



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MATRIMONIAL CAUSE NO. 11 OF 2020

LWM.....PLAINTIFF/APPLICANT

VERSUS

HMT.....RESPONDENT/ CONTEMNOR

RULING

1. This is a ruling on application dated **19th January 2021**. It seeks the following orders: -

i. Spent.

ii. Spent.

iii. THAT on failing to show necessary cause, this Honorable Court be pleased to cite the Respondent/Contemnor for Contempt of Court for disobeying the Lawful Court Orders issued on the 12th November, 2020, compelling him to amongst other orders, unlock the doors of the Plaintiff/ Applicant's hardware business established on Plot No.[....] and return any goods and/or stock removed from the said hardware business without the consent of the Plaintiff/ Applicant, which orders the Respondent/Contemnor has disobeyed and/or refused to comply with to the detriment of the Plaintiff/ Applicant.

iv. THAT consequent to prayer (3) herein above being granted, the Respondent/ Contemnor herein be committed to jail for a duration not exceeding six (6) months and/or such other duration as the Honourable Court may deem fit and expedient.

v. THAT the costs of the application be borne by the Respondent/Contemnor.

vi. Such further and/or other orders be made as the court may deem fit and expedient.

2. Grounds on the face of the application are that the Respondent/Contemnor was disobedient of the Lawful Court Orders issued on the 12th November, 2020 which were duly served upon the Respondent/Contemnor through his advocates on record on the 12th November, 2020 but has deliberately and/or willfully chosen not to comply therewith.

3. Further that, the Respondent/Contemnor understood the full tenure and extent of the said the orders, which compelled him to unlock the doors of the Plaintiff/Applicant's hardware business established on Plot No.[....] and return any goods and/or stock removed from the said hardware business without the consent of the Plaintiff/Applicant.

4. That prior to orders of 12th November, 2020, this Honourable Court had issued orders on the 8th October, 2020, maintaining the status quo obtaining on or before the 17th September, 2020, Orders which were duly served upon the Defendant/Contemnor.

5. That all requisite requirements before taking contempt proceedings were complied with and in particular the Orders of 12th November, 2021 were duly extracted on the said 12th November, 2020 and same was duly and personally served on the Respondent/Contemnor herein through his counsel on record, he therefore had knowledge of the said Court Order.

6. This application is supported by affidavit sworn by **LWM** the applicant herein on 20th January, 2020. She restated grounds of this application.

7. She further averred that even before the respondent was served, there had been two (2) other Orders for preservation of the matrimonial property as well, hence the third party illegally assumed occupation during the pendency of this suit. She averred that there has been non-compliance with the said orders by the Respondent/Contemnor to the detriment of the Applicant as follows: -

a. He has refused, failed and/or neglected to return goods and/or stock he removed from the Applicant's hardware without her consent.

b. He has flagrantly ignored the said Court Orders and has failed to surrender the suit premises to the Applicant and on the contrary, unlocked the premises and leased out to a third party who is currently in occupation.

c. The said third party was very condescending, derogatory and threatened the applicant's life if she dared come close to the shop in the presence of the **OCS Menengai Police Station** and the third party equally demanded that she reimburses him **Kshs. 300, 000** paid to the contractor in rent and renovation if she wanted to assume occupation of her shop.

8. She averred further, that this Court fixed the suit herein for directions and further orders on the 21st January, 2021, thus there is and can never be any justification for non-compliance with clear and unambiguous orders of the court by the Respondent/Contemnor. That owing to the said contemptuous acts and/or behavior, she was unable to continue with her business, her only source of income, as ordered by this Honorable Court thus denying her the right to enjoy the fruits of her litigation.

9. She averred finally that it is in the interest of justice that this Honorable Court raises to the occasion and ensure compliance with of its Orders and protect its dignity and integrity to prevent this suit from being reduced to an academic exercise.

10. In response, the defendant filed a replying affidavit dated 4th March, 2021. He averred that he had appointed the firm of **Ochweri Ngamate & Co. Advocates** to act for him in this matter and that the said advocates had not communicated to him since he gave them instructions in October 2020 or thereabouts.

11. He averred that he never knew that there was a Court Order directing him to reinstate the applicant or return the goods to her and that he had not been served personally with the said order and that there is no affidavit of service attached in support thereof as required by law.

12. The respondent averred that he however learnt of the Court Order in January, 2021 when the application dated 19th January, 2021 was personally served on him and he sought change of representation.

13. He further averred that upon doing his own investigations, he found out that the previous law firm that was representing had professional challenges and were using the name of **M/s. Naomi Murithi & Co. Advocates** to advance their practice and has also learnt the said advocates did not defend his application dated September, 2020 and also failed to inform him, thus the adverse orders issued against him.

14. He averred that since March, 2020 he has been working from home as a result of the government directive on vulnerable persons due to the corona virus pandemic.

