Khisa v Kundu (Environment and Land Appeal 43 of 2007)
[2023] KEELC 492 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 492 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 43 OF 2007

FO NYAGAKA, J

FEBRUARY 1, 2023

BETWEEN

JOHN KUNDU KHISA ..... PLAINTIFF

AND

KENNEDY KHISA KUNDU ..... DEFENDANT

RULING

1. Some litigants, such as the defendant/ applicant herein, baffle the court by presenting contentions that are, to say the least, most vexatious, obnoxious and corrosive to the judicial process right from the start. It is not in dispute that every party has a right to be heard by the court. However, that opportunity should not be misused, worse, to the extent of parties being before the court for the sake of it. The right to be heard ought to be based on an existing reason that is at risk or has been infringed: there has to be a basis for being in court.

2. I state the above against backdrop of the court's clear view that judicial time is a precious commodity that ought not to be wasted, and its process is a hallowed trail towards the realization of justice hence, as the only avenue of achieving the God-given duty of judges and judicial officers as His representatives here on earth, it should be used in honour even as sacred things that accord the higher realms are.

3. Thus, the court of Appeal in, *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No 25 of 2002* [2009] KLR 229, stated as follows:

> " In our view, the often-quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system

of the administration of justice...in the case of Fremar Construction Co Ltd v Mwakisiti Navi Shah 2005 e KLR at page 6 where the court said:

"Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernible issues it would be farcical to waste judicial time on it."

4. Also, in *Union Insurance Co of Kenya Ltd v Ramzan Abdul Dhanji* Civil application No Nai 179 of 1998 the same court (of Appeal) held that:

> " Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. ... The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

5. It flows from the above authorities that it is not in every case or issue raised by a party that he/she should be heard. Now, I have before me an application to which grounds of opposition were filed by a party who was fully aware that he ought to present himself to court voluntarily but had not. Actually, he even defied several entreaties to attend on his own volition. He now scoffs at and opposes the instant application that is designed to facilitate his attendance in court by way of a warrant of arrest, by arguing that the process being followed it not right. Of court he is mistaken even on that argument. If there is a demonstration of great impunity, daring the authority of the court, demeaning its dignity and abusing its process, which one else can be? This is a classic example of a party who is in court, praying for orders (of dismissal of an application) for the sake of it.

6. That said, by a notice of motion dated July 18, 2022 and filed on July 21, 2022 this court was called upon to grant three (3) main prayers. The application was brought under section 63(e) of the *Civil Procedure Act*, order 40 rules 3(1), (3) and (4) and order 51 rule 1 of the *Civil Procedure Rules*. The application was accompanied with a certificate of urgency dated the same date. It sought the following reliefs:

    1. ...spent

    2. That this honourable court be pleased to re-issue a warrant of arrest to be effected by the Trans Nzoia court commander since the OCS Sikhendu has failed, refused or ignored to effect the warrants of arrest that was issued by this honorable court on May 2021 after finding the respondent guilty of the contempt of court order for disobeying the court order dated 11th Day of February, 2009 and issued on May 9, 2017 and the same order re-issued on July 30, 2018 from the said plot No 50 located at Sikhendu Market within Trans Nzoia county.

    3. That the county police commander Trans Nzoia county to effect this order.

    4. Costs of this application be provided.

7. In support of the application, the Plaintiff listed six grounds which can be summarized as follows: that the respondent trespassed onto the Plaintiff's premises being the said plot No 50 situate at Sikhendu Market; he is in contempt of court; a warrant of arrest was issued in May, 2021 to be executed by the OCS Sikhendu Police Station; on May 17, 2021 the OCS was served with the warrant and duly received it; he is unwilling to effect it for unknown reasons; the respondent wants dispose of the premises and

unless the warrants are executed the applicant will suffer irreparable harm and damage; the applicant is the lawful owner of the premises.

8. The applicant supported his application through an affidavit sworn by himself on July 18, 2022. He repeated the contents of the grounds of the application except that he annexed to the affidavit three (3) copies of the orders of this court which were issued on May 9, 2016, December 13, 2017 and July 30, 2018. He also annexed and marked as JKK4 a copy of the ruling delivered by this court on May 5, 2021 by which the learned judge found the respondent in Contempt of court. When the Ruling was delivered, the learned judge directed that the respondent attends court on May 12, 2021 for mitigation and sentencing.

