Onguto (Suing as the legal representative of the Estate of Joseph Louis Onguto (Deceased) v Abuya t/a J Louis Onguto Advocates (Civil Suit E033 of 2021) [2023] KEHC 896 (KLR) (Civ) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 896 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL

CIVIL SUIT E033 OF 2021

A MABEYA, J

FEBRUARY 10, 2023

BETWEEN

CONSOLATA ONGUTO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH LOUIS ONGUTO (DECEASED) ..... PLAINTIFF

AND

EDWIN ODHIAMBO ABUYA T/A J LOUIS ONGUTO ADVOCATES ..... DEFENDANT

RULING

1. The late Hon. Justice Joseph Louis Onguto was a prominent Advocate in Nairobi. He was practicing in the partnership firm of J. Louis Onguto Advocates until he was appointed a Judge of the High Court in July, 2014. He sadly passed on in March, 2018.

2. Before his appointment as a Judge of the High Court, he was in the partnership of the said firm with the defendant between 2012 and the said 2014. Of course with his appointment, the late Judge must have ceased to be a partner in the said firm. However, his entitlements on leaving the partnership were part of the assets that were distributed by the Family Court in NBI H.C Succession Cause No. 870 of 2018 ("the succession Cause").

3. The plaintiff was appointed the administrator of the estate of the late Judge in that Succession Cause.

4. By an Originating Summons dated 31/8/2021, the plaintiff sought that the defendant does render true and correct statement of accounts in respect of the said partnership since its inception till March, 2018. She also sought its dissolution apart from having the release to her the partnership rights due to the estate.

5. When the Originating Summons came up for mention on 25/10/2021, I gave directions that the same be responded to within 21 days and directed that it be mentioned before Mwita J on 2/12/2021 for directions. However, Ms. Mwangi appearing for the defendant informed the Court that the defendant was not opposed to the application and that there was therefore no need to respond to the same.

6. In view thereof, I set aside the directions I had made and allowed the Summons as prayed. I directed that the accounts be rendered within 21 days of the order and listed the matter for mention on 1/12/2021. The order for accounts was not complied with and on 22/6/2022, the defendant applied to set it aside while the plaintiff applied on 28/6/2022 to cite the defendant for contempt for disobeying that order.

7. On 12/7/2022, I directed that both applications be heard together. The applications were argued vide written submissions that are on record and which have been considered.

8. The Motion dated 22/6/2022 by the defendant sought that the proceedings and order of 25/10/2021 be set aside and the Originating Summons dated 31/8/2021 be heard on merit. The application was supported by the affidavits of Kisilah Daniel Gor sworn on 22/7/2022, respectively.

9. It was contended that upon being served with a mention and Notice of Motion dated 5/10/2021, the defendant's advocates thought that the mention was for the Motion of 25/10/2021. The Motion was for the transfer of the suit from the Civil Division to the Commercial and Tax Division of this Court.

10. That being of that view, the said Advocates were not opposed to the application and gave such instructions to one of their Advocates, one Mr Muchiri to attend Court and state as much. That on the said 25/10/2021, Mr. Muchiri asked one Ms. Mwangi Advocate to hold his brief and she told the Court as much.

11. That it was a mistake on the part of the Advocate to have allowed the application as such. That as a result, they prepared a replying affidavit to the Originating Summons and served the same upon the plaintiffs Advocates in March, 2022. That the defendant could not have agreed to the orders sought in the Summons for the reasons set out in the said replying affidavit.

12. It was submitted for the defendant that a consent entered into by misapprehension of the facts is liable to be set aside. The cases of Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd (1982) KLR 485 and Purcell vs F.C Trigell Ltd [1970] 2 ALL ER 671 were cited in support of that submission.

13. That the 3 Advocates involved, Kisilah Daniel Gor, Denning Muriithi and Betty N Mwangi had inadvertently assumed that the mention of 25/10/2021 was for the application for transfer. That the defendant had the right to have the matter determined on merit. Article 50 of *the Constitution* and the case of Belinda Murai & 6 Others vs Amos Wainaina [1978] were cited in support thereof.

14. The defendant further relied on the case of CMC Holdings Ltd vs Jameas Mumo Nzioki (CA 329 of 2001) in support of the submission that a court of law in exercising the discretion to set aside an ex-parte order has to ensure that a party does not suffer an injustice. Further, the Court was urged to apply the over ridding objective of the law and exercise its discretion in favour of the defendant.

