



REPUBLIC OF KENYA



**Koilel & 2 others v Koilel & another (Civil Appeal E002 of 2021)
[2022] KEHC 10288 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E002 OF 2021**

**F GIKONYO, J
JUNE 30, 2022**

BETWEEN

**KOTOINE KOILEL 1ST APPELLANT
TUBULA KOILEL 2ND APPELLANT
PETER MUTUNKE KOILEL 3RD APPELLANT**

AND

**KANINI KRSAI KOILEL 1ST RESPONDENT
NKURUNA OLE KOILEL 2ND RESPONDENT**

*(Being an appeal from the Ruling of Hon. G.N. Wakabiu (C. M)
Delivered on 1st April 2021 in Narok CM Succ. No. 45 of 2017)*

JUDGMENT

1. In a ruling delivered on April 1, 2021, the trial court found the three objectors; the appellants herein in contempt of the court order requiring them to maintain the status quo. The trial court then made the following orders: -
 - i. Each of the three objectors shall pay a fine of Kshs. 200,000/= (two hundred thousand only) or serve 6 months imprisonment.
 - ii. The 2nd objector be arrested by the OCS Nairegia Enkare forth with to pay the fine or serve the sentence whichever is applicable.
 - iii. The OCS Nairegia Enkare police station to provide adequate security to the petitioners while they are at work and to require the objectors to execute bonds to keep peace.



- iv. The objectors are hereby prohibited from entering into LR number Cis Mara/ Nailoklok /223 and number Cis Mara/Nailoklok/73 pending the determination of the succession cause.
 - v. The applications dated February 19, 2021 and March 22, 2021 were substantially filed seeking conservatory orders which are spent and the parties are directed to move with speed and fix the matter for hearing and determination on priority basis.
2. Being dissatisfied with the ruling delivered on April 1, 2021, the appellants filed the memorandum of appeal dated March 7, 2021 citing the following grounds;
- i. That the learned trial magistrate erred in law and in fact in making orders that were prejudiced to the appellants herein.
 - ii. That the learned trial magistrate erred in law and in fact in hearing the matter and issuing substantive orders on a contentious matter in the absence of a formal application.
 - iii. That the learned trial magistrate erred in law and in fact in hearing the matter after 5:30 p.m. and proceeding to issue substantive orders at around 7:30 p.m. outside the permitted working hours thus violating the established regulations.
 - iv. That the learned trial magistrate erred in law and in fact in hearing an oral application for contempt of court and issuing substantive orders in the absence of a formal application.
 - v. That the learned trial magistrate erred in law and in fact in entertaining an oral application for contempt without addressing its mind and or giving directions on the appellants' application for revocation of the grant and the respondents' application for interlocutory orders of injunction.
 - vi. That the learned trial magistrate erred in law and in fact in making in passing a conviction and sentence against the appellants which apart from being manifestly harsh was founded on a wrong and erroneous interpretation of the meaning of maintenance of status quo.
 - vii. That the learned trial magistrate erred in law and in fact in making a finding that was contrary to the provisions of the law.

Submissions

3. The appeal was canvassed by way of written submissions.

Appellant's submissions

4. It was the appellants' submission that the respondent made no application for contempt of court proceedings. No certified copy of extracted order allegedly disobeyed was served personally on the appellants. There is no affidavit of service of a duly licensed process server in proof of service of the alleged contemned order upon the appellants.
5. The appellants submitted that the 1st respondent in her testimony in court did not mention the 2nd appellant as having been present and or having committed any acts complained of. In the absence of any allegations against the 2nd appellant, the appellants prayed that the conviction and sentence was irregular and unlawful.
6. The appellants submitted that the proceeding before the trial court were irregular and unlawful in the absence of a filed and served application.



7. The appellants submitted that they were never served with any orders of injunction or maintenance of status quo. Therefore, failure to comply with the order was not deliberate.
8. The appellants submitted that the standard of proof for contempt of court and civil committal was not met or taken into consideration.
9. The appellants submitted that the proceedings received after 5.00 p.m and conviction of the appellants to committal to jail were irregular and unlawful.
10. The appellants submitted that counsel for the appellants is compliant with Section 9 of the Advocates Act and is properly on record.
11. In conclusion, the appellants prayed that this court allows the appeal herein with costs to the appellants.
12. The appellants have relied on the following:
 - i. The supporting affidavit sworn by Kotoine Koilel on April 7, 2021.
 - ii. Human Rights Commission vs Attorney General And Another [2018] eKLR
 - iii. John Mugo Gachuki v New Nyamakima Co. Ltd Civil Cases 456 of 2011
 - iv. Civil Procedure Rules and Practice Directions Part 81
 - v. Samuel M.N. Mweru & others v National Land Commission & 2 others Miscellaneous Application No. 443 of 2017.
 - vi. Abdalla Mugute v Moshin Bin Saleh and 3 others
 - vii. IK v RMS [2019]eKLR Civil Case No. 68 of 2018
 - viii. Vimal Kumar Bhmji Depar Shah v Bidco Africa Limited.
 - ix. Republic v Ahmad Abolfathi Mohammed & Another
 - x. Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR
 - xi. Afro freight Forwarders Limited v Pinnacle Consultants Limited & Another [2003] eKLR.

