



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL CASE NO. E018 OF 2021 (OS)**

**IN THE MATTER OF SUMMONS FOR DECLARATION OF MATRIMONIAL PROPERTY**

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

**IN THE MATTER OF MATRIMONIAL CAUSES ACT, 2014**

**IN THE MATTER OF ARTICLES 45, 28, 27, 40, 19 & 20 OF THE CONSTITUTION**

**BETWEEN**

**DKG.....PLAINTIFF**

**VERSUS**

**EG.....DEFENDANT**

**RULING**

1. Before the Court is an application dated 12<sup>th</sup> November 2021 principally seeking to cite the Respondent for contempt of Court for disobeying the Court’s orders of 12<sup>th</sup> August 2021. It also seeks for the Court to authorize the OCS Meru Police Station to implement the orders issued on 12<sup>th</sup> August 2021 by confiscating/impounding and availing to the Applicant motor vehicle registration number KBV XXX.
  2. The orders of 12<sup>th</sup> August 2021 directed the Respondent to grant the Applicant access to the parties’ former matrimonial home located at NYAKI/MULATHANKARI/xxxx which is registered in the parties’ joint names, with the alternative of providing other premises for her accommodation. The orders also directed the Applicant to surrender motor vehicle registration number KBV XXX to the Applicant, pending the hearing and determination of the cause.
- Applicant’s Case***
3. The Applicant’s application is supported by her supporting affidavit sworn on 12<sup>th</sup> November 2021 and her supplementary affidavit sworn on 4<sup>th</sup> December 2021. She urges that the Respondent and his Advocates were duly served with the Court orders via their respective email addresses and their WhatsApp accounts and that in any event, the Respondent even filed an application to stay the orders and was thus aware of the said orders. She urges that the Respondent has sworn never to obey those orders and has indicated that the Court will do nothing about it. She urges that the Respondent has threatened to harm or even kill her over the suit properties. She urges that the Respondent has greatly interfered with the administration of justice and undermined the authority of the Court. She urges that she continues to languish in lack of shelter, food, clothing and other basic needs at the instigation of the Respondent despite the fact that they jointly acquired the matrimonial properties.
  4. In her supplementary affidavit, she urges that the Respondent whom she was married to for over 30 years can be very cunning and conniving so as to avoid doing what he doesn’t want to do. She urges that it was just in September 2021 when the Respondent passionately submitted to the Court that he still uses motor vehicle registration number KBV XXX to take the children to school and that this renders the contents of paragraphs 6, 7, 8 and 9 of his replying affidavit false. She urges that even if such an accident indeed occurred, the same occurred in May 2020, long before the instant suit was instituted and that the police abstract attached shows that the vehicle was comprehensively insured and the repairs therefore ought to have been taken care of by the insurer.
  5. She urges that her Advocate has tried to reach out to the Respondent’s Advocate for out of court talks but he was informed that the Respondent wanted nothing to do with it. She urges that the alleged letter written to her Advocates purportedly communicating willingness to

offer an alternative vehicle was tailor made by the Respondent so as to get a response to the application as it was served upon her Advocate on 2<sup>nd</sup> December 2021 at 3:33 p.m, four (4) days after the suit application came for hearing. She urges that while the Respondent in his replying affidavit claims that the vehicle is in a garage in Meru, the aforesaid letter indicates that the vehicle is in a garage in Nairobi. She urges that if the Respondent's averments are true, he did not have to conceal this information from the Court until the Applicant was forced to cite him for contempt of Court.

6. She urges that her Advocate called the Respondent's Advocate to have the matter resolved amicably but the Respondent has refused to allow the same. She urges that her Advocate also called the Respondent's Advocate over the issue of conducting inspection on the suit property and they agreed that it was impossible for the Respondent to coexist with her in the same home and they at some point talked about the alternative of paying a rental for her and her Advocate proposed a figure of Ksh 50,000/= per month which information the Respondent's Advocate was to share with the Respondent.

7. She urges that in order to circumvent the wheels of justice, the Respondent filed Nairobi HCCOM No. E858 of 2021 while this suit and HCCC No. E023 of 2021 are still pending in Court.

8. During hearing, Counsel for the Applicant made oral submissions to highlight the above.

### **Respondent's Case**

9. The Respondent filed a replying affidavit sworn on 3<sup>rd</sup> December 2021. He urges that he has never refused to hand over motor vehicle registration number KBV XXX to the Applicant but that there is an engine mechanical problem which is attributed to a previous accident which occurred on 7<sup>th</sup> May 2020. He urges that he has been in communication with the Applicant who is aware of the mechanical problem and that the vehicle requires a full engine overhaul among other repairs estimated at a cost of Ksh 630,000/=. He urges that for over 3 months, he has not used the car as it was towed to Katsastus Kenya Garage where it is awaiting repairs and that he has been making effort to look for money to conduct the repairs. He urges that he has written to the Applicant's Advocates indicating his willingness to look for an alternative car for the Applicant to use in the meantime. He denies being aware of the WhatsApp communication forwarding to him the orders.

