



**Onduro v Wanyonyi (Miscellaneous Civil Application
E001 of 2024) [2024] KEHC 755 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 755 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CIVIL APPLICATION E001 OF 2024**

**DK KEMEL, J
JANUARY 23, 2024**

BETWEEN

DOUGLAS ONYALLA ONDURO APPLICANT

AND

COLLINS FESTUS WANYONYI RESPONDENT

RULING

1. The Applicant filed an application dated 1.1.2024 brought pursuant to Article 22 (1), 23, 50, 25(c), 165 (6) and (7) of the Constitution and Rule 3 of the High Court (Practice and Procedure) Rules seeking the following reliefs:-
 1. Spent
 2. That pending the hearing and determination of the application, Mr. Lawrence Onduro Othieno be released from custody at Bungoma GK prison with immediate effect and/or on such terms as this court shall deem fit.
 3. That this court be pleased to call for the file in Civil Suit No. 304 of 2020 Collins Festus Wanyonyi v Douglas Onyala Onduro in the Chief Magistrate’s Court Bungoma and revise, stay, vacate or otherwise set aside the trial court’s committal and imprisonment of Mr. Lawrence J Onduro Othieno for alleged contempt of court.
 4. That the decision of the trial court that Mr. Lawrence J Onduro Othieno was guilty of contempt of court be revoked, annulled varied or otherwise set aside for violating the right to a fair trial/hearing administered by an impartial judicial officer without conducting a hearing.
 5. That all exparte proceedings from 13.5.2023 taken by the Respondent in the subject matter be declared null and void for violating tenets of fair trial, due process and/or procedure and thus be expunged from the file in the main suit.



6. That this court be pleased to issue a permanent injunction against the OCS Matungu and any other Police officer against the arrest of Mr. Lawrence Ju Onduro Othieno in regard to his capacity as surety in the main suit.
 7. That the Hon. Ezra Masira Ayuka be disqualified from adjudication of Civil Suit No. 304 of 2020 Collins Festus Wanyonyi v Douglas Onyala Onduro in the Chief Magistrates' Court Bungoma and that the court be pleased to refer the same to the head of station and the matter be placed before another magistrate other than Hon. Ezra Masira Ayuka PM and Hon. Ruth B Maloba SPM.
 8. That costs be in the cause.
2. The application is supported by the grounds on the face thereof and by the supporting affidavit of Ashford Muriuki Mugwuku and Douglas Onyala Onduro sworn on even date. The Applicant's gravamen is *inter alia*; that the Applicant's surety has been committed to civil jail for failure to attend court and to produce the accused (applicant) and was denied audience by the trial court; that the surety has suffered and will continue to suffer irreparable harm if he is not released from unlawful custody, that the Applicant has since filed an application scheduled for directions on 15.2.2024 before the trial court; that the imprisonment of his surety and issuance of warrant of arrest is orchestrated to punish, humiliate and settle personal scores by the Respondent; that the civil suit has been converted into a criminal matter; that the Applicant had been arrested and committed to prison for two weeks before being released on bond with a surety; that the surety who is currently in prison is of old age and of ill health; that the rights of the applicant and his surety have been repeatedly violated and will continue to suffer unless this court intervenes; that the matter has been handled by Hon. Ayuka in a manner that is prejudicial to the Applicant; that the applicant's right to fair hearing and natural justice has been impeded, violated and infringed by the learned Magistrate Hon. Ayuka who should recuse himself.
 3. The Application was vehemently opposed by the Respondent who filed a replying affidavit sworn on 11.1.2024 wherein he averred *inter alia*; that the application is an abuse of the court process; that the Applicant upon being served with the suit papers failed to file response whereupon a judgement was entered against him; that the Applicant was later allowed to file his defence but failed to do so leading to execution of the decree; that a warrant of arrest was issued against the applicant for failing to attend court and answer to a NTSC; that the Applicant was arrested and committed to Civil jail for 30 days whereupon a consent was entered into and that he undertook to liquidate the decretal sums by instalments; that the Applicant failed to honour the agreement and court attendance and that his surety also failed to attend court forcing the court to issue a warrant of arrest to both Applicant and surety; that the surety was later arrested and committed to civil jail for failing to fulfill his recognizance; that the present application is not a judicial review application as contemplated under Order 53 of the [Civil Procedure Rules](#) and that this court lacks jurisdiction to entertain the same.
 4. The application was canvassed by way of written submissions. Both parties duly filed and exchanged submissions which were a reiteration of their rival averments.
 5. I have considered the rival affidavits and the submissions presented. I have also perused the record of the trial court in Bungoma CMCC No. 304 of 2020 Collins Festus Wanyonyi v Douglas Onyala Onduro. It is not in dispute that the *ex parte* Judgement entered against the Applicant was subsequently set aside conditionally and that upon the applicant's failure to adhere to the conditions, the initial judgement was reinstated and a decree issued accordingly and thus the *ex parte* judgment is still in force and yet to be set aside. It is also not in dispute that there is a warrant of arrest in force against the Applicant for going against the conditions of release from civil jail. It is also not in dispute that the Applicant has filed an application before the trial court dated 8.12.2023 seeking almost similar reliefs and which is pending



