



DMM v ENM (Civil Appeal 84 of 2015) [2023] KEHC 19693 (KLR) (Civ) (22 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19693 (KLR)

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

CIVIL

CIVIL APPEAL 84 OF 2015

EKO OGOLA, J

JUNE 22, 2023

BETWEEN

DMM APPELLANT

AND

ENM RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion Application dated March 5, 2020 filed under a Certificate of Urgency. The Application is made by the Respondent/Applicant ENM where she seeks the following Orders; -
 1. Spent
 2. That pending the hearing and determination of this Application, this Honorable court be pleased to order the Appellant to process the transfer documents for the Property namely LR No Dagoretti/Thogoto/1xxxx, Maisonette Number x, [Particulars Withheld] Gardens in compliance with the Court Order made on the November 28, 2019 by Lady Justice Achode in order to secure the Applicant's accommodation
 3. That in the alternative, the deputy registrar be empowered by this honorable court to sign all documents that the Appellant may be required to sign to give effect to the transfer of property namely LR No Dagoretti/Thogoto/1xxxx, Maisonette Number x, [Particulars Withheld] Gardens, in compliance with the Court Order made on the November 28, 2019 by Lady Justice Achode
 4. That this honorable court be pleased to find that the Appellant, DMM is in contempt of court for failure to comply with the Consent Order made on June 19, 2017



5. That the appellant, DMM, be detained in prison for a period of six (6) months or for such period as this Honorable court shall deem necessary for disobedience of the Consent Order made on June 19, 2017.
 6. That this honorable court be pleased to grant such further order or relief as may be just in the circumstances
 7. That the appellant be condemned to pay the costs of this application and incidental costs thereto
2. The application is premised upon Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 51 rule 4 of the Civil Procedure Rules and under section 5 of the Judicature Act Cap 8, Section 4 of the Contempt of Court Act No 46 of 2016 and all enabling powers and provisions of the Law. The Application is based on the grounds set out therein and supported by the Affidavit of the Applicant.
 3. The Appellant opposed the Application *vide* Replying Affidavit dated January 28, 2022. The Respondent/Applicant filed a Further Affidavit dated March 22, 2023.
 4. The Respondent/Applicant filed submissions dated March 22, 2023. There is no record of the Appellant's submissions.

The Respondent/ Applicant's case

5. On 19th of June, 2017 this court adopted a settlement agreement dated June 15, 2017 where the Appellant agreed to settle the matter by providing Kshs 32,500,000/-. The breakdown of the amount was Kshs 16,000,000 to purchase a house for the applicant through a mortgage facility with the appellant giving personal guarantee, Kshs 8,000, 000/- to come from the proceeds of sale of land parcel Kajiado/Delalekutuk/5xxx, Isinya in Kajiado which was to be sold within six months; the remaining Kshs 8,500,000 was to be paid through monthly instalments in Kshs 250,000/- and out of that Kshs 45,000 was to go towards the upkeep of the children and was to commence in the month of July 2017; Kshs 205,000/- was to be paid monthly to the Applicant.
6. The Respondent/ Applicant further deposes that the appellant was to provide education expenses of the children up to the first degree and the children's medical cover. The Appellant was to withdraw Criminal Case No 1085 of 2015 against the Respondent/Applicant on July 7, 2017. According to the Respondent/Applicant, the Appellant was to hand over ownership of Probox KBY 8xx A to the Respondent; the appellant would also continue paying for the Respondent's accommodation until the respondent would take over possession of the acquired property.
7. According to the Respondent/Applicant, the appellant has failed to fulfill the terms of the settlement agreement and has disobeyed the orders of this court. The Respondent/Applicant states that she gave spousal consents to allow the appellant sell the parcels of land in Kikuyu and Kajiado so that funds would be released to the Respondent/Applicant as per the settlement agreement but the Appellant sold the land without knowledge of the Respondent and utilized the money solely. According to the Respondent/Applicant, the property as at May 8, 2017 was worth Kshs 10,000,000/-
8. According to the Respondent/Applicant, the only settlement agreement that the appellant has fulfilled are that he has continued to provide for the children's educational expenses; he withdrew the criminal case against the respondent and the Appellant has provided towards the Respondent's accommodation.
9. The Respondent/Applicant deposes that the Appellant has filed two applications dated February 9, 2018 and December 18, 2019 seeking to set aside the settlement agreement claiming he was



unwell yet in all the mediation sessions the appellant and his advocate attended and never sought an adjournment due to any sickness. The appellant also sought to review the settlement amount from Kshs 32,500,000/- to Kshs 8,000,000/-

10. The Respondent/Applicant deposes further that the Appellant has also failed to comply with orders made on the November 14, 2019 and on the November 28, 2019 by Lady Justice Achode.
11. According to the Respondent/Applicant, the appellant has capacity to fulfill the terms of the Settlement Agreement but the Appellant lacks in good will yet the decision to settle this matter amicably emanated from the Appellant and his Advocate Mr Miller. The Respondent/Applicant prays that her application be granted.

