



**KAR v JR (Matrimonial Cause E030 of 2022)  
[2023] KEHC 18588 (KLR) (Family) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18588 (KLR)

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

**FAMILY**

**MATRIMONIAL CAUSE E030 OF 2022**

**MA ODERO, J**

**JUNE 2, 2023**

**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY ACT 2013**

**BETWEEN**

**KAR ..... APPLICANT**

**AND**

**JR ..... RESPONDENT**

**RULING**

1. Before this court are two applications for determination as follows:-
  - (a) Notice of Motion dated July 27, 2022.
  - (b) Notice of Motion dated September 12, 2022.
2. The two application were canvassed by way of written submissions. The Applicant filed the written submissions dated January 18, 2022 whilst the Respondent relied upon the submissions dated January 31, 2023.
3. I will now proceed to deal with each application individually.

**Notice of Motion dated July 27, 2022**

4. By this application the applicant KAR sought the following orders:-
  - “ 1. Spent.
  2. Spent.
  3. Spent.



4. The Honourable Court be pleased to review and set aside the orders of this Honourable Court issued on June 23, 2022 directing the respondent and/or her servants or agents to deposit the proceeds of the sale of the suit property situated on 2 Gatundu Crescent Kileleshwa L. R. No.209/6880) in an escrow account to be opened in the name of both advocates pending the hearing and determination of the Application dated May 9, 2022.
  5. This honourable court be pleased to issue such further orders as it may deem fit, appropriate, and expedient to grant in the circumstances of this matter.
  6. The costs of this Application be awarded to the respondent.
  7. The costs of this application be provided for”.
5. The application which was premised upon Order 45 Rule 1, Order 51 of the *Civil Procedure Rules*. Sections 1A, 1B, 3, 3A, 63e and 80 of the *Civil Procedure Act* and all other enabling provisions of the law was supported by the affidavit of even sworn by the applicant.
  6. The respondent J.R opposed the application through his replying affidavit dated September 9, 2022.
  7. This suit was commenced by way of an Originating Summons dated May 9, 2022. Contemporaneously with the summons the plaintiff sought orders that the proceeds of sale of alleged matrimonial home situated at 2 Gatundu Crescent Kileleshwa L.R. No.209/6880 (hereinafter ‘the suit property’) be placed in an escrow account pending the hearing and determination of the suit.
  8. When the matter came up in court on May 19, 2022 the parties indicated that they were willing to negotiate as an attempt to reach an out of court settlement. The court allocated them time to pursue negotiations. The matter was to be mentioned on 23<sup>rd</sup> June, to report back on the status of the negotiations.
  9. The parties did hold mediation sessions but failed to reach any agreement. When the matter was mentioned in court on June 23, 2022 Counsel for the applicant informed the court that the property had already been sold for Kshs.260 million. He stated that the applicant had instructed her Advocate to utilize part of the sale proceeds to pay outstanding debts and to pay a deposit on a replacement property and investments. That only Kshs.50 million was remaining out of the proceeds of sale.
  10. The court took issue with the applicant’s action in utilizing the proceeds of sale of the suit property without seeking the consent of the other party or the authority of the court to do so. The court directed that the entire proceeds of sale be deposited in an escrow account to be opened in the names of the Advocates for both parties pending the hearing and determination of the application. It is this order that the applicant now seeks to have reviewed and/or set aside.
  11. The applicant argued that in full knowledge that the proceeds of sale were no longer available the respondent’s Advocates never the less moved the court to issue an order which had already been overtaken by events. As such the applicant states that she is unable to fully comply with the court orders. That no prejudice will be suffered by the respondent as the proceeds of sale have not been fully utilized. The applicant also indicates that she still lives with the respondent.
  12. As stated earlier the application for review, was opposed. The respondent stated that during the negotiations at a meeting held on June 9, 2022 counsel for the applicant stated that he had not undertaken to hold on to the proceeds of sale. The respondent then filed an application dated June 14, 2022 seeking to have the proceeds of sale deposited into an escrow account.