10. He urges that the parties' Advocates have never agreed on a mutual date to conduct inspection of the suit property for purposes of determining the feasibility of an order granting the parties joint possession and access. He thus urges that the order for provision of alternative accommodation to the Applicant has not taken effect because the same was preconditioned on the inspection exercise. He urges that the Applicant has not provided any evidence as to whether her Advocate attempted to reach out to his Advocate for purposes of agreeing on the inspection. He urges that the instant application is intended to settle a personal vendetta that the Applicant seems to have had with him over the years. She urges that the Applicant wants him to be committed to civil jail so that she can have custody of their adopted children who she allegedly abandoned when she walked out of their matrimonial home.

### **Determination**

11. The main issue for determination in this application is on the question of whether the Respondent is in breach of court orders issued herein on 12<sup>th</sup> August 2021 and what orders the Court should make upon a finding of contempt on his part.

12. The High Court in the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others** [2020] eKLR discussed the applicable law on contempt of court as follows: -

***"It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) The terms of the order, (ii) Knowledge of these terms by the Respondent, (iii) Failure by the Respondent to comply with the terms of the order."***

13. The court in the aforementioned case proceeded to quote with approval the learned authors of the book; ***Contempt in Modern New Zealand*** thus: -

***"There are essentially four elements that must be proved to make the case for 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;***
- d) The defendant's conduct was deliberate."***

14. The standard of proof in contempt of Court applications is higher than that of balance of probabilities but lower than that of beyond reasonable doubt. This was discussed in the *locus classicus* of ***Mutitika vs Baharini Farm***, Civil Application No. NAI 24 of 1985 (1985) eKLR.

### **Terms of the Order**

15. On 12<sup>th</sup> August 2021, the Court delivered its Ruling on an Application by the Applicant and issued among others, the following orders: -

***i) That in order to ensure safety of parties, the Advocates of the respective parties are hereby directed to mutually agree on a date when they will inspect the premises at NYAKI/MULATHANKARI/xxxx for purposes of determining the suitability of an order granting the Applicant access to the property while the Defendant continues to reside thereon.***

***ii) That in the event the inspection at i) above reveals that the premises are not conducive for the return of the Applicant, the Defendant shall provide the Applicant with alternative residential area pending the hearing and determination of the suit.***

***iii) That parties to appear in Court after fourteen (14) days for mention for further orders based on findings of the inspection at i) above and the alternative arrangements as per ii) above.***

***iv) That the Defendant do release M/V KBV XXX to the Applicant for her personal use forthwith pending the hearing and determination of the suit.***

16. To this Court's mind, the above orders are clear and unambiguous. The Court considers that at the time of delivery of the Ruling, the parties' respective Advocates were present and they did not raise any concern on the meaning and implications of the order.

#### ***Notice of the terms of the Order***

17. This Court has considered that at the time of delivery of the Ruling, both parties were represented in Court and this is indicative of notice upon them of the terms of the order. The Court of Appeal (**Karanja, Mwera & Mwilu JJA**) in ***Shimmers Plaza Limited vs National Bank of Kenya Limited*** (2015) eKLR held as follows with respect to notice of court orders to litigants who are represented by Counsel: -

***“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.”***

18. The Court further considers that shortly after delivery of the Ruling on 12<sup>th</sup> August 2021, the Respondent's Advocate filed an application for stay of execution dated 17<sup>th</sup> August 2021 and this means that the Respondent was aware of the terms of the order in issue. The Court considers that one can only apply to stay that which he has knowledge of.

#### ***Disobedience of the Order***

19. The Court as seen above ordered for the Respondent to either grant the Applicant access to the suit property with the alternative of provision of other accommodation. The Court also ordered for the surrender of motor vehicle registration number KBV XXX to the Applicant. The Applicant urges that there has been disobedience of the Court orders. The Respondent on the other hand has given an explanation as to why he has not complied with the Court orders.

20. With respect to the surrender of motor vehicle registration number KBV XXX, the Respondent urges that the vehicle has a mechanical problem and it needs an engine overhaul which costs about Ksh 630,000/=. He urges that he has written to the Applicant's Advocate with a proposal to provide an alternative vehicle. The Court considers that the Applicant appears to be untruthful as in his application for stay of 17<sup>th</sup> August 2021, he indicated that he was using the vehicle to take the children to school. It is thus surprising that the Respondent now claims that the vehicle has an engine problem. Without going into the issue of the comprehensive insurance coverage, this Court finds that the Applicant has been untruthful.