15. The plaintiff opposed the application vide the Replying Affidavit of Daniel Musyoka Advocate. He averred that the application was frivolous and an afterthought. He set out the history of the matter how his firm served a proper mention notice upon the defendant's Advocates, that clearly showed that the matter was now before the Commercial Division and that the issue of transfer of the suit was a non-issue.

16. That after the order was made, there were several appearances in Court in which the defendant asked for more time to comply with the order of 25/10/2021. That not until June, 2022 that the present application was filed.

17. It was therefore contended that there had been inordinate delay and that there were no plausible reasons to grant the orders sought. It was urged that the application be dismissed.

18. In her submissions, the plaintiff stated that conditions for setting aside a consent order had not been met. The cases of Isaac Kinyanjui Njoroge vs National Industrial Credit Bank Ltd [2018] Eklr and Lazarus Kirech vs Kisorio Arap Barno [2018] Eklr were cited in support thereof.

19. That due to the inordinate delay in bringing the application, the Court should not exercise its discretion in favour of the defendant. That the defendant was in contempt of court and had therefore come to court with unclean hands and was therefore undeserving the Court's equitable jurisdiction. The cases of Contractors Ltd vs Margaret Oparanya [2004] Eklr and Jane Njeri Karogo & Anor (sued as representatives of the estate of Rongo Kilari vs Hannah Wanjoku [2021] Eklr were cited in support of those submissions.

20. The Court has considered the rival averments as well as submissions. Setting aside an order is discretionary. That discretion should however not be exercised capriciously. See Shah vs Mbogo & Anor 1967 EA. In that case it was stated that the exercise is meant: -

> " To avoid injustice or hardship resulting from accident, inadvertence or exehesable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice".

21. As regards consent orders, it was held in Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd (supra) that:-

> " A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud, collusion or by an agreement contrary to the policy of the Court or where the consent was given without sufficient material facts or misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement."

22. From the foregoing, it is clear that there is power to set aside orders for purposes of metting out justice. That where a consent order is made with ignorance of the prevailing circumstances the same can be set aside.

23. In the present case, the grounds relied on are that the defendants advocates were mistaken as to the application for which they were consenting to. That they thought that they were consenting to the Motion for transfer of the suit from the Civil Division to the Commercial Division.

24. I have looked at both the Notice of Motion dated 5/10/2021 and the mention Notice dated 21/10/2021 that were served upon the defendant's advocates. While the title of the Motion clearly showed that the matter was HCC No. 240 of 2021(OS) in the Civil Division, the mention Notice showed that the matter was before the Commercial Division with case file No. HCCOM No. 033 of 2021. The question that arises is why would the said advocates be confused that the matter was being transferred to the Commercial Division yet it was already in the Commercial Division, with a Commercial Case No. being mentioned in that Division?

25. That notwithstanding what happened on the material day and subsequently is telling. I think it is important to set out verbatim the proceedings of that day in order to understand whether Ms Mwangi was also of the mistaken belief that it was the Motion for transfer of suit being dealt with:-

> " Court
>
> 1. Let the OS dated 31/8/2021 be responded to within 21 days of today.
> 2. Matter allocated to Hon Mwita J. mention on 2/12/2021 before the good Judge for directions.
>
> Signed
>
> A. Mabeya J
>
> Ms Mwangi
>
> We are not opposed to the application. There is no need to respond to the same.
>
> Signed
>
> A. Mabeya J
>
> Court
>
> In view of what Ms Mwangi has stated, I set aside the directions given earlier. I allow the OS as prayed. Let the statement of account be rendered within 21 days of today. Mention on 1/12/2021 for directions before this court.
>
> Signed
>
> A. Mabeya J".

26. It is clear from the foregoing that the Court stated twice that what was being dealt with was the Originating Summons and not the Notice of Motion. Further, the Court specified clearly in its order that the statement of accounts be supplied within 21 days. If what the affidavits in support state be true, it would be expected that immediately after the order was given the advocates should have realized that a different order than the one they intended to consent to had been made.

27. As if that was not enough, the matter came up twice for mention on 1/12/2021 and 10/3/2022 respectively and the issue of a wrong unintended order having been given was never raised.

28. The defendant contended that he had not consented to the orders in the Summons and that is why he filed a lengthy replying affidavit in answer to the summons.

29. The replying affidavit alluded to was exhibited in the replying affidavit of Kisilah Danieal Gor. It was sworn on 22/3/2022. This is after the defendant had made 2 appearances in Court on 1/12/2021 and 10/3/2022. If the contention was true, the replying affidavit could have been prepared and filed well before 1/12/2021 when the matter was fixed for directions. The replying affidavit, in the Courts view was an afterthought.

