



REPUBLIC OF KENYA



KENYA LAW
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**Wanjiru v Mureithi (Originating Summons 16 of 2014)
[2023] KEHC 23240 (KLR) (15 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23240 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS 16 OF 2014**

G MUTAI, J

SEPTEMBER 15, 2023

BETWEEN

ESTHER WAMBUI WANJIRU APPLICANT

AND

ALBERT NDERIH MUREITHI RESPONDENT

RULING

1. There are 3 matters coming up for determination before me regarding the instant cause. Two of these were filed by the Respondent. The Applicant, on the other hand, filed a Notice to Show Cause. I shall refer to each of these matters in turns.
2. The Respondent filed a Notice of Motion Application dated 23rd August 2022 seeking the following orders:-
 - a. Spent;
 - b. This honourable court be pleased to grant orders of stay of execution of the orders granted by this honourable court on 9th June 2016 and the subsequent orders of the NTSC ruling delivered by this honourable court on 29th July 2022 and all consequential orders thereon pending hearing and determination of the application;
 - c. This honourable court be pleased to grant order of setting aside of the orders granted by this honourable court on 9th June 2016 and the subsequent orders of NTSC ruling delivered by this honourable court on 29th July 2022 and all consequential orders thereon pending the hearing and determination of the application;
 - d. This honourable court be pleased to review the orders granted by this honourable court on 9th June 2016 and the subsequent orders of NTSC ruling delivered by this honourable court



on 29th July 2022 and all consequential orders thereon pending the hearing and determination of the application;

- e. Costs of this application be in the cause.
3. The application is premised on the grounds stated therein and also on the Supporting Affidavit of the Applicant sworn on 23rd August 2022. The Respondent/Applicant stated that he deposited Kes.260,000/- directly to the account of the Applicant's advocate. The said payment arose from the orders that this court issued on 9th June 2016 vide which the Respondent/Applicant was directed to pay the sum of Kes.20,000/- per month to the Applicant so that she could obtain suitable accommodation in Mombasa after the Respondent was transferred by his employer to Nairobi. He averred that the issues of the marriage are adults staying in Canada. He stated that the court in its ruling of 29th July 2022 did not take into consideration the fact that the Applicant/Respondent herein had ceased being his wife and dependant as per the judgement delivered on 2nd December 2020 by the Chief Magistrate in a divorce petition he filed against her.
4. He denied that he had deliberately refused to pay the rent arrears and stated that he was willing to pay the correct amount. He averred that he had paid a total of Kes.500,000/- inclusive of the Kes.260,000/- stated above. He therefore urged the court to allow the application.
5. In response the Applicant/Respondent filed a Replying Affidavit sworn on 22nd September 2022 vide which she stated that the Respondent/Applicant was ordered, by consent, to pay half of her rent, Kes.20,000/-, to enable her vacate the matrimonial home in Nyali. She deposed that the said order was not related to the divorce proceedings. It was issued, she argued, to enable her vacate the matrimonial home. In her view it was part of her share in the matrimonial property. For that reason, she deposed, the orders sought by the Respondent/Applicant shouldn't issue.
6. She further stated that the applicant filed a similar application dated 13th March 2017 which was dismissed vide ruling delivered on 6th October 2017. She argued that the Respondent/Applicant had not complied with the orders of this Court directing him to make payment to the Applicant/Respondent and thus he is undeserving of the exercise of the court's discretion. She deposed that the Respondent/Applicant had not come to court with clean hands and is therefore not deserving of equitable remedies. She argued that the application herein is a resjudicata and a nullity in law by virtue of the provisions of the [Civil Procedure Act](#) and the Rules made thereunder. Ms. Wanjiru deposed that the Respondent/Applicant has not appealed against the judgement that this Court delivered on 23rd December 2021.
7. The Applicant/Respondent stated that the instant application has no merit, was made in bad faith and ought to be dismissed. She argued that this court is being asked to sit on appeal on its own decision. It was submitted that the application does not meet conditions for review. Lastly it was urged that the application is bad in law, mischievous, vexatious, scandalous and an abuse of the court process.
8. The application was canvassed by way of written submissions.
9. The Respondent/Applicant through his advocates Mutanu & Co. Advocates filed written submissions on 1st March 2023. Counsel submitted on three issues to wit whether the court orders issued on 9th June 2016 and the subsequent orders of the NTSC ruling of 29th July 2022 should be set aside; whether the court orders issued on 9th June 2016 and the subsequent orders of the NTSC ruling of 29th July 2022 should be reviewed and lastly, who should be granted costs of the suit.
10. On the 1st issue counsel submitted that the decision whether to or not to set aside orders is discretionary. To support this position Counsel relied on Section 3A of the [Civil Procedure Act](#) on the inherent



