



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**HCCC NO. 6 OF 2017**

**EM.....PLAINTIFF**

**VERSUS**

**KFM.....1<sup>ST</sup> DEFENDANT**

**NGK.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. Before this court is a Notice of Motion dated 14<sup>th</sup> May 2019 lodged by **EMK**, the Plaintiff/Applicant and in the said motion she seeks the following reliefs namely:-

**i. That the Defendants/Respondents herein be committed to civil jail for a period not exceeding 6 months for being in contempt of the orders issued by this court on 1<sup>st</sup> March 2018.**

**ii. Spent**

**iii. That this honourable court be pleased to issue an order to OCS Chuka to enforce compliance of the court order issued on 1<sup>st</sup> March 2018 allowing the Plaintiff access and use of matrimonial home in Karingani/Mugirirwa/\*\*\*\*\* pending the hearing and determination of the suit herein.**

**iv. That the Respondents be condemned to pay costs.**

2. This application is based on the following grounds namely:-

1. That Respondents are in blatant disobedience of the court's orders of 1/3/2018 and have completely refused to allow the applicant access and use the property Karingani/Mugirirwa/\*\*\*\*\* despite the court ordering the same on 1/3/2018.

2. That the actions of the Respondents have caused the Plaintiff to suffer irreparable loss and damage and psychological torture and anguish by forcing her to incur extra costs to pay for accommodation or seek to be hosted by well-wishers during her stay in Kenya.

3. That court's dignity has been greatly undermined by the actions of the Respondents by openly disobeying court orders.

4. That unless the Respondents are punished for contempt, the continuation of the main suit would be an exercise in futility.

3. The Applicant has supported the above grounds with her affidavit sworn on 14<sup>th</sup> May 2019 where she has deposed the following:-

a. That the 1<sup>st</sup> Defendant, in contravention of the court orders, transferred the property known as LR Karingani/Mugirirwa/\*\*\*\*\* to his mother's name ie LCM, in an attempt to defeat the course of justice and the 1<sup>st</sup> Defendant may attempt to transfer the same even to third parties.

b. That the Respondents have entered the property 2072 and vowed not to enter the property \*\*\*\*\* which they were directed to use.

The applicant avers that she tried to access parcel 2072 severally but the respondents have completely denied her access and they are armed with bows, arrows and pangas and have threatened to cut off her head.

c. That on 19/12/2018, the applicant raised this issue in open court but the defendant lied and said she could access the home when he knew that it was not the case because on that very same day, the 1<sup>st</sup> defendant descended on the house accompanied by relatives and strangers and they broke the doors and window panes to make the house uninhabitable. The applicant claims that she locked herself in one of the bedrooms to avoid being harmed as they kept issuing death threats.

d. That the defendants even went to Chuka police station and sought the assistance of police to remove her from the house but when the police arrived, she informed them that she had a court order and served them with a copy.

e. That the following day, she repaired the doors and windows but once again the defendants came to the house and broke the same. She reported the issue at Chuka police station and it was booked under OB No 34/20/12/2018. While she made her report, the defendants accessed the house and she has been forced to seek alternative accommodation for her own safety.

f. That the defendants has refused to even let her access her clothes and travel documents but she finally managed to get the same when AP officers accompanied her to the house.

g. That during her stay in Kenya, she and her children have no other place to live save for that very house where access has been denied. The actions of the respondents have greatly inconvenienced, unsettled and caused the applicant and her children pain and anguish therefore defeating the purpose of the orders issued.

h. That the court does not issue orders in vain, it ought to punish the respondents for contempt of court as they have vowed not to follow any orders that will emanate from the court.

4. The Applicant in her further affidavit sworn on 6th February 2020 further deposed the following:-

(i) That the 1<sup>st</sup> respondent's allegations of being a stranger to the land transfer cannot hold water as there is no way the land could have been transferred without him being a signatory to the documents and further his attendance at the land control board would have been mandatory. Therefore, the 1<sup>st</sup> defendant intentionally violated the orders given by the court while fully aware of his actions.

