s conduct was deliberate.

... Two principals emerge. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. In this regard, I am not satisfied that wilful disregard of the court order has been established.



The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.

Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.

It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and mala fide, all the requisites of the offence will have been established.

And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one':-

'The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far reaching.

There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of *the Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.'

Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

13. The court notes that the parties were required in Paragraph 84(d) of the Judgment to value the properties within 60 days and sell them within 90 days after that. The court did not contemplate a situation where properties would be jointly owned with rent accruing to both parties. Sale requires action by both sides.
14. It is clear to me that both parties opted to modify the terms of the judgment. In any case, it is apparent that the Claimant acted with undue haste and that, rather than cooperating with the Respondent, she opted to institute these contempt proceedings.
15. I note that the parties made arrangements to comply with the court orders, and to that extent agreed on the sale of the motor vehicle and valuation of the properties. In my view under these circumstances application of the extraordinary remedies available in contempt of court proceedings isn't called for.
16. My understanding of the authorities I have cited is that the contempt orders ought to be issued sparingly and only in the clearest of cases. In my view this is not one such case.



17. In the circumstances, I find no merit in the contempt application and dismiss the same. In the interest of justice, I give the parties a further 60 days to complete the sale.
18. As this is a dispute between former spouses each party shall bear her/his own costs of the application.
19. To confirm compliance and for further directions, this matter will be mentioned before me on 10<sup>th</sup> December 2024.
20. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 4<sup>TH</sup> DAY OF OCTOBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Florence Ndinda Manyara (in person);

Ms Katisya, for the Respondent; and

Arthur – Court Assistant.

