



**Land Registrar Bungoma County v Khatete & another (Civil Appeal E122 of 2024) [2024] KEHC 12832 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12832 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E122 OF 2024**

**DK KEMEL, J**

**OCTOBER 25, 2024**

**BETWEEN**

**LAND REGISTRAR BUNGOMA COUNTY ..... APPELLANT**

**AND**

**CALVIN MAPESA KHATETE ..... 1<sup>ST</sup> RESPONDENT**

**JOHN KINDA WARABA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellant/Applicant herein filed an application dated 23<sup>rd</sup> August, 2024 pursuant to Article 50 (2) of *the Constitution* of Kenya, 2010, Sections 1A,1B and 3A of the *Civil Procedure Act*, CAP 21 laws of Kenya, Order 42 Rule 6 of the Civil Procedure Rules Laws of Kenya and all the enabling provisions of the law. It seeks the following reliefs:
  - a. Spent;
  - b. There be a temporary stay of execution of ruling dated 7<sup>th</sup> August 2024 and consequential orders herein pending hearing and determination of this application inter partes.
  - c. There be a temporary stay of execution of ruling dated 7<sup>th</sup> August 2024 and consequential orders herein pending hearing and determination of this appeal.
  - d. Costs of the application.
2. The application is supported by the grounds on its face and verified by the supporting affidavit of Felix Maura, the Land Registrar Bungoma County, sworn on 23<sup>rd</sup> August 2024.
3. In the affidavit Mr. Maura depones that by an application dated 15<sup>th</sup> July 2024, the Respondents herein sought orders for him to show cause why he should not be committed to prison for disobeying and failing to implement Court orders as issued on 9<sup>th</sup> May 2024. According to him, he was active



- in the confirmation of grant process in Succession Cause No. E317 of 2023 which led to the issuance of a certificate of confirmation of grant. He stated that upon his investigations, he discovered that the said process was marred with irregularities and fraud, and that his office being bound by legal and administrative procedures, he could not process the said documents that clearly presented inconsistencies and potential fraud.
4. He deposed that on 7<sup>th</sup> August 2024, the trial Court delivered a ruling in which it found him in contempt and proceeded to issue orders that he complies with the requisite registration of the certificate of confirmation of grant within seven (7) days and in default a warrant of arrest to issue.
  5. Mr. Maura further averred that the Respondents on 20<sup>th</sup> August 2024 extracted an order based on the said ruling and had the same served upon their offices on even date. He deposed that the seven days' notice has since lapsed and that there is a likelihood of execution of the said warrant of arrest issued against him. He avers that vide a memorandum of appeal dated 21<sup>st</sup> August 2024, via his instructions, the Attorney General instituted an appeal against the ruling issued on 7<sup>th</sup> August 2024, and that the same raises tangible triable issues and has a higher chance of success. He insisted that the execution of the order extracted on 20<sup>th</sup> August 2024 will render the appeal an academic exercise.
  6. He urged this Court to allow this application as failure to do so will lead to his committal to a civil jail, infringement of his guaranteed constitutional rights and that he stands to suffer irreparable damage.
  7. Vide a replying affidavit sworn on 5<sup>th</sup> October 2024, the 1<sup>st</sup> Respondent herein Mr. Calvin Mapesa Khatete, averred that the Applicant's application and supporting affidavit therein is frivolous, vexatious, scandalous and an abuse of due Court process.
  8. According to him, the Applicant herein was well notified of the Court order as issued but that he deliberately chose to disobey the same. He averred that the Applicant lacks respect for the rule of law and that his application fails to meet the dictates of Order 42 Rule 6 (2) of the Civil Procedure Rules 2020.
  9. He urged this Court not to issue the discretionary and equitable reliefs sought as the Applicant's actions are in blatant disrespect to the rule of law.
  10. Vide Court directions issued on 8<sup>th</sup> October 2024, the application dated 23<sup>rd</sup> August 2024 was canvassed by way of written submissions. However, it is only the Respondents who complied.
  11. Counsel for Respondents argued that Courts do not act in vain and that the orders issued ought to be obeyed and that the application as filed by the Applicant did not meet the threshold as set under Order 42 Rule 6(2) of the Civil Procedure Rules. He relied on the cases of Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR and James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR.
  12. I have considered the application, the supporting grounds and the rival affidavits as well as submissions filed. I find the issue for determination is whether the Applicant has met the threshold for the grant of the orders sought. There is no dispute that indeed, on 7<sup>th</sup> August 2024, Hon. T.M. Olando-PM made a ruling in which he granted the Applicant herein seven working days to comply with the orders of effecting registration in accordance with the certificate of confirmation of grant and thereafter effect transmission and that in default, warrant of arrest to issue against the Applicant.
  13. According to Section 5 of the *Judicature Act*:



