Owongo v Alielo (Environment and Land Miscellaneous Case E001 of 2025) [2025] KEELC 4854 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4854 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND MISCELLANEOUS CASE E001 OF 2025

A NYUKURI, J

JUNE 26, 2025

BETWEEN

IDD CHAMAWI OWONGO ..... APPLICANT

AND

ANTONY SHIVEKA ALIELO ..... RESPONDENT

RULING

1. Before court is a Notice of Motion dated 13th January 2025 filed by the applicant seeking the following orders;

    a. Spent

    b. The conviction for contempt of Court and Sentence to pay a Fine of KES 200,000 or serve a Civil Imprisonment of 6 Months via Ruling issued by Hon. Z.J. Nyakundi (Senior Principal Magistrate) in Kakamega MCELC No. E285 of 2024 – Antony Shiveka Alielo v Iddi Chamawi Owongo issued on the 18th December, 2024 be quashed and set aside consequently via Revision.

    c. Spent

    d. Spent

    e. Costs

2. The application is predicated on the affidavit sworn by the applicant dated 13th January 2025. The applicant's case is that when Kakamega MC ELC No. E285 of 2024 came up for exparte mention on 22nd January 2025, he was not involved therein and that without being given opportunity to defend himself on a charge of defying a court order, the learned trial magistrate proceeded to arbitrarily and summarily convict and sentence him for contempt of court.

3. The applicant complained that he was never given opportunity to offer mitigation upon conviction before sentence as is required in law. He stated that the trial magistrate relied on an Act of Parliament that was declared unconstitutional in convicting and sentencing him for contempt. He further averred that his constitutional right to a fair hearing had been breached. He urged the court to invoke its supervisory jurisdiction and interrogate the decision/ruling of the trial court. He attached the ruling and proceedings of 18th December 2024.

4. The respondent opposed the application. He filed what he termed as respondent's written response together with a supporting affidavit supporting the response and submissions. It was his averment that the applicant's conviction and sentence should not be set aside as the punishment was properly meted. He stated that the applicant knowingly belittled the court by disobeying the court order which required him to stop "barking" activities that involved using tones of firewood, harmful chemicals and highly combustible oils in a residential area. He maintained that the applicant had not presented any convincing reasons for review of the conviction and sentence as the ruling was not by fraud and that the trial court had jurisdiction to make the orders.

5. That the applicant's punishment was for the court to save itself from embarrassment and that the applicant had not shown under which law he had moved this court. He opposed the prayer for ex parte stay of execution and argued that the applicant only needed to say "sorry". On costs, he stated that the applicant is guilty of perjury and that on 22nd January 2025, the matter did not come up ex parte as the applicant's counsel was in court.

6. He further stated that the counsel for the applicant was misleading the court since he failed to disclose that counsel for the applicant in the lower court filed a preliminary objection and hence the applicant was accorded a fair trial. He maintained that the trial court did not quote any Act of parliament in convicting and sentencing the applicant. He also averred that this court has jurisdiction to grant the prayers sought but contended that the applicant was abusing the court process as he could seek for review before the magistrate's court.

7. It was further his contention that the applicant was represented by an advocate in the lower court, who entered appearance on 2nd December 2024 and should not blame the trial court for mistakes of his advocate, who instead of filing defence or mitigation, filed a preliminary objection. He further stated that the applicant's counsel initiated a pardon process which is pending before the trial court and that the applicant was accorded a fair trial.

8. He attached the court order that was said to have been disobeyed, proceedings of 22nd January 2025, return of service, and preliminary objection.

9. Both parties filed submissions. As the submissions filed by the respondent's counsel were not signed, it my view that failure to sign a document presented in court is not a technicality to be overlooked by court as suggested by the respondent's counsel. An unsigned document has no ownership; hence such document lacks legal effect and must be disregarded, which I hereby do. Parties also made oral submissions.

Submissions

10. The respondent submitted that the advocate for the applicant is not on record and is a stranger to these proceedings having not represented the applicant in the lower court and that therefore he needed to file a Memorandum of appearance. He argued that the application breached the sub judice rule as he has sought to be pardoned in the lower court and has sought for revision in this court. The respondent

also contended that there was misjoinder of parties as he was not responsible for the court's exercise of discretion because the fine of Kshs. 200, 000/= is not an award made to him.

11. It was the respondent's argument that the application failed to meet the threshold of section 107 of the *Evidence Act* which places the burden of proof on a claimant. He argued that the applicant had failed to prove his allegations. He also contended that the applicant does not deserve equitable orders as he had approached court with unclean hands since he had so far breached two court orders. He stated that in the application, no law had been cited giving him difficulties in responding to the same. He cited the case of Refrigerator & Kitchen Utensils v Gulabchand Popatlal Shah & Others Civil Application No. Nai 39 of 1990 for the proposition that anyone against whom an order is made, must obey it. He added that the application was seeking for the applicant to be exempted from obeying a court order as the applicant had not denied the contempt, but it was the sentence he did not want.