30. In view of the foregoing, I am satisfied that there was no mistake as to what application the defendant was consenting to.

31. In any event, it was never disclosed to this Court when the mistake, if any, was discovered. The order being challenged was made on 25/10/2021. There were appearances on 1/12/2021 and 10/3/2022. The present application was made on 22/6/2022, 8 months later. That was inordinate delay.

32. The application was an afterthought. It was made to avoid complying with the orders made on 25/10/2021. The same is rejected.

33. That leaves the application dated 28/6/2022 for determination. The same is by the plaintiff and seeks to cite the defendant for contempt. That he had deliberately disobeyed the order of this Court made on 25/10/2021.

34. It was contended that the said orders were clear. That the defendant had deliberately refused to obey the same. That in the premises, he had brought the dignity and honour of the Court into dispute.

35. It was submitted that the defendant knew the terms of the order and had knowledge of the order. The cases of Katsuri Ltd vs Kapurchad Depar Shah [2016] Eklr Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Anor [2014] Eklr and Basil Criticos vs AG & 8 Others [2012] Eklr were relied on in support of those submissions.

36. That it was not upon the defendant or his advocates to determine whether or not to comply with the said orders. The case of Wildlife Lodges Ltd vs County Council of Narok [2005] EA was cited in support thereof.

37. In the circumstances, the Court was urged not to hold its hands and watch its orders being disobeyed with impunity. The Courts authority must be protected and upheld.

38. The application was opposed vide the replying affidavit of Kisilah Daniel Gor sworn on 25/7/2022. He is an advocate practicing with the firm of Sheth & Wathigo Advocates for the defendant. He stated that he had the defendant's instructions to swear the said affidavit.

39. He narrated how the defendant had forwarded the Originating Summons to his firm with instructions to represent him. They were later served with a Motion on Notice dated 5/10/2021 and a mention notice by the plaintiff's advocates informing them that the matter was for mention on 25/10/2021.

40. That his firm inadvertently assumed that what was being mentioned was the Motion for transfer of the suit and how one of their advocates inadvertently agreed that the orders in the Summons be allowed.

41. He denied that the defendant had disobeyed the orders on the ground that they had not realized that the orders in the Summons had been inadvertently allowed. That that is why they made an elaborate response to the Summons.

42. He challenged the orders on the grounds that one of the orders sought accounts from inception of the partnership to March, 2018. That it covered a period 2004 and 2011 when the defendant was not a partner in the subject firm. Further, that the orders were too general and therefore incapable of being executed.

43. In the submissions dated 31/8/2022, the defendant submitted that the application was unmerited. That because the application was brought under sections 1A,1B,3 and 3A of the *Civil Procedure Act*, the same did not provide for contempt of Court. The provisions applicable to wit section 5 of the *Judicature Act* Cap 8 was repealed by section 38 of the *Contempt of Court Act* No. 46 of 2016 was nullified in the case of Kenya Human Rights Commission vs AG & Anor. That section 5 of the *Judicature Act* continue to apply.

44. That the terms of the order were imprecise, unclear, ambiguous and impracticable. That the order to provide accounts before joining the law firm were impracticable. That the defendant had no knowledge of the order. The court of Appeal case of Abdi Saterhaji & Anor vs Omar Ahmed & Anor MSA CA

No. 51 of 2018 was cited in support thereof. That the defendant had not been served with the subject order.

45. That the failure to obey the orders was not willful as the advocates on record assumed that the orders granted were of transfer of the suit. The case of Sheila Cassatt Issenberg & Anor vs Anthony Machathe Kinyanjui Kajiado H.C. No. 19 of 2020 was relied in support of that submission.

46. It was further submitted that the Court should interpret the provisions of the law to give effect to the overriding objectives of the law. The case of Stephen Boro Gitiha vs Family Finance Building Society & 3 Others CA No. 263 of 2009 was cited in support of that proposition.

47. This is an application for contempt. The High Court has the inherent power to punish for disobedience of its own orders. This flows from the inherent fact that the rule of law and therefore law and order will be in extreme jeopardy if court proceedings and orders are made in vain. This country will be a banana republic whereby it will be a free for all were the power to punish not inherent in a court.

48. In Hadkinson vs Hadkinson [1952] P 285 at 288, it was held:-

> " It is plain and unqualified obligation of every person against whom 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".