Appellant's Case

12. The Appellant states that the Respondent/Applicant is misleading court for not factoring the several steps the Appellant has made towards complying with the Order. The Appellant states that with regard to Property Parcel LR No Dagoreti/Thogoto/1xxx, Maisonette Number x, [Particulars Withheld] Gardens, he has made all the requisite payments. What is pending is transferring it to the name of the Respondent/Applicant. The Appellant further states to have instructed his advocates to complete the transaction in favor of the Respondent/Applicant. The Applicant's Advocate are aware since they were emailed a copy of the instructions.
13. The Appellant states that he has continuously taken care of their children, being the one footing the biggest portion of the children's expenses.
14. According to the Appellant, his business was extensively impacted by the Covid-19 pandemic and he has been fairing badly in terms of debt rating due to difficult economic times and since the adoption of the consent, there has been drastic change of circumstances which the court should take consideration of.
15. The Appellant confirms receipt of the Respondent/Applicant National Identity Card and KRA PIN to enable him process transfer of Motor Vehicle KBY 8xx A.
16. The Appellant states that it will not be in the interest of Justice if he is put in jail being that he is the major provider for the children and continues to work towards the well-being of his family. He prays for the Respondent/Applicant's application to be dismissed.

Respondent/Applicants' response to the Appellant's case

17. The Respondent/Applicant states that since the Contempt proceedings were filed, the appellant executed the transfer documents of the property Parcel LR No Dagoreti/Thogoto/1xxx, Maisonette Number x1, [Particulars Withheld] Gardens to the Applicant/Respondent's name; that the property is yet to be transferred to her name as the Appellant is yet to activate the transaction on his ardhi sasa account. The Respondent/Applicant confirms that the Appellant has transferred the Motor vehicle KBY 8xxA to her and she is awaiting the logbook to be processed in her name.
18. The Respondent/Applicant states that she is not claiming the Kshs 45,000/- that was meant for upkeep of the children since the children live with the appellant but all other amounts the appellant was supposed to pay he has not done so.
19. According to the Respondent/Applicant, the appellant is a man of means, he is a director of [Particulars Withheld] Limited, he is also a director of the [Particulars Withheld] Limited which owns the [Particulars Withheld] Mall in Karen which is running successfully and he is also a director and



shareholder of [Particulars Withheld] Trustees Limited which is operational and on top of that, the Appellant is a beneficiary of his late father's vast estate therefore the appellant is able to pay the amount as ordered.

Determination

20. After careful consideration of the Application, the Affidavits and the party submissions, the issue coming up for determination is whether the Respondent/Applicant's application should be allowed.
21. The parties herein are divorced and are pursuing a matrimonial property cause. During the proceedings of the matrimonial cause, the matter was referred to mediation where the parties settled and entered into a mediation agreement on June 15, 2017. This Court then adopted the Mediation Agreement into a Consent Order on June 19, 2017 by Hon Justice Musyoka and the words of the Order are produced herein verbatim:-

“It is hereby Ordered by Consent

That the parties herein have engaged in mediation and have agreed as follows: -

- i. That the appellant shall settle the matter by providing a sum of Kshs 32,500,000/- (Kenya Shillings thirty-two million, five hundred thousand only) as a global settlement made out as follows:
 - a. That the appellant will provide a house worthy Kshs 16,000,000 (Kenya Shillings Sixteen Million Only) towards purchase of a house of the Respondent's choice. The Purchase shall be within the next 90 days
 - b. Parties have agreed that the Applicant shall purchase a house through a mortgage facility with him giving his personal guarantee and the property to be in the Respondent's name
 - c. That the land parcel Kajiado/Dalalekutuk/5xxx Isinya, Kajiado County shall be sold within 6 months and the sale proceeds in the sum of Kshs 8,000,000 (Kenya shillings eight million only) to be paid as lump sum to the Respondent. Parties agree that any amount in excess shall go towards mortgage repayments
 - d. That the remaining amount in the sum of Kshs 8,500,000 (Kenya Shillings Eight Million five Hundred Thousand only) shall be paid to the Respondent through monthly instalments in the sum of Kshs 250,000 (Kenya Shillings Two Hundred and fifty thousand) for the duration of 41 months
 - e. Of the Kshs 250,000, Kshs 45,000 (Kenya Shillings Forty-Five thousand) is towards upkeep of the children and the sum of Kshs 205,000 (Kenya Shillings two hundred and five thousand) towards reducing the global settlement amount
 - f. The payment of Kshs 205,000 commences immediately upon the respondent's possession of the acquired house
 - g. The Appellant will commence payment of kshs. 45,000 (Kenya Shillings forty five thousand) in the month of July, 2017.