- powers of the court and the case of David Bundi versus Timothy Mwenda Muthee [2022]eKLR. She submitted that the respondent is a woman of means capable of taking care of herself as she is a business lady. Setting aside orders of 9th June 2016 would not interfere with her standard of living. Counsel urged the court to set aside the said orders, as well as the subsequent orders of NTSC of 29th July 2022 as they had served their purpose.
11. On the 2nd issue counsel relied on Order 45 Rule 1(1) of the Civil Procedure Rules and the case of Salama Mahmoud Saad versus Kikas Investments Limited & Another [2014]eKLR on review and submitted that the Respondent/Applicant's ground for review is that there was an error in the calculation of the monthly rent that is supposed to be paid to the Applicant/Respondent. The Respondent/Applicant urged that he was obliged to pay the Applicant/Respondent up to December 2020 when their marriage was dissolved. It was submitted that the orders issued on 9th June 2016 were based on the fact that the Applicant/Respondent and the Respondent/Applicant were then respectively wife and husband and the Applicant/Respondent was living with the issues of the union. The Respondent/Applicant stated that the said position had changed since the delivery of the divorce judgment on 2nd December 2020 and the children are now adults living in Canada. That being so, it would be unfair for the Respondent/Applicant to continue paying rent for the Applicant/Respondent who was no longer his wife and who in any case was not living with the children.
 12. On the third issue counsel relied on Section 27 of the *Civil Procedure Act* and the case of Cecilia Karuru Ngayu versus Barclays Bank of Kenya Limited & Another [2016] eKLR and submitted that it is trite law that costs follow the event.
 13. In conclusion counsel urged the court to set aside and review the court order of 9th June 2016 and subsequent orders of NTSC ruling of 29th July 2022.
 14. In response the Applicant/Respondent, through her advocates, P.A. Osino & Co. Advocates, filed written submissions dated 28th February 2023 and filed on the same day. Counsel submitted that no evidence had been placed before court in respect to the orders referred to by the applicant and thus the court is not seized of sufficient material to review the orders sought. Counsel relied on the case of Guardian Bank Limited versus Jetha and Sons Limited & 3 Others [2004] eKLR in support of this proposition.
 15. Counsel submitted that the application is made under Order 42 rule 6 of the Civil Procedure Rules whereas no Notice of Appeal has been filed against the orders referred to by Respondent/Applicant. Thus, the prayer for stay of execution is incompetent, superfluous and ought to be struck out. In support of the said contention Counsel relied on the case of University Of Eldoret & Another versus Hosea Sitienei & 3 Others [2020] eKLR.
 16. Counsel further submitted that there is nothing to stay as the order issued on 29th July 2022 had already been served upon the Respondent/Applicant's employer and deductions had commenced.
 17. On review counsel submitted that one cannot apply for both appeal and review at the same time, as the applicant has done, making the application incompetent and therefore the same ought to be struck out.
 18. Counsel further submitted that there is no error apparent on the face of record or mistake and the correct avenue would have been appeal after delivery of judgement of 23rd December 2021.
 19. The Applicant/Respondent contended that the prayers sought in respect of orders of 9th June 2017 are res judicata as they had been sought earlier. To support her argument counsel relied on section 7 of the *Civil Procedure Act*.



20. On setting aside counsel submitted the applicant did not meet the conditions set out in the case of *The Board of Trustees of NSSF versus Michael Mwalo* [2015]eKLR on setting aside consent orders. It was submitted that the order of 9th June 2016 was a product of an agreement mediated by the court. The Applicant/Respondent urged that the sum payable under the said order was proposed by the Respondent/Applicant following which the Applicant/Respondent moved out of the matrimonial home.
21. The Respondent/Applicant filed a Notice of Motion Application dated 8th May 2023 seeking the following orders: -
- a. Spent;
 - b. That this honourable be pleased to issue stay of proceedings and/or the applicant/respondent's Notice to Show Cause herein pending hearing and determination of this application inter parties;
 - c. That this honourable court be pleased to offer the correct interpretation and /or clarification of judgement delivered herein on 23rd December 2021 and thereafter make the following imminent orders:-
 - i. That the interim orders issued on 9th June 2016 for the respondent to pay the applicant's house rent ceased upon the dissolution/divorce of the parties' marriage in Mombasa Chief Magistrate's Divorce Cause No.33 of 2014 on 2nd December,2020;
 - ii. Alternatively, the interim orders issued on 9th June 2016 for the respondent to pay the applicant's house rent ceased upon the determination of this matter via judgement herein dated 23rd December 2021;
 - iii. That the interim orders issued on 9th June 2016 for the respondent to pay the applicant's house rent did not include interest on the same hence no interest is payable on the same;
 - iv. That the consent recorded in court for plot numbers 704,705,708,709 ,354 and 717 Majengo Mapya as per paragraph 11 of the judgement should be adopted as an adopted as an order of this court and the applicant to avail their titles for equal division and to execute documents of transfer accordingly;
 - v. That paragraph 48(ii) of the judgement to specify the shares to include all physical assets and profits to be determined by auditors made by the account's companies from incorporation to the date of judgement;
 - vi. The execution of any transfer documents in (iv) above and paragraph 48(iii) to be done jointly and simultaneously;
 - vii. Any other matter the court deem fit to interpret so as to bring the judgement to finality.
22. The application is premised on the grounds in the body of the Motion and also on the Supporting Affidavit of the Respondent/Applicant. He stated that he filed a suit for division of matrimonial property and that a judgement was delivered on 23rd December 2021. He sought interpretation of, inter alia, the following points; the continuation of payment of rent by the Respondent/Applicant to the Applicant/Respondent even after the divorce was granted, notice to show cause by the respondent vis a viz the judgement of Chief Magistrate, in the Chief Magistrate Divorce Cause No.33 of 2014 and