13. When the matter next came for mention Counsel for the applicant indicated to the court that he was holding the proceeds of sale in his client account. The court then directed that the funds be placed into an escrow account which order has not yet been complied with.
14. The respondent submits that the application for review of the court orders is not warranted and states that the applicant is in effect trying to appeal the order through the back door. He urges the court to dismiss this application with entirety.

### **Analysis And Determination**

15. I have considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties.
16. Order 45 of the Civil Procedure Rules provides as follows.

“(1) Any person considering himself aggrieved –

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of Judgment to the court which passed the decree or made the order without unreasonable delay”.
17. In *Muyodi v Industrial and Commercial Development Corporation & another* (2006) 1 EA 243, the court of Appeal described an error apparent on the face of the record as follows:

“... In *Nyamogo & Nyamogo v Kogo* (2001) EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is applicable in the matter before us”. (emphasis mine)

18. The pertinent issue for determination herein, therefore, is whether the applicant herein has established any of the above grounds to warrant an order of review.
19. There has been no claims by the applicant that they have been a discovery of new and important evidence which was not within their knowledge at the time the application was being argued. Nor is there any allegation of an error apparent on the face of the record.



20. What the Applicant states is that the orders made by the court on June 23, 2022 had already been overtaken by events as part of the proceeds of sale of the suit property had already been utilized upon her instructions.
21. It is important to note that when the matter was mentioned in court on May 19, 2022, the court gave the parties time to negotiate in an attempt to reach an out of court settlement. The court did not adjourn the matter to enable/facilitate the use of the proceeds of sale by any party.
22. The court on June 23, 2022 noted that counsel for the Applicant had earlier on May 19, 2022 given an oral undertaking not to utilize the proceeds of sale pending the outcome of negotiations and the next court date. Unfortunately, due to inadvertence this undertaking was not recorded in the court's proceedings of that day.
23. However, even without a recorded undertaking the respondent and her Advocate were fully aware that the dispute between the parties revolved around the said property and were aware that the court had only adjourned the matter to enable parties attempt to reach an out of court settlement.
24. The proper and ethical thing would have been for parties to return to court and indicate that no agreement had been reached, then seek the directions of the court regarding the utilization and/or preservation of the proceeds of sale. Instead, having reached no settlement the applicant and her Advocate without seeking the consent of the Respondent or seeking the authority of the court, unilaterally decided to utilize the proceeds of sale. This they did in the full knowledge that this was the property in dispute between the parties. Clearly their actions were an attempt to steal a match against the Respondent.
25. The applicant cannot, having acted mala fides and unethically now approach the court seeking to have the orders in questions reviewed. This would be tantamount to allowing the Applicant to benefit from her own misconduct.
26. I find no valid grounds to review or set aside the courts orders of June 23, 2022 and dismiss with entirety the application dated July 27, 2022.

#### **Notice of Motion dated September 12, 2022**

By this application the Applicant J.R sought the following orders:-

1. Spent
2. That this honourable court be pleased to find that the respondent is in breach and or contempt of the orders made by this honourable court on June 23, 2022.
3. That summons be issued against the respondent to appear in court physically and show cause why she should not be committed and detained in civil jail for a term of six (6) months or as the court may deem fit for contempt of the court order made on June 23, 2022.
4. That this honourable court be pleased to make such orders as may be appropriate.
5. That the costs of this application be provided for".
27. The application was premised upon section 5(1) of the *Judicature Act*, part 81-1 of the *English Civil Procedure Rules* (Amendments No.3) Rules 2020 and part 8 – 1, 2, 3, 4, 5, 6 and 7 and Order 51 Rule of the *Civil Procedure Rules* 2010 and all other enabling provisions of the law and was supported by the affidavit of even date sworn by the applicant.
28. The respondent KAR opposed the application.



