



REPUBLIC OF KENYA



KENYA LAW
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**Cooperative Bank of Kenya Ltd v Gituma (Environment and Land Appeal
E021 of 2024) [2024] KEELC 6895 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6895 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E021 OF 2024**

CK NZILI, J

OCTOBER 16, 2024

BETWEEN

COOPERATIVE BANK OF KENYA LTD APPELLANT

AND

GOERGE MUGAMBI GITUMA RESPONDENT

RULING

1. There are three applications before this court that stem from the ruling of this court dated 19.6.2024. In it, the court granted a stay of execution pending the hearing in terms of a restriction on the suit property and for the surrender of original title to the court. The court made a finding that the purported execution of the decree was illegal and irregular, and ordered that the respondent surrender the decretal amount to the Deputy Registrar within three days. A notice to show cause was also issued against the auctioneer as to why he proceeded with the execution in the manner he did, while there were interim orders.
2. The immediate response by the respondent was to file the first application dated 22.6.2024, seeking a stay of the orders dated 19.6.2024, pending an intended appeal, review, variation, and setting aside of the said orders, on the basis that the appellant was still holding as security title deed to the suit land. The applicant averred that there were serious legal issues to be canvassed in the intended appeal and that it was humanly impossible to comply with the court orders.
3. In the affidavit sworn by George Mugambi Gituma, he states that the ruling by the court had devastating consequences in that the court has inhibited the land whereas the appellant held the original title deed and has a registered illegal charge. The respondent avers that this has come as multiple tragedy considering his property worth over Kshs.30,000,000/= was held as security based on an illegal charge that the trial court declared as unlawful since no monies were advanced to his, which still decision stands until the appeal is heard and determined.



4. The respondent also avers that unless the orders are stayed, he shall suffer severe substantial losses considering the consequences of his inability to comply, which may render his properties to be sold before his appeal is heard.
5. The respondent avers that the security held by the appellant was more than the illegal amount indicated on the charge, and the money that was ordered to be refunded; otherwise, the appellant was likely to steal a judicial match against him in that he would suffer double jeopardy.
6. The applicant herein opposes the application through a replying affidavit of Duncan Matisero dated 8.7.2024. It is averred that if the monies ordered were deposited in court, the respondent if he were to succeed in the appeal, would be refunded the monies. The deponent deposes that in the replying affidavit dated 14.5.2024 at paragraph 25, the applicant had said that he had written a letter to the land registrar on 20.3.2024 and attached the decree seeking to have the title deed, which letter was duly acted upon and therefore, the deponent's averment on oath then and now appear contradictory and unbelievable.
7. The deponent avers that his assertions that repaying the money paid barely two months ago was impossible cannot be factual for a transfer was a simple transaction within minutes.
8. Therefore, it was averred that the applicant has not demonstrated the impossibility and the impracticability of complying with the court orders and that if the applicant had been bereaved, he could have sought additional time.
9. The deponent deposes that the preservation of the substratum of the appeal was key for not rendering the appeal nugatory, and the property is the subject of the appeal; the applicant could not pledge it as security for the appeal. Similarly, the deponent avers that it was not true that the property was worthy of Kshs.30,000,000/= as the forced sale value was Kshs.10,650,000/= and with an open market value of Kshs.14,200,000/= as per the valuation report dated 7.3.2022.
10. Again, the deponent avers that the applicant has not demonstrated the inability to comply with the court orders by showing how he spent the decretal sum in just two months and the justification thereof given that he was privy to valid consent and that he has not demonstrated the loss that he would suffer by merely restituting that which was irregularly acquired by him barely two months ago.
11. The deponent deposes that other than a notice of appeal, there were no reasonable grounds for review, the value of the suit property is insufficient to cover the security that there is no stealing of match for the appellant is unable to access the sum, let alone use, if the applicant who has demonstrated bad faith in dealing with the court and the appellant and having stolen the match was now out to perpetuate the injustice from the courts of justice. The application was a reactionary application devoid of any merits, reserving no discretion from the court.
12. The applicant relied on a written submission dated 10.7.2024. It was submitted that on stay, there was no demonstration of substantial loss, there was an undue delay, security was not offered, and it was not in the interest of justice to grant the orders sought. Reliance was placed on Githau vs Kagiri & another (2024) KLR (30th May 2024) (Ruling) James Wangalwa & another vs Agnes Naliaka Cheseto (2012) eKLR and Arun C Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & others (2014) eKLR.
13. On review, the applicant submitted that the applicant has not met the grounds of review as set in Order 45 of the Civil Procedure Rules. Reliance was placed on Lydia Kaguna Japheth & others vs Mbesa Investment Ltd & 2 others (2022) eKLR, Ajit Kumar Rath vs State of Orisa & 9 others Supreme Court Cases 596, Nyamogo & Nyamogo vs Kogo (2001) E. A 170, Ndithya vs Total (K) Ltd (2022) KEHC



