



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT GARISSA**

**ELC . CASE NO. E02 OF 2021**

**MUHAYIDIN KALI.....APPELLANT/APPLICANT**

**VERSUS**

**FATUMA HUSSEIN HASSAN.....RESPONDENT**

**(An appeal from the entire ruling and decision of the Hon. Mr. Ole Tanju-SRM)**

**on 20<sup>th</sup> January 2020 in the Civil Matter ELC No. 13 of 2020**

**between:**

**FATUMA HUSSEIN HASSAN.....PLAINTIFF/APPLICANT**

**AND**

**MUHAYIDIN KALI.....1<sup>ST</sup> DEFENDANT**

**ADHAR KALI.....2<sup>ND</sup> DEFENDANT**

**HALIMA ZUBER.....3<sup>RD</sup> DEFENDANT**

**SAHAL MILE.....4<sup>TH</sup> DEFENDANT**

**RULING**

Coming up for determination is the appellant applicant application dated 22<sup>nd</sup> January, 2021 and filed on 25<sup>th</sup> January, 2021 brought under Order 51 Rule 1, Order 22 Rule 22 and Order 44 Rule (1) of the Civil Procedure Rules, section 1, 1A, 3 & 3M of the Civil Procedure Act and Article 22 and 23 and other enabling provisions, seeking the following orders:

- 1) The matter be certified Urgent and dispensed with in the first instance**
- 2) THAT this Honourable Court be pleased to stay execution of order dated 25<sup>th</sup> November, 2020 pending the hearing and determination of this application.**
- 3) THAT this Honourable Court be pleased to stay execution of order dated 25<sup>th</sup> November, 2020 pending the hearing and determination of appeal dated 22<sup>nd</sup> January, 2021**
- 4) The Court to issue other orders as it may seem just**

The application is supported by the affidavit of Muhayidin Kali sworn on 22<sup>nd</sup> January, 2021. The Respondent in response to the instant application filed a Replying affidavit sworn by Fatuma Hussein Hassan dated 9<sup>th</sup> February, 2021 in opposition to the application.

**The Applicants Case**

The applicants in their grounds in support of the instant application aver that the orders of Hon Ole Tanju (SRM) committing them to civil jail were issued unfairly without giving them a chance to be heard and defend themselves pursuant to contempt application filed by the Respondent.

It is their case that the Respondent filed an application under certificate of urgency on 15<sup>th</sup> October, 2020 where the court on consideration issued temporary injunction barring them from accessing their home, and fixed the matter for inter parties hearing on 4<sup>th</sup> November, 2020, where on the said date the Respondent sought leave to amend their application and the court rescheduled the matter to the 18<sup>th</sup> November, 2020 for mention.

The applicant avers that misunderstanding arose between themselves and their advocate on record culminating with their advocates filing an application to cease acting for them, and that they sought more time to get other advocates to act for them; however, it became difficult due to their poor status. And that subsequently, the Respondent filed an application for contempt on 25<sup>th</sup> November, 2020, which application was set for hearing on 20<sup>th</sup> January, 2021 and they allege that the court on that date without giving them a right to defend themselves committed them to civil jail.

It is their case that they both reside in the subject property the subject of the said contempt proceedings and that it is their only place of abode and complying with the said orders would render them destitute.

### **The Respondent's Case**

The Respondent opposed the instant application averring that the applicants conduct herein cannot be excused as they acted in contempt of court orders requiring them to vacate the suit premises. It is their case that upon filing their suit and serving the applicants, the applicants appointed the firm of Bare & Balgesa & Co. Advocates on 17<sup>th</sup> November, 2020, this was after the court on 5<sup>th</sup> October, 2020 issued interim injunction restraining the applicants from interfering with the Respondent quiet possession of the suit premises.

They aver that on 1<sup>st</sup> December, 2020 the firm of Bare & Balgesa & Co Advocates filed a notice of withdrawal from acting for the applicant, and when their application in which interim orders were issued came for inter partes hearing on 2<sup>nd</sup> December, 2020 their advocates ceased acting.

