



REPUBLIC OF KENYA



**Ongondi v Nyangau (Environment and Land Appeal 35 of 2021)
[2023] KEELC 17045 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 35 OF 2021**

EM WASHE, J

APRIL 25, 2023

BETWEEN

DISMAS O ONGONDI APPELLANT

AND

JUSTUS MOSIRIA NYANGAU RESPONDENT

JUDGMENT

1. The Appellant herein filed a Memorandum of Appeal dated 4th December 2019 (hereinafter referred to as “the present Appeal”) seeking for the following Orders thereof; -
 - i. The Appeal be allowed as a consequence thereof and the Ruling made by the learned Magistrate on the 5th of November 2019 be set-aside; and
 - ii. The costs of this Appeal be granted to the Appellant as against the Respondent.
2. The prayers sought hereinabove are premised on the following grounds outlined in the Appeal.
 - a. The learned Magistrate erred in law and in fact in dismissing the said Application dated 2nd August 2018.
 - b. The learned Magistrate erred in law and misdirected himself by finding that there was no contempt of court orders by the Plaintiff/Respondent.
 - c. The learned Magistrate erred in law by not applying himself to the fact that there was a valid decision by the Court stopping the Respondent’s actions whether in the interim or before the determination of the suit/Application.
 - d. The Learned Magistrate failed to exercise his discretion properly and judiciously in considering the applicant’s case and in that respect failed to fully consider the applicant’s pleadings and



have due regard to the applicant's submissions and to the facts, evidence and authorities in support thereof.

- e. The Learned Magistrate in the circumstances of the matter failed to do justice as regards the suit that was before him and accordingly erred in law to granting the Order that he did.
3. The Appeal herein was canvassed through the filing of submissions by the parties herein.
4. The Honourable Court has gone through the Record of Appeal, the Supplementary Record of Appeal and the submissions therein and identifies the following issues as core to the determination of the present Appeal.

Issue No. 1- Did the trial court have jurisdiction to entertain & determine the application dated 2nd August 2019?

Issue No. 2- Were the interim orders issued by the court on 15th November 2017 still valid on the 18th of October 2018 when the application dated 14th November 2017 was determined?

Issue No.3- What was the determination of the application dated 14th november 2017 on the 18th of october 2018?

Issue No. 4- Did the respondent in this appeal disobey and/or disregard the orders issues by the court on either the 15th november 2017 or 18th october 2018?

Issue No. 5- Are the prayers sought in this appeal merited?

Issue No. 6- Who bears the costs of this appeal?

5. This Honourable Court having duly identified the above issues for determination, the same will now be discussed as outlined herein below.
6. However, before this Honourable Court embarks on discussing the core issues in this Appeal, it must remind itself on the mandate which it exercises as the first Appellate Court.
7. In the case of *Selle & Another v Associated Motor Boat Co.ltd & Others* (1968) EA 123, the Court held as follows; -

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”

Issue No. 1- Did the trial court have jurisdiction to entertain & determine the application dated 2nd August 2019?

8. The first issue for determination is whether or not the Learned Magistrate had the jurisdiction to entertain the Application dated 2nd August 2019 and pronounce the contested Ruling dated 5th November 2019.
9. According to the Appellant's submissions herein, the prayer contained in the Application dated 2nd August 2019 was one seeking to cite him for contempt of Court regarding the Orders issued on the 15th November 2017 and 18th October 2018.



