



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. E002 OF 2021

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the Ruling of Hon. G. N. Wakahiu (C. M))

Delivered on 11st April 2021 in Narok CMCC Succession cause No. 45 of 2017)

KOTOINE KOILEL.....1ST APPELLANT/APPLICANT

TABULA KOILEL.....2ND APPELLANT/APPLICANT

PETER MATUNKE KOILEL.....3RD APPELLANT/APPLICANT

-VERSUS-

KANINI KARSAL KOILEL.....1ST RESPONDENT

NKURUNA OLE KOILEL.....2ND RESPONDENT

RULING

[1]. Before me are three applications. One is filed by the applicant and is dated 7th March 2021- curiously, the application seems to want to upset orders that were made on 1st April 2021. The other two are dated 15th April 2021- one by the applicant and the other by the respondents.

[2]. The application dated 7th March, 2021 by the appellants, is essentially for stay of the orders made on 1st April 2021 in Narok Succession Cause No. 45 of 2017 pending the hearing and determination of this application and for the release of the appellants on bond pending hearing and determination of the appeal.

[3]. The application dated, 15th April 2021 by the appellants seeks this court's directions on the appellants'/applicants' prayer for their bond and or bail. It is therefore a saddle upon the application dated 7th March 2021. I will deal with it as such. The one by the respondent of the same date is a kind of reply to the application dated 7th March 2021- I will deal with it as such except for one issue on Kilele advocate's practicing certificate about which I shall issue specific orders.

[4]. The application by the appellants are supported by grounds set out in the motion, the supporting affidavit sworn by Kotoine Koilel on 7th March 2021 and 15th April 2021 respectively and which are duly expounded in the written submissions filed herein. It is discernible from these filings that the appellants arguments are: -

i. THAT The appellants averred that the lower court insisted on proceeding with the contempt proceedings on a date fixed for hearing of the appellants' application dated 19th February 2021 and the respondent's application dated 22nd march 2021.the appellants' claim that they were convicted and sentenced without a chance being given to them to mitigate.

ii. THAT the proceedings received after 5.00 p.m. and committal of the appellants to civil jail was irregular and unlawful.

iii. THAT the appellants contend that they were never served with any orders of injunctions and or maintenance of *status quo*. They did not willfully disobey or neglect to comply with the court's orders.

iv. THAT there was no formal application for contempt of court proceedings.no certified copy of the extracted order allegedly

contemned was served personally on them. There is no affidavit of service of a duly licensed process server in proof of service of the alleged contemned order upon the appellants.

v. THAT the standard of proof for contempt of court and civil committal was neither met nor taken into consideration.

vi. THAT the appellants' claim that the sentence passed against them was founded on wrong and erroneous interpretations of the meaning of maintenance of *status quo* and the same was manifestly harsh.

vii. THAT the matter proceeded after permitted working hours in violation of the established regulations.

viii. THAT the appeal will be rendered nugatory unless the orders sought are granted.

ix. THAT on 13th April 2021 the court did not give directions or pronounce itself on the appellants release on bond. The appellants are aggrieved by the continued detention in custody.

x. THAT their release will not be prejudicial to the respondents as they undertake to abide by any terms and or conditions that the court will deem fit

xi. THAT the counsel on record is compliant with the provisions of section 9 of the Advocates Act and is properly on record.

[5]. The Plaintiff/ applicant cited the following cases in support of their arguments: -

i. Human Rights Commission V Attorney General [2018] eKLR

ii. John Mugo Gachuki V New Nyamakima Co. Ltd Civil Case 456 Of 2011

iii. Samuel M. N. Mweru & Other V National Land Commission & 2 Others , Miscellaneous Application No. 443 Of 2017

iv. Mutitika V Baharini Farm Ltd [1985] KLR 229, 234

v. IK v RMS [2019] eKLR Civil Case No. 68 Of 2018

vi. Afro freight Forwarders Limited V Pinnacle Consultants Limited & Another [2003]

[6]. The respondents filed an application dated, 15th April 2021 seeking to have the orders issued by this court on 13th April staying the ruling made in succession cause no 45 of 2017 set aside and or reviewed and the application dated 7th April 2021 together with the memorandum of appeal dismissed. I have noted this application is largely a reply to the application by the appellants.