- whether the rent is payable to the landlord or the Applicant/Respondent. He urged the court to allow the application.
23. The Applicant/Respondent filed a Certificate of Urgency dated 24th April 2023 vide which she sought a date for the hearing of the Notice to Show Cause. The Notice to Show Cause was subsequently issued on 10th May 2023. Vide the said Notice she sought payment of the sum of Kes.731,700/-. The basis of the said demand was the ruling of this court delivered on 29th July 2022. The Applicant/Respondent that the Respondent/Applicant had accrued a sum of Kes.1,633,250/-, of which he had paid a sum of Kes.926,000/- in March 2023 leaving a balance of Kes.727,250/- as at 4th April 2023.
 24. The Respondent/Applicant opposed the said Notice to Show Cause and contended that his obligation to pay Kes.20,000/- in respect of the Applicant/Respondent's rent lapsed upon the dissolution of the marriage or delivery of the judgment in this cause. It was submitted that in any case whatever amount was justly due from the Respondent/Applicant was settled in full in March 2023 when the Respondent/Applicant paid Kes.926,000/- to the Applicant/Respondent. The Respondent/Applicant denied that the Applicant/Respondent could justifiably demand interest on the outstanding amounts.
 25. The Applicant/Respondent filed a further affidavit sworn on 6th June 2023. She stated that the Respondent/Applicant made payment in the sum of Kes.360,0000/- on 23rd May 2023 being monthly maintenance up to the May 2023 leaving a balance of Kes.387,250/-.
 26. She stated that the allegation that the interest is not due is misleading as it was ordered by court and that as per the practice directions and procedures in the high court an interest of 14% per annum accrues where a decree is silent in respect to the payment of interest. She urged that the issue of interest is still pending as the rent outstanding continues to accumulate.
 27. She stated that the ruling of 6th October 2017 dismissed a similar application dated 13th March 2017. If the Respondent/Applicant was dissatisfied with the judgement of 15th December 2021 he ought to have appealed against the same. She urged that the right avenue to set aside the order for payment of rent is through an appeals since the court had become functus officio.
 28. When the matter came for hearing on 21st June 2023 counsel for the Respondent/Applicant reiterated the averments in his affidavits in respect to the orders of 9th June 2016 and submitted that there is a judgment distributing properties. The said judgment notwithstanding it was submitted that the Applicant/Respondent wishes to be maintained permanently even after divorce was granted.
 29. On whether the application is resjudicata counsel submitted that the issue of whether there should be payment post matrimonial cause is an issue that was never canvassed. It was submitted that Respondent/Applicant is seeking clarification on whether a party can enjoy alimony in perpetuity.
 30. Ms. Osino, counsel for the Applicant/Respondent submitted that the court cannot clarify what is not in the judgement.
 31. Counsel further submitted that there was no statement in the ruling issued by this Court in 2016 that the court is being asked to interpret. She urged that he issue of divorce was factored in Judge Onyiego's judgement at paragraph 19 and that the only remedy available to the Respondent/Applicant is to appeal against the judgement.
 32. On the Notice to Show Cause counsel referred the court to the ruling of 29th July 2022, in particular to paragraph 23 thereof. It was stated that the rent amount remains outstanding, as does the interest. Counsel urged the court to dismiss the application.



