



**JWN v MRG (Family Originating Summons E030 of 2023)
[2024] KEHC 12880 (KLR) (Family) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12880 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

FAMILY ORIGINATING SUMMONS E030 OF 2023

PM NYAUNDI, J

OCTOBER 24, 2024

**IN THE MATTER OF SECTION 17 OF THE
MATRIMONIAL PROPERTY ACT NO. 49 OF 2013**

AND

IN THE MATTER OF ARTICLE 45(3) OF THE CONSTITUTION OF KENYA

BETWEEN

JWN PLAINTIFF

AND

MRG DEFENDANT

RULING

1. The Application for determination is Notice of Motion dated 31st May 2024 presented under Order 51 Rule 1, Order 10 Rule 11, Order 12 rule 7 and Section 1A, 1B, 3,3A and 63 (e) of the [Civil Procedure Act](#) in which the Applicant seeks the following orders
 1. Spent
 2. Spent
 3. That the Honourable Court do find that the Consent judgement adopted by this Court has been frustrated by the Respondent’s conduct.
 4. That this Honourable Court be pleased to set aside the consent judgment entered on 23rd November 2023, reopen the Applicant’s case and admit it to fill (*sic*) trial on merit.



5. That the originating Summons and the Affidavit dated 24th March 2023, the Affidavit, the Replying affidavit by the Respondent and the bundle of annexures thus filed be deemed as filed for purposes of compliance.
6. That the Applicants be allowed a right of reply within 14 days to the Replying Affidavit dated 5th July 2023 upon which the suit can be set down for full hearing on viva voce evidence.
7. That the Respondent be held in contempt of Court
8. That the costs of this application be provided for.

The Applicant has sworn affidavits on 31st May 2024 and 26th July 2024. The Respondent opposes the Application vide replying affidavit sworn on 5th July 2024.

2. The Court directed that the Application be canvassed via written submissions, both parties have complied.

Summary of the Applicant's Case

3. It is the Applicant's case that the Respondent has frustrated the implementation of the consent judgment entered on 23rd November 2023. It is her case that if the Court were to order specific performance the Respondent would have benefitted from his inactions. It is her averment that the consent no longer serves her any purpose as she has since taken up other liabilities. She is of the view that if she litigates the matter she will obtain a better outcome.
4. The Respondent only moved to comply with the Court order after the time for compliance had lapsed. She was moved to rescind the agreement as the Respondent has not been forthcoming on the rent collected, has frustrated her efforts to occupy the apartment and the ruling in *Ederman Property Limited v Kenya Commercial Bank* Civil Application No. E042 of 2004 has a cast a shadow on whether she will be able to secure the asset.
5. The Applicant identifies the following as the issues for determination
 1. Whether the Respondent is in contempt of the Honourable Court's Order dated 23rd November 2023?
 2. Whether this Court can set aside the consent judgment dated 23rd November 2023 and reopen this case and hear and determine it to full trial on merit
 3. Whether this Court can grant stay of execution of the consent judgment dated 23rd November 2023?
6. The Applicant contends that the Respondent is in contempt and relies on the decision in *Teachers Service Commission v Kenya National Union of Teachers & 2 Others* [2013] eKLR to urge that the Court must move to punish the respondent.
7. On the 2nd issue, the Applicant submits that the grounds on which a consent judgment can be set aside are now well established by judicial precedent and relies on a number authorities including the locus classicus decision in *Flora Wasike v Destimo Wamboko* (1982-1988) 1KAR 625. The applicant submits that the Court has discretion to set aside consent judgments and that this principle prevails over technicalities and will correct any injustice. The ground on which the Court is invited to exercise its discretion is that the Respondent is in breach of the consent.



8. On stay it is urged that the Judgment of 23rd November 2023 be stayed pending the hearing and determination of the matter in full and on merit. Reference is made to the decision in *Nicholas Mutuku Mwasuma v Patricia Mueni Kilonzo* [2022] eKLR that the Court has broad discretion.

Summary of the Respondent's Case

9. The Respondent denies he is in contempt and in his affidavit sets out the sequence of events post the consent judgment. It is his contention that it is the applicant who has frustrated the implementation of the consent agreement. The Respondent submits that the Applicant has not met the threshold for the grant of the prayers sought and cites several decisions on principles that guide Courts in setting aside consent judgments. Including the celebrated decision of *Flora Wasike* (*supra*) and *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982]KLR 485.

Analysis and Determination

10. Having considered the pleadings herein and the rival submissions, the issues for determination are
1. Whether the Respondent is in contempt of the Court order issued on 23rd November 2023
 2. Whether the Court should set aside the consent judgment
 3. Whether the matter should proceed to full hearing
 4. Who should pay costs of the suit
11. On the 1st issue whether or not the respondent is in contempt and therefore sanctions to issue against him, 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.
12. 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 Shab & 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.”
13. 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.
14. 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.



15. 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 on 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)

16. Both parties insist that the other is in contempt. What is evident from pleadings is that the Respondent has signed and forwarded scanned copies of document to facilitate transfer of Apartment No. [particulars withheld] situated at [particulars withheld] and Title Number [particulars withheld]. The Applicant has not signed the documents that would relinquish her interest in [particulars withheld], she maintains that she will do so once she gets occupation of Apartment No. [particulars withheld] and once the Respondent accounts for the rental income prior to her taking occupation.
17. The conditions that the Applicant are not part of the Consent recorded on 23rd November 2023. I am unable therefore to find the Appellant in contempt of the consent order.
18. On whether or not the Court should set aside the Consent order. Both parties have accurately stated the law and I need not set out the authorities here again. The issue is whether the Applicant has brought herself within the parameters within which the Court will grant these orders.
19. One of the tenets of our justice system is that litigation must come to an end and this is especially so where the parties as in the instant case have recorded a consent. The test as stated in the *Florence Wasike case (supra)* is whether the grounds raised by the Applicant would justify the setting aside of a contract. In my view the applicant has not succeeded in discharging this burden.
20. With regards to the ruling in *Ederman Property Limited v Kenya Commercial Bank* Civil Application No. E042 of 2004, it has not been demonstrated that this particular apartment is affected and further upon perfecting her title the applicant will have a remedy against the developer if it gets to that. The sum of the matter is there is not sufficient basis laid for vacating or varying the consent order. Accordingly, the application also fails on this ground.
21. Having so held on the 2nd issue, the 3rd issue is rendered moot.
22. The Notice of motion dated May 31, 2024 is dismissed and the following orders made



1. The Parties to execute documents necessary to comply with clauses (ii), (iii) and (vi) within 21 days. In the event any party fails to comply the Deputy Registrar, Family Division will sign on behalf of the defaulting party within 7 days of the default.
2. Mention on 28th November, 2024 to confirm compliance
3. Each party to bear their own costs

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF OCTOBER, 2024.

P M NYAUNDI

JUDGE

In the presence of:-

.....Advocates for the Applicant

.....Advocates for the Respondent

Fardosa Court Assistant