[7]. Nonetheless, the respondents opposed the appellants' application through a replying affidavit sworn by Kanini Ene Karsal Koilel on 20th April 2021 and written submission which succinctly set out the following grounds: -

i. THAT appellants have presented a series of falsehoods and blatant non-disclosure of material facts in an attempt to hood wink this court into granting the ill-conceived prayers therein.

ii. THAT the counsel for the appellants who obtained the orders on 13th April 2021 is unqualified to practice as he is in breach of the provisions of section 30 of the advocates act requiring counsel to obtain a current practicing certificate in order to handle court matters and therefore the orders obtained are improper and / or void.

iii. THAT the orders sought should not be granted as the same do not prejudice the objectors who have no proprietary interest in the land.

iv. THAT there is zero chance that the appeal herein can be said to have overwhelming probability of success.

v. THAT it is highly doubtful that there are any exceptional circumstances to warrant the grant of bail/bond pending appeal.

vi. THAT this court has the capacity and ability to expedite the appeal herein hence no foreseeable delay or eventuality that the appellants can serve their sentences before the appeal is heard.

vii. THAT the appellants' motions under review lack merit and therefore they should bear the costs as well as the order granted on 15th April 2021 to consider that the appellants canvas the appeal in custody.

[8]. The respondents cited the following authorities in support of their arguments: -

i. Joshua Kiarie Nguguna V Republic [2021] eKLR

ANALYSIS AND DETERMINATION

[9]. I have very carefully considered the three applications and affidavits in support and annexures, replying affidavits in opposition and the rival oral submissions by the parties herein. The issues emerging for consideration are: -

i. Whether to release the appellants on bond and or bail pending hearing and determination of the appeal.

ii. Who bears the costs of the applications?

[10]. I noted that the applicants' application dated 15th April, 2021 was simply asking for directions on the hearing of the application dated 7th April, 2021. I will therefore deal with it as such. I have also noted that the application by the respondent is a kind of a reply to the application by the applicant for bond pending appeal. I will consider it as such save for one issue on Kilele's practicing Certificate about which I shall make specific orders.

[11]. I see a common aspect in the application by the applicants and the respondents on variation or setting aside of stay orders; it has been overtaken by events as the stay order which had been initially granted was reviewed and varied and the applicants were granted and released on cash bail of Kshs 2,000/= each pending hearing and determination of the application.

[12]. I do note, however, that the appellants have also applied for their release on bond pending the hearing and determination of the appeal. This is the focus of this ruling.

[13]. Contempt of court is not a light matter as some may think. It is a serious affront on administration of justice for it undermines the authority of the court. Nonetheless, as the contemnors face penal sanction which may also result into imprisonment, the contempt of court proceedings must adhere to the due process of law. Given the nature of the appeal, I am inclined at giving the contemnors an opportunity to argue their appeal.

[14]. I have deliberately refrained from specific interrogation of the arguments presented as they are the substantive matters for the appeal. I have in mind matters of service or knowledge of order, the procedure adopted in the contempt proceedings, competency of contempt proceedings and legality of the committal orders, etc.

[15]. In the interest of justice and to give the applicants an opportunity to argue their appeal, I order that the applicants shall remain on bond pending the hearing and determination of the appeal on same conditions set by the judge sitting at Naivasha, i.e. cash bail of Kshs. 2,000/=.

[16]. I note however constant complaints from M/S Mogere that the contemnors are using these proceedings to delay the succession cause to warrant court's attention. As a matter of law, an appeal does not operate as a stay of proceedings. Nevertheless, I state categorically that unless there is a specific order of stay of proceedings, the succession proceedings should proceed to logical conclusion. Meanwhile, in order to avoid delay, the appeal be prosecuted within a period of 14 days from the date hereof. In default, the bond granted to the applicants herein will lapse forthwith.

[17]. There will be no order as to costs.

[18]. I do note that Kilele advocate attached Current Practicing Profile of a period not relevant to the application by the respondents. I expected him to attach a Practicing Certificate for the relevant period with the effective date of practicing competence. I order that he supplies the court within 14 days, a certified copy of his practicing certificate that relates to the period in issue herein as his profile at the time shows that his status was inactive at the time.

[19]. It is accordingly ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 15TH DAY OF NOVEMBER, 2021.

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F. GIKONYO M.

JUDGE

In the presence of:

1. Mogere for Respondent

2. Kilele for the appellants

3. Mr. Kasaso – CA