They further aver that they filed contempt application against the applicants on 25<sup>th</sup> November, 2020 and served the same on the firm of Bare & Balgesa Advocates on 1<sup>st</sup> December, 2020 . The matter was rescheduled to the 18<sup>th</sup> December, 2020 when the firm of Bare & Balgesa appeared for the applicants and sought an adjournment on the basis that one of the applicants was from Turkey and was on quarantine and the court rescheduled the matter to the 20<sup>th</sup> January, 2021 and further reminded the applicants of the existence of interim orders issued.

It is therefore their case that the applicants refused to obey the court orders despite being served and having attended court in person on 2<sup>nd</sup> and 18<sup>th</sup> December, 2020 where they never sought time to appoint another advocate and therefore their instant application lacks merit.

### **Analysis and Determination**

I have considered the application and the affidavits, both in support and in opposition to the said application. I have also considered the arguments and submissions by the Applicant in person and Mr. Mukwe, Counsel appearing for the Respondents. The Applicant's application dated 22<sup>nd</sup> January, 2021 is for stay of execution of Orders issued by the trial court on 25<sup>th</sup> November, 2020 pending the hearing and determination of an intended appeal. A copy of the Memorandum of Appeal is annexed to the said application.

The gist of the matter is that in a Notice of Motion dated 15<sup>th</sup> October 2020 filed under certificate of urgency the Respondent sought a raft of orders at ex-parte stage including a temporary injunction restraining the Defendants/Applicants by themselves, their servants, agents, employees or anyone acting on their instructions from any form of trespassing, occupying, interference in any way of the Plaintiffs quiet possession and exclusive right to all that property known as GSA/2425 pending hearing and determination of that application. Upon considering the said application exparte, the trial court granted the orders which he also directed that the Officers Commanding Garissa Police Station (O.C.S) do effect the orders. The Applicants instructed the law firm of Balqesa Abdi & Co. Advocates to act for them but the Advocates later filed an application to cease acting due to some difference between them and the Applicants. The Respondents thereafter filed an application dated 25<sup>th</sup> November 2020 in which they sought to have the Applicants herein detained in prison for a term not exceeding six (6) months for disobeying the orders issued by the trial court ex-parte on 15/10/2020. The Applicants are challenging the said orders which were issued by the trial court. Ex-parte without giving them an opportunity to be heard. According to the Applicants, they reside in the suit property and the orders issued by the trial court ex-parte was tantamount to a mandatory injunction evicting them from their only residence they have known as their home. They have annexed photographs which have not been controverted. The Applicants also contend that they were not given an opportunity to Show Cause before being committed to Civil jail.

Having carefully considered the arguments raised by the Applicant and the rival submission, it is clear in my mind that committing a litigant to Civil jail is a serious issue that is a threat to his constitutional right to liberty, freedom, dignity and privacy all of which are enshrined in the Bill of Rights of our Constitution. In the case of **Beatrice Wanjiku & Another –Vs- Attorney General & another (2012) eKLR**, the Court held inter-alia;

***“.....committal and imprisonment constitutes a violation of fundamental rights and freedoms guaranteed by our Constitution. The right to inherent dignity of the person protected under Article 28 is a proclamation of our humanity. Arbitrary arrest and imprisonment degrades the human spirit, affect families and relationships. Arbitrary arrest and committal also infringes the right to security of the person protected under Article 29, the right to a fair trial protected under Article 50 (1) and the right to***

***movement under Article 39. A consideration of all these rights pints to the fact that arrest and committal of a judgement debtor constitutes a violation of the collectively of these rights.”***

I agree with the reasoning in the above decision. The orders which were the subject of the committal were issued ex-parte without giving a hearing to the Applicants herein. I find the application for stay pending Appeal dated 22<sup>nd</sup> January 2021 merited and the same is hereby allowed as follows;

- 1. The orders issued by the trial court committing the Applicants to Civil jail on 25<sup>th</sup> November, 2020 be and are hereby stayed pending hearing and determination of the intended Appeal.**
- 2. The Applicants to compile the record of Appeal within 90 days from today failing which the stay shall be discharged.**
- 3. The costs of this application to abide the intended Appeal.**

**READ, DELIVERED AND SIGNED IN THE OPEN COURT THIS 28<sup>TH</sup> DAY OF MAY, 2021.**

.....

**E. C Cherono (Mr.)**

**ELC JUDGE**

**In the presence of:**

1. Mr. Mukwe for Plaintiff
2. Plaintiff: present
3. Defendant: present
4. Court Assistant: Ijabo