



**Yongo & 2 others v Otai (Environment and Land Appeal 27 of 2020)
[2022] KEELC 15535 (KLR) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 27 OF 2020
MN KULLOW, J
DECEMBER 19, 2022**

BETWEEN

OKOTH YONGO 1ST APPELLANT

OMONDI YONGO 2ND APPELLANT

OWINO YONGO 3RD APPELLANT

AND

MICHAEL ODHIAMBO OTAI RESPONDENT

*(Being an appeal against the ruling and order of Hon DO Onyango
delivered on August 5, 2020 in Migori CMCC ELC No 64 of 2019)*

JUDGMENT

1. This appeal emanates from the ruling and order of Hon DO Onyango delivered on August 5, 2020 in Migori CMCC ELC No 64 of 2019. The grounds in the memorandum of appeal are that: -
 - i. The learned trial magistrate erred in law and in fact in finding and holding that the appellants were in contempt of the subordinate court's orders made on October 2, 2019, without any evidence that the appellants were guilty of any wilful disobedience of the said orders.
 - ii. The learned trial magistrate erred in law and in fact in ordering for the issuance of warrants of arrest of the appellants and the arraignment of the appellants in court, under those warrants, for punishment for being in contempt of the trial court's orders made on October 2, 2019, when on the facts of the case before him, that order was premature, unnecessary and illegal.
 - iii. The learned trial magistrate erred in law and in fact in failing to address and determine the issue, as raised by the appellants, that in view of the happenings of the material day, as were narrated in the replying affidavit of Okoth Yongo, the 1st appellant, sworn and filed on October



30, 2019, the appellants had not been in wilful disobedience of the subordinate court orders of October 2, 2019 and thus the appellants were not in contempt thereof.

- iv. The learned trial magistrate erred in law and in fact when, in the totality of the circumstances of that suit, he allowed the respondent's application dated October 8, 2020, when in the totality of the circumstances of that motion, it was unjust and disproportionate to grant it.
 - v. The learned trial magistrate erred in law and fact in misapprehending the appellant's joint response to the respondent's application dated October 8, 2018 in the appellant's joint replying affidavit sworn and filed on October 30, 2019 and in consequence thereof, the learned trial magistrate reached wrong conclusions of fact and law in granting that motion.
 - vi. The learned trial magistrate was manifestly and unjustifiably biased against the appellants.
 - vii. The learned trial magistrate erred in fact and law in importing his own impressions of the parties' cases into the proceedings before him, hence reaching erroneous conclusions of law.
 - viii. The learned trial magistrate erred in law and fact, on the whole, in deciding the application against the evidence that was before him and thus he arrived at a wholly erroneous decision.
2. Consequently; the appellant's sought the following orders against the respondent: -
- a) The ruling an order dated and delivered on August 5, 2020 be set aside entirely.
 - b) The respondent's notice of motion dated October 8, 2019 be dismissed with costs.
 - c) The costs of this appeal be awarded to the appellants.
3. A brief background to bring the appeal into perspective is that; the plaintiff/ respondent filed a notice of motion application dated October 1, 2019 under certificate of urgency. On the October 2, 2019, by consent of the advocates on record and which consent was adopted as an order of the court; a temporary order of injunction was issued against the defendants/ appellants, their agents, representatives, assigns or anyone acting through them from burying the remains of one Kimberly Diana on the suit parcel No Suna East/ Wasweta I/29 until October 16, 2019.
4. On October 4, 2019, when the matter came up for directions for an application dated October 3, 2019 by the defendant; counsel for the plaintiff informed the court that the defendants had buried the body of Kimberly Diana on the suit parcel contrary to the interim orders issued on the October 2, 2019. It was the plaintiff/ respondent's claim that despite being served and being fully aware of the said interim orders; the defendants/ appellants in flagrant breach of the said orders went ahead and buried the remains of Kimberly Diana on the suit parcel contrary to the terms of the court order.
5. Consequently, the plaintiff/ respondent filed an application dated October 8, 2019 seeking to cite the defendants/ appellants for contempt. The same was heard and a ruling dated August 5, 2020 was issued, whose effect was to find that the defendants were in flagrant breach of a lawful order when they buried the remains of Kimberly Diana on the subject land in dispute. Further, warrants of arrest were issued against the defendants. Even though the defendants were found to be in contempt, the same is still pending for punishment and/or sentence.
6. Aggrieved by the said decision of the trial court dated and delivered on the August 5, 2020; the defendants/appellants lodged the instant appeal.
7. On March 22, 2022, this court issued directions that the appeal be canvassed by way of written submissions. However, I do note that only the respondent filed his submissions dated July 25, 2022



which I have perused and given due consideration in arriving at my decision. Be that as it may, I will proceed to render my decision as hereunder.

