



**Torry v Monaco (Miscellaneous Application E023 of 2022)  
[2023] KEHC 21309 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21309 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E023 OF 2022**

**SM GITHINJI, J**

**JULY 20, 2023**

**BETWEEN**

**SAFINA NEGESA TORRY ..... APPLICANT**

**AND**

**MAURIZIO MONACO ..... RESPONDENT**

**RULING**

1. There are two applications pending before the court for determination. The application dated April 6, 2022 seeking the following orders;
  - a. That an order of temporary injunction be issued against the respondent, his servants, agents, employees, tenants and or any other person (s) acting on his behalf or claiming through him, prohibiting them from preventing the applicant from returning to the house standing on land known as Watamu 615 and Watamu 616, transferring, leasing, fencing, surveying, selling, developing, trespassing and adversely dealing in any way with the house standing on land known as Watamu 615 and Watamu 616 pending the hearing and determination of this application.
  - b. That an order of temporary injunction be issued against the respondent, his servants, agents, employees, tenants and or any other person (s) acting on his behalf or claiming through him, prohibiting them from preventing the applicant from returning to the house standing on land known as Watamu 615 and Watamu 616, transferring, leasing, fencing, surveying, selling, developing, trespassing and adversely dealing in any way with with the house standing on land known as Watamu 615 and Watamu 616 pending the hearing and determination of this suit.
  - c. That the officer commanding police station Watamu to ensure compliance with the court orders.
  - d. That costs be in the cause.



2. The application is founded on the grounds set out on the face of it and the supporting affidavit of **Safina Negesa Torry** who deposed that she met the respondent in the year 2011 and they cohabited from time to time. That around the year 2012/2013 they bought two motor cycles for business which the applicant was running while the respondent was in Italy and they would later sell the motor cycles. She averred that later they bought a parcel of land jointly which land she paid for and eventually they constructed a matrimonial home under the applicant's supervision and her money. It was further averred that in 2021 the respondent asked her to sell the matrimonial home which was the beginning of their differences and later disputes on ownership of the matrimonial home.
3. The respondent filed a replying affidavit dated April 21, 2022 stating that he was not involved in any formal marriage with the applicant and that he met the applicant when he was on a tour to Kenya. That he would later send the applicant money from time to time via western union to start several projects which money she squandered. He deposed that in 2013 he visited Kenya and through the assistance of the applicant he acquired a parcel of land and as a token of appreciation he gave the applicant Kshs 400,000/=. Further, on several occasions he sent her money amounting to Kshs 2,500,000. It was also deposed that the applicant coerced him to sign an agreement where she had included herself as the purchaser by stating that foreigners cannot own land in Kenya. In addition, it was deposed that the property in contest is plot no. 615 and not plot no. 616 and none belong to the applicant.
4. The court issued orders on April 12, 2022 granting prayers 1 and 2 of the application. The respondent allegedly did not comply with the said orders which necessitated the filing of the Notice of Motion dated May 30, 2022 seeking the following orders;
  - a. That this honourable court do cite the respondent namely Maurizio Monaco for contempt of this court's order of April 12, 2022 and commit him to civil jail for a period of 6 months or less as the court shall please.
  - b. That a warrant of arrest and detention to civil jail do issue against Maurizio Monaco.
  - c. Costs of this application be awarded to the applicant.
5. The application is premised on the sworn affidavit of Safina Negesa Torry the applicant who stated that the order was served upon the respondent together with other pleadings in this case and despite the order being duly served upon the respondent, he has knowingly blatantly disobeyed the order by personally preventing the applicant from accessing their matrimonial home.

### **Analysis and Determination**

6. The applications were canvassed by way of written submissions which I have carefully considered. The issues arising for determination are;
  1. Whether the injunctive orders sought are meritorious.
  2. Whether the respondent is in contempt of the court orders issued on April 12, 2022.
7. The germane principles on interlocutory injunctions were stated by the Court of Appeal in East Africa in the case of *Giella v Cassman Brown & Co Ltd* (1973) EA as follows:
  - a. The applicant must first establish a *prima facie* case with a probability of success.
  - b. The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.