Respondent's Submissions

13. The respondents submitted that by practice the court hearing proceedings are concluded by 5.00 p.m. However, the court has discretion to vary this time depending on the circumstances. In this case, the appellants persuaded the court to place aside the matter to allow their counsel to conduct hearing. Counsel arrived at 5:30 p.m. and informed the court that he had gone for a COVID jab. Counsel participated in cross examining the respondent.
14. The respondents submitted that the trial court correctly and lawfully dispensed the hearing of the contempt of court as a priority.
15. The respondents submitted that the counsel for the respondents properly moved the court as an officer of the court. The trial court acted swiftly to summon the alleged contemnors to appear in court for hearing on April 1, 2021. Protecting the rule of law and promoting dignity of the court is a duty bestowed upon advocates hence the oral application ought to be upheld.



16. The respondents submitted that the appellants did not suffer any prejudice. The appellants have not demonstrated that they were denied access to justice or fair trial. The appellants appeared for hearing and they were fully represented by their counsel. Therefore, the conviction and sentence meted out is safe since the appellants were accorded a fair hearing and trial. The prejudice contended by the appellants is untenable.
17. The respondents submitted that the learned trial magistrate applied the correct legal principles in respect of contempt of court. That the order for status quo was entered by consent of both parties on March 30, 2021.
18. The respondents submitted that the appellants had the benefit of representation by counsel and ought to have known the inevitable consequences of a guilty finding in contempt of court proceedings. Neither the appellants nor their counsel attempted to mitigate at any part of the proceedings. The trial court cannot be said to be in error on that basis. Therefore, the sentence meted out was reasonable. The respondents urged this court to uphold the trial courts conviction and sentence in its entirety.
19. The respondents relied on the following authorities
 - i. [*Econet Wireless Kenya Ltd v Minister For Information & Communication of Kenya & Another*](#) [2005] eKLR
 - ii. Article 4(2) , 2,3 159 and 48 of [*the Constitution*](#)
 - iii. Section 55 of the [*advocate's act*](#)
 - iv. [*Republic v Ahmad Abolfathi Mohammed & Another*](#) [2019] eKLR
 - v. [*Francis Mugo & 22 Others v James Bress Muthee & 3 Others*](#), Civil Suit No. 122 of 2005 [2005] eKLR
 - vi. [*Priscillah Wanja Kibui v James Jiongo Kibui & Another*](#) ELC 176 of 2011 as cited In *Saifudeen Abdullahi & 4 other* In Msa High Court Civil Case No 11. of 2012
 - vii. [*Cheptanui Soy v Michael Sayay & Another*](#) [2018] eKLR
 - viii. [*Black's law dictionary*](#) (ninth edition) definition of contempt of court.
 - ix. [*Mutitika v Baharini Farm Ltd*](#) [1985] eKLR
 - x. [*In Re Estate of Kiplagat Kigen \(Deceased\)*](#) [2019] eKLR

Analysis and Determination

Duty of court

20. As first appellate court, I shall re-evaluate the evidence and come to own conclusions, except, giving allowance of the fact that it neither saw nor heard the witnesses; matters of demeanor are best observed by the trial court (*Okeno vs. R*)

Issues for Determination

- i. Whether proceedings undertaken by the trial court after 5:30 p.m. are irregular and invalid.
- ii. Whether oral application for contempt of court is incompetent.
- iii. Whether the conviction and sentence for contempt was founded on evidence and the law



Form of an application for contempt

21. *Contempt of Court Act* No 46 of 2016 was declared invalid for lack of public participation as required by Articles 10 and 118(b) of *the Constitution*, and for encroaching upon the independence of the Judiciary (*Kenya Human Rights Commission vs. Attorney General & Another* [2018] eKLR).
22. According to Section 5 of the *Judicature Act*:
 - (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.
23. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in *Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR.
24. Rule 81.4, 81.5, 81.7 and 81.8 of the English Civil Procedure Rules (Amendment No. 3) Rules, 2020 provides for the requirements of a contempt application, the manner of service of the application, directions for hearing of contempt application and hearings of such applications.
25. My understanding of the foregoing provisions is that at the stage of directions, the Court has the power to direct the manner of the hearing of the application and this may include directions for the attendance of witnesses and oral evidence, as it considers appropriate. In exercise of this power, it may direct that the witnesses, if any, attend and give oral evidence. It may also decide to determine the matter by way of written representations since the decision to direct the attendance of witnesses and giving of oral evidence is not mandatory and depends on whether the Court considers it appropriate to do so. Again, the Court may at that stage issue a bench warrant to secure the attendance of the defendant at a directions hearing or at the substantive hearing. However, the Court may not compel a Defendant to give evidence either orally or in writing. In other words, the Court's power is limited to securing the attendance of the Defendant but it is upon the Defendant to decide whether or not to give evidence and if so whether to do so orally or in writing.
26. In this case what the trial court directed was that the objectors would appear in person. The court issued summons to that effect.
27. Pursuant to the provisions of Rule 81.8(1) of the said Rules, all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs. Contrary to the insinuations by the appellants, the fact that the proceedings were conducted after 5 p.m. does not turn such proceedings into a private session as long as the public have an opportunity to access the court and the proceedings. Therefore, the proceedings conducted herein after 5.00 p.m. are not prejudicial to the appellants herein.