(ii) That the 1<sup>st</sup> defendant has also disobeyed the court order giving the applicant access and use of Karingani/Mugirirwa/\*\*\*\* as the respondents are still in occupation of the same as well as parcel Karingani/Mugirirwa/\*\*\*\* and they have made it impossible for her to occupy the matrimonial home as ordered by the court.

(iii) That the last time she accessed the house, the window panes and doors were broken and water was poured on the seats and the beds. The locks to the house and the gate were also changed denying her complete access to the house but with the help of police, she managed to access her clothes and documents.

(iv) That the applicant visits Kenya often and she is always forced to incur extra costs for accommodation for her and her children yet the defendants have access to both houses and they do not suffer in any way if she occupies parcel \*\*\* as they already have parcel \*\*\* and therefore they are making her suffer for no apparent reason.

(v) That the 1<sup>st</sup> defendant has not given her the house in America willingly as he claims, rather the same was given to her and the children by the courts and he was also directed to pay 500USD a month as temporary child support.

(vi) That the 1<sup>st</sup> defendant has undermined the court and unless he is held accountable, he will continue to disobey it.

5. In her written submissions through Ms Lucy Kaaria, Matumbi and Co. Advocates, the Applicant contends that the Respondents are in contempt of court because for one, that property known as Karingani/Mugirirwa/\*\*\*\* where the matrimonial house is situated was transferred from the 1<sup>st</sup> defendant to his mother at a time the court order restricting such transfer subsisted. The Applicant contends that even if the 1<sup>st</sup> Respondent consented to revoking the transfer, he has not given access to the Applicant to matrimonial home despite the court order.

6. It is further submitted that the defendants have constantly threatened the Applicant's life and that the same cannot be taken lightly. She avers that she and her children continue to suffer while the defendants enjoy occupying both Karingani/Mugirirwa/\*\*\*\* and Karingani/Muiru/\*\*\*\*. She insists that the 1<sup>st</sup> defendant's mother does not live on parcel No.2072 and that if she does, she was brought there to further disobedience of court orders.

7. The Applicant faults the 1<sup>st</sup> defendant for being untruthful about the transfer of parcel No.\*\*\*\* on the grounds that he claims he was unaware of the transfer yet he was the one who executed the transfer forms.

8. The Applicant submits that unless court orders are obeyed respect to courts will be eroded and that can lead to anarchy. She relies on the decision of *Hadkinson -vs- Hadkinson (1952) All ER 567* where the court maintained that court orders must be obeyed whether one agrees with them or not and where one is in disagreement, he/she ought to move the same court to discharge them otherwise ignoring the same is to belittle the purpose for which the court is set up.

9. The Applicant has also relied on the case of **Kanchanben Ramniklal Shah- vs- Shamit Shantilal Shah and 6 others [2010]eKLR** where the court held that a court order is valid from the moment it is made and commands obedience forthwith.

10. The Applicant submits that the defendants had no basis to breach the court orders and that he had not appealed against the same if he felt aggrieved. She relies on the case of **Econet Wireless Kenya Ltd -vs- Minister for Information and Communication of Kenya & Another [2005] eKLR** where the court stated that it is an unqualified obligation of every person to obey a court order until it is discharged and that court would not condone contemnors even if they believed that the order is irregular or void.

11. The Applicant urges this court to punish the Respondents as provided by law for disobedience of court orders and has relied on the case of **African Management Communications International Ltd -vs- Joseph Mathenge Mugo and Another [2013]eKLR** where the court held that a court order binds all and the reason courts have power to punish for contempt is in order to safeguard the law and administration of justice which is normally threatened when one is in contempt of court.

