



REPUBLIC OF KENYA



KENYA LAW
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**Okello v Odondo (Environment & Land Case E013 of 2022)
[2022] KEELC 4903 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E013 OF 2022
AY KOROSS, J
SEPTEMBER 22, 2022**

BETWEEN

TIMOTHY RAYOLA OKELLO APPELLANT

AND

SELVIA ODONDO RESPONDENT

RULING

The Appellant's Case

1. Pursuant to the provisions of Sections 1A, 1B and 3 of the *Civil Procedure ACT* and Order 42 Rule 6 of the *Civil Procedure Rules*, the appellant who acts in person filed a motion dated 22/04/2022. The motion is the subject of this ruling. Some of the reliefs sought are spent and the prayers pending determination are as follows:
 - a. Spent;
 - b. Spent;
 - c. That this honourable court be pleased to allow the appeal;
 - d. That this honourable court be pleased to grant an order setting aside the order keeping the appellant in prison for 6 months pending the hearing and determination of the application;
 - e. That there be further or other orders as the court may deem fair and expedient to grant in the circumstances; and
 - f. That costs of the application be provided for.
2. The motion is premised on the grounds set out on its face and on the supporting affidavit of the appellant dated 02/04/2022. He admitted that despite the court issuing permanent injunctive orders against him, he trespassed onto land parcel number Uholo/Sigomere/1181 (hereinafter referred to



as ‘the suit property’). He justified his action on ignorance on the existence of a court decree. He contended that the 6-month jail term that had been ordered by the trial court should be substituted with a fine because he was aged and suffered a myriad of ailments. He contended that his appeal had reasonable chances of success.

The respondent’s case

3. In response, the respondent who is represented by the firm of W.O. Ochuka & Co. Advocates filed a replying affidavit dated 27/06/2022. She contended that she had filed a suit against the appellant in Ukwala PM ELC No. 34 of 2020. Despite the appellant entering appearance, he failed to file any documents. Consequently, judgement was entered in her favour; she was in possession of the suit property and permanent injunctive orders were issued against the appellant.
4. She asserted that the appellant had declined to comply with the decree and consequently, she instituted contempt proceedings in the trial court which culminated into the orders that are the subject of this court’s determination; conviction to civil jail for a period of 6 months. She averred that the motion was vexatious, bereft of merit and an abuse of the court process.

Appellant’s submissions

5. The appellant filed written submissions dated 04/05/2022. He reiterated the averments in his supporting affidavit and stated that the lower court suit proceeded without his knowledge. It was his position that there was a footpath on the suit property that enabled him access his property; this footpath was the genesis of the lower court suit.

Respondent’s submissions

6. Through counsel, the respondent filed written submissions dated 27/06/2022. In it, she averred that the appellant had been given numerous opportunities to defend his case which he had squandered and therefore he was the author of his own misfortune.
7. She also contended that the appellant had not proffered any official medical document to demonstrate his health status and therefore the court was bereft of evidence of the alleged ill health.
8. She stated that the appellant had introduced new issues at an appellate stage and that by virtue of Order 45 of the *Civil Procedure Rules*, the only avenue available to the appellant was to ventilate his grievances by way of a review of the orders of the court. She submitted that the orders being sought by the appellant were a kin to beseeching this court to review the orders of the trial court.

Analysis and determination

9. I have carefully considered the parties’ respective pleadings and rival submissions and the only issue falling for determination is whether the motion is merited.
10. The only main prayer pending determination is that the appeal be allowed. The other prayer that this court do set aside his conviction was made “pending hearing and determination of the application”. I do not know if there was oversight on the appellant’s part or not. However, it must be borne in mind that the court as an independent arbiter cannot enter the realm of litigation and grant orders that have not been sought by the parties. It is bound by the pleadings of parties.



11. Had the appellant sought for setting aside his conviction in civil jail pending the outcome of the appeal, I would have exercised my discretion under Section 43 of the Civil Procedure Act. This provision of law provides as follows;

- “(1) At any time after a warrant for the arrest of a judgment-debtor has been issued, the court may cancel it on the ground of his serious illness.
- (2) Where a judgment-debtor has been arrested, the court may release him if in its opinion he is not in a fit state of health to be detained in prison.
- (3) Where a judgment-debtor has been committed to prison, he may be released therefrom—
- (a) by the superintendent of the prison in which he is confined on the grounds of the existence of any infectious or contagious disease; or
- (b) by the committing court or the High Court on the ground of his suffering from any serious illness.
- (4) A judgment-debtor released under this section may be rearrested, but the period of his detention in prison shall not in the aggregate exceed that prescribed by section 42 of this Act.

12. From this provision of law, it is clear that this court has jurisdiction to hear the motion. However, it is my considered view that it was not necessary for the appellant to rush to this court. He should have first moved the committing court in the appropriate manner because it had the benefit of understanding the gravamen of the suit that led to the appellant’s conviction. I am persuaded by the decision of Kennedy Milton v Hiten Shantilal Shah & 2 others [2019] eKLR where the court stated thus;

“For good order the same ought to start from the Committing Court. Further, this Court noted that Section 43 of Civil Procedure Act is a standalone provision employed to be utilized on application before the Committing Court or the High Court”

13. Even if the appellant had sought for cancellation and or setting aside his conviction pending appeal, which for the benefit of doubt he has not, I would have declined to grant him the orders sought. Though he has availed to this court his national identity card which indeed confirms that he is aged 84 years, he has not adduced any evidence to corroborate his assertions that he suffers a myriad of medical illnesses.

14. In an application for release from civil jail on account of ill health, it behooves upon an applicant and in this case the appellant to persuade court that he is suffering from serious illnesses that would warrant a court to exercise its discretion to release him from prison.

15. His prayer that the appeal be allowed cannot be granted at this stage. This court cannot grant final orders at an interlocutory stage. I find this prayer premature.

16. In upshot, I find the motion is not merited and because costs abide the outcome, I award costs to the respondent. I issue the following disposal orders.

- a. The motion dated 2/04/2022 is hereby dismissed with costs to the respondent.

DELIVERED AND DATED AT SIAYA THIS 22ND DAY OF SEPTEMBER 2022.



HON. A. Y. KOROSS

JUDGE

22/9/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing the Presence of:

Mr. Timothy Royola Okello acting in person present

N/A for the respondent

Court assistant- Ishamel orwa