1. The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate Courts.
14. It is trite law and as seen in other contemporary jurisdictions, that in order to succeed in Civil Contempt proceedings, the Applicant has to prove these three conditions; (i) the terms of the order; (ii) Knowledge of these terms by the Applicant; and (iii) Failure by the Applicant to comply with the terms of the order (*Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005).
15. I have considered the proceedings herein as well as the orders contained in the impugned ruling. The Court record is clear that the order is in the knowledge of the Applicant herein. That order has not been complied with despite service of the same upon the Applicant. The Applicant deposed that based on his investigations, he observed that the confirmation of grant process was marred with illegalities and fraud and thus declined to participate in the process since the same bore clear legal inconsistencies and potential fraud.
16. No compelling reason has been advanced by the Applicant as to why the said registration is yet to be effected as per the certificate of confirmation of grant and that the transmission has not been conducted to date and that there is nothing before this Court to show that the said decree has been set aside or varied by this Court or on Appeal, or that the orders as issued by the trial Court has been stayed or set aside.
17. The obligation to obey orders of Court and the necessity to punish for contempt of Court orders was explained in detail by the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* [2018] eKLR where the Court observed;
  - “(23) Authorities on the necessity to punish for contempt are legion. We have considered those provided by the respondent, and also cite the following, in affirmation of the principle.
  - (24) In *Econet Wireless Kenya Ltd V. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990* (unreported), where the Court of Appeal stated as follows:

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In *HADKINSON v. HADKINSON* (1952) 2 All E.R. 567, it was held that: It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”



(25) In *Att-Gen. v. Times Newspapers Ltd.* [1974] A.C. 273, Lord Diplock stated:

“... There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.”

(26) The Court of Appeal in *A.B. & Another v R.B.*, Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa’s decision in *Burchell v. Burchell*, Case No.364 of 2005 where it was held:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

(27) Ojwang, J (as he then was) in *B. V. Attorney General* [2004] 1 KLR 431 that:

“The Court 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 legality, and for the rights of all people.”

(28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

(29) The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged “contemnor’s conduct was deliberate,



in the sense that he or she willfully acted in a manner that flouted the Court Order.”

18. Also, this Court is guided by the Scottish case in *Stewart Robertson vs. Her Majesty’s Advocate*, 2007 HCAC63, where Lord Justice Clerk stated that:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”

19. Further, Romer L.J in *Hadkinson vs. Hadkinson*(1952) ALL ER 567 stated that:

“It is the plain and unqualified obligation of every person, against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

20. At this juncture, it is elaborate that obedience of Court orders is momentous. Any lapse in enforcement of Court orders is a sure invite to a total breakdown of the rule of law as we know it. The inevitable result would be anarchy and an erosion of our social fabric. This Court has an obligation to stand firm and guard against such an eventuality. This, it would achieve, by strict enforcement of its orders. There is evidence that the Applicant is the officer obligated to settle the decree herein. He has knowledge of the order. He has not effected registration and transmission as per the certificate of confirmation of grant. No compelling reasons have been brought before this Court as to why the Applicant has failed to comply with the Court’s order as issued on 7<sup>th</sup> August 2024. It is safe to infer that that the Applicant’s conduct is deliberate, in the sense that he has willfully acted in a manner that flouted the Court Order and attempted to disrepute legitimacy of the judicial system in such an uncouth manner by alluding that their office commitment to legal and administrative procedures is superior to Court Orders issued that are allegedly marred with legal inconsistencies and potential fraud.

21. I find that the actions of the Applicant ran afoul of the terms of the Court orders issued 7<sup>th</sup> August 2024 which had constrained them from disrupting the status quo. Court orders are not made in vain. They must be obeyed at all times. Parties cannot choose which orders to obey and which ones not to obey since every person is equal before the law. It was incumbent upon the Appellant/Applicant to comply with the order and then approach the court and seek to have the same varied or vacated once he appraises the court of the correct information regarding the true position of the matter. As the Applicant failed to do so, i find that he was in contempt of the court orders. It is instructive to note that the Applicant has not bothered to purge his contempt before approaching the trial court or this court. As long as that has not been done, this militates against his quest for an interim/ conservatory orders pending determination of this application or the appeal. It is further noted that the order sought is an equitable remedy and hence the Applicant was expected to approach this court with clean hands. However, that is not the case either.

22. In view of the foregoing observations, it is my finding that the application dated August 23, 2024 has no merit. The same is dismissed. The Appellant/Applicant is directed to file and serve the record of appeal within fourteen (14) days and that upon the admission of the appeal, to set it down for hearing on priority basis. Meanwhile, the Deputy Registrar do proceed to call for the lower court record and commence admission of the appeal. The costs hereof shall abide in the appeal.

**DATED AND DELIVERED AT BUNGOMA THIS 25<sup>TH</sup> DAY OF OCTOBER,2024.**



**D. KEMEI**

**JUDGE**

**In the presence of :**

.....for Appellant/Applicant

.....for Respondents

.....Court Assistant