9. On the May 12, 2021, the respondent, despite being duly served, did not attend court. The learned judge issued warrants of arrest against the respondent. While, from the record, the warrants of arrest were not directed at a specific police station for execution, it is clear that they were extracted. From the affidavit in support of the instant application, they were served on the OCS, Sikhendu police station on May 17, 2021. This was evidenced through annexture JKK5. This is the basis of the application now before me.

10. The respondent opposed the application by way of four grounds of opposition dated November 17, 2022 and filed the same date. They were that the application was bad in law, misconceived, poorly drafted, incurably defective and unsustainable; it did not meet the provisions of law and ought to have been brought under order 22 (sic); instead of making the application the applicant ought to have simply written a letter to the deputy registrar to re-issue warrants if at all they had been issued before since that is an administrative issue; and the application ought to be directed to the OCPD Sikhendu Police Station who has declined to comply with the orders, and not the defendant/respondent.

11. When the application came up for inter partes hearing on January 25, 2023 learned counsel for the respondent wished that the applicant files submissions so that he too could file his. The applicant stated that he needed not to file any since the application was straightforward. At that point this court fixed the application for Ruling.

Analysis and Disposition

12. I have applied my mind to the instant application. I have also taken into account the law, facts herein. I am of the view the following issues lie for determination:

    a. Whether the application is merited

    b. What orders to issue including who to bear costs

13. This court now proceeds to determine the issues sequentially.

a. Whether the application is merited

14. After service of the application, the respondent instructed learned counsel KW Nakitare to represent him. Learned counsel filed a notice of appointment of advocates dated November 1, 2022 on November 3, 2022. That was after being granted leave to come on record by a consent entered between himself and the respondent. The consent was dated November 1, 2022 and filed on November 3, 2022. I deduce that learned counsel and the respondent did so in a bid to comply with order 9 rule 9 of the *Civil Procedure Rules*. But my understanding of the Rule is different from what the respondent and applicant did in this matter. I state so because, if the record is anything to go by, the respondent was represented by the firm of Zablon Mokua & Co. Advocates up to the time judgment was delivered and taxation of the Plaintiff's costs done.

15. While there is no record to show that the law firm ceased to act for the respondent thereafter, there is no consent on the record between the law firm and the latter law firm for the latter to come on record in that behalf. There is no consent on record permitting the respondent to act in person either. And if there could have been a consent of that nature, that is to say, for the respondent to act in person, then order 9 rule 9 of the *Civil Procedure Rules* does not envision a situation where a party having acted in person post-judgment enters into a consent with or has to consent to an Advocate to come on record to represent him. The import of the Rule is that an order of the court or a consent between the in-coming Advocate and the Advocate on record up to judgment but now outgoing is required only in these two instances and not vice versa. Parties and counsel should always do well to read the law as it is an interpret it properly.

16. My findings regarding the notice of appointment filed on November 1, 2021 are that having been filed in misapprehension of the law and without following the proper procedure, the Notice is incompetent and improperly on record. It therefore follows that the grounds of opposition which were filed on November 17, 2022 were brought onto the record by a stranger. They are a candidate for striking out. The requirement of article 159(2)(d) of the *Constitution* for courts not to be decide matters on technicalities but substantively is of no avail to a party who fails to follow the step.

17. However, even assuming that my finding is not correct on the issue, which I am sure is not the position, the grounds would not merit anything at all to cause the court to dismiss the application. This is for a number of reasons to be given after I make the next point. Suffice it to say that the submission by the respondent that the application should have been brought under order 22 of the *Civil Procedure Rules* is but intended to confuse the court. The order is about execution of decrees of the court. It contains such numerous provisions on the manner to execute decrees of the court that to point the court to the general order was not helpful.

18. The next issue is whether this court should permit the respondent to abuse its process by giving him audience to stand on the way of the instant application. I think it should not because the respondent is in a constant contemptuous trajectory to the dignity and authority of this court (emphasis added). Why do I hold the view? In the instant case, the respondent was ordered a long time ago, that is to say, on February 11, 2009 (by the judgment of this court), to vacate the premises, namely, plot No 50 situate in Sikhendu Market, Trans Nzoia County. When he did not, as captured in the ruling of this court delivered on May 5, 2021, he was evicted on December 13, 2017 through the assistance of both the OCPD and police of Sikhendu Station following issuance of orders of this court. He immediately went back. Again, he was evicted September 5, 2019 by the OCS Kitale police station but he returned the same date and broke the padlocks put on the premises and put himself back into possession. He is in the premises. On May 5, 2021, he was found guilty of contempt of court. He was ordered to attend court on May 12, 2021 for mitigation and sentencing but he defied the order, triggering the cat and mouse games he keeps playing to this date, yet he is in the suit premises.