- 10080 (KLR) (14th July 2022) and Gerald Kithu Muchanje vs Catherine Muthoni Ngare & another (2020) eKLR.
14. The respondent relied on written submissions dated 29.7.2024. The respondent submitted that he has disclosed and offered factual evidence of where and how he used the decretal amount paid to him. Reliance was placed on Consolidated Marine vs Nampijja & another NRB Civil Appeal No. 93 of (1989), that the purpose of the stay was to preserve the subject matter of the appeal. Further, the respondent relied on Mukuma vs Abuoga (1988) KLR 645.
 15. Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act* provide that an application for review is only available where an aggrieved party by a decree or order in which an appeal is allowed, but from which no appeal has been preferred. See Ndithya vs Total (K) Ltd (supra), Gerlad Kihitu Muchanje vs Catherine Muthoni Ngare & another (supra).
 16. In this application, the respondent/applicant has already exercised his rights of appeal going by a notice of appeal dated 21.6.2024, regarding the orders made on 19.6.2024. Once the applicant exercised that right, he devise this court of the right to review, vary, or set aside the said orders through the application dated 22.6.2024. A party cannot have it both ways. He has to choose what forum to litigate either through review or an appeal. See Orero vs Seko (1984) KR 238. See Kisya Investment Ltd vs. Attorney General & another Civil Appeal No. 31 of 1995 and Yano Haryanto vs E.D. & F Man Sugar Ltd civil appeal No. 122 of 1992.
 17. Consequently, I find the prayer for review, variation, and or setting aside of the orders dated 19.6.2024 not only incompetent and lacking merits but also an abuse of the court process.
 18. As to stay of the stay orders, this court exhaustively dwelt with the order of stay under Order 42 Rules 6 & 7 of the Civil Procedure Rules. The said orders have been appealed against by the respondent going by the notice of appeal dated 21.6.2024, which, unfortunately, the applicant has not followed up to ensure that the Deputy Registrar of this court appends a signature on time for it to be regular and valid.
 19. The orders sought to be stayed were to be complied with within three days. The same lapsed on 21.6.2024. The application before the court was filed after the time given for compliance had expired. There was no application for an extension of time to comply. The inordinate delay has not been explained. It is the respondent in the affidavit sworn on 14.5.2024 who, on oath, told the court that the land registrar had already lifted the restrictions and acted on the reversal of encumbrances to the title deed. It is the applicant who swore in paragraph 25 thereof that there was nothing to stay, for he had already collected the title deed and removed the illegal charge over his title, and hence, the appeal before the court was academic since the matter had been settled.
 20. Other than generally lamenting that the orders of 19.6.2024 were impossible to implement or comply with, the applicant has not told the court how not staying order numbers 2, 3, 4 & 5 in the extracted order would cause him substantial loss, render his intended appeal nugatory, put him in great danger, enable the applicant to steal a judicial match against him, make him suffer doubt jeopardy or be against the interest of justice.
 21. A party cannot be allowed to blow hot and cold at the same time. Equity looks at the intent rather than the form. Equity inputs an intention to fulfill an obligation and is generally a sense associated with notices of fairness, morality, and ethics. See Republic vs Instituion of Certified Public Accountants of Kenya (exparte) Mundia Njeru Gateria (2010) eKLR and Behan & Okero Advocates vs National Bank of Kenya (2007) eKLR.



