



**Sum v Koech (Civil Suit E077 of 2024) [2024] KEHC 14276 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14276 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E077 OF 2024  
RN NYAKUNDI, J  
NOVEMBER 15, 2024**

**BETWEEN**

**VERONICA CHEPSAT SUM ..... APPELLANT**

**AND**

**ZEPHANIA KIPCHUMBA KOECH ..... RESPONDENT**

**RULING**

1. Before me for determination is an application dated 19<sup>th</sup> August, 2024 expressed under the provisions of Art. 165(6), Section 29 of the *Environment and Land Court Act*, Section 5 of the *Judicature Act* and Order 40 Rule 3 of the Civil Procedure Rules, 2010. The applicant seeks orders to wit: -
  - a. Spent
  - b. The Respondent herein be and is hereby committed to civil jail for the period of not exceeding six (6) months and/or pay a fine of Kenya Shillings Thirty Million or both for being in contempt of a court order.
  - c. Costs of this application be provided for.
2. The application is premised on 8 grounds together with an affidavit in support sworn by Edel Chepkorir Sum. The applicant avers that:
  - a. The court issued a temporary stay of execution. In respect to this, the court directed the respondent to deposit the decretal sum of Kshs. 5,000,000/= into a joint interest earning account in a reputable financial institution of both counsels within a period of 30 days from the date of the court's ruling dated 16<sup>th</sup> July, 2024.
  - b. That the Respondent failed to comply with the said court order.
  - c. That the Respondent has gone ahead to execute the suit property no Pioneer/racecourse Block 2(kapmalel)/9 before the lapse of 30 days stay despite the court orders.



- d. The parties and both counsels were aware of the orders given.
  - e. The Respondent's action is fragrant belittling to the court and is calculated to bring the Honorable Court into disrepute.
  - f. The applicant contends that the Respondent's actions are in direct disobedience of the court's conservatory orders and the applicant stands to suffer loss and damage of the suit property and the court's authority of the protection of its rights.
3. In response to the application, the Respondent filed a replying affidavit sworn on 23<sup>rd</sup> September, 2024. The Respondent argued that the application is fatally defective and is a waste of the court's precious time. He argued that there is no suit property as the appeal herein is arising out of a civil debt and not an appeal of a land case. that the execution process had commenced way back on 2<sup>nd</sup> May, 2024 and the appellant/applicant was informed of the entire process by the auctioneer.
  4. The Respondent further argued that court orders must be served personally upon the respondent. He further stated that there was no stay of execution pending appeal was granted as the Respondent's application for stay of execution was denied by the Honorable judge.
  5. In further response, the Respondent contended that that applicant was granted a latitude of 30 days of stay of execution on conditions that they could deposit the entire decretal amount within 30 days but neglected to fulfill the conditions as set by the court. That he has never been served with any court orders.
  6. The Respondent through learned counsel Ms. Koech, filed his submissions in opposition to the instant application, in which he essentially argued that the applicant has not satisfied the elements for contempt proceedings to succeed in the sense that the Respondent had no knowledge of the alleged order and has never served at all with an order. In support of this argument, counsel relied on the cases of Vimalkumar Bhimji Depar Shah & Another cersus Stephen Jennings & Other eKLR and the decision in Kariuki & 2 others v Minister for gender affairs sports culture & social services & 2 other (2004) eKLR.

### **Analysis and determination**

7. The background to this application stems from earlier proceedings where this court, while dismissing an application for stay of execution, directed the Respondent to deposit a decretal sum of Kshs. 5,000,000/= into a joint interest earning account within 30 days from 16th July, 2024. The Applicant alleges that the Respondent, in contempt of this direction, proceeded to execute against the property known as PIONEER/RACECOURSE BLOCK 2(KAPMALEL)/9 before the lapse of the 30-day period.
8. The law on contempt of court in Kenya is well settled. As held in Mutitika v Baharini Farm Limited [1985] KLR 227, for contempt to be established, the following elements must be proved:
  - a. The order must be clear and unambiguous
  - b. The alleged contemnor must have had proper notice of the terms of the order
  - c. The breach must be proved beyond reasonable doubt
  - d. The contemnor must be shown to have acted in breach of the order deliberately and willfully



9. Further, in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR, the court emphasized that contempt proceedings are quasi-criminal in nature and the standard of proof is higher than the balance of probabilities but not as high as beyond reasonable doubt.

