



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E014 OF 2021

AROMA DEVELOPERS LIMITED.....1ST APPELLANT

NINA PETROVINA AKINYI OWINO..... 2ND APPELLANT

VERSUS

ENG. GILBERT ONGIDI ONDIS

T/A BOYA TECHNICAL SERVICES..... RESPONDENT

[Being an appeal from the Ruling/Order of Hon. R. K. Ondieki SPM

dated 22nd February 2021 issued in Kisumu CMCC NO. 27 of 2020]

RULING

The application dated 24th February 2021 was brought by the Appellants, who were seeking the stay of execution of an order made on 22nd February 2021, until their appeal was heard and determined.

1. The Appellants also asked this Court to order that the proceedings before the trial Court be stayed until the appeal was heard and determined.
2. On 22nd February 2021 the learned trial magistrate held that **NINA PETRONIVA OWINO** was in contempt of court. In the circumstances, the trial Court ordered that Warrants of arrest should issue forthwith, against the contemnor.
3. Being dissatisfied with the Ruling of the trial Court, the Appellants filed a Memorandum of Appeal on 24th February 2021.
4. Simultaneously with the Memorandum of Appeal, the Appellants filed the application herein.
5. It was the Appellants' position that they had not committed any acts of contempt of court.
6. The Appellants' position is that when they withdrew money from the account at **FAMILY BANK LIMITED**, they were unaware of the existence of any order barring them from doing so.
7. In fact, the Appellants' position was that at the time the money was withdrawn, they did not even know that the Respondents had instituted proceedings against them.
8. In answer to the application, the Respondents asserted that the Appellants had knowledge of the order barring them from withdrawing money from the account at Family Bank.
9. In his replying affidavit, **ENG. GILBERT ONGIDI ONDIS** deponed thus;

“4. THAT I know of my own knowledge that the Applicant had knowledge of existence of the said Court order, much as service was not effected upon her.”

10. He added that the Applicants went ahead to defy the order, by withdrawing money from the bank on 24th February 2020.

11. In the opinion of the Respondents, the application herein was just an attempt to buy time and to circumvent the course of justice. Therefore, the Respondents urged this Court to dismiss the application, so that the Applicant may;

“..... be arrested and committed to civil jail.”

12. I have given due consideration to the application. First, I am alive to the fact that the appeal herein is of an interlocutory nature. It is therefore imperative that I refrain from making conclusive remarks, which may have the effect of tying the hands of the learned trial magistrate hereafter.

13. This Court shall also refrain from making determinative remarks which might be construed as pre-determining the appeal.

14. In their submissions the Respondents stated thus;

“The Appellant herein was duly served with the order but deliberately ignored and went ahead to withdraw money from Family Bank Limited.”

15. That contention is at variance with the factual position. Indeed, Eng. Gilbert Ongidi Ondis conceded, in his replying affidavit, that the order was never served upon the Applicant.

16. It is therefore most unfortunate that counsel should seek to base submissions on an inaccurate factual position.

17. Furthermore, even the trial Court was of a view that is not consistent with that of the Respondent, as can be seen from the following words within the Ruling which is sought to be challenged on appeal;

“It is not disputed as to the law on contemnors and on the distinction of personal service and when a party has knowledge of the existence of an Order of the Court. What is clear is that the contemnor herein was not personally served, neither was she in Court when the Orders were issued by the Court.”

18. The learned trial magistrate noted that the Order issued on 24th January 2020, was duly served upon Family Bank on 27th January 2020.

19. On the other hand, the money in issue was withdrawn on 24th January 2020.

20. The trial Court was of the considered view that the Applicants connived with the bank to have the money withdrawn. The trial Court's said view was pegged upon;

“..... the fact that the legal department was aware of the existence of the Order.....”

21. On a prima facie basis, I find that the Appellant has an arguable appeal. I further find that if the Appellant were to be punished for contempt of court, before the appeal was heard and determined, there was a real possibility that she would have been condemned before the efficacy of the trial court's findings was verified.

22. On the other hand, should the appeal be heard and be dismissed, the Respondents would not be prejudiced as the Appellants would, thereafter, still undergo appropriate punishment.

23. In the result, I order that the further proceedings in **KISUMU CMCC NO. 27 OF 2020** be stayed until the appeal is heard and determined.

24. I also order that there shall be a stay of execution of the orders made on 22nd February 2021, until the appeal is heard and determined.

25. Costs of the application shall be in the substantive appeal; so that the party who wins the said appeal, will also be awarded the costs of the application dated 24th February 2021.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF NOVEMBER 2021

FRED A. OCHIENG

JUDGE