29. The applicant stated that on June 23, 2022 the court directed the respondent to deposit the proceeds of sale of the suit property into an escrow account opened in the joint names of the two Advocates on record. That this was not done. That instead the Respondent filed an application seeking to set aside the said order.
30. The applicant states that the respondents actions are prejudicial and are intended to defeat his suit before the same is heard and determined by the court.
31. The respondent in opposing the application argued that the order was not capable of being obeyed as the same had been overtaken by events given that the suit property had already been sold to a third party and part of the proceeds of sale utilized upon the instructions of the respondent. The respondent insists that no undertaking had been given by her Advocate or herself to request for the proceeds of sale.

### **Analysis and Determination**

32. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions of both parties
33. The only issue for determination is whether the respondent has disobeyed the orders made by the court on October 9, 2014.
34. *Black's Law Dictionary* 7<sup>th</sup> Edition defines contempt as follows:-
 

“The failure to obey a court order that was issued for another party’s benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order”.
35. *Halsbury's Laws of England* (4<sup>th</sup> Edition (9<sup>th</sup> Re-Issue), pg. 33, para 52) defines civil contempt as follows:-
 

“...disobedience to process is a civil contempt of court to refuse or neglect to do an act required by a Judge or order of the court within the time specified in the Judgement order requiring a person to abstain from doing a specified act, or to act in breach of an undertaking given to the court by a person, on the faith of which the court sanctions a particular course of action or inaction...”
36. Section 5 of the *Judicature Act* which confers jurisdiction on the superior courts to punish for contempt provides as follows:
  - “(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.
37. In the case of *Ringer & 2 others v Muite & 10 others* Nairobi Civil Suit No.1330 of 1991. The court set out the conditions upon which a finding of contempt may be made as follows:-
  - (a) There must be an existing court order capable of being disobeyed;



- (b) The alleged contemnor must have been made aware of the existence of the court order; and
- (c) There must be shown to be a breach (disobedience) of the said court order.
38. The reason why courts punish for disobedience of its orders is in order to uphold the dignity of the court and to ensure that courts are not reduced to issuing orders in vain.
39. In *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* (2021) eKLR, the court 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”
40. In order to establish contempt which may give rise to circumstance sanctions the standard of proof is above a balance of probability but below the standard required in criminal cases being beyond reasonable doubt. In *Muthika v Baharini Farm Ltd* (1985) KLR 229, 234, the Court of Appeal stated as follows:-
- “...In our view the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to offence which can be said to be quasi-criminal in nature”.
41. The order in question was made on June 23, 2022. The suit property was sold on June 9, 2022. A copy of a sale Agreement dated June 9, 2022 is annexed to supplementary Affidavit dated January 31, 2023 (Annexure ‘P0‘1’)
42. By the time the matter come up in court on June 23, 2022 the property had already been sold. Therefore, the respondent contention that the order had been overtaken by events is valid.
43. The undertaking made to sequester the proceeds of sale were made not by the applicant but by her Advocate. As pointed out earlier due to inadvertence that undertaking was not recorded.
44. It is trite law that the High Court is a court of record. The parties can only be held to account for orders/directions which have been recorded by the court.
45. Given the circumstances of this case I find no valid of rounds upon which to hold the respondent in contempt. All that exists is proof of bad faith by the respondent in proceeding to direct her Advocate to disburse the proceeds of sale without first coming back to the court to seek directions on the matter. Let the respondent grapple with her own conscience over her actions.
46. Finally, I dismiss the application dated September 12, 2022 and I direct that the balance of the proceeds of sale being Kshs.50 million be placed in an escrow account opened in the name of both Advocates. If the Plaintiff eventually succeeds in his claim after the main suit is heard then the court will take into account the funds which have already utilized by the respondent.
47. This being a family matter each side will bear its own costs.



DATED IN NAIROBI THIS 2<sup>ND</sup> DAY OF JUNE, 2023.

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**MAUREEN A. ODERO**

**JUDGE**