10. Similarly, in *Gatharia K. Mutikika – vs Baharini Farm Ltd* (Supra) it was held that-

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily..... it must be higher than proof on a 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 criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be heard to process contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject..... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

11. In the light of the gravity of the personal consequences that would ordinarily flow from a finding of contempt, the law requires proof that the order in question was brought to the attention of the alleged contemnor as proof that he/she had personal knowledge of said order.

12. In *OILFIELD MOVERS LTD – VS – ZAHARA OIL & GAS LIMITED* [2020] eKLR the court stated –

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.....”

13. The first issue for determination is whether there was a clear and unambiguous order. While the court dismissed the main application for stay of execution, it exercised its inherent discretion to grant the Applicant a 30-day window within which to deposit the decretal sum of Kshs. 5,000,000/= in a joint interest earning account. This was not a contradiction but rather a balanced exercise of judicial discretion, offering the Applicant a reasonable opportunity to secure their interests while recognizing the Respondent's right to the fruits of their judgment. The order was specific both in its timeframe (30 days from 16th July, 2024) and the required action (deposit of Kshs. 5,000,000/=).

14. The second critical issue is whether the order was properly served on the Respondent. The Respondent has categorically stated that he was never served with any court orders. This is a fundamental requirement in contempt proceedings.

15. The Respondent's contention that the execution process had commenced on 2nd May, 2024, well before the impugned orders, raises significant questions about the chronology of events and the



applicability of the court's directions. The court must also consider that the original application for stay of execution was denied, and what was granted was merely a conditional 30-day period contingent upon deposit of the decretal sum.

16. Having carefully considered the submissions and the law, I find that the existence of a clear and unambiguous order has not been definitively established. The dismissal of the stay application, coupled with directions about the decretal sum, created an ambiguous situation. The Applicant has not produced proof of service of the orders upon the Respondent. As held in *Kariuki & 2 others v Minister for gender affairs sports culture & social services & 2 other* (2004) eKLR, personal service of the order is a prerequisite for contempt proceedings. The execution process having commenced before the impugned orders suggests that the Respondent's actions may not have been in willful defiance of the court's authority.
17. The issue was raised in the context of the order on stay issued by this court which had condition precedents of security deposit within a set timeline. Therefore, for contempt to apply and be invoked in relation to this order, there are very clear elements which must be satisfied by the applicant as espoused in the comparative dicta in *Stewart Brown Investment Ltd. Et al v. National Import Export Bank of Jamaica Ltd. Et al.* (2020) in which the court stated:

“That in order for the test relating to contempt of court to be satisfied, the following requirements must be met: (a) the order itself must be clear and unequivocal and not open to various interpretations; (b) in order to satisfy the criminal nature of the contempt proceedings, the party disobeying the order must do so in a deliberate and willful fashion; and (c) in considering the evidence as to whether there has been a deliberate breach of the court order, it must be proven beyond reasonable doubt. Contempt of court is an offence of a criminal nature involving the liberty of the subject and therefore having regard to gravity of the charge, guilt must be proved beyond reasonable doubt.”
18. Likewise, the court in *Perna v Foss* 2015 ONSC 5636 held that:

“The cases state that the civil contempt remedy is one of last resort and that great caution must be exercised when considering contempt motions. Contempt remedies should not be sought or granted where other adequate remedies are available to the alleged aggrieved party. Any doubt must be exercised in favor of the person alleged to be in breach of the order.”
19. Looking at the orders of the court, it became clear however that the applicant's stay was conditioned on deposit of security within a specified period even as she is agitating for the respondent to be held culpable for breach of a court order, there is no evidence placed before this court that she has complied with the alternative order of depositing security so that she can enjoy the fruits which go with stay of execution. If indeed the respondent has unlawfully sold the property in question, the subject matter of this are pending appeal, there are other alternative remedies available to the applicant embodied in our Civil law.
20. I am of the considered view that the threshold for the charge of contempt of court as against the Respondent has not been met by the applicant. Consequently, the application dated 19th August, 2024 is hereby dismissed with no orders as to costs.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15<sup>TH</sup> DAY OF NOVEMBER 2024**

.....

**R. NYAKUNDI**



**JUDGE**