22. Inconsistency of one's conduct is critical. Stealing a judicial match is what the applicant did in this appeal. He obtained the decretal amount and, with an intention to steal a match, disposed of it as soon as it came to him; he put it beyond the reach of the court and the appellant.
23. The receipts attached bear no revenue stamps. The deposit slips are missing. In issuing the order that the court made in the interest of justice, the same cannot be said to be a prohibitive cost tag to access justice on the part of the respondent to the appeal. The amount is what the applicant/respondent was paid in an illegal execution. The order that the execution was illegal has not been set aside or varied. The applicant/respondent admits that he obtained the money from the appellant.
24. The applicant/respondent has not demonstrated how the depositing of the decretal amount in court pending the hearing of the appeal is unreasonable or will impede his rights to access justice in this court or at the Court of Appeal. See *Westmost Holdings SD N B.HD vs Central Bank of Kenya (Civil Appl. 10 (E017) of 2021 (2021) KESC 3 (KLR) (8th October 2021) (Ruling)*. The upshot is that I find the applicant does not deserve the order sought for a stay.
25. The next application is the one dated 2.7.2024 to join M/s Stephen Nyamu t/a Lifeline Auctioneers as an interested party to the application dated 2.7.2024, whose central prayer is on whether the respondent to the appeal is in contempt of the orders dated 5.7.2024.
26. An interested party has been defined as one whose participation in court is necessary for the court to determine all the issues at hand effectually. See *Francis Muruateru & others vs. Republic & others (2021) KESC 31* It is not disputed that the intended interested party was the auctioneers who took out the warrants of execution. In a replying affidavit dated 29.7.2024, the auctioneer admits that on 14.3.2024, he was instructed to execute the judgment by the principal, Mr. Gikunda, advocate of G.A. Gikunda & co. Advocates and that on 20.3.2024, he collected the decree and the judgment, following which he effected the proclamation on 21.3.2024, which was stayed until 4.4.2024, when he was again given the go-ahead to proceed with the execution. For purposes of the disclosed stake, I find that there will be no prejudice if the auctioneer is joined as an interested party for purposes only of the application for contempt.
27. The third application is that of contempt of court. It is not disputed that the court, by a ruling dated 19.6.2024, this court made several orders that the respondent deposit both the original title deed and the decretal with the Deputy Registrar within three days of the order.
28. The orders were duly served by Maureen Njoki process server on 19.7.2024 upon the respondent and the auctioneers. A return of service dated 19.7.2024 was duly filed. After the deadline passed, the Deputy Registrar of this court confirmed that there had been no compliance with the court order. There are no stay orders by a higher court that have been issued or for that matter, review setting aside or extension of the orders for compliance.
29. Court orders and court decrees are not made in vain. In *Republic vs Ahmed Abolfathi Mohammed & another (2018) eKLR*, the court held that it is essential for the maintenance of the rule of law and that the authority and the dignity of the court be upheld at all times; otherwise, the administration of justice would be undermined if an order of any court of law would be disregarded with impunity. In *AB & another vs. R.B. (2016) eKLR*, the court observed that compliance with court orders was an issue of fundamental concern for a society that seeks to base itself on the value of law and that the failure to enforce court orders effectively would have the potential to undermine the confidence in recourse to the law as an instrument to resolve civil disputes and may impact negatively on the rule of law.