33. In response Mr. Origi counsel holding brief for Ms Musyoki submitted that the application is brought under the inherent powers of the court. He argued that the court had indicated that unless the order for payment of rent is set aside it remains valid. He reiterated the Respondent/Applicant's application and urged the court to allow the application dated 8th May 2023 and dismiss the Notice to Show Cause.
34. I have considered the applications before me. I find and hold that the application dated 23rd August 2022 and filed on 25th August 2022 is spent. This is so because the same does not seek permanent orders. The application is in vacuo. There is nothing for me to do as the orders sought were interlocutory in nature.
35. On the application dated 8th May,2023 the applicant seeks an interpretation of the judgement of 23rd December,2021. The court in paragraph 18 of the said judgement stated,
- “...besides when the respondent moved out of the house in Nyali Barracks following his transfer, he offered to contribute to the applicant's rent in the monthly sum of kshs 20,000, meaning that she was living in rented premises. The court draws the conclusion that this property cannot be said to be parties' matrimonial home.”
36. In paragraph 19 of the said judgement the court stated,
- “... the applicant has not claimed that any of these other suit properties is the matrimonial home of the parties. The properties are not in the joint names of the parties. In the premises, I make a finding that none of the suit properties is matrimonial property.”
37. On contribution the court in paragraph 36 of its judgement stated,
- “it is not possible to ascertain the exact contribution of each party to the acquisition of the properties herein. In such circumstances, noting that each party did make contribution, I find that the justice of the case would require that I apply the maxim that equality is equity...”
38. The court in its ruling of 29th July 2022 factored in the issue of the payment of Kes.260,000/- and what was due as rent arrears, in paragraph 17,18,19.
- “ 17; According to the applicant, the amount due is for the period August 2016 to October 2020. That the amount of Kes.260,000/- paid which is not in dispute is for the period December 2020 to December 2021, which fact was admitted by Ms. Musyoki for the respondent.
- 18; From the schedule of payment attached in replying affidavit sworn by Kipsang in response to the Notice to Show Cause of 1st April 2022 the respondent had made payment up to July 2017 and that he had only defaulted for the period August 2017 to February 2020, translating to a sum of Kes. 560,000/- which should be recovered from the sale of matrimonial property.
- 19; From the facts of this case and parties' own admission, the order directing payment of rent was open ended. They did not allege any condition made as to when the order was to lapse. In other words, until set aside or reviewed, the order is deemed to be valid. The rent payable for the period August 2016 to February 2020 is not in dispute.”



39. I am required to interpret the ruling of my brother. Could I lawfully do so? In my view the previous applications did not seek the interpretation of the judgment of the Court. I therefore unable to find that the application is res judicata.
40. Article 45(3) of *the Constitution* provides that:-
- “(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”
- a. The Court of Appeal in MEK v GLM [2018] eKLR as follows, “Equality in marriage is not a principle to be applied blindly nor is it intended to encourage dependency by one spouse. It is a situation where each party makes a contribution. In other words it is not shifting the burden, but the sharing of responsibilities and benefits taking into account the gender limitations.”
41. I have looked at the divorce proceedings before the Court below. The said court declined to grant the prayer for alimony. It would appear to me that the orders made in 2016 were intended to last only as long as the matrimonial proceedings subsisted. After those proceedings ended and each party got their share of the matrimonial property there would not be a justification for continuing with the payment. I do not understand Onyiego, J as having agreed that such payment is just.
42. In the circumstances I find and hold that the Respondent/Applicant’s obligation to pay the Applicant/Respondent’s rent ended on 23rd December 2021.
43. Regarding the notice to show cause I note that the court directed that the outstanding amount of Kes.926,450/- should be paid within 30 days, in default 1/3 of his salary be attached to recover the debt. I must note that attachment of salary has already taken place. I note that the Respondent/Applicant made payments, which I have considered in arriving at the outstanding sum.
44. My view is that the Respondent/Applicant is only under obligation to pay rent for the period up to 23rd December 2021. Once the Court divided the matrimonial property each party was set free from the other. Consequently as equal human beings, none of them could justly or lawfully be compelled to maintain the other party. Having considered the matter, bearing in mind the facts, I find and hold that Respondent/Applicant is under obligation to pay the sum of Kes.197,970/- being the principal sum outstanding, together with interest thereon, calculated up to the date of this ruling.
45. Based on the foregoing the orders that commend themselves to me are the following: -
1. The application dated 22nd August 2022 is bereft of merit and is dismissed;
 2. The Respondent/Applicant’s application dated 8th May 2023 is allowed in terms of Prayer C (ii) only. Consequently this Court finds and holds that the obligation on the part of the Respondent/Applicant to pay Kes.20,000/- per month to the Applicant/Respondent lapsed on 23rd December 2021 when the Court delivered judgment on the matrimonial property dispute;
 3. The Respondent/Applicant is ordered to pay the Applicant/Respondent outstanding balance in the sum of Kes.197,970/- being the principal sum, together with interest thereon calculated up to the date of this ruling, within 14 days. In the event he defaults 1/3 of his salary to be deducted until payment in full is made;
 4. Mention to confirm compliance and for further directions on 4th October 2023;
 5. No orders as to costs as this is a family matter.



Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2023 VIA
MICROSOFT TEAMS.**

GREGORY MUTAI

JUDGE

