



**Nur v Karam (Divorce Cause E010 of 2021) [2022] KEKC 149 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEKC 149 (KLR)

**REPUBLIC OF KENYA**  
**IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)**  
**DIVORCE CAUSE E010 OF 2021**  
**AH ATHMAN, SPK**  
**JULY 28, 2022**

**BETWEEN**

**YASSIN NUR ..... PETITIONER**

**AND**

**MANA MOHAMED KARAM ..... RESPONDENT**

**RULING**

1. The respondent's Notice of Motion dated June 3, 2022 seeks orders:
  1. Spent
  2. That this honourable court be pleased to cite the petitioner for contempt of the orders dated September 30, 2021 and sentence him accordingly.
  3. That the court be pleased to direct the petitioner to account for and pay the total rental income unilaterally collected him to the exclusion of the applicant from the date of the order.
  4. That this court be pleased to grant any other or further orders, for the purpose of protecting the dignity and authority of the court.
  5. Costs
2. The applicant deposed that in a ruling dated September 30, 2021 the court ordered parties herein to open a joint account for depositing the proceeds of rental flat A6 209 / 3271 / 28 located at Eastleigh – Nairobi (hereinafter referred to as the flat). He averred that despite writing and several reminders to the respondent he has refused and / or neglected to comply to the orders of the court and has been unilaterally collecting and enjoying the rental proceeds to her exclusion and in disobedience of the court orders.
3. The petitioner / respondent opposed the application through his replying affidavit dated June 30, 2022. He deposed that due to the respondent's threats to the tenants he filed an appeal against the



ruling of this court in HCFA E126 of 2021 which matter is still pending directions. He averred the applicant has come to court with unclean hands having relied on misrepresentation, false hood and deceit.

4. The application was disposed of by way of oral submissions.
5. Mr Dayib for the applicant submitted that they severally wrote to the counsel for petitioners inviting them to open joint account as directed by court and even suggested a bank and forwarded to them the necessary forms. However, they did not comply with the orders of the court despite numerous reminders and are continuing to collect rent of the flat. He further submitted that the petitioner filed an appeal against the ruling of the honourable kadhi and sought orders to set aside the ruling and an injunction against the applicant from dealing with the flat in any manner, which application was dismissed by the High court. He argued orders are not made in vain and the orders of the court must be respected. He further submitted that filing of an appeal does act as stay of execution. He urged court to direct that the petitioner be ordered to account for the amount he collected from date of issuance of the order to date and that rental proceeds from the flat be deposited in the applicant counsel's account.
6. Ms Mary Wanjiku for the petitioner / respondent submitted that there is a pending appeal in the matter and the application was not made in good faith and applicant has not come to court with clean hand. She further submitted that no documents were filed to show the petitioner has failed to comply with the orders of the court.
7. I have carefully read the application and reply thereto and considered submissions of learned counsels of parties herein. I have also perused the record and the ruling of the High court in civil appeal no E126 of 2021 dated May 6, 2022 by Maureen A Odero J The court (Hon A I Hussein) made a ruling granting orders for the preservation of the suit property. The orders given are not disputed. Aggrieved with the orders the petitioner moved the High Court in Civil Appeal no 126 OF 2021 through Notice of Motion application seeking orders *inter alia* stay of the Kadhi's court order issued on September 30, 2021 and an injunction against the respondent from harassing, collecting rent from tenants of the flat. The High Court, Hon Maureen A Odero J, while dismissing the application in its entirety observed:

“secondly, the Hon Kadhi directed that the rental income be deposited in a joint account to be opened by both parties. Once again, I fail to see how this order would cause substantial loss to the applicant. The rental income which is the subject of the dispute between the parties is to be collected and retained in a joint account to prevent any dissipation of the same. If the applicant is successful upon appeal then his appeal will not be rendered nugatory as the funds will still be available in the joint account.”
8. Contempt of Court is an attack on the rule of law under article 10 and judicial authority exercised by courts under article 159(1) of the Constitution. A party that is unhappy with a decision of the court should appeal against the decision or apply for review of the same. It is trite law that court do not give orders in vain. To preserve integrity of courts and for promotion of the rule of law, several statutes and rules have been legislated. Section 3, Magistrates Court Act [no 26 of 2015] cap 10 provides:

“In the case of civil proceeding the willful disobedience of a judgment, decree, order or other process of a court or willful breach of an understanding given to a court constitutes contempt of court”.



9 Section 10 (1), Magistrates Court Act [no 26 of 2015] cap 10 lists some of the types of contempt of court offences in the face of court. It states:

“Subject to provisions of any other law, the court shall have power to punish for contempt to a person who in the face of the court:

- a) assaults, threatens, intimidates or insults a magistrate, court administrator, judicial officer, or a witness during a sitting or attendance in court or in going to or returning from the court.
- b) interrupts or obstructs the proceedings of the court, or
- c) without lawful excuse disobeys an order or direction of the court in the cause of the hearing of a proceeding commits an offence.’

