



**Noorani v Ochieng & another (Environment & Land Case
319 of 2008) [2023] KEELC 18328 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 319 OF 2008**

**LN MBUGUA, J
JUNE 22, 2023**

BETWEEN

AHMED NOORANI PLAINTIFF

AND

JOYCE AKINYI OCHIENG 1ST DEFENDANT

**ONESMUS G GITHINJI T/A ONESMUS GITHINJI & CO
ADVOCATES 2ND DEFENDANT**

RULING

1. Judgement was entered for the Plaintiff in this matter on May 12, 2022. The defendants herein had filed their statement of defences, but they did not turn up for the trial. The Plaintiff has commenced the process of execution of the aforementioned judgment.
2. The 1st Defendant has filed in person a Notice of Motion application dated February 15, 2023 seeking a stay of execution of the judgement dated May 12, 2022. On April 19, 2023, one Ms. Njeri Kariuki appeared before this court and addressed the court as follows; 'I am coming on record for the 1st defendant/ applicant.'
3. Counsel for the Plaintiff however argued that the 1st Defendant has no right of audience since she has remained in contempt of court orders issued on July 28, 2010 by Hon Justice Msagha Mbogholi in which she was directed to facilitate deposit of ksh 4.4 million to the Plaintiff's Advocates Account. That even a warrant of arrest was issued against her but it was never enforced as she could not be traced. He argues that before 1st defendant is heard, she should purge the contempt.
4. On her part, counsel appearing for the 1st defendant admits that the Plaintiff was granted orders to commit the 1st Defendant to civil jail for 30 days by the Court of Appeal but he did not serve the orders upon the 1st Defendant, thus he intentionally refused to execute. She places reliance on the case



of *Rose Detho v Ratirau automobiles Limited & 6 others [2007] eKLR* where the Court found that disobedience of a court order does not in itself bar a person from being heard.

5. She also argues that as provided by Article 25 of the *Constitution*, the right to hearing cannot be limited. It is also submitted that at the time of the 1st Defendant's alleged contempt, the 1st Defendant had communicated to the Plaintiff her inability to deposit the money and had agreed to serve the term of 30 days but the Plaintiff refused to enforce the order.
6. She urges the court to give the 1st Defendant who is in custody at Lang'ata prison sufficient time (90) days to purge the contempt if their application is allowed.
7. The 2nd defendant is in support of the arguments of the 1st defendant and states that the right to audience is granted by the *Constitution* and is to be jealously guarded as it is the cornerstone of the rule of law.
8. In rejoinder, Counsel for the Plaintiff submits that that the 1st Defendant has confirmed being aware of the orders of the court yet she made no attempt to purge the contempt over the years.
9. I have duly considered all the rival arguments. The issue for determination is whether the 1st defendant should be given audience by the court to enable her prosecute her application dated February 15, 2023.
10. It is not disputed that on July 28, 2010, this court ordered the Defendant to deposit ksh 4.4 Million with the Plaintiff's Advocates. On March 31, 2017, the Court of Appeal also committed the 1st Defendant to civil jail for a period of 30 days on account of her failure to deposit the sum of Khs 4.4 million with the Plaintiff's Advocates. The issue of none compliance with the orders of Judge Mbogholi Msagha (as he then was) dated July 28, 2010 is captured at paragraph 6, 7 and 27 of this court's judgment dated May 12, 2022.
11. The record indicates that the 1st Defendant was fully represented in court when the trial court issued the orders in question. Counsel for the 1st Defendant also appears to admit that the 1st Defendant was aware of the orders as she submitted that the 1st Defendant communicated to the Plaintiff her inability to pay at the time the orders were issued. She cannot therefore claim that she was not served with the orders. Knowledge of an order is sufficient in the circumstances of this case.
12. In *Rose Detho v Ratiral Automobiles Ltd & 6 Others [2007] eKLR* which was relied on by the 1st Defendant to argue that being in contempt does not bar a party from acting, the Court found thus;

'Thus, there is no absolute legal bar to hear a contemnor who has not purged the contempt to be heard and whether the court will hear the contemnor is a matter for the discretion of the court dependent on the circumstances of each case.'
13. Therefore, each case is to be determined on its own circumstances. The 1st Defendant has been in contempt since the orders were first issued more than a decade ago on July 28, 2010. I'm guided by the finding of the Court of Appeal in the case of *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR* where it was held that;

' In deserving cases, this Court has itself set its face firmly against granting contemnors audience until and unless they first purge their contempt and it shall continue to do so in such cases as.... a headstrong contumaciousness proceeding from a bold impunity, open defiance or cynical disregard for the authority of the Court and the integrity of the judicial system. Such pernicious conduct cannot be countenanced and those hell-bent on it will



find neither help, nor refuge under a convenient and self-serving appeal to natural justice when their impudent conduct threatens the very foundation of the rule of law. While the right to fair hearing is sacrosanct and is one of the non-derogable rights in Article 25 of the Constitution, we affirm with this Court in AB & ANOTHER vs RB 2016 eKLR that there may be instances where due to the risk of the rule of law being deliberately undermined, such right may be denied and the hearing of an application for stay denied until there is full compliance with the orders of the High Court.'

14. I find that the 1st defendant falls in this category of a party who has been in open defiance of this court's orders as well as the Court of Appeal orders and has therefore undermined the authority of the courts. I therefore conclude that the 1st defendant does not deserve to be given audience by this court.
15. It is also pertinent to note that before the delivery of the judgment, the 1st defendant was still represented by an advocate in these proceedings. The filing of the application of the 1st defendant dated February 15, 2023 in person as well as the appearance by her advocate, one Njeri Kariuki is in contravention with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* which stipulate that;

' When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-
 - a. Upon an application with notice to all the parties; or
 - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.'
16. The upshot of the findings of this court are that, the 1st defendant has no audience and that the application dated February 15, 2023 has been irregularly filed, the same is hereby struck out with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Opundo holding brief for Mr. Michuki for Plaintiff

M/s Njeri for 1st Defendant

Kabugu for 2nd Defendant

Court assistant: Kajuju