30. In *B. vs AG* (2004) 1 KLR 431, the court held that it does not and ought not to be seen to make orders in vain; otherwise, the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for the legality and the rights of all people.
31. As to the standard of proof in contempt of court proceedings, the Court of Appeal in *Mutitika vs Bahariri Farm Ltd* (1985) KLR 229 at 234 held that it must be higher than on a balance of probabilities for the offense to be quasi-criminal for the liberty of the contemnor is also at stake and should be exercised with ultimate care only where the conduct of the contemnor was deliberate.
32. In *Republic vs County Chief Officer Finance and Economic Planning, NRB City County exparte David Mugo Mwango* (2018) eKLR, the court cited *Refrigerator and Kitchen Utensils Ltd vs Gulabchand Popatlal Shah & others* NRB Civil Application No. 39 of 1990 and *Wildlife Lodges Ltd vs County Council of Narok and another* (2005) 2 E. A 344 that every person against or in respect of whom a court made an order must obey it until that order was discharged, and the disobedience of such an order as a general rule would result in the person disobeying it, being in contempt and punishable by committal or attachment and an application to the court by him not being entertained until he had purged his contempt.
33. In *Central Bank of Kenya & Another vs Ratital Anto Mobile Ltd & others* Civil Application No. NRB 246 of 2006, the court of appeal held that court orders must be obeyed, and it was not open to any person(s) to choose whether or not to comply with or ignore such orders as directed to him or them by a court of law.
34. On the parameters to be met, in *Samuel M.N Mweru and others vs National Lands Commission & others* (2020) eKLR, the court held that an applicant for the contempt of court must prove:
 - i. The terms of the order.
 - ii. Knowledge of those terms by the respondent
 - iii. Failure to comply with the terms of the order, out of which the court would infer the presence of willfulness and bad faith on the part of the respondent, unless he rebuts the inference by contrary proof.
35. In the application before the court, the applicant has submitted that four elements of the cited case law are not contested:
 - a. The terms of the order in question were unambiguous.
 - b. The respondent knows or knew the order.
 - c. He has been cited in breach of the said orders.
36. Regarding the questions of whether the respondent's conduct was deliberate, the applicant submitted that the respondent knew of the application dated 20.5.2024, he filed a replying affidavit to it, and despite knowledge thereof that there may be an order for the refund, he proceeded to allegedly make payments to *M/s Kiogora Mugambi and Co. Advocates* who prosecuted his suit at the lower court, with recklessly abandon, long after the filing and service of the application, only to run back to court and allege that all funds have been utilized.
37. The applicant submitted that the receipts produced in support of the payment contain inconsistencies that point to a deliberate scheme by the respondent to hoodwink the court and deliberately fail to obey the court order using receipts that are not genuine.



38. Similarly, the applicant submitted that the inconsistencies indicate a charade played out by the respondents as laid bare in the further affidavit of Duncan Matisero dated 16.9.2024, which the appellant urged the court to see through the smokescreen. The applicant submitted that, as stated in the further affidavit, the respondent has a penchant for playing fast and lose with the facts; he does not care.
39. In Fred Matiangi, the C.S Ministry of Interior & Coordination of National Government vs Miguna Miguna & others (2018) eKLR, the court said that when courts issue orders, they do so not as suggestion or plea to the person at whom they are directed; court orders are issued ex cathedra; are compulsive, pre-emptive, and expressly binding; it is not for any party, be he high or low, weak or mighty and quiet regardless of his status or standing in society, to decide whether or not to obey, to choose which to obey and which to ignore or to negotiate the manner of his compliance.
40. In this application, there is no dispute that the citee was party to the application, leading to the issuance of orders of 19.6.2024.
41. Soon after the orders were issued, the citee filed a notice of appeal, and after the three days of compliance were over, he applied for a review, variation, setting aside, and stay of the said orders. The citee swore on oath how he was gravely prejudiced or aggrieved by the orders and told the court on oath that compliance with the orders was impossible and he was incapable of complying with them.
42. All that the court required the citee to do was to submit the original title deed, which he had earlier on said that the land registrar had discharged the illegal charge and had released it to him, following the decree at the lower court. Secondly, the court had ordered that the citee deposit all the decretal sum to the Deputy Registrar within three days. The citee has not made the slightest attempt to comply with the court orders or, at the very least, genuinely disclose and render an accurate account of the manner in which he allegedly utilized the entire decretal amount in a record timeline of two months.
43. Bereavement and burial of a mother on 20.6.2024, though highly regrettable, cannot be said to be an impossibility to comply with a court order requiring simply an electronic transfer of the funds or surrender of the title deed.
44. The fact that this court has not set aside the decree of the lower court cannot be taken to mean that the respondent can flagrantly disobey court orders. The filing of an unendorsed notice of appeal cannot be used as an excuse not to obey lawful court orders. Further, the fact that the ruling of 19.6.2024 raises severe legal issues requiring ventilation by way of an appeal cannot be used to undermine the dignity of this court by disobeying its lawful orders.
45. Far from the truth, in its sworn statement, the appellant urges the court to find that the respondent was engaged in sharp practice with no intention of aiding the court in the administration of justice. In addition, the applicant urged the court to infer from the facts herein that the respondent has, by design, willfully declined to obey the court orders and has gone through a long-winded tale of poorly manufactured evidence. Therefore, the court was asked to assert its authority to ensure its dignity and the rule of law are respected by punishing the respondent for his contempt towards the court.
46. In the written submissions dated 29.7.2024, the citee, through his advocates on the record, submitted that the application dated 2.7.2024 for contempt was directly related to the application dated 22.6.2024.
47. The respondent/ citee submitted that the subject land was valued at over Kshs.30,000,000/= and was enough security. There is no expressed willingness to comply with the court order in the written submissions.



