



**YN v MMK (Civil Appeal E026 of 2023)
[2024] KEHC 4004 (KLR) (Family) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4004 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E026 OF 2023
HK CHEMITEI, J
APRIL 25, 2024**

BETWEEN

YN APPELLANT

AND

MMK RESPONDENT

RULING

1. This ruling relates to the application dated 22nd September, 2022 filed by the Appellant, YN ; seeking orders that:
 - (a) Spent.
 - (b) Spent.
 - (c) The Honourable Court be pleased to order stay of execution of the Ruling and Order of the Kadhi’s Court delivered on 28th July, 2022 in Kadhi’s Court Divorce Cause No. E010 of 2021 at Nairobi by the Senior Principal Kadhi Hon. A. H. Athman pending the hearing and determination of the Appeal.
 - (d) Pending the hearing and determination of this application this honorable court be pleased to stay the warrants of arrest directive issued on 28th July, 2022.
 - (e) This Honourable Court be pleased to lift the warrants of arrest directive dated 28th July, 2022.
 - (f) Pending the hearing and determination of this application this Honourable Court do issue an order that a joint account be opened by the advocates for the Applicant and the Respondent for the purpose of collecting rent for flat No. Ax, Ground Floor on LR. No. xxx/ xxxx/ xx, Eastleigh, Nairobi.



- (g) The costs incidental to this application be provided.
 - (h) The Honourable Court be pleased to issue such further orders it deems just and convenient in the circumstances of this case.
2. The Respondent filed a replying affidavit sworn on 18th November 2022 opposing the application vehemently. She accused the applicant of refusing to cooperate in opening the accounts where the rent could be deposited.
 3. She further accused the Applicant of failing to comply with the courts directives hence the contempt orders against him.
 4. She therefore prayed for the application to be dismissed.
 5. The Appellant filed written submissions dated 19th December, 2022 placing reliance on *In Re Estate of the Late Wambui Njeru (Deceased)* [2018] eKLR where the court held that, “... It is clear from the record that the application herein has been made timeously specifically after 10 days after the delivery of the ruling and indeed within the existence of a temporary stay of 21 days that was granted by Court.”
 6. He also cited *Mugab vs Mugab* (1988) KLR where the Court of Appeal stated that, “The practice of the court of appeal in the case of land which is a sensitive issue is that the parties should be allowed to come to the court to have the issues involved in their dispute determined by a court of last resort. For the parties to come to this court, the court has to consider whether the status quo should be maintained pending the hearing of the appeal failing which the appeal if successful will be rendered nugatory. The court was of the view that the status quo should be maintained until the appeal was heard and determined.”
 7. The Respondent has filed submissions dated 19th December, 2022 placing reliance on the following on Order 42 Rule 6 of the *Civil Procedure Rules*.
 8. Similarly, she relied on *Butt vs rent Restriction Tribunal* [1982] KLR 417 & *Amal Hauliers Limited vs Abdulnasir Abukar Hassan* [2017] eKLR para 16 – 17.

Background

9. The genesis of this application is the Judgment delivered by Hon. Abdulhalim Athman – Senior Principal Magistrate in Nairobi Kadhi’s Court Divorce Cause No. KCDRC/ E010/ 2021: YN Vs MMK delivered on 28th July, 2022 whose summary is as follows;
 - (a) That the Petitioner/ Respondent be and is hereby found to be in contempt for willful disobedience of valid court orders dated 30th September, 2021.
 - (b) That accordingly, he is hereby committed to four months’ jail term for contempt under the provisions of Article 10 of the *Constitution* of Kenya (2010), Section 3 of the *Magistrate’s Court 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).
 - (c) That warrant of arrest be and is hereby issued against the Petitioner/ Respondents.
 - (d) That the Petitioner or his agents are hereby restrained from collecting rent of Flat No. Ax xxx/ xxxx/ xx located at Eastleigh, Nairobi.



- e. That the proceeds of the suit property be and are hereby directed to be deposited in the Respondent's counsel's account who shall account for the same upon determination of the matter.

Analysis And Determination

10. I have carefully considered the application before the court, the Replies filed in response thereto as well as the written submissions filed by the Appellant and address the issues for determination, as crafted by the parties namely:
 - (a) Whether the applicant has met the conditions for grant of stay of execution under Order 42, Rule 6 (2) of the Civil Procedure Rules?
 - (b) Whether the applicant ought to be granted an order for stay of execution pending the hearing and determination of this appeal?
 - (c) Who should bear the costs of this application?
11. In Chevron Kenya Limited (caltex) V Kanyotta Holdings Limited [2009] eKLR, the court stated that, "...We find no difficulty in hearing the applicants on their plea even before compliance with the court order in the circumstances of the case. We may repeat what this Court stated in Fatma Ali Mohamed v. Harbans Singh Soor Civil Appl. NAI. 313/06 (UR):

"It is apparent in this case that the learned Judge was of the view that the alleged contemnor who had made an application to set aside the order alleged to have been disobeyed could not be heard on such application unless and until she obeyed the order first then question it later. With respect, the learned judge does not appear to have appreciated the full import of the Hadkinson Case or that he was seized of any discretion in the matter. In that case Lord Denning L.J. stated: -

"It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance."
12. I am persuaded that the applicant was not granted an opportunity to ventilate his case. The supporting affidavit to his application speak as much.
13. At any rate it appears that the opening of a joint account was not entirely his own failure. As a matter of fact, the respondent's advocates ought to have conducted the applicants counsel for a mutually convenient time and date when the applicant was within the country.
14. All is not lost to the parties as the appeal is yet to be determined. I find that holding the applicant in contempt as ruled by the Honorable Kadhi was not efficacious in the circumstances.
15. Consequently, and pending the hearing and determination of the appeal it is hereby directed as hereunder.
 - (a) The trial courts orders dated 28th July 2022 are hereby set aside for all intend and purposes.
 - (b) The Applicant and the Respondent with the assistance of their counsels on record within 14 days from the date herein are hereby directed to open a joint account in their names or those of their advocates on record in a reputable bank where all the rental income from the Flat No Ax Ground floor on LR NO xxx/xxxx/xx Eastleigh shall be deposited.



(c) The appeal be set down for hearing forthwith.

(d) Each party to bear own costs.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 25TH DAY OF APRIL 2024.

H K CHEMITEI

JUDGE.