12. She further submits that she is aggrieved by the acts of contempt by the Respondents and has approached this court for relief and enhance public confidence in the judiciary. She relies on the case of **Kenya Human Rights Commission -vs- Attorney General & Another [2018] eKLR** where the court *inter alia* stated that courts and Tribunals act on behalf of the people and that courts orders must be complied with to enhance public confidence in the Judiciary which is vital for constitutional democracy and to enable courts to remain effective in discharging their constitutional mandate.

13. The Applicant contends that under **Section 5** of the *Judicata Act*, this court is empowered to punish for contempt and has relied on the case of **African Management Communication International Ltd -vs- Joseph Mathenge Mugo & Another [2013] eKLR** to buttress her contention that court orders are not issued in vain.

14. The Respondent have opposed this application through a Replying Affidavit sworn by the 1<sup>st</sup> defendant sworn on 31<sup>st</sup> May 2019. He deposes that Land Parcel No. Karingani/Mugirirwa/\*\*\*\* is a family land and that he only holds it as a trustee. He avers that the transfer was unintentionally done without his participation. He avers that it was a family wish to have the property transferred to his mother after he started having differences with the Applicant.

He claims that he executed the transfer prior to the issuance of the court order and that the transfer was executed later without his knowledge as he had left transfer documents with his mother.

15. The 1<sup>st</sup> Respondent further avers that he does not mind the access granted to the Applicant to access the home in Parcel No.\*\*\* and that he knows he cannot evict her.

16. The 1<sup>st</sup> Respondent has faulted the Applicant for pushing for exclusive use of parcel No.2072 with the intention of evicting his ailing mother who also resides there. The 1<sup>st</sup> Respondent deposes that he has property and livestock in the said parcel and has the responsibility to take care of the same. He avers that the intention by the Applicant to have exclusive use of the parcel is meant to punish him and embarrass him arguing that the Applicant only visits when she is on leave while for him he is more frequent because he is a businessman.

17. The 1<sup>st</sup> Respondent claims that as an act of good faith he gave the Applicant exclusive use of their matrimonial home in the U.S.A apart from paying her U.S. dollars 500 every month for maintenance .

18. The 1<sup>st</sup> Respondent insists that he only has a residential house in Karingani/Mugirirwa/\*\*\*\* which he claims is used by use of his child with the 2<sup>nd</sup> defendant. He accuses the Applicant for being rowdy and violent after she turned in December 2018 and threw his clothes and other items outside their matrimonial home and that when he inquired why she in the company of other women assaulted him.

19. The 1<sup>st</sup> Respondent contends that the Applicant's action seeks to have exclusive access to the matrimonial property and that to him the same is a ploy to get final orders before the suit is heard and determined.

20. In their written submissions through Ms Kimathi Wanjohi Muli Advocates, the Respondents contend that the Applicant want to have both defendants punished and yet she has failed to disclose the action taken by the 2<sup>nd</sup> Respondent which violated the court order issued by this court.

21. It is submitted that the family of the 1<sup>st</sup> defendant panicked when differences arose between the Plaintiff and the 1<sup>st</sup> Defendant and that they implored upon him to surrender the title and transfer to his mother. He submits that at the time there was no order stopping the transfer and that when he learnt that an order had been issued and that the transfer had breached the order he conceded to have the property reverted back to him.

22. The 1<sup>st</sup> Respondent denies blocking the Applicant from accessing the matrimonial home and is only against the claim for EXCLUSIVE USE which in his view is aimed at throwing out his mother. He submits that the house in Karingani/Muiru/\*\*\*\*\* is not a matrimonial home but a house he constructed for his child with the 2<sup>nd</sup> Defendant to avoid renting a house for the 2<sup>nd</sup> defendant and their child. They urge this court to prioritize the hearing and determination of the main suit because there is no proof that they are in contempt of court.

23. This court has considered this application and the response made by the respondents. The Applicant is seeking to punish both Respondents for contempt of court issued on 1<sup>st</sup> March 2018 claiming that the two have breached the said order.