- c. Where there is doubt on the above, then the balance of convenience should tilt in favor of the applicant.
8. The above principles were restated in the case of *Micah Cheserem v Immediate Media Services & 4 others* [2000] eKLR cited by the respondents, thus:
- Firstly, the applicant must establish a prima facie case with a probability of success. Secondly, the applicant must show that he or she stands to suffer irreparable loss that cannot be adequately compensated by way of damages. Thirdly, where the court is in doubt, then the balance of convenience should tilt in favor of the applicant.
9. The applicant’s case is predicated on the suit property being matrimonial property. Matrimonial property is defined in Section 6 of the *Matrimonial Property Act* as follows:
- (1) For the purposes of this Act, matrimonial property means—
- a. the matrimonial home or homes;
- b. household goods and effects in the matrimonial home or homes;  
or
- c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage
10. From the above definition, matrimonial property must constitute the matrimonial home or homes of the parties and household goods and effects in such home or homes. Other property jointly owned and acquired during the subsistence of the marriage of the parties also constitutes matrimonial property. However, from the definition it is clear that acquisition of a property during the subsistence of a marriage does not necessarily make it matrimonial property unless it is jointly owned.
11. The applicant contends that the suit property is matrimonial property as they cohabited with the respondent whenever he visited the country. On his part, the respondent maintains that he was never involved in any formal marriage with the applicant. This then raises the question of proof of marriage. Is it safe to presume that there existed a marriage between the parties herein?
12. The Supreme Court of Kenya in *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* (Petition 9 of 2021) [2023] KESC 2 (KLR) observed thus:
- “The doctrine of presumption of marriage was on its deathbed which reasoning was reinforced by the changes to the matrimonial laws in Kenya. The presumption should only be used sparingly where there was cogent evidence to buttress it.”
13. In the instant case, I am not convinced that the applicant has adduced evidence which would invoke the doctrine of presumption of marriage even through long cohabitation. Ergo, I do not find that the suit property was matrimonial property. In the circumstances, I am not convinced that the applicant has satisfied the three tenets of grant of an interlocutory injunction as pronounced in the *Giella v Cassman Brown Case*. That said, the prayer for injunctive orders is hereby declined.
14. From a copy of sale agreement marked SNF-5 in the applicant’s documents, it raises the issue of ownership of the suit property. In my view, this would be an issue best canvassed in the Environment and Land Court that is mandated by the *Constitution* to deal with matters relating to land.



15. Black’s Law Dictionary defines contempt of Court 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.
16. Sections 5 of the Judicature Act grants jurisdiction to superior courts to punish for contempt of court.
17. Further, Order 40 Rule 3 of the Civil Procedure Rules (2010) provides that in the event of disobedience, or breach of any terms of a temporary injunction, the Court granting that injunction may order for property of the person guilty of such disobedience or breach to be attached or may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.
18. In the case of Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya and Another [2005] KLR Ibrahim J (as he was then) stated;

“It is essential for the importance of the rule of law and order that the authority and 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 and void.”
19. The threshold for prove of contempt was laid out by the Supreme Court of India in Mabinderjit Singh Bitta V Union of India & Others IA No 10 of 2010 as follows; -

“In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party who is before the court and even otherwise, is expected to obey orders of the court in its spirit and substance. Every person who is required to respect and obey the orders of the court with due dignity for the institution.”
20. The key aspects for contempt of court are intentional and willful violation of the order of the court. Bearing that in mind, the question is whether the respondent intentionally and willfully violated the orders of the court dated April 12, 2022. The applicant brought contempt proceedings against the respondent and stated that despite the respondent being served with the court order he blatantly disobeyed the same. I have looked at the said court order. In its totality, it was meant to restrain the respondent from preventing the applicant from returning to the suit property. It was incumbent upon the applicant to demonstrate that the respondent disobeyed the court order. From the material placed before me, I find that there is no shred of evidence to show how the respondent disobeyed the said orders of the court. This prayer also fails.
21. In sum the notice of motions dated April 6, 2022 and May 30, 2022 fail in their entirety and the same are hereby dismissed with no orders as to costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 20TH DAY OF JULY, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**



**In the Presence of; -**

Ms Mulleniah holding brief to Mr Nyongesa for the Applicant

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