



**Omboto & another v Kenya Railways Corporation & 4 others (Petition 8 of 2019) [2022] KEELC 15007 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15007 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
PETITION 8 OF 2019  
A OMBWAYO, J  
NOVEMBER 24, 2022**

**BETWEEN**

**JOHANNES AKELO OMBOTO ..... 1<sup>ST</sup> PETITIONER**

**GRADUCE OMBOTO AKELLO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY MINISTER OF INTERIOR AND CO-ORDINATION  
OF NATIONAL SECURITY ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**KENYA PORTS AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**Brief Facts**

1. Before me is an Application dated 13<sup>th</sup> May 2022 filed by the Attorney General filed on behalf of the 2<sup>nd</sup> Respondent under sections 1A, 1B,3 and 3A of the [Civil Procedure Act](#), Order 42 Rule 6 (1) of the [Civil Procedure Rules](#), Article 50 and 159 of the [Constitution](#) of Kenya 2010 seeking orders that:
  1. That this matter be certified as urgent and be heard on priority.
  2. That the Honourable Court be pleased to stay the execution of its orders of 10/12/2021 and extracted on December 14, 2021 temporarily pending inter party hearing of this Application.
  3. That the Honourable Court be pleased to stay the execution of its orders of 10/12/2021 and extracted on December 14, 2021 temporarily pending the ruling to be delivered by the court



of Appeal in COA Application No. E0220 of 2022 set for 8<sup>th</sup> July 2022 or until its delivery on any other date other than the set date.

4. That the costs of this Application be provided for.
2. The Application was based on grounds that the 2<sup>nd</sup> Respondent/Applicant was found to be in contempt of this court's orders and ordered to be committed to jail or pay a fine of Kshs. 200,000/= and the Applicant being aggrieved of the finding of this court, has preferred an Appeal to the Court of Appeal and has filed an Application for stay of execution of the said order in COA Civil Application No. EO20 of 2022.
3. The Application was supported by the Affidavit of Callen Masaka where it was stated that the Applicant filed an Application for stay of the finding and execution of the sentencing and the Application's pending Ruling on 8/7/2022. That pending the ruling on 10/05/2022 the Respondent through the officer in charge of Central Police Station Kisumu visited the offices of the Applicant in an attempt to arrest him in execution of the orders.
4. It was stated that the Applicant was away on official duties and therefore escaped the arrest. That the Applicant is a civil servant of a middle cadre cannot be able to raise the monetary fine at once as the amount is high. It was further stated that the Applicant is charged with providing security to the ongoing revampishment of the Kisumu port and the shipment area and the entire marine activities ongoing and hence always available and can purge the contempt any time after the pronouncement of the court of appeal.
5. It is the Applicant's case that in view of the specific duties and the high alert security zone area that the Applicant has been charged with, it is fair that this stay is granted for his peace of mind in delivery of such critical service. That since there is a pending Ruling at the court of Appeal, it will be in the interest of justice to grant a temporal order of stay until the ruling is delivered.
6. The Application was placed before me where I directed that the matter be heard on 18<sup>th</sup> May 2022. When the matter came up for hearing on 18<sup>th</sup> May 2022, Counsel for the Petitioners stated that he had filed Grounds of Opposition and the court directed that the same shall be considered.
7. The Petitioners filed their Grounds of Opposition on 18<sup>th</sup> May 2022 opposing the Application on grounds that the Application is mischievous and designed to frustrate the Petitioners and the same is fatally defective. That the Application is an affront and *sub judice* the Kisumu Court of Appeal Application number E022 of 2022 that is pending a ruling on a similar application that the 3<sup>rd</sup> Respondent/Applicant made before the Appellate court.
8. The Petitioners further opposed the Application on grounds that the 3<sup>rd</sup> Respondent/Applicant is in contempt of the orders of this court hence must first purge the contempt before being granted audience and that the deponent of the Affidavit in support of the Application M/S Callen Masaka is in serious conflict of interest as she is unlawfully residing in the suit property hence lacks moral legal standing to advise the government and the contemnors as pertains the offences related to violation of court orders. That no grounds have been furnished to warrant grant of the orders sought.
9. The Petitioners also filed submissions on 19<sup>th</sup> October 2022 and stated that the 3<sup>rd</sup> Respondent/Applicant who refused to obey the court orders is the same one begging the court to stay the same and this is ironical and the court should not allow such to go unmentioned. It was further stated that the Applicant has failed to place sufficient material to convince the court to stay its orders. The contemnor was found guilty of contempt and sentenced to pay a fine of Kshs. 200,000/= in default to serve 30 days in prison.