24. The record in this matter shows that on 1<sup>st</sup> March 2018, this court issued an order after a compromise between the parties herein that the

Applicant be granted access and use of matrimonial home at Karingani/Mugirirwa/\*\*\*\* while the 1<sup>st</sup> defendant was to use and utilize Karingani/Mugirirwa/\*\*\*\* and motor vehicle Registration No.\*\*\*\*\* pending the hearing and determination of the main suit herein. This court also directed that the *status quo* in regard to the ownership of parcels \*\*\*\*, \*\*\* and motor vehicle No. \*\*\*\* be maintained pending the hearing and determination of the main suit herein.

25. The record also shows that both parties (Plaintiff and 1<sup>st</sup> Defendant) agreed by consent on 17<sup>th</sup> May 2019 to have the transfer that had been effected on parcel No.2072 sometime on 27<sup>th</sup> November 2018 to be revoked and the property to revert back to the 1<sup>st</sup> defendant. That is how prayer (2) of this motion was settled and/or spent.

26. The powers of this court to punish for contempt is donated by the Judicature Act (Cap 8 Laws of Kenya).

Section 5 thereof states;

**"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 such power shall extend to upholding the authority and dignity of subordinate courts."**

27. In the case of **Miguna Miguna -vs- Fred Matiang'i C.S Ministry of Interior and Coordination of National Government and 8 Others [2018] eKLR Odunga J** held as follows;

**"..... the matter cannot be better expressed than in the words of Ojwang, J (as he then was) in B vs. Attorney General [2004] 1 KLR 431 that:**

**"The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.....The law does not exist to protect the personal dignity of the Judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged."**

**In my view contempt of Court is such a grotesque monster that the courts should hound it wherever it rears its ugly head and wherever it seeks to take cover behind any craft or innovation. As was held by the Court of Appeal in Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006 judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law....."**

28. The importance of obedience to court orders cannot be overemphasized. It is at the core of the rule of law in any democratic society. Breaching of court orders or decrees erodes confidence of the authority and sovereign people of Kenya which is delegated to the Judiciary pursuant to the provisions of **Article 1 (3) (2) of the Constitution of Kenya 2010**. It should therefore be seriously guarded by the State and State organs. This court agrees with the *stare decisi* of the decisions cited by the Applicant in that regard.

29. In this matter the existence of the court order issued on 1<sup>st</sup> March 2018 is not in dispute. The power to punish as seen from the above statutes and the case law is uncontested also. There is no issue of service of the said court order or lack of awareness of its existence. The only issue for determination in this motion is whether the Respondents are in contempt or put another way whether the Applicant has proved that the Respondents are guilty of contempt of court for which they deserve to be punished.

30. This court has considered the allegations made against both the Respondents and it is quite apparent that the allegations of contempt of court is actually directed at the 1<sup>st</sup> Respondent. The Applicant has not cited a single act committed by the 2<sup>nd</sup> Respondent that can be deemed to constitute contempt of court. It is trite law that the standard of proof of contempt of court is usually high because of penal consequences or sanctions that contempt of court attracts. The standard is therefore beyond the standard in civil cases and almost equals to prove required in criminal cases though not exactly the same.

31. The Applicant has claimed that she has been denied access to the matrimonial home at parcel No.\*\*\* and that she has been threatened. The said allegations have been denied in equal measure by the 1<sup>st</sup> Respondent. **Section 107 of the Evidence Act** places the burden of proof to whoever alleges. The Applicant in this motion therefore had the burden of proof and as observed above the standard of proof required is high in the case of **Regina Butt -vs- Haroon Butt and another [2016] eKLR** Thande J dealt with a similar scenario and made the following observations;