10 Section 6, contempt of Court Act (No 46 of 2016) donates power to punish for contempt to all subordinate courts. It provides:

“Every subordinate court shall have power to punish on the face of the court in any case where a person:

- a) assaults, threatens, intimidates or willfully insults a judicial officer or a witness during a sitting or attendance in court or in going to or returning from the court to whom any relevant proceedings relate;
- b) willfully interrupts or obstructs the proceedings of a subordinate court, or
- c) willfully disobeys an order or direction of a subordinate court ”

11. It had been suggested that there is no legislation that confers on the Kadhi’s courts powers to enforce its orders or punish for contempt and that its orders were to be filed in the magistrates court or high court for enforcement. This understanding was fallacious and misplaced. The High court ruled strongly clearing doubts on the Kadhi’s courts ability to enforce its orders and therefore to punish for contempt. In the case of Fazleabbas Mohammed Chandoo v A.I. Hussein - Kadhi, Kadhi’s Court & 4 others [2015] eKLR, Onguto J held:

“There is no controversy that the rules contemplated under section 8 of the Kadhis’ Court Act are yet to be promulgated. Effectively, the provisions of the Civil Procedure Act and the rules made thereunder would be applied by the Kadhis’ court. My reading of the said section 8 does not suggest that a separationist approach ought to be adopted by the Kadhis’ court. I do not view it possible as suggested by the Petitioner that when it comes to execution of its own orders and judgments, a Kadhi’s court is hapless and must seek help elsewhere.

62. Given that the Kadhis’ court under the Constitution is of even status to the Magistrates’ court, to state that the Kadhi must surrender his ability to execute his orders to a magistrate would also be unreasonable and untenable.

63. The procedure and practice so prescribed for execution of decrees and judgments of both the subordinate courts and the High Court may be found under order 22 of the Civil Procedure Rules, 2010. It is relatively clear. The decree may be executed by a magistrate as well as a deputy registrar. The warrants too may be executed by a deputy registrar or a magistrate. In my view, to say that the Kadhis’ court is to be limited to expressing views and opinions of the matters and questions before them without the ability to enforce those opinions and



views while the magistrates' court can would be a wrong and unreasonable construction of both the Constitution and the statute. The magistrates' court may enforce a decree and so too may the Kadhis' court."

12. Rules of practice and procedure under section 8 of the Kadhi's court Act, cap 11 laws of Kenya have since been promulgated, giving clarity on the issue. Section 120 of the Kadhi's court procedure and practice rules (KCPFR) 2020 specifically confers powers to punish for contempt to the Kadhi's courts. It provides:

"(1) The Court shall have the power to institute proceedings against any person for contempt of Court and may, in such proceedings, make an order of committal or may impose a fine in accordance with written laws."

(2) The court shall be deemed a court of record for these purposes.'

13. Respect to rule of law is the cornerstone of stability and development of any country. The respect to and compliance of court orders by individuals, body corporates and government institutions is mandatory to avoid anarchy in any country. In Wildlife Lodges Ltd v County Council of Narok and another 2005] 2 EA 344 the court held that:

'the whole purpose of litigation as a process of judicial administration is lost if court orders are not complied with'.

14. The court quoted with approval Hadkinson v Hadkinson [1952] 2 All ER 575 the landmark case on contempt which held:

"'a party who knows of an order whether or null or void, regular or irregular, cannot be permitted to disobey it."

15. In the instant case the petitioner / respondent has clearly not complied with orders of the court given on September 30, 2021. The respondent has been economical with the truth or intentionally misleading the court regarding the appeal on the orders of this court. The appeal lodged against the ruling and orders of this court is concluded. It was dismissed. There is thus no excuse for not complying with the orders of the court. I find and do hereby find the petitioner / respondent in contempt of court for wilful disobedience of valid court orders. Accordingly, he is hereby committed to four (4) months jail for contempt under the provisions article 10 of the Constitution of Kenya (2010), section 3 of the Magistrates courts Act (no 26 of 2015), section 8 of the Kadhi's court Act, cap 11 laws of Kenya, rule 120 of the Kadhi's Court procedure and practice rules (2020) and section 6 of the contempt of court Act (no 46 of 2016). Warrants for his arrest to issue.

16. In furtherance of preservation of the suit property pending hearing and determination of this matter, we further order that the petitioner or his agents are hereby restrained from collecting rent of the suit property. The rent proceeds of the suit property be now deposited in the respondent counsel's account who shall account for same upon determination of the matter.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THE 28TH JULY, 2022**

**HON ABDULHALIM H. ATHMAN**

**SENIOR PRINCIPAL KADHI**

**In the presence of**

**Ms Judith Ndori, court assistant**



**Mr Dahir for the applicant**

**Ms Mary Wanjiku for the respondent.**

