



REPUBLIC OF KENYA



KENYA LAW
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**ARR v UI (Civil Appeal E079 of 2022)
[2023] KEHC 18200 (KLR) (Family) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18200 (KLR)

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

**FAMILY
CIVIL APPEAL E079 OF 2022**

EKO OGOLA, J

MAY 4, 2023

BETWEEN

ARR APPELLANT

AND

UI RESPONDENT

RULING

1. The Appellant and the Respondent got married on January 5, 2019, and the marriage was blessed with one issue. On July 10, 2020, the Respondent herein filed a Petition for Divorce in the Kadhi Court, Matrimonial Cause No KCDC 96 of 2020. Senior Resident Kadhi delivered his Judgment on February 10, 2021 issuing the following orders:-
 - a. Marriage celebrated between the Petitioner and Respondent on the January 5, 2019 be and is hereby dissolved by judicial decree (faskh) and consequently, a divorce certificate does issue.
 - b. The Respondent is to pay the Petitioner mutatu talaq on a reasonable scale.
 - c. Respondent to pay the petitioner her dowry of Kshs 250,000.
 - d. The Respondent to return all petitioner's personal belonging and furniture.
 - e. No orders as to costs.
2. Following the Court's Judgment, the Respondent herein filed a Notice of Motion Application dated November 10, 2021 praying inter alia the Court to declare the Appellant herein in contempt of court and for the Appellant to be Sentenced to pay a fine not exceeding Kshs 200,000 or to be committed to civil jail; for the court to order the Appellant to file an affidavit of means and further pay mutatu talaq.



3. The Kadhi Court delivered its Ruling dated August 17, 2022. The Court held that 'the fact that the respondent is not gainfully employed doesn't mean that he lacks means to comply with the Orders of the Court, his suggestions lack sincerity.' The Appellant was consequently found in contempt of court and sentenced to one month in civil jail.
4. Aggrieved with the decision of the Court, the Appellant filed a Memorandum of Appeal dated August 19, 2022. This is the subject of this Ruling. The Appellant prays for the following Orders: -
 - a. The learned Kadhi erred in law and in fact in ordering that the Appellant be committed to civil jail on the basis of the Contempt of Court Act No 46 of 2016 yet the same was declared unconstitutional.
 - b. The Learned Kadhi erred in Law and in fact in finding the Appellant in contempt of court in respect of non-payment of dowry in the sum of Kshs 250,000 yet the same had been paid.
 - c. The Learned Kadhi erred in law and in fact in complete disregarding the Replying Affidavit filed by the Appellant on the issue of assessment of Mutat al talaq.
 - d. The Learned Judge erred in law and in fact in committing the Appellant to civil jail despite the Appellant having show cause why he should not be committed to civil jail.
5. The Appellant prayed that this Court sets aside the Ruling of the Kadhi's Court dated August 17, 2022.
6. In response to the Appeal, the Respondent in her Replying Affidavit sworn on September 14, 2022 deposed that in the Appellant's submissions dated July 28, 2022, the Appellant attached a copy of a postdated cheque dated August 15, 2022 and when the Kadhi delivered its judgment on August 17, 2022, they found the Appellant to be in contempt. He deposed that this Appeal does not automatically stay the execution of the Kadhi's Ruling.

Determination

7. I have considered the Record of Appeal, the pleadings filed and the submission of counsel. The main issues for determination are as follows:-
 - a. Whether the Kadhi Court had jurisdiction to issue Orders of contempt of court.
 - b. Whether the Appellant complied with the Orders issued by the Kadhi's Court on February 10, 2021
8. It is true as submitted by the Appellant's counsel that currently, and regrettably so, we do not have our own legislation dealing with contempt of court. This is so because in Kenya Human Rights Commission vs Attorney General & Another [2018] eKLR, Mwita, J declared that the entire Contempt of Court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution and found that the said Act as enacted encroached upon the independence of the Judiciary.
9. Before the enactment of the nullified Contempt of Court Act which deleted Section 5 of the Judicature Act Cap 8 Laws of Kenya, the first port of call with respect to the procedure for institution contempt of Court proceedings was and therefore is Section 5 of the Judicature Act Cap That Section provides:
 1. 'The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of



Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

2. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.'