**"The standard of proof in contempt proceedings is well established. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their submissions in opposition to the Application cited the case of Mutitika Vs Baharini Farm Limited [1985] KLR 229, 234. In that case, the Court of Appeal disagreed with the distinguished Lord Denning's position in, Re Breamblevale Ltd [1969] 3 All ER 1062, at page 1063, who said,**

**"A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt".**

The court went on, " **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 an offence which can be said to be quasi criminal in nature,"

32. In JGK -vs- FWK [2019] eKLR Gikonyo J also made the following observations on the standard of proof required in contempt of court proceedings;

**“ Be that as it may, the standard of proof in contempt matters is beyond the balance of probabilities. There is good reason for the high standard; the proceedings are quasi-criminal, penal sanctions are likely to be imposed and the liberty of the contemnor is at risk. ....”** The same court cited with approval the decision in Katsuri Limited v Kapurchand [2016] eKLR where it was held:

**“.....Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order.....”**

33. Having highlighted the case law in respect to the standard of proof required, it is quite apparent that the allegations against the 2<sup>nd</sup> Respondent has not been established at all. In regard to the 1<sup>st</sup> Respondent, it is apparent that the main bone of contention is the interpretation of the court order in regard to granting access to the Applicant to the matrimonial home situate at that property known as Karingani/Mugirirwa/\*\*\*\*\*. The order appears to have been taken by the Applicant to be an exclusive access and use of the matrimonial home which obviously was not the case. The order only talked of "access" but the access/use was not expressly exclusive and I agree with the Respondents that the order may have been misunderstood by the Applicant as giving her exclusive access and use of the said matrimonial house. That certainly was not the case.

34. The claim that the 1<sup>st</sup> Respondent has been violent and has resisted her access has been countered by the 1<sup>st</sup> Respondent's claim that he was assaulted and his clothes and other property thrown out. This court finds that the Applicant's claims has not met the threshold required in law as observed above. She states that she involved the police in the incident of the denial of access by the 1<sup>st</sup> Respondent and got the assistance but there is no evidence from the police through any officer to confirm the allegations. She further claims her properties were damaged but again she has not provided proof and the onus of proof as observed above was on her.

The Applicant has made a strong claim that the 1<sup>st</sup> Respondent breached the orders of *status quo* by transferring parcel No.\*\*\*\*\* to his mother. On the other hand however, the 1<sup>st</sup> Respondent states that he had signed transfer documents and left them with her mother together with the title deed and that the family members effected the transfer in his absence due to anxieties caused by the squabble between him and the Applicant. This claim on oath by the 1<sup>st</sup> Respondent should have been refuted by the Applicant by showing that the transfer documents were signed after 1<sup>st</sup> March 2018 when the court issued orders of *status quo* to all properties in dispute. Instead the Applicant only exhibited a copy of Registration Certificate (Green Card) indicating that the transfer was effected on 27<sup>th</sup> November 2018 which has not been denied. It is however possible that the transfer form and consent form Land Control Board could have been obtained earlier than 1<sup>st</sup> March 2018.

35. This court besides the above significantly finds that the, 1<sup>st</sup> Defendant/Respondent readily purged the contempt by recording a consent with the Applicant to have the said property revert back to him. That is significant because a court usually is likely to be lenient to a contemnor who comes to court after purging the contempt. Such a person is likely to only escape with a word of caution and so I find that on the overall the Applicant has failed to prove that the Respondents did intentionally and willfully disobeyed the court orders and must be sanctioned for the same.

In the end this court finds no merit in the notice of Motion dated 15<sup>th</sup> May 2019. The same is disallowed. Costs shall be in cause.

**Dated, signed and delivered at Chuka this 7<sup>th</sup> day of July 2020.**

**R. K. LIMO**

**JUDGE**

**7/7/2020**

Ruling dated signed and delivered in the open court in presence of Mugo holding brief for Kaaria for Plaintiff/Applicant and in the absence of Kimathi for Respondent.

**R. K. LIMO**

**JUDGE**

**7/7/2020**