



**UAM v MOA (Divorce Cause 1 of 2020) [2022] KEKC 157 (KLR) (12 September 2022) (Ruling)**

Neutral citation: [2022] KEKC 157 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT BUSIA  
DIVORCE CAUSE 1 OF 2020  
IN NYABOGA, SRK  
SEPTEMBER 12, 2022**

**BETWEEN**

**UAM ..... PETITIONER**

**AND**

**MOA ..... RESPONDENT**

**RULING**

1. This ruling is resulting from a Notice of Motion filed by the Applicant, who was the Respondent in the above mentioned case against one Respondent who was the Petitioner then.
2. The Applicant states that the Petitioner has failed to comply with part of the decision and thus guilty of contempt and prays that this court punish her.
3. The Petitioner was duly served and during mentioning of the case, the Petitioner stated that she was not ready to respond to the Application as she had been sick for a long period and asked that the matter be heard on the 27/07/2022.
4. When the matter came for hearing, the Respondent had not file any response but the court allowed her to respond orally during the hearing.
5. The applicant states that after the original petition by the Respondent who was then the petitioner was decided, the Respondent herein has partially failed to comply with the decision thus asks the court to punish her for contempt.
6. The Applicant also prays that an order be directed to the Respondent barring her from visiting the issues of their marriage at school while being accompanied by strangers.
7. The Applicant prays for an order to collect Kshs 150,000 plus costs of execution from the Respondent being cash award to the applicant and the same be executed by auctioneers.



8. The Applicant prays for an order to collect Kshs. 52,000 plus cost from the Respondent being 50% of school fees from 10 /05/2021 to 4/03/2022 and the same be executed by auctioneers.
9. The Applicant prays for an order to collect Kshs. 7,000 every month from the Respondent being the 50% contribution of school fees from 25/05/2022 until when it shall be reviewed and the same be executed by auctioneers via Teachers Service Commission who is the Respondent's employer and the be done by depositing the amount to the Applicant's bank account no. 0111603824XXXX at the Co-operative Bank of Kenya.
10. This application which is supposed to cite the respondent for contempt of court as instead addressed numerous issues from both the parties which are not necessary at this particular point.
11. During the hearing, the Applicant stated that after the orders of the original petition were issued by this court, both parties were supposed to comply with the same but instead it is only the Applicant who has been complying and that led to the filing of this application.
12. He states that efforts to reach the Respondent were futile as she could not be reached through her mobile phone.
13. In response to the Applicant, the Respondent states that she has not complied with the orders of the court because the Applicant has been threatening her and warning her not to associate herself with their two children.
14. The Respondent also stated that in according to Islamic faith, the Applicant who is the father of the two issues of their marriage is the one who is supposed to cater for the needs of his family and not the Respondent.

**Determination:**

15. The issue to look at here is whether the Respondent is guilty of contempt or not.
16. The Applicant states that he has been trying to approach the Respondent for purpose of fulfilling the orders of this court but the Respondent has not been willing to meet him. Though the Respondent didn't dispute that, the Applicant has not shown the court how tried to meet the Respondent.
17. First, contempt of court is any act of one being disobedient to a court of law or its officers in a manner that undermines the dignity of the court. It is a kind of disturbance that may impede the functioning of the court and thus lead to violation of rights.
18. If contemnors were left without any action being taken against them, then having courts of law would have been a waste of time and resources.
19. It has been narrated that an Ansaari man (a resident of Madinah) had a dispute with Az-Zubair Ibn al Awwaam before the Prophet (P.B.U.H) about the Harra Canals which were used for irrigating the date-palms. The Ansaari man had asked Az-Zubair saying, "Release the water to pass" but Az-Zubair refused to do so. The case was brought before the Prophet (P.B.U.H) who made a decision and said to Az-Zubair, "You Az-Zubair! Irrigate (your land) and then let the water pass to your neighbor." From that decision, the Ansaari got angry and said to the Prophet, "Is it because he (i.e. Az-Zubair) is your aunt's son?" On that the color of the face of Allah's Messenger (P.B.U.H) changed (because of anger) and he said, "O Az-Zubair! Irrigate (your land) and then withhold the water till it reaches the walls between the pits round the trees."( Sunan-Attirmidhy: 1363)
20. From the above narration, the Ansaari is considered a contemnor because he disrespected not only the decision but also the person of the Prophet as he was a messenger of Allah and at the same time a judge.



21. The Prophet (P.B.U.H.) in his decision had given the Ansaari his right but as a result of his act of disrespecting the authority and the decision, the Prophet (P.B.U.H.) punished him by denying him or delaying his right.
22. The famous Imaam Almaawardy in explaining the hadith has stated that the statement by the Prophet (P.B.U.H.) i.e. "withhold the water till it reaches the walls between the pits round the trees." which is contrary to his previous statement i.e. "Irrigate and then let the water pass to your neighbor." Meant punishing the contemnor. (Adab Alqaadhy: 1:250)
23. The Respondent herein filed a notice of appointment of advocate accompanied by a replying affidavit on the 2/9/2022.
24. She states in her replying affidavit that this court lacks jurisdiction to grant the prayers sought by the Applicant and she referred to the land parcel number Bukhayo/mundika/12693
25. The jurisdiction of the Kadhi court is limited to the determination of questions of Muslim law relating to personal status, marriage, divorce and inheritance as provided by article 170(5) of the constitution, the kadhis court act cap 11 and other laws.
26. Section 3 of the Matrimonial Property Act no. 49 of 2013 states: A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property. Many, among the succession matters litigated before kadhis courts involve land where there is no dispute about the ownership.
27. In an appeal against the ruling of the Hon kadhi on jurisdiction over matrimonial property and among that a plot of land, the Hon Thande. J agreed with the decision of the Hon kadhi. (HA v AH [2019] eKLR)
28. There is no dispute that the land the respondent is referring to was acquired by the contribution of both the Applicant and the Respondent during the subsistence of their marriage and thus, this is a matrimonial property.
29. I find that the Respondent has no legitimate reason whatsoever of not complying with the orders which were given by this court and thus guilty of contempt.
30. As courts have been furnished with powers to punish for contempt, these powers are discretionary and should be a last resort as the Supreme Court of Canada in Carey v. Laiken, 2015 SCC 17, [2015] 2 S.C.R. 79 stated that: " The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders..... Rather, it should be used cautiously and with great restraint ..... It is an enforcement power of last rather than first resort. "
31. Having made my own considerations, I hereby give the Respondent herein 60 days from the date of this ruling to comply with the orders which were issued by this court and failure to that, the Applicant may at any given time after the lapse of that period come back to this court so that the court can take its action.
32. It is so orderd.

**GIVEN UNDER MY HAND AND SEAL OF THIS COURT ON 2022-09-12 10:01:41**

**IDRIS N. NYABOGA**

**SENIOR RESIDENT KADHI**

**In the presence of:**



**The Petitioner,  
C/A Hassan**