Respondent's Submission

8. He submitted on the grounds of appeal collectively and particularly on the issue of contempt of the court orders issued on the October 2, 2019. It was his submission that the appellants despite being aware of the existence of the said court order, they proceeded and buried the remains of Kimberly Diana on the subject land in flagrant disregard and breach of the court order.
9. That the said order was a consent order made in the presence of the Appellants' advocates and further that they were also served with the same on October 2, 2019 at around 1:30 pm. The said order was clear, explicit and unequivocal and contained a penal notice.
10. It was further his contention that the application dated October 8, 2019 was heard and determined on merit vide the ruling delivered on August 5, 2020, the subject of this appeal. He thus urged the court to dismiss the appeal with costs.
11. He relied on the case of *Justus Wanjala Kisiangani & 2 others v City Council of Nairobi & 3 others* [2008] eKLR in support of his case.

Analysis And Determination

12. I am of the considered view that the main issue for determination is whether this court should interfere with the exercise of discretion by the trial court by setting aside and substituting its ruling and order delivered on August 5, 2020 and whether the appellants are entitled to the reliefs sought in the memorandum of appeal;
13. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. The Court of Appeal in *Selle v Associated Motor Boat Co* [1968] EA 123 held as follows: -

“ this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
14. At the centre of the dispute between the parties herein is proprietorship of the suit parcel and further, whether there was deliberate and wilful disobedience of the interim orders issued on the October 2, 2019; whose effect was to restrain and/or stop the appellants from burying the remains of the late Kimberly Diana on the subject land. The appellants denied any wilful disobedience of the said orders on their part and maintained that the court erred in allowing the application dated October 8, 2019 for contempt.
15. The respondent on the other hand maintained that there was a wilful and deliberate disobedience and disregard of the interim orders issued on the October 2, 2019, despite both the appellants and their advocate being fully aware of the existence of the said court orders. I will now proceed to determine whether the trial court exercised its discretion correctly in finding that the appellants were guilty of



contempt of the court orders issued on the October 2, 2019 and to re-evaluate each of the party's claim from the trial court record.

16. I have looked at the trial court record and the respective affidavits filed; and I note that the orders made on the October 2, 2019 was a consent order made in the presence and knowledge of the parties' advocate. The effect of the said order was to restrain the appellants from interring the remains of the late Kimberly Diana on the subject land in dispute. The terms of the said order were clear, unambiguous and were binding on defendants/ appellants.
17. I further note that despite the said order, which was a valid order of the court and had not been set aside and/or varied; the appellants went ahead and buried the remains of the said Kimberly Diana on the subject land contrary to the express terms of the interim orders of October 2, 2019. Despite being aware of the temporary injunction, the appellants' actions were deliberate with the intent of breaking the terms of the said injunction.
18. The court in *Hardkinson v Hardkinson* [1952] ALL ER 567, held that: -

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”
19. The appellants have neither denied being aware of the terms of the said order nor burying the remains of the late Kimberly Diana on the subject land. No plausible explanation and/or justification has been issued by the appellants of their actions of burying Kimberly Diana on the suit land. I have critically looked at the ruling of the trial magistrate and I fully agree with the same. Court orders are not issued in vain and parties are bound by the terms of the said order.

Conclusion

20. In view of the foregoing, I find no need to interfere with the trial court decision dated and delivered on August 5, 2020. Consequently, it is my considered opinion that the appellants herein are not entitled to the reliefs sought in the memorandum of appeal and I accordingly dismiss the appeal with costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA EMAIL ON 19TH DAY OF DECEMBER, 2022.

MOHAMMED N KULLOW

JUDGE

In presence of; -

Tom Maurice – Court Assistant