10. Nevertheless, the Respondent’s position is that the Learned Magistrate did not have the jurisdiction to hear and determine an application for contempt of Court orders as such prayers can only be entertained by the superior courts.
11. Further to that, the Respondent submits that the provisions invoked in the application dated 2nd August 2019 which is Order 40 Rule 3 of the *Civil Procedure Rules* give the judicial officers in the lower courts to only deal with issues of disobedience of orders and not contempt orders.
12. The Appellant in his submissions did not make any submissions on this issue of jurisdiction.
13. However, be as it may, the issue of jurisdiction is usually one of utmost importance as the lack of it would render the proceedings and determinations thereof annuity.
14. For this Court to reach a determination of this issue, a discussion about the distinction between Contempt proceeding under Section 5 of the *Judicature Act*, Cap 8 Laws of Kenya and Disobedience or breach of Court orders under Section 40 Rule 3 of the *Civil Procedure Rules*, 2010 must be undertaken.
15. The provisions of Section 5 of the *Judicature Act*, Cap 8 laws of Kenya state as follows; -
 5.
 - (1) 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 that power shall extend to upholding the authority and dignity of subordinate courts.
 - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”
16. The plain reading of the statute hereinabove points to the position that an application made under the provisions of Section 5 of the *Judicature Act*, Cap 8 Laws of Kenya can only be entertained in the superior courts.
17. On the other hand, the provisions of Order 40 Rule 3 (1) of the *Civil Procedure Rules*, 2010 reads as follows; -

“In case of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such a person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”
18. Section 1 (1) of the *Civil Procedure Act*, Cap 21 Laws of Kenya further provides as follows; -

“This Act applies to proceedings in the High Court and, subject to the Magistrate’s Court Act, to proceedings in the sub-ordinate Court.”
19. Section 10 of the *Magistrates’ Court Act*, 2015 which came into force on the 2nd January 2016 also provides as follows; -
 - (1) subject to the provisions of any other law, the Court shall have powers to punish for contempt.
 - (2) A person who, in the face of the Court-



- a)
 - b)
 - c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence,
- 3) in the case of civil proceedings, the wilful disobedience of any judgement, decree, direction, order, or other process of the Court or wilful breach of an undertaking given to a court constitutes contempt of Court.”
20. Turning to the Application dated 2nd August 2019, the Defendant/applicant therein invokes the provisions of Order 40 Rules 1, 2, 3 and 10 of the *Civil Procedure Rules*, 2010.
21. The prayers sought in the said Application dated 2nd August 2019 were outlined as follows; -
- “(I). That the application be certified as urgent and be heard ex-parte in the first instance.
 - (II). That this honourable court be pleased to grant an order for the plaintiff/respondent to be committed to civil jail for contempt of court orders issued by Honourable Justice Mohammed Noor Kullow on the 15th of November 2017 and 18th October 2018.
 - (III). That this honourable court be pleased to order the plaintiff/respondent to pay damages to the defendant/applicant for the loss of his sugercane plantation as per the court’s ruling on the 18th october 2018.
 - (IV) That this honourable court be pleased to grant an order in interim for the plaintiff/respondent to pay the proceeds that were realised from the illegal and malicious harvest of the sugarcane crops to the applicant as per the court’s ruling on the 18th october 2018.
 - (V) That the costs of the suit be in the cause.”
22. The prayers outlined hereinabove show that the Applicant was seeking to cite the Plaintiff/ Respondent for contempt of Court orders issued on the 15th November 2017 and 18th October 2018.
23. This Court’s considered view is that the provisions of Order 40 Rule 3 as read with Section 10(3) of the Magistrates’ Act of 2015 grants jurisdiction to the Magistrates Court to deal with applications for disobedience, breach of terms and/or contempt proceedings thereof.
24. The only limitation for the lower Court in handling contempt proceedings is that such an application should have been filed after 2nd January 2016 when the Magistrates’ Act of 2015 came into force.
25. The application which has given raise to this Appeal was filed on the 2nd of August 2019 which is after the date when the Magistrates’ Act, 2015 came in force and therefore, the Learned Magistrate have jurisdiction to entertain and determine the said Application dated 2nd August 2019.



Issue No. 2- Were the interim orders issued by the court on 15th November 2017 still valid on the 18th of October 2018 when the application dated 14th November 2017 was determined?

