



**Ogle v Sheikh & 2 others (Environment and Land Appeal E059 of 2023)  
[2023] KEELC 20373 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20373 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E059 OF 2023  
LN MBUGUA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**KATRA ABDI OGLE ALIAS RAHMA HUSSEIN ..... APPELLANT**

**AND**

**ABDI AHMED SHEIKH ..... 1<sup>ST</sup> RESPONDENT**

**HASSAN ABDI IBRAHIM ..... 2<sup>ND</sup> RESPONDENT**

**HUSSEIN ABDULLAHI IBRAHIM ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. These proceedings relate to a suit before the Milimani Magistrates Court in the case ELC No. 438 of 2022, where the Appellant is the defendant, while the Respondents herein are the plaintiffs.
2. The Appellant filed an application before this court dated 9.6.2023 seeking orders that; there be a stay of execution of the ruling of the Principal Magistrate delivered on 12.5.2023 and that there be a stay of proceedings in the case MC ELC/E438/2022 pending the lodging, hearing and determination of this appeal, and that the Deputy Registrar of this court be directed to avail the original court file in the aforementioned matters.
3. The application is grounded on the Appellant's supporting affidavit sworn on 9.6.2023. She avers that in a ruling delivered on 12.5.2023 in MC ELC/E438/2022, the court found her to be in contempt of a court order issued on 10.1.2022 which is non-existent since the said suit was filed on 17.12.2022.
4. She further avers that the learned trial magistrate erred in law and fact by relying on an invalid statute being the *Contempt of Court Act*, 2016 and by failing to apply the relevant legal provisions namely; Order 1 Rule 13 (1) & 2 of the *Civil Procedure Rules*, 2010, Section 106B (4) and Section 78A of the *Evidence Act*, Cap 80.



5. The application is opposed by the Respondents vide the affidavit of the 1<sup>st</sup> Respondent sworn on 8.7.2023. He Avers that the Respondents are tenants of the space of land located on IR No. 209/6846 and the space adjacent to the said parcel which is the property of Ainsworth Primary School and lies between the school's concrete perimeter wall and the road reserve along Muratina Street.
6. He further avers that since the suit property was laying bare and morphing into a dumpsite, the Respondents approached the school for permission to rehabilitate the land and create an income generating project that would benefit them mutually.
7. Their request was approved vide a letter dated 10.2.2021 from the school's Board of Management. They duly paid for the use of the suit premises. However, the moment they started to clear garbage, the Appellant swooped in and began erecting illegal structures and her actions were objected to by the school and the community.
8. The Appellant then filed case ELC Case No. 169 of 2022 before the Magistrate's court and she was initially granted protective orders ex parte on 2.6.2022 and 16.5.2022, but they were vacated by Hon. S.A Opande on 8.8.2022. The court ordered anyone in occupation of the suit property to vacate within 7 days until the ownership of the property was determined. However, the Appellant herein disregarded the said orders. Instead of complying, she filed an appeal on those orders vide Milimani ELCA No. E066 of 2022 where by she was denied the orders sought.
9. That the appellant then filed an application seeking review of Hon S.A Opande's orders of 8.8.2022, but the court instead proceeded to affirm the same on 11.10.2022.
10. The Respondents then filed an application in ELC 169 of 2022 citing the Appellant for contempt but she withdrew the suit to defeat the hearing of the application for contempt.
11. The deponent avers that since the Appellant had withdrawn her suit, the Respondents filed CMCC ELC No. E438 of 2022 and on 10.1.2023, they were granted temporary orders prohibiting the Appellant herein from interfering with their possession of the suit land .The orders were served on the Appellant on 13.2.2023 but the Appellant constructed more structures.
12. He avers that the court was well guided in its ruling dated 12.5.2023 and did not rely on the [Contempt Of Court Act](#) 2016. He adds that the Appellant has approached this court with unclean hands as she has conveniently omitted some parties in ELC No. E438 of 2022 being the 4 interested parties who are the Ex-Chairman Board of Management Ainsworth Primary School, the headmaster of the School, the chairperson of the board of management and the director of education, Starehe Sub County. He adds that the said parties played a critical role and have offered their input in ELC No. E438 of 2022.
13. The Respondents also filed a further affidavit sworn by the 1<sup>st</sup> Respondent on 18.7.2023. He avers that the Appellant's main argument is that the court order issued on 10.1.2023 is non-existent since it was erroneously dated 10.1.2022 instead of 10.1.2023, but it is pretty obvious that this was a typographical error indicating 2022 instead of 2023, and that is a straightforward issue to be remedied under Order 45 Rule 1 (b) of the [Civil Procedure Act](#).
14. The court notes that the Appellant filed a supplementary affidavit and written submissions of even date on 17.8.2022 outside this court's directions that the same be filed by 27.7.2023. The practice of filing documents in defiance of court's directions is irregular and unacceptable. See SCOK decision in [Dande & 3 others v Director of Public Prosecutions & 2 others](#) (Petition 4 (E005) of 2022) [2022] KESC 23 (KLR) (19 May 2022) (Ruling) thus the said documents are hereby disregarded. Further, it is noted that the Respondents had not filed their submissions by 11.8.2023 as directed by the court.