- h. That the appellant will provide the following towards upkeep of the children
The education expenses up-to the first degree
Their medical cover
- i. That the appellant has agreed to withdraw Criminal Case No 1085 of 2015 against the Respondent on July 7, 2017
- j. That the appellant will hand over ownership of Probox KBY 8xxA to the Respondent by executing necessary documents within 60 days
- k. That the Appellant agrees to continue paying towards the Respondent's accommodation until the Respondent takes over possession of the house purchased by the appellant
- l. That the Respondent agrees to execute documents for spousal consent for two parcels of land that is Kikuyu and Kajiado
- m. Parties have agreed to pursue family counselling. The Respondent shall take up the responsibility of setting up the meetings
- n. Parties agree that the Kajiado parcel of land be placed in the market immediately and sold to the highest bidder
- o. That this agreement is made in full and final settlement in respect of matrimonial property”

22. From the parties' cases and in reference to the Consent Order it is clear that the Appellant has complied with the following: -

- i. Payment of educational related expenses and upkeep of the children
- ii. The motor Vehicle KBY 8xxA has been transferred to the Applicant's name
- iii. The Appellant has made major steps in acquisition of property LR No Dagoretti/Thogoto/1xxx, Maisonette Number x, [Particulars Withheld]Gardens

23. The contention is that the appellant has failed to pay Kshs 8,500,000 an amount which was payable in monthly instalments in the sum of Kshs 250,000 for a duration of 41 months and also that the appellant sold the Kajiado property and solely utilized the funds which is contrary to the consent Order. The Appellant did not respond on the issue of the allegedly sold property though there is an agreement for sale provided by the Applicant.

24. The Respondent/Applicant seeks for the Appellant to be held in contempt of the Consent Order.

25. Contempt of court is that conduct or action that defies or disrespects authority of court. *Black's Law Dictionary* 9th Edition, defines contempt as:

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.” Properly put, contempt is conduct that impairs the fair and efficient administration of justice. Section 5 of the *Judicature Act* confers jurisdiction on the superior courts to punish for contempt



26. *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR Judge Mwita stated that:-

“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.”

27. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Ibrahim, J. (as he then was), underscored the importance of obeying court orders, stating:

It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void. (emphasis)

28. The Respondent/Applicant has prayed that the Appellant be cited for contempt of court and further to be committed to civil jail for a period of six months or whatever period the court will deem fit.

29. As earlier discussed, the Appellant has complied with the Order partially, he has argued that he was affected largely by the Covid-19 Pandemic which affected him financially. The argument of the Applicant is that the Orders were granted way before the pandemic began and the Appellant is a man of means and should be able to pay the amount in the consent Order.

30. 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. That is why the court observed in *Carey v Laiken* 2015 SCC 17 that if courts were to find contempt too easily, “a court’s outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect. The court’s contempt power should be used cautiously and with great restraint. It is an enforcement power of last resort rather than first resort.”

31. I find that the Appellant is in compliance with most parts of the Order, he has been living with and taking care of the children something which the Applicant has attested to. Even though he has not complied with some parts of the Order, it would not be prudent to commit him to civil jail for how then will he provide for his children and even pay the amounts due to the Applicant.

32. Taking into account the circumstances of this case and the 60% compliance by the Appellant, the Appellant is Ordered to comply with the Consent Order of June 19, 2017 as follows: -

1. The Appellant shall complete the transfer of property LR No Dagoretti/Thogoto/1xxx, Maisonette Number x, [Particulars Withheld] Gardens to the Respondent/Applicant within sixty (60) days from the date of this Ruling



2. The Appellant shall issue to the Respondent/Applicant Kshs 8,000,000 (Kenya Shillings Eight Million Only) from the proceeds of the sale of Kajiado/Dalalekutuk/5xxx Isinya Kajiado County within the next six (6) months and any amount in excess shall be used towards Mortgage repayment.
3. In consideration that the Respondent/Applicant is no longer interested in Kshs 45,000 per month since the children now live with the Appellant, the Appellant shall pay the Respondent/Applicant Kshs 6,655,000 which is the balance after deducting Kshs 45,000/- for 41 months.
4. For avoidance of doubt, the Appellant is granted a maximum of six (6) months to fully comply with the orders of the court made on June 19, 2017.
5. The Appellant shall bear the costs of this Application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE 2023.

E.K. OGOLA

JUDGE

Ruling read and delivered in chambers online in the presence of:

M/s Ndirangu for the Respondent/Applicant

Mr. Mabeya hold brief for Omari for the Appellant

Ms. Gisiele Court Assistant