26. The second issue is the validity of the Orders which the Defendant/Applicant sought to be enforced and/or claimed to have been disobeyed by the Plaintiff/Respondent in the Application dated 2nd August 2019.
27. One of the Orders which the Defendant/Applicant claimed to have been disobeyed were those issued on the 15th of November 2017 by Honourable Justice Mohamed Noor Kullow.
- The Orders issued on the 15th November 2017 directed as follows; -
- i. That the Application be and is hereby certified urgent.
 - ii. That a temporary order be and is hereby issued restraining the Plaintiff/Respondent, his servants and agents from encroaching and harvesting the sugar cane plantation that is growing on the title No. Transmara/Ololchani/657 pending the hearing and determination of this Application.
 - iii. That the OCS Nyangusu Police Station be and is hereby directed to ensure compliance of the orders.
 - iv. That the Application be served on the Plaintiff/Respondent for inter-parte hearing on the 30th of November 2017.
28. The Orders issued on the 15th of November 2017 also included a Penal Notice prescribed therein.
29. The Appellant's position was that the Orders of 15th November 2017 were valid and should have been fully complied with by the Respondent who was fully aware of the same through the Advocate's presence on the date of pronouncement.
30. The Respondent on the other hand submitted that the Orders issued on the 15th of November 2017 were temporary in nature and had been extended every time the same came up for directions.
31. However, on the 2nd of March 2018, the orders issued on the 15th of November 2017 were never extended and consequently therefore, the same lapsed and therefore became terminated and of no legal effect thereof.
32. Further to the foregoing, the Respondent further submitted that any orders pursuant to an interlocutory injunction were subject to the provisions of Order 40 Rule 4 (6) of the *Civil Procedure Rules*, 2010 which provides as follows; -
- “where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”
33. The Respondent's submission was that the Orders issued on the 15th November 2017 has therefore lapsed and/or automatically vacated upon the lapse of 12 months from the date they were granted.
34. The conclusion of the Respondent's submissions was that the Orders issued on the 15th of November 2017 were of no legal effect at the time the sugar cane was harvested from the suit property and an application for contempt cannot survive.



35. The Court herein has had an opportunity to go through the Orders issued on the 15th November 2017 which are part of the Record of Appeal.
36. Order No. 2 issued on the 15th November 2017 was a temporary injunction prohibiting the Respondent from encroaching and harvesting the sugar cane plantation that was growing on the property known as L.R.No. Transmara/Olochani/657 pending the hearing and determination of the application thereof.
37. The Order No. 2 issued on the 15th November 2017 was specific on the period within which the said temporary injunction against the Respondent was to be in force.
38. The allegations by the Respondent that these orders were subject to extension every time the application came up for directions is therefore misplaced and/or misguided to say the least.
39. Once the Court pronounced itself in Order No.2 issued on the 15th of November 2017, such orders were binding and lawful unless the same were reviewed and/or set-aside thereof.
40. Further to that, the provisions of Order 40 Rule 4 (6) of the *Civil Procedure Rules*, 2010 cannot be said to have taken effect and discharged, vacated and/or terminated the Orders issued on 15th November 2017 by the 18th of October 2018.
41. The reason is that the injunctive orders having been issued on the 15th of November 2017, the same would be affected by the provisions of Order 40 Rule 4 (6) after the expiry of 12 months from the date of granting the same.
42. In essence therefore, the orders issued on the 15th November 2017 would have been affected by the provisions of Order 40 Rule 4 (6) of the *Civil procedure Rules*, 2010 on the 16th of November 2018.
43. However, the determination of the Application dated 14th November 2017 was done before the expiry of the 12 months period within which its interlocutory orders were valid and binding on the parties thereof.
44. In other words, the Orders issued on the 15th of November 2017 were valid and binding on the 18th of October 2018 when the determination of the Application dated 14th November 2017 was done.

Issue No.3- What are the orders issued on the 18th of October 2018 in the determination of the application dated 14th november 2017?