15. He averred further that in August, 2020 or thereabouts he learnt that his wife (the applicant) was committing acts of adultery with a stranger in the shop on broad daylight and that the tenants were getting concerned if he was still alive. That on 12th September, 2020, he visited the premises and found her with a stranger sitting in a compromised position outside the shop and he was informed that the said stranger was her friend.

16. He further averred that he was informed that on the afternoon of 12th September, 2020 that they removed goods from the shop and took them to railway go-down in town and on 13th September, 2020, he moved and welded the door to save a few goods inside the shop because he had majority stake in the shop having bought the goods single handedly to empower the applicant.

17. He averred that on 14th September, 2020 he removed the goods and took them home, mainly terrazzo materials not exceeding Kshs.180,000/= and leased out the premises to a third party who paid Kshs.45, 000/= being rent for three months and Kshs. 45,000/= being rent deposit for three (3) months as well and that a new tenancy had taken effect on 22nd September, 2020 by the time that an order of this Honorable Court was issued and he did not therefore deliberately disobey the court order.

18. The Respondent admitted that the premise is occupied by a third party who has given stringent conditions to vacate and that he has given the applicant an alternative shop but she has refused to take it up.

19. He averred that the goods in the shop were largely his and he was ready to compensate her to the extent of her contribution which she has not quantified.

20. He stated the he cannot disobey court order but he was not aware of it but is willing to pay the applicant her share of contribution. He urged the court to dismiss the contempt proceedings in favor of a full hearing of the cause.

21. In a rejoinder, the Applicant filed a supplementary affidavit dated 17th March, 2021 and averred that the applicant's blame on his Advocate are unfounded and devoid of merit; that a case belongs to a litigant and it was his duty to pursue the prosecution of his case.

22. She further averred that it is on record that the firm of **M/S Naomi Murithi & Co. Advocates**, then acting for the Defendant/Applicant, filed a notice of preliminary objection dated 10th October, 2020 which was dismissed by ruling delivered on the 5th November, 2021 and

contents of replying affidavit do not offer justification for deliberate and/or willful disobedience of the express orders of this Honorable court.

23. She averred that the receipts marked **HMT-2** attached to replying affidavit relates to a company which is a separate legal entity from the Defendant/Applicant herein and the identities of the directors thereof have not been disclosed and/or identified through a **CR12** to assist in authenticating the receipts therein.

24. That there is no justification for the Respondent/Contemnor deliberate and/or willful disobedience of the express orders of this Honorable Court.

25. Parties agreed to proceed by way of written submissions.

PLAINTIFF/APPLICANT SUBMISSIONS

26. The Plaintiff/Applicant submitted that this court has powers to punish for contempt by dint of **Section 5 (1) of the Judicature Act** which provides as follows: -

“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.”

27. The Plaintiff further cited the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 Others 2020** where the Court quoted with approval the learned author's book ‘**Contempt in Modern New Zealand as follows-**

“There are essentially four elements that must be proved to make a case of civil contempt. The applicant must prove to the required standard in civil contempt cases which is higher than civil cases) that:

(a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) The defendant had knowledge of or proper notice of the terms of the order;

(c) The defendant has acted in breach of the terms of the order and

(d) The defendant’s conduct was deliberate.”

28. The Applicant submitted that the Court Orders herein were clear and unambiguous as the Respondent/Contemnor has not disputed clarity and unambiguity of the said orders and therefore has no reason to feign ignorance and/or fail to comply.

29. On whether the Respondent/Contemnor had knowledge of or proper notice of the terms of the order, the Applicant submitted that the Respondent/Contemnor’s deposition under paragraph 6 of his replying affidavit that the orders were not personally served upon him is legally untenable as it is evident that the Respondent/Contemnor does not dispute that the said orders were duly extracted and served upon his erstwhile advocate whom he properly instructed to represent him in this matter.

30. The Applicant cited the case of **Oilfield Movers Limited v Zahara Oil and Gas Limited 2020 eKLR** where the Court while addressing the issue of service held that where a party is represented by an advocate, the party is deemed to have knowledge of a Court Order if the party’s advocate is aware of it.

31. She further submitted that even if this Court was to be persuaded that the orders herein were not personally served upon the Respondent/Contemnor, he admits at paragraph 7 of the replying affidavit that he had knowledge of the said orders in around January 2021, a fact the Applicant vehemently denies.

32. On whether the Respondent/ Contemnor has acted in breach of the terms of the order, the Applicant submitted that she had demonstrated to the required legal threshold that the Respondent/Contemnor, without any color of right, failed and/or refused not complied with this Court’s Orders issued on the 12th November, 2020 and his actions as demonstrated in his replying affidavit were totally at variance with the said orders.

33. And finally on whether the Respondent’s conduct was deliberate, the applicant submitted that she has clearly established that the Respondent/ Contemnor not only had full knowledge of the orders but was also duly served in person as well as through his erstwhile advocate but has not made any step and/or demonstrated his willingness to comply with the said Orders as shown in his replying affidavit dated 4th March, 2021 as the said replying affidavit corroborated the Plaintiff/Applicant's case to the extent that, to date, the Respondent/Contemnor is still in contempt of the court orders.