49. The defendant contended that since the provisions of section 5 of the *Judicature Act* was not invoked, the application was incompetent. That the plaintiff should have followed the procedure obtaining in England.

50. My view is that the procedure obtaining in England where there was requirement for leave and many other procedures are no longer tenable. The process was so technical that indignant litigants used to hide behind them to avoid accountability. Article 159 is an answer in that, Constitutional imperative of the overriding objective of the law is obedience to the law and the rule of law under Article 10. All that is required is proof that (i) there was an order made by a court (ii) its terms were clear (iii) the party was aware of these terms and (iv) there is willful failure to comply therewith. See Katsuri Ltd vs Kapurchand Depar Shah [2016] Eklr.

51. There is no dispute that in the present case, there was an order that was made on 25/10/2021. The terms thereof were clear that the defendant was to provide accounts for the firm since inception till March, 2018. There was nothing ambiguous about that. If the defendant considered that there was any hardship thereof, he should have returned to Court either for clarification or the setting aside that part of the order that was difficult to comply.

52. In Siloh Worldwide Inter-enterprises vs county secretary Nairobi County & Anor [2015] Eklr, Odunga J held:-

> " Court orders are not made in vain and are meant to be complied with. If for any reason, a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a court order is made in a suit the same is valid unless set aside on review or an appeal."

53. In the present case, the defendant did not return to Court until 8 months later when faced with enforcement proceedings. I reject the submission that the terms were imprecise and incapable of being complied with.

54. As regards knowledge, the deponent of the replying affidavit alleged that the defendant had not been served with the order. That he could not therefore comply with the same.

55. This is a baseless argument. First, the Court notes that although the person cited for contempt is the defendant himself, he refused to file any response and was comfortable instructing his advocates to respond to the same. An advocate cannot swear to matters such as when a client is being cited for contempt. It is the party to deny knowledge of the order, the terms thereof as well as absence of willful disobedience. An advocate cannot purport to swear to these matters. To that effect, the application cannot be said to have been properly defended. All an advocate can swear to are matters within his knowledge and of a procedural nature only.

56. As regards knowledge of the order, the terms thereof and failure to comply therewith, there was no satisfactory evidence on record to rebut the evidence produced by Mr. Musyoka.

57. Secondly, it is no longer the law that there should be personal service. Knowledge of the order and the terms thereof is sufficient. In Basis Criticos vs AG & 8 Others [2012] Eklr Lenaola J held:

> " The law has changed and as it stands today knowledge supersedes personal service...where a party clearly acts and shows that he had knowledge of a court order, the strict requirements that personal service must be proved is rendered unnecessary."

58. In the present case, Mr. Kisilah Danid Gor Advocate swore in his supporting Affidavits in support of the Motion dated 22/6/2022 for setting aside those orders that he had instructions of the defendant to swear the same. How would the defendant give instructions to set aside orders he was unaware of? It is impossible. He must have been aware and that is why he gave instructions that an application to set them aside be made. The defendant is being further contemptuous when he failed to personally respond to the application.

59. Accordingly, I am satisfied that the defendant was aware and had knowledge of the orders of 25/10/2021.

60. As regards compliance, the defendant did not produce any evidence to negate the allegation that he had deliberately failed to comply therewith. I have already held that if there were any difficulties on his part, he should have come back to Court for clarification or variation. This he did not.

61. Accordingly, I hold that, well aware of the order of 25/10/2021 and its terms, the defendant has willfully refused to comply therewith and is in contempt thereof.

62. However, in order to give him an opportunity to extricate himself from the drastic consequences that are appurtenant to his willful disobedience, I am inclined to grant him a window of an opportunity to purge his contempt.

63. Accordingly, the application dated 22/6/2022 is hereby dismissed with costs. The application dated 28/6/2022 is allowed in the following terms:-

    a. The defendant is held to be in contempt of the court order of 25/10/2021 but is granted time to comply therewith as follows:-

i. He is to file and serve the accounts of the partnership known as J. Louis Onguto Advocates for the period between 2012 and 2018 within 21 days of the date hereof.

ii. He is to disclose to court the benefits due to the late Justice L. Onguto that were outstanding at the time of the dissolution of the firm of J. Louis Onguto Advocates within 21 days.

b. In default, the defendant shall stand convicted of being in contempt of the order of 25/10/2021 and shall be liable to punishment which shall be metted out on a day to be fixed.

c. The costs of the application to the plaintiff in any event.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.

A. MABEYA, FCIArb

JUDGE