48. The citee asks the court to temper justice in such a way that the parties shall be heard in their appeal without necessarily taking grievous measures against a party before the court and disallow the application dated 2.7.2024.
49. In the replying affidavit, which is undated, the citee does not deny the existence of the orders made on 19.6.2024. To the contrary, the respondent has attached annexures marked GMG "1" and "5", which have no revenue stamps accompanying orders or warrants of attachment. There is no bank statement showing that the respondent wired the monies to any judgment creditors as alleged in the cases mentioned above or decrees. The respondent insists that there is enough security for the applicant, yet there is no recent valuation attached to substantiate the allegation.
50. What the court is concerned about is the illegal monies that the respondent obtained as part of the decretal sum, which is the subject matter of the appeal requiring preservation. The respondent has trivialized the orders of this court. The citee's conduct and the assertion that the amount is colossal and or alleging an inability to repay as ordered by the court shows that he willingly sought to evade and or avoid the court process.
51. In the ruling, the court, in the exercise of its discretion, considered the likely prejudice that the applicant may suffer if the appeal was to succeed and the judgment debtor was unable to refund the sum due. The respondent has not attempted to show his bonafides by disclosing how much he was worth and was remaining out of the decretal sum. In view of the foregoing, I find the application for contempt of court proved to be the required standards. The citee is put on his mitigation before sentencing.
52. As to the auctioneer, the court has read the affidavit of Manase Kariuki Karoki, Daniel Gikunda Anampiu and that of Stephen Nyambu vis a vis that of George Mugambi Gituma. The court reiterates its finding in the ruling dated 19.6.2024 that the execution process was irregular, unlawful and unprocedural.
53. As indicated in the further affidavit of Duncan Matiserio sworn on 9.9.2024, in paragraph 4, there appears to have been a deliberate perversion of the course of justice bordering on an affront to the administration of justice and evasion to pay statutory dues to the judiciary.
54. The auctioneer was ordered to show cause and appear in court on 24.6.2024. No cause was shown to the satisfaction of the court. Both the auctioneer, the respondent, and his lawyers on record still insist on oath through affidavits that there was a valid decree and a proper execution process.
55. There is overwhelming evidence to the contrary. The auctioneer's bill of costs was not taxed or presented for taxation before payment on 9.4.2024. There is back and forth on who collected the decree of the court, warrants of attachment and the sale. A decree cannot be executed before costs are taxed without leave of court, leave was not sought to execute the decree under Section 94 of the Civil Procedure Act before party-to-party costs were taxed by either the decree-holder or the auctioneer. The execution proceeded in an irregular manner and contrary to the law.
56. The upshot is that I find the warrant of execution and sale was a nullity ab initio. Any payments of auctioneer's fees was equally a nullity. There was already a consent order before the court. The auctioneer, despite warning by the appellant's counsel as per his affidavit, continued to execute the decree with impunity. The auctioneer and the respondent purported to bypass the consent order by seeking for break open orders to further an illegality. Therefore, all the auctioneer's fees paid were irregularly obtained. The auctioneer is, as a result of this, ordered to refund the same to the appellant within three days from the date hereof, otherwise, the auctioneer shall be detained for contempt of court.



57. The appellant is at liberty to follow the law as to the liability of whoever else, alongside the auctioneer, perpetuated the illegality and irregularly perverted the course of administration of justice. Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 16TH DAY OF OCTOBER, 2024

In presence of

C.A Kananu

Auctioneers

Anampiu for the respondent

Kimani Waweru for the applicant

HON. C K NZILI

JUDGE