15. The issues falling for determination are;
- a. Whether the execution of the ruling dated 12.5.2023 issued in MC Elc/E438/2022 should be stayed.
  - b. Whether proceedings in MC ELC/E438/2022 should be stayed pending the outcome of the intended appeal.
  - c. Whether the file MC ELC/E438/2022 should be availed in this court.
16. The legal framework to grant/refuse an application for stay of execution pending appeal is anchored under Order 42 Rule 6 (1) of the Civil Procedure Rules, of which the power is discretionary. In Loice Khachendi Onyango v Alex Inyangi & another [2017] eKLR the court held as follows;
- “The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant”.
17. The applicant argues that she was found guilty of disobeying orders issued on 10.1.2022, and that the trial court in its ruling of 12.5.2023 relied on a non-existent statute, being the Contempt of Court Act.
18. I find that the Respondents have annexed a certified copy of the orders that the Appellant is said to have disobeyed and they are dated 10.1.2023. Clearly, the ruling in MC ELC/E438/2022 has a typographical error in that the year of the order is mentioned as 2022 instead of 2023.
19. On the issue of the application of the Contempt of Court Act, I find that the Application dated 8.2.2023 before the trial court was anchored on the following provisions of law; Article 23 (1) of the Constitution, Sections 3, 3A, 63(c) & (e) of the Civil Procedure Act, Sections 4 (1) (a), 6 (c), 28 (1)(6) of the Contempt of Court Act, 2016 and all enabling provisions of the law. However, even if the Contempt of Court Act is mentioned in the application, nowhere in the ruling of 12.5.2023 did the trial court address its mind to the application of the said statute.
20. In the case of Ramadhan Salim v Evans M. Maabi T/A Murby Auctioneers & another [2016] eKLR, the Court of Appeal had this to say in relation to the powers of Magistrates in dealing with contempt proceedings;
- “However, the Magistrates’ Courts Act, 2015 which came into force on 2<sup>nd</sup> January 2016 now gives the magistrate’s courts unlimited jurisdiction to punish for contempt. Section 10 of the said Act specifically provide:-
- .....
- (3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.”
21. The provisions of Section 63 (c) of the Civil Procedure Act provides that;
- “In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed
- 



- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold”.

22. While the provisions of Order 40 rule 3 (1) stipulate that;

“In cases 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 person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release”.

23. It is clear beyond peradventure that the Magistrates Courts have powers to punish for contempt of court orders, thus there is no sufficient grounds to warrant an order of stay of execution of the ruling dated 12.5.2023.

24. The court has also seen the order given on 10.1.2023 of which the applicant has not challenged the existence of the same, thus there is no need to call for the trial court.

25. Similarly, the court finds no basis for staying the proceedings before the trial court, noting that the said case is at the infancy stage. The court is guided by the decision in *Kenya Wildlife Service v James Mutembei* [2019] eKLR where it was held that: -

“...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent...”.

26. This court has also taken into consideration the circumstances under which the suit E438 of 2022 was filed of which, at paragraph 3 (f)- (l), of the Replying Affidavit of Ahmed Abdi Sheik, the respondents have given minute details of the previous case E169 of 2022. In particular, the Applicant who was the plaintiff in the said case has not rebutted the averments made by the respondents that she withdrew that case just when a contempt application was filed against her. The applicant is certainly guilty of failing to disclose material facts and she has approached this court with unclean hands.

27. In the case of *Re Estate of Julius Ndubi Javan (Deceased)* [2018] eKLR, the court had this to say albeit in a succession case;

“Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (*uberimae fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law”.

28. Looking at the conduct of the Appellant in the dispute surrounding the suit parcel, I opine that she does not deserve the discretion of this court in her favour. The totality of the findings of this court is that the application dated 9.6.2023 is found to have no merits, the same is hereby dismissed with costs to the respondents.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023  
THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Ombiri holding brief for Olanda for Respondent

Court Assistant: Eddel