19. At this point it is worth noting that the case herein is between a father (the plaintiff/applicant) and a son (the respondent). The case herein seems to be one in which a son is despising and defying the wishes and proprietary rights of the father, which defiance has now escalated to one where the son is defying the court. The applicant must have forgotten that the authority of the court is not of the same nature as that of the father, or he thinks 'small' about the will of the people of Kenya when they delegated their power to the Judiciary and tribunals, vide article 1(3)(c) of the *Constitution*.

20. The respondent is an individual who if he were an applicant intent on stopping the execution of the warrant of arrest this court would have denied audience right from the point he moved the court for the orders. This is because he is an individual whose ominous conduct to the proper administration of

justice cannot be countenanced whatsoever. For the interpretation of his conduct, I exemplify it herein in the form of simple conversations in life. I do so for the benefit of the minds of ordinary citizens and young people learning to understand how the law works and learn what the law does not expect them to do and that they too can abhor behavior of this kind and teach their children's children to the fourth generation against it. In any event the current Judiciary blue print as given by the Chief Justice is Social Transformation through Access to Justice (STAJ). Hence by this emphasis, I hope this ruling will transform many a people. First, the court finds him to be in 'wrongful' occupation of the suit premises. It orders him, "move out." He does not move. The applicant and police come to him and tell him, "you are required to move out." He does not do so. They move (evict) him out. He moves himself back 'by force'. They come the second time and tell him, "you were told to move out, you did not, we moved you and you returned yourself. Move out." He does not do so. They move him out again. This time, they lock the premises. He comes back in their absence, this time, with force, conversing to himself, "useless work." He breaks the padlocks and moves himself in again. The court directs him, "move to court to explain why you should be treated leniently". He does not. Instead he purports to direct the court how to make him to come to court. Is this not conduct that is a shear affront to the rule of law and reason?

21. In the circumstances as summarized in paragraph 17 above, this court is of the view that the respondent being in further contempt of court by refusing to attend court May 12, 2021 and the subsequent dates up to the January 25, 2023, does not deserve to be given audience until he purges it. In any event, of what value and justice end is it for him to contend before this court that he be heard on his opposition to the instant application when he does not "hear the court" or want to be heard on his mitigation or at least for sentencing if he does not wish to mitigate? He cannot despise the authority of the court and at the same time run to the same court for favourable orders. It is either the court retains its dignity hence firming the rule of law or none.

22. Times without number, courts have held that where a party disobeys an order of the court, he should be denied audience until he purges the contempt therefor. The parties are invited to read the cases of *Ramesh Popatlal and 2 others v NIC Bank* (2005) eKLR, *v chadburn-1984/ Clarke and others v Chadburn and others* (1985)ALL ER, *Leah Agao Onguto vs Cotu* (2004) eKLR, *Pharmacy and Poisons Board v Sipri Pharmaceuticals Ltd* Misc appeal No103/98, and *E A M v P A A* [2017] eKLR, among others.

23. Thus, in *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 Others* [2018] eKLR, the Court of Appeal was emphatic as follows:

> "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."

24. Similarly, in *Kenya Union Of Post Primary Teachers & 3 others v Njeru Kanyamba* [2018] eKLR, it was held: -

> " In this jurisdiction, this court has emphasized the sacrosanct nature of the right to be heard in the context of contempt of court applications. Speaking for the majority, Githinji, JA expressed himself as follows in Rose Detho v Ratilal Automobiles Ltd & 6 Others, CA No 304 of 2006 (171/2006 UR): "Thus, there is no absolute legal bar to hear a contemnor who has not purged the contempt...and whether the court will hear the contemnor is a matter for the discretion of the court depending on the circumstances of each case."
>
> The reason why, depending on the circumstances of each case, the court must retain the discretion, albeit to be exercised sparingly, to decline to hear a contemnor is because our entire constitutional edifice is predicated on respect for the rule of law. The moment a party hacks at that foundation, the entire system is threatened."