10. So, does the Kadhi Court have Jurisdiction to hear and determine matters of contempt of their judgments and Orders?

11. When the [Contempt of Court Act](#) came to force on January 23, 2017, it provided for the procedure in handling proceedings on contempt committed on the face of the court and conduct committed outside court but classified as constituting an offence committed against the court. Section 6 of the [Contempt of Court Act](#) provided as follows:-

' Jurisdiction of subordinate courts to punish for contempt of court

Every subordinate court shall have power to punish for contempt of court on the face of the court in any case where a person —

- (a) Assaults, threatens, intimidates, or willfully insults a judicial officer or a witness, during a sitting or attendance in a court, or in going to or returning from the court to whom any relevant proceedings relate;
- (b) Willfully interrupts or obstructs the proceedings of a subordinate court; or
- (c) Willfully disobeys an order or direction of a subordinate court.'

12. Further to this, the [Magistrate's Act](#) No 46 of 2016 which came to force on January 2, 2016, issued the Magistrate's Courts with jurisdiction to inter alia hear and punish for contempt arising out of their decisions. Section 10(3) of the Magistrate Act stipulates as follows:-

' (1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.

(2) .

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.'

13. Since the [Contempt of Court Act](#) was declared unconstitutional, does Section 10(3) of the Magistrate's Act apply to the Kadhi's Court since it is a subordinate court? The Preamble to the Magistrate's Court' Act is drawn as follows:-

' AN ACT of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of the [Constitution](#); to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes.'

14. The Act further defines Magistrate's Court as follows:-

' Magistrate's court' means a subordinate court established by Article 169(1)(a) of the [Constitution](#);



15. Section 10 of the Magistrate's Court Act does not apply to the Kadhi's Court, despite the Kadhi's Court being a subordinate court. The Kadhi's Court Act is also silent on whether the said court can punish offences of contempt of court and without the backing of Section 6 of the [Contempt of Court Act](#), the Kadhi's Court lacks the jurisdiction to punish for contempt of court. It is trite that jurisdiction is key and the cornerstone of litigation and without it a court cannot move a step further hence it should down its tools. See [Owners of the Motor Vessel 'Lillian S' v Caltex Oil \(Kenya\) Ltd \(1989\)eKLR](#).
16. On the issue of whether the Appellant complied with the Kadhi's court. The Kadhi's Court had ordered the Appellant to pay the Respondent mutat al talaq on a reasonable scale; to pay the Respondent a dowry of Kshs 250,000; and for the Appellant to return to the Respondent all her belonging and furniture. The Appellant claims that he issued a post-dated cheque payable on August 15, 2018. According to the Appellant, the same has cleared and money credited to the Respondent. Unfortunately, it is unclear from the evidence on record whether the money was actually credited to the Respondent. The Appellant further averred that it was impossible for him to pay mutat talaq of an undefined amount. It is also unclear from the record whether the Respondent's furniture was returned. From the foregoing it is impossible to determine whether the Appellant fully complied with the Judgment of the Kadhi's Court dated February 10, 2021.

Disposition

- a. In the premise, I allow the Appeal.
- b. The Ruling of the Kadhi's Court dated August 17, 2022 is hereby set aside.
- c. The Trial Court is Ordered to look into the circumstances of the case and issue a definite mutat talaq to be paid.
- d. The Respondent is to inform the Trial Court whether the dowry as ordered has been fully paid and whether the furniture and belonging have been returned to her as ordered.
- e. Costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MAY 2023

E.K. OGOLA

JUDGE

In the presence of:

Mr. Odek for the Appellant

Ms. Athman for the Respondent

Gisiele Muthoni Court Assistant.