21. Concerning the order requiring the Respondent to provide alternative accommodation to the Applicant, the Respondent urges that this was only to be done in the event the parties' Advocates, upon inspection of the suit property found that it was not possible for the two to have joint possession and access. He urges that since the inspection has not been done as yet, he cannot be said to have disobeyed the Court orders. While the Court agrees that the order first required the inspection of the suit property to determine suitability of joint occupation, the Court considers that even before the expiry of 14 days period when parties were expected to appear back in Court to report on the findings of the inspection or the provision of alternative accommodation, the Respondent had already commenced the appeal process and also lodged his application for stay. One of the grounds in support of his application for stay was the assertion that it is not possible for him to stay in the same house as the Applicant because they had irreconcilable differences leading to the dissolution of the marriage and that the Plaintiff was cruel and hostile to him and the children. He also urged that he had no means of providing the Applicant with alternative accommodation and he further urged that the Respondent already has a house in Meru where she has been residing from the time she left the matrimonial home.

22. From the above, this Court considers that Respondent appears to have made up his mind on the issue of joint occupation. He has also expressed his resistance to providing an alternative accommodation. This Court considers that if the Applicant was genuine in his perceived difficulties, he would have long approached the Court to get a legal reprieve as opposed to going quiet and giving conflicting excuses as to why he is unable to comply.

23. The above conduct and facts reveal that the Respondent willfully disobeyed the Court orders.

#### ***Conclusion***

24. This Court on 12<sup>th</sup> August 2021 ordered for the parties' Advocates to conduct inspection of the suit property to determine suitability of joint occupation by the Applicant and the Respondent. The Court ordered that in the alternative, the Respondent provides the Applicant with alternative premises for her occupation pending the hearing and determination of the case. The Court also ordered the Respondent to release motor vehicle registration number KBV XXX to the Applicant for her use pending the hearing and determination of the case.

25. The Court considers that the terms of the order were clear and unambiguous and further, that both parties were represented by their respective Advocates at the point of delivery of the Ruling. The Respondent, therefore, had full knowledge of the terms of the order and this is further confirmed by the fact that he filed an application for stay of execution, shortly after delivery of the Ruling.

26. The Court does not accept the Respondent's explanation as to why he was unable to comply with the Court's orders and the Court considers the same as mere afterthoughts and attempts to circumvent the wheels of justice. While the Respondent urges that motor vehicle registration number KBV XXX has had a mechanical problem since May 2020, in support of his application for stay filed less than 3 months ago, he urged that he was using the said vehicle to take the children to school. In the same application for stay, he also urged that it was not possible to coexist together with the Applicant and further, that he was unable to provide the Applicant with alternative accommodation because he was paying for the children's school fees.

27. To this Court's mind, the Respondent's inconsistency in his averments and his conduct in the proceedings in general demonstrate a litigant who is hell bent to frustrate the court process. The Court considers that if at all he was unable to comply with the orders, it behoved the Respondent to take the initiative to approach the Court and explain his predicament rather than wait for the Applicant to cite him for contempt of court.

28. The Court is thus convinced that the Respondent has deliberately and intentionally disobeyed the court orders of 12<sup>th</sup> August 2021.

### **ORDERS**

29. Accordingly, for the reasons set out above, the Court makes the following orders:-

***i) The Applicant's application seeking to cite the Respondent for contempt of court dated 12<sup>th</sup> November 2021 is hereby allowed and the Respondent is found to be in contempt of Court for disobeying the Court's orders of 12<sup>th</sup> August 2021.***

***ii) The Respondent is hereby directed to purge his contempt within the next five (5) days by availing motor vehicle registration number KBV XXX to the Applicant in good working and road worthy condition and to provide the Applicant with alternative accommodation pending the hearing and determination of the cause.***

***iii) In default of compliance with order ii) above, a Notice to Show Cause will issue against the Respondent to appear in person before the Court on 20<sup>th</sup> December 2021 to show cause why he should not be committed to civil jail for disobedience of this Court's orders of 12<sup>th</sup> August 2021.***

***iv) Costs in the cause.***

Order accordingly

**DATED AND DELIVERED ON THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**M/S Thangicia M. David & Co. Advocates for the Plaintiff/Respondent**

**M/S Laichena, Mugambi & Yieko Advocates, LLP for the Defendant/Applicant**