25. It is on these premises that this court is of the view that, apart from the other reasons given elsewhere in this ruling, the respondent ought not to have been granted a chance of opposing the instant application since he was in contempt of court. Where it is shown that the disobedience is not only deliberate but repetitive as is in the case of the respondent herein, the court must be firm in its resolve to ensure that the party obeys its orders first before he can be heard further.

26. The applicant prayed that this court re-issues warrants of arrest against the respondent and they be executed by the county commander, Trans Nzoia County. This the respondent opposed, contending that it should have been an administrative exercise. This court finds the views of both parties incorrect but understands the applicant to have meant that the warrants which were directed for execution by the OCS Sikhendu police station be directed to the county commander to effect them. It did not mean that the warrants ceased to be valid for reason of having not been executed. It is worth noting here that once warrants of arrest are issued by the court, they remain in force until they are either executed, cancelled by other order of court, recalled and or otherwise complied with. Thus, in the instant case, the warrants of arrest are still in force. They are only to be re-directed for execution if need be. This finding answers the opposition to the application herein which was based on a technicality aimed at defeating the ends of justice. Article 159(2)(d) of the *Constitution* takes care of any misapprehension of the point by the applicant. In any event, the applicant

27. In analyzing this issue an examination of the law and facts is apt. Regarding the law, the applicant relied on section 79G and 95 of the *Civil Procedure Act* and order 50 rule 6 of the *Civil Procedure Rules, 2010*.

28. For the respondent to argue that the application is baseless, incompetent and an abuse of the process of the court while he knows well that the same was only brought because he is openly in contempt of court is but a shame and direct affront to the dignity of this court. More shocking was when learned counsel acting for him in the instant application descended from the sacred duty of an Advocate, as provided for under section 1B (3) of the *Civil Procedure Act*, which is to the effect that he should participate in the processes of the court and to comply with the directions and orders of the court, and purported to further his client's acts of disobedience of the orders of the court by opposing the application. Rather than learned counsel advising his client to comply with the orders of the court by presenting himself for mitigation, he impliedly advised him to keep away while he opposed the application of merely seeking to change the rank of officers to enforce the warrants of arrest.

29. Moreover, by the respondent raising the argument through counsel that application ought not to have been filed but rather that the applicant only ought to have written a request to the Deputy Registrar of this court to extend the warrant of arrest and direct other officers to effect it, he in essence was telling

the court in such words as a layman can put it, "mtado?" (interpreted as, "what will you do?"), I will not attend court until I hear that you got the warrants of arrest out in a different way than you want to." This court cannot condone this conduct.

30. I would conclude the determination of this application in the same way as G V Odinga J (as he then was) would put it in *Wambua Maithya v Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & 2 others (Interested parties)* eKLR. He stated thus:

> " Having considered this application and the history of this case, it is my view and I find that to grant this application would be amounting to aiding and abetting the abuse of the court process which the applicant herein has consistently set out to achieve. His actions in these proceedings are clearly geared towards the obstruction of the course of justice an action that must be deplored by any court of law as not only being an abuse of the court process but may also render the applicant a vexatious litigant."

b. What orders to issue including who to bear costs

31. Therefore, borrowing from the above quotation, given the conduct of the respondent herein and the history of this case, I am inclined to find that to agree with the respondent that the instant application is not worth granting is to aid and abet the abuse of the process of this court as is intended to be by him. I depart from his baseless timewasting baffling opposition to the instant application and grant the application on the following terms:

    (1) That warrants of arrest herein are still in force.

    (2) The OCS Sikhendu is hereby directed to effect the warrants of arrest within the next one (1) week, and if any expense is to be incurred in the process, the same be facilitated by the Plaintiff herein, but to be ultimately borne by the defendant upon being presented before this court.

    (3) In the event that the warrants are not executed within the one (1) week, the OCS Sikhendu is directed to attend court on February 13, 2023 to show cause why that is not done.

    (4) This matter be mentioned on February 13, 2023 at 9.30 am in open court for further directions.

32. Orders accordingly.

RULING DATED, SIGNED READ AND DELIVERED AT KITALE IN OPEN court THIS 1ST DAY OF FEBRUARY, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

Plaintiff/ applicant: Present

Nakitare for defendant: Present