10. That the grounds granting stay under Order 42 Rule 6 (1) is categorical that security must be furnished by the Applicant as a pre-condition for stay. The Applicant has not provided security nor has he demonstrated that he has an arguable appeal or his appeal will be rendered nugatory if stay is not granted. The Petitioners relied in *Hadkinson v Hadkinson* (1952) 2 All ER 567,575, *Mutitika v Baharini Ltd* (1985) eKLR and *E-conet Wireless Kenya Limited v Minister of Information Communications of Kenya & Another* (2005) e KLR.

### Analysis and Determination

11. The 3<sup>rd</sup> Respondent/Applicant herein has sought orders that the court do stay its orders of 10<sup>th</sup> December 2021 temporarily pending the Ruling to be delivered by the court of Appeal in COA Application No. E0220 of 2022 set for 8<sup>th</sup> July 2022 or until its delivery on any other date other than the date set date. It is the 3<sup>rd</sup> Respondent/Applicant's case that the Applicant was found to be in contempt of court orders and ordered to be committed to jail or pay a fine of Kshs. 200,000/= and being aggrieved by the said finding, the Applicant preferred an Appeal to the Court of Appeal and has also filed an Application for stay of execution of the said order in the Court of Appeal.
12. The Petitioners on the other hand have opposed the said Application on grounds that the Application is fatally defective and is an affront and *sub judice* the Kisumu COA Application No. E0220 of 2022 that is pending Ruling on as a similar Application filed by the 3<sup>rd</sup> Respondent/Applicant. The Application is also opposed on grounds that the Affidavit sworn by M/S Callen Masaka in support of the Application is in conflict of interest as she is unlawfully residing in the suit property hence lacks moral legal standing to advise the government and the contemnors as pertains the offences related to violation of court orders.
13. This court delivered its Ruling on 10<sup>th</sup> December 2021 where the Applicant was found to be in contempt of the court orders and the orders of the said Ruling were extracted and served upon all the parties herein. This instant Application was filed on 18<sup>th</sup> May 2022 that is six months after the said Ruling. It is clear that the 3<sup>rd</sup> Respondent/Applicant has filed an Application in the Court of Appeal seeking stay of the orders issued on 10<sup>th</sup> December 2021 and the said Application is pending Ruling at the Court of Appeal. I am of the view that this instant Application before me is *sub judice* and is an afterthought and the same amounts to an abuse of the court process.
14. In the case of *Fred Matiangi, The Cabinet Secretary, Ministry of Interim and Co-ordination of National Government v Miguna Miguna & 4 Others* the Court of Appeal held: -

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 evince 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 *A. B. & another v.R.B.* 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.”



15. Mutungi J (as he then was) in the case of *Trust Bank Limited V Shanzu Villas Limited & 3 Others* (2004) 2 KLR, 299 held that:-

When allegations of contempt of the court are raised, the alleged contemnor must either be purged of the contempt allegation or punished for it, if proved, before he/she can continue to have audience before the said Court or tribunal.”

16. In the case of *Hadkinson v Hadkinson* (1952) 2 ALL E.R. 567, at page 575 Lord Denning made the following observation: -

I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues it impedes the cause of justice by making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then, the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed”.

17. In the same case of *Hadkinson v Hadkinson (supra)* the court further emphasized on the need to obey court orders and stated as follows: -

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. Lord Cottenham, L.C., said in *Chuck v Cremer* (1) (1 Coop. temp.Cott 342):

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

18. I am guided by the above case law and I am convinced that the 3<sup>rd</sup> Respondent/Applicant failed to obey court orders knowing clearly that court orders need to be obeyed. I do find that this Application lacks merit and the same is hereby dismissed with costs to the Petitioners.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022**

**A.O OMBWAYO**

**JUDGE**