Of form of Application

28. In this case, the legal Counsel for the petitioner orally sought the trial court to find the objectors to be in contempt of court and punish them accordingly. The oral Application was premised on action of the objectors carried out on March 31, 2021 whereby they prevented the petitioner from carrying out farming activities in the suit parcel of land despite the court having directed the parties to maintain the status quo. The application was supported by oral testimony by the petitioner.
29. Mr. Kilele, counsel for the objectors had the opportunity to cross examine the petitioner on her testimony concerning the acts of the alleged contempt of court committed by the objectors.



30. The application herein was made orally. The arguments by the appellants are competence-based. In the nature of proceedings before the trial court- succession proceedings- I doubt, in the face of the objective of article 159 of *the Constitution*, an oral application for contempt of orders issued thereto is prohibited. Under the law of succession Act courts have wide powers in preservation of estate property and also in regulating the conduct of parties including beneficiaries during the pendency of the proceedings to determine the estate property, identify beneficiaries and distribute the estate of the deceased.
31. I do not, therefore, find any demonstrable prejudice in these proceedings by reason only that the application for contempt was made orally. Therefore, the ground on form of application fails.

Essential elements of contempt

32. Judicial borrowing from contemporary jurisdiction: in order to succeed in civil contempt proceedings, the Applicant has to prove; (i) the terms of the order; (ii) Knowledge of these terms by the Respondent; and (iii) Failure by the Respondent to comply with the terms of the order (*Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005).
33. I have considered the proceedings herein as well as the orders contained in the impugned ruling. The Court record is clear that on the March 30, 2021 when the orders were issued, there was appearance for both parties.
34. The jurisprudence now favors knowledge of the existence of Court orders as opposed to strict personal service. In the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR the Court of Appeal posed the question as to whether knowledge of a Court order or judgment by an Advocate of the alleged contemnor would be sufficient for purpose of contempt proceedings and answered the question in the affirmative stating: -

“We hold the view that it does. This is more so in a case as this one where the Advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an Advocate appears in Court on instructions of a party, then it behooves him to report back to the client all that transpired in Court that has a bearing on the clients’ case...”

35. The order was that ‘by consent all pending applications shall be heard on April 1, 2021. Status quo as it obtains now be maintained till April 1, 2021.’ This Court thus finds that the objectors had knowledge of the Court’s orders.
36. I find that indeed there was a valid Court order issued by the trial Court whose terms were clear and unambiguous. In essence thereto, the objectors were to maintain the status quo.
37. The court is guided by the Scottish case in *Stewart Robertson vs. Her Majesty’s Advocate*, 2007 HCAC63, where Lord Justice Clerk stated that:

“contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”

38. Further, Romer L.J in *Hadkinson vs. Hadkinson*(1952) ALL ER 567 stated that:

“It is the plain and unqualified obligation of every person, against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it



extends even to cases where the person affected by an order believes it to be irregular or even void”

39. I find that the actions of the objectors herein willfully and intentionally defied orders of the Court despite knowledge of the same.
40. I find that the actions of the appellants ran afoul of the terms of the Court orders issued March 30, 2021 which had constrained them from disrupting the status quo.

Conclusion and orders.

41. The appeal has no merit. It fails. However as this is a matter involving family members I will suspend the sentence herein to enable the contemnors to purge the contempt and abide by the consent orders made on March 30, 2021 pending the hearing and determination of the chief magistrate’s Succession Cause No. 45 of 2017. Should they commit any further acts of disobedience of court orders, the suspension of sentence shall lapse and they will be required to satisfy or serve the sentence imposed by the trial court.
42. Subject to the orders I have made, the appeal herein is dismissed.
43. In light thereof, the petitioner’s application dated March 22, 2021 seeking maintenance of status quo is overtaken by events.
44. The objector’s application dated February 10, 2021 shall be heard on priority basis on a date to be fixed by the trial court.
45. Finally, parties should desist from any acts which may run afoul of court orders herein pending the hearing and determination of the chief magistrate’s Succession Cause No. 45 of 2017.
46. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 30TH DAY OF JUNE 2022

F. GIKONYO M

JUDGE

In the Presence of:

Kilele for the Appellant

M/s Mogere for the Respondent

Mr. Kasaso - CA