for directions on 15.2.2024. It is also not in dispute that a consent was entered between the applicant and Respondent on 25.7.2023 before the trial court regarding settlement of the decree wherein the Applicant undertook to pay a sum of Kshs. 200,000/- and thereafter engage the Respondent on further consents. It is also not in dispute that the Applicant secured a surety to stand for him so as to be released from civil jail following the consent dated 25.7.2023. It is also not in dispute that the surety was subsequently committed to civil jail for failing to present the Applicant to court and for failing to satisfy the recognizance that he had made before the trial court. It is not in dispute that the said surety has not approached the trial court for revision of committal order or otherwise or even file an affidavit in support of the Applicant's application. It is also not in dispute that the Applicant has not made an oral or formal application seeking the trial magistrate to recuse and or disqualify himself from prosecuting the matter. It is also not in dispute that the surety who bailed out the applicant has not lodged an appeal against the committal to civil jail. That being the position, I find the only issue for determination is whether the application has merit.

6. The Applicants application seems to be mainly predicated upon Article 165 (6) and (7) of the Constitution of Kenya 2010. The same Article provides as follows;

165(6) – the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi – judicial function but not over superior court.

165 (7) – for the purposes of clause (6) , the High Court may call for the record of any proceedings before any subordinate court or person or authority referred to in clause (6) and may make an order or give any direction it considers appropriate to ensure the fair administration of justice.

In obedience to the above succinct provisions of the Constitution, I have carefully perused the entire record of the lower court and that my findings are as noted in paragraph (5) above. Indeed, the Applicant is entitled to approach this court for orders of revision. However, the raft of prayers sought appear in my view to be premature for the simple reason that the Applicant is yet to exhaust the requisite avenues available before the trial court. What is glaring is that the Applicant's application for review of orders in the trial court is still pending determination. Again, the Applicant is yet to move the trial court either orally or formally for the recusal and or disqualification of the trial magistrate. Further, the surety is an adult of sound mind and who is capable of making his representation or request for variation or revision of the orders by the trial court. He is yet to approach the court over the same and hence the Applicant's attempt to rope him in the present application without securing an affidavit in support by the surety is in bad faith. It is quite surprising to note that the Applicant, despite being aware of the order that he presents himself in court, has deliberately kept off but has been appearing virtually despite the fact of his knowledge that a warrant of arrest against him is still in force. He has not given plausible reasons as to why he has not obeyed the court's order and or directions. His conduct in dodging the court order is not in good faith. The Applicant is fully aware that the surety's obligation to the court is separate from his and therefore he should not hide behind the surety in his bid to avoid presenting himself to court. Clearly, the orders sought by the applicant are yet to crystalize and therefore there is need for him to exhaust all the requisite procedures before the trial court and thereafter approach this court. It seems to me that the applicant is using this forum to escape from appearing before the trial court and ventilate his issues. I have not seen any irregularity in the proceedings before the trial court to warrant this court to invoke its powers of revision.

7. In view of the foregoing observations, it is my finding that the Applicant's application dated 1.1.2024 lacks merit. The same is dismissed with costs.

DATED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF JANUARY 2024

D. KEMEI



JUDGE

In The Presence of :-

Mwaniki for Applicant

Wamalwa R For Respondent

Kizito Court Assistant