45. The next issue for determination was the outcome of the 45. Application dated 14th November 2017 and the Orders issued on the 18th of October 2018 upon determination of the said Application.
46. According to the Contempt Application filed on 2nd of August 2019, the Appellant was of the view that this Order of 18th October 2018 was also disobeyed by the Respondent.
47. The Respondent on the other hand states that the Order issued on the 18th October 2018 discharged the earlier orders issued on the 15th of November 2017.
48. Consequently therefore, the Application dated 14th November 2017 was actually dismissed.
49. Further to that, the Respondent was also allowed to access the said sugar cane with a view of harvesting the same even as the main suit was pending hearing and determination thereof.
50. In essence therefore, the Respondent denied any wrong doing in accessing the property known as L.R.No. Transmara/Olochani/657 and harvesting the sugar cane plantation that was in it.



51. This Court has also had a chance to peruse the Ruling of the Court issued on the 18th of October 2018.
52. Referring to the second last paragraph on Page 3 of the said Ruling dated 18th October 2018, the Court made the following observation; -

“From the above I find that the Applicant has not established a prima facie case for the grant of order of injunction and it is my finding that the Respondent be allowed to access the sugar cane on the land with a view of harvesting the same.”
53. The Court’s interpretation of the finding made in the Ruling dated 18th October 2018 was that the Applicant in the Application dated 14th October 2017 had failed to establish a prima facie case and consequently therefore, the prayers thereof would not be granted as prayed for.
54. Further to this finding, the Ruling pronounced on the 18th October 2018 allowed limited access to the Respondent for purposes of harvesting the sugar cane plantation that was on the property known as L.R.No.Transmara/Olochani/658 even before the hearing and determination of the substantive suit.
55. In other words, the ruling of 18th October 2018 vacated, set-aside and/or lifted the temporary injunction orders issued on the 15th November 2017 in totally.
56. Consequently, the Court’s finding is that the Orders issued on the 15th of November 2017 were set-aside, lifted and/or vacated by the Ruling pronounced on the 18th of October 2018.
57. The gist of the matter was that there were no Court Orders of temporary injunction against Respondent in the main suit that was capable of being disobeyed beyond the 18th of October 2018.

Issue No. 5- Are the prayers sought in this appeal merited?

58. Reflecting back on the Ruling pronounced on the 18th of October 2018, it is clear in the Court’s mind that the directions issued in the said ruling allowed the Respondent herein to proceed and harvest the sugar cane plantation that was on the property known as L.R.No. Transmara/Olochani/657.
59. How the Respondent is in contempt of any Court Order is therefore a misery to this Court.
60. This is because as earlier held, there was no Court Order existing against any party after the Ruling pronounced on the 18th of October 2018 capable of being disobeyed.
61. Further to that, the Ruling pronounced on the 18th of October 2018 did not make any determination of the issue of payment of damages for the loss of any sugar cane as alleged in Prayer No. 3 of the Application dated 2nd August 2019.
62. In essence therefore, there was no order of payment of damages made against the Respondent in the Ruling pronounced on 18th October 2018 which can possibly be enforced through the Application dated 2nd August 2019.
63. Consequently Prayer’s No.2, 3 and 4 of the Application dated 2nd August 2019 were not merited and could be granted as prayed.

Issue No. 6- Who bears the costs of this appeal?

64. Costs usually following the outcome of the proceedings.
65. In this judgement, the Appellant herein has not been successful in this Appeal and therefore he should bear the costs thereof.



Conclusion.

66. In conclusion therefore, the Court hereby makes the following Orders as appertains the Memorandum of Appeal dated 4th December 2019; -

- A. The memorandum of appeal dated 4th december 2019 be and is hereby dismissed.
- B. The ruling and decision pronounced on the 5th of november 2019 by honourable d.k.matutu principal magistrate be and is hereby upheld.
- C. The costs of this appeal shall be borne by the appellant herein.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 25TH APRIL, 2023.

EMMANUEL.M.WASHE

JUDGE

In The Presence Of:

Court Assistant: Ngeno/mempe

Advocate For The Appellant: Mr. Ngari

Advocate For The Respondent: Mr. Wafula