34. The Applicant cited the case of **Econet Wireless Kenya Ltd Vs Minister for Information & Communication of Kenya & Another [2005] KLR 823** where the court held that, 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 and urged this Court to allow this application.

RESPONDENT/CONTEMNOR’s SUBMISSIONS

35. The Respondent/Contemnor submitted that in order to sustain an application for contempt, the Applicant must demonstrate willful disobedience and submitted that he swore a replying affidavit in response to the application for contempt and stated that he had instructed **M/s Ochweri Ngamate & Co. Advocates** and not **M/s Naomi Murithi & Co. Advocates** as shown in the ruling of court dated 5th November, 2020 where the court observed that **Mr. Bosire** was given three (3) days to file response and he failed to do so or attend Court.
36. The respondent submitted that this court should consider whether the ends of justice will be met if he is punished for the mistakes of his advocate. He submitted further that there was need to serve the respondent personally with the order of the Court to avoid doubt.
37. The respondent submitted that by 22nd September 2020, a new tenant was already in the premise and demanded a colossal sum of the money in order to vacate.
38. That OCS Nakuru West who was directed to enforce the Order did not visit the premises or inform the respondent and due to Covid 19 protocols at that time, little was happening and it is not safe to punish the him on the basis of proof on a balance of probability.
39. The Respondent submitted that when he learnt of this Order, he gave the Applicant alternative premises but she has refused to take it up and he was not therefore involved in willful disobedience of the court order as his offer of alternative space would have facilitated the return of the goods for which he also has a substantive share.
40. The Applicant cited the case of **Christina Sote Kiptui & Margaret Jemutai Chepto (Suing as the administrators of the Estate of the late George Kiptui Chesang) & Another Vs Musa Cherutich Sirma & 2 Others, Nakuru ELC 18 of 2020**, where the court declined to punish the respondents in exercise of caution citing lack of proper service of the order.
41. The Respondent/ Contemnor concluded by stating that the substantive matter before the court is matrimonial arising out of marital disagreements and there is need for higher caution especially where there is no evidence of personal service. He urged the court not punish the him as contempt has not been proved to the required standard but instead this matter be heard to resolve the pending issues.

ANALYSIS AND DETERMINATION

42. I have considered arguments by both parties herein and submissions filed, what I consider to be in issue is whether the Respondent/Contemnor is in contempt of the court orders issued on 12th November, 2020.

43. This Court is empowered to punish a party who deliberately fail to comply with court orders as provided by Section 5(1) of the **Judicature Act** as follows: -

“(5)(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.”

44. The Court of Appeal in **Fred Matiangi the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR** held as follows: -

“When courts issue orders, they do so not as suggestions or please to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who decides to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”

45. There is no doubt that every person against whom an Order is made by Court of competent jurisdiction has a duty to obey it unless and until it is discharged as Orders are not issued in vain. Punishment for failure to comply with Court Order is intended to protect the dignity of the court and for good order in the society.

46. In the instant case, Order issued on the 12th November, 2020 compelling him to amongst other orders directed the Contemnor/Respondent to unlock the doors of the Plaintiff/Applicants hardware business established on Plot No.4/312 and return any goods and/or stock removed from the said hardware business without the consent of the Plaintiff/ Applicant.

47. It is not disputed that the Respondent had an Advocate on record who was duly served with the said order via email on the 12th November 2020 and he was equally served in person in support of this, the Applicant has attached a copy of the email sent to the Respondent/Contemnor’s advocate as provided by **Order 5 rule 22B sub rule 4 of Civil Procedure (Amendment) Rules 2020** which provide as follows-

“An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service. 1. Summons may be sent by mobile-enabled.”

48. The Applicant attached a copy of the order signed by the Respondent/Contemnor, both marked as **L.W.M.11** and **L.W.M.1** respectively.

49. He denied being aware of the Court Orders and explained that his Advocate had professional challenges. However, in my view, cases belong to parties. He chose the Advocate and it was his responsibility to follow up his matter with his Advocates to know the position of his matter. Further, the Respondent knew that there was a Court matter in respect of the properties in issue and he should have been cautious as he dealt with the properties especially signing a lease with a third party yet issue of ownership/distribution was yet to be settled by Court.

50. The Respondent has further failed to demonstrate as he alleges that a third party had already moved into the premises by the time the Order herein was issued and further no explanation has been given for failure to return goods taken from the shop.

51. From the foregoing I find that that the applicant has demonstrate that the Respondent/Contemnor is in contempt of Court Orders issued on 12th November 2020.

52. FINAL ORDER

- 1) The Respondent is in contempt of Court Order issued on 12th November 2020.**
- 2) The Respondent to be punished by the Court for failure to comply with Court Order issued on 12th November 2020.**
- 3) Costs of the application to the applicant.**

Ruling dated, signed and delivered via zoom at Nakuru

This 8th day of July, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Mr. Ouma for applicant

No appearance for respondent/Contemnor