12. In response, counsel for the applicant submitted that there is no requirement in law that he ought to file a memorandum of appearance to come on record. Regarding undated and unsigned submissions, counsel argued that the same was an oversight on his part contending that failure to sign submissions was not fatal and that the same was merely a legal technicality. Counsel maintained that the trial court cited the applicant for contempt without according him an opportunity to be heard and that no Notice to show cause was served on him. Counsel submitted that no aspersions had been cast on the judicial officer.

Analysis and determination

13. The court has carefully considered the application, the response thereto as well as the parties' oral and written submissions filed by the respondent. The issue of failure to file a Memorandum of appearance by the applicant's counsel does not arise in these proceedings as there is no requirement in law for an applicant in a Miscellaneous application to file a memorandum of appearance for the advocate to be deemed to be properly on record. In addition, the issue of sub judice does not arise in these proceedings as the respondent did not demonstrate that there exists another application for revision pending before another court of competent jurisdiction, besides this application. Therefore, the sole issue for this court's determination is whether there exists exceptional circumstances to warrant the court's exercise of its supervisory jurisdiction in regard to the ruling dated 18th December 2024 delivered in Kakamega MC ELC CASE No. 285 of 2024, for purposes of quashing and or setting aside the conviction and sentence meted against the applicant.

14. Article 165 (6) of *the Constitution* grants the High Court supervisory jurisdiction over subordinate courts and other bodies exercising judicial and quasi-judicial functions. In the exercise of supervisory jurisdiction, the High court has power to call for the record of any proceedings before any subordinate court or body exercising judicial and quasi-judicial functions and make orders or give appropriate directions to ensure fair administration of justice.

15. As Article 165 (5) of *the Constitution* provides that the High court has no jurisdiction in respect of matters falling within the jurisdiction of the Environment and Land Court and the Employment and Labour Relations Court, it therefore follows that the High Court cannot exercise supervisory jurisdiction over the subordinate courts where the latter exercise jurisdiction regarding Environment and Land disputes. Hence it is the Environment and Land court that has supervisory jurisdiction over subordinate courts exercising jurisdiction in land and environment disputes.

16. Therefore, where it is clear that proceedings before a subordinate court in respect of land or environment dispute, are manifestly unjust and further proceedings would perpetuate the injustice, this court may intervene, call for the lower court record and make orders or give directions as the fair

administration of justice may demand so as to correct manifest illegalities and irregularities. However, supervisory jurisdiction is not a jurisdiction that is exercised as a matter of course, it is sparingly exercised only in exceptional cases where failure to intervene by the superior court would lead to obvious injustice.

17. Supervisory jurisdiction ought to be differentiated from appellate and judicial review jurisdiction. As was held in the case of Republic v Chief Magistrates Court at Milimani Law Courts; Director of Public Prosecutions & 2 Others (Interested Parties); Ex Parte Applicant Pravin Galot [2020] e KLR, supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts for purposes of keeping the latter within their prescribed sphere and prevent usurpation.

18. Similarly, in the case of National Social Security Fund v Sokomania Ltd & Another [2021] e KLR the court held that the court's supervisory jurisdiction should be exercised sparingly and only in exceptional circumstances and that that power should not be exercised where there is an alternative remedy including the right of appeal.

19. In the instant case, the applicant has stated that he was convicted of contempt of court without being accorded an opportunity to be heard and ordered to pay a fine of Kshs. 200, 000/= or serve a jail term sentence of six months in prison, without being accorded an opportunity to present his mitigation.

20. Contempt proceedings are not ordinary civil proceedings. They are quasi criminal proceedings as the likely consequences for a convicted contemnor may include loss of personal liberty and or payment of a fine which would touch on their constitutional rights to liberty and property respectively. Before a person's rights are detrimentally affected by an order of court, in a quasi-criminal proceeding, they must with deliberation, be accorded not just substantive justice, but also procedural justice. A person accused of contempt of a court order, like in this case, has rights to a fair hearing protected under Article 50 of *the Constitution*.

21. Article 50 provides for the right to fair hearing as follows;

Fair hearing.

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

a. to be presumed innocent until the contrary is proved;

b. to be informed of the charge, with sufficient detail to answer it;

c. to have adequate time and facilities to prepare a defence;

d. to a public trial before a court established under this Constitution;

e. to have the trial begin and conclude without unreasonable delay;

f. to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

g. to choose, and be represented by, an advocate, and to be informed of this right promptly;

h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

i. to remain silent, and not to testify during the proceedings;

j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

k. to adduce and challenge evidence;

l. to refuse to give self-incriminating evidence;

m. to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

n. not to be convicted for an act or omission that at the time it was committed or omitted was not—

i. an offence in Kenya; or

ii. a crime under international law;

o. not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

p. to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

q. if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

3. If this Article requires information to be given to a person, the information shall be given in language that the person understands.

4. Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

5. An accused person—

a. charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

b. has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—

(a) a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and (b) new and compelling evidence has become available.

7. In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

8. This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

9. Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

22. Therefore, every person subjected to a judicial or quasi-judicial process in dispute resolution is entitled to the right to a fair hearing, which includes the right to be presumed innocent until proven guilty; the right to have adequate time and facilities to prepare a defence and the right to be given sufficient detail of the charge to answer it.

23. This court has perused the impugned ruling dated 18th December 2024. The ruling was in regard to the application filed by the respondent and dated 3rd December 2024. While the respondent argued that having served the applicant with the application meant that there was a fair hearing, the affidavit of service presented by the respondent dated 4th December 2024, shows that the applicant's advocate was served with the application on 3rd December 2023 at 18:58 hours, which was the eve of the hearing date as the application was slated for hearing on 4th December 2024. The applicant's advocate filed a notice of preliminary objection dated 5th December 2024, and the application was heard culminating in the impugned ruling of 18th December 2024.

24. In the instant case, the applicant was accused of contempt of court in the respondent's application dated 3rd December 2024. In view of the seriousness of a charge of contempt, I do not think that one day's notice on the applicant and his advocate could be said to be adequate time for the applicant to prepare a defence. Whether or not the applicant raised the issue of adequacy of time, is in my view immaterial since it was incumbent upon the trial court to ensure that the person citing the applicant for contempt had complied with Article 50 (2) (c) as the court in the pursuit of substantive justice, must be guided by procedural justice at all times. The role of the court was to facilitate and avail adequate time for the alleged contemnor to prepare a defence. What they choose to do with the adequate time is basically their business. Whether or not the respondent will appropriate such adequate time by filing such defence is their choice, but adequate time must be availed to them, as a core tenet of the right to a fair hearing.

25. In the instant case, the trial court did not interrogate the sufficiency of one day's notice served on the advocate for the applicant, before embarking on determining the application for contempt, thereby violating the applicant's rights to a fair trial under Article 50. In the premises I find and hold that the trial court failed to accord the applicant adequate time to respond to the charge of contempt thereby violating his right to a fair trial, before making its decision dated 18th December 2024.

26. I now turn to the contents of the ruling of 18th December 2024. In that ruling, the trial court had the following to say;

> " the court has considered the application, the court records and notes that the court did issue an order dated 25/11/2024 to the effect that the defendant respondent, his agents, servants, employees and or any person whatsoever to stay all bakery/factory activates(sic) and remove all firewood, timber chemicals, the shanty and flammable oil from plot No Isukha/Shirere/1394 in Kakamega county pending the hearing and determination of this application. Which order the defendant/respondent has disobeyed hence this current application.

> The defendant/respondent filed a preliminary objection but it was incumbent upon the defendant to purge the contempt by abiding by the order dated 25/11/2024 before filing the preliminary objection. As at now the defendant/respondent is still in contempt of the court order and therefore has no audience before this court. It is important that we should all be law abiding citizen(sic). A lawless country is a recipe of anarchy.
>
> Conclusion
>
> The defendant/respondent be and is hereby fined Kshs. 200, 000/= and in default be committed to civil jail for a period of 6 months for contempt of the court order dated 25/11/204, the plaintiff/applicant to pay subsistence allowance, the order to be served upon the OCS Kakamega Central Police Stationto ensure compliance."

27. Clearly, the trial court having been invited to determine whether or not the respondent had proved his allegation of contempt of court order against the applicant herein, failed to subject the application to a merit review and instead proceeded to presume that the applicant was already guilty of contempt, imputing that the guilt began before filing of the application for contempt. The trial court categorically declined to consider the grounds in the preliminary objection filed by counsel for the applicant, and held the position that unless the purported contempt was purged, the applicant herein had no right of audience before that court on the charge of contempt leveled against him. Effectively, the trial court locked out the applicant herein from offering a defence to the charge of contempt, negating the old rule of thumb now codified in Article 50 (2) (a) of our Constitution, that every accused person has the right to a fair trial which includes the right to be presumed innocent until the contrary is proved.

28. Plainly put, the trial court derailed from the course of justice which was to consider the merits of the application dated 3rd December 2024, by considering the allegations of contempt made against the applicant vis a vis the response filed, and instead, proceeded to hold the view that once allegations of contempt are made, the alleged contemnor becomes guilty of contempt, automatically loses the right to be heard on the same charge of contempt and must first purge the alleged contempt before being given an opportunity to defend himself. Thus, the trial court presumed that the applicant was already guilty of contempt and that proof of contempt was unnecessary.

29. Having been invited to consider the merits of the application for contempt dated 3rd December 2024, the court's role was simply to find out whether the order of 25th November 2024 had clear terms; whether the applicant was aware of the clear terms of the said order and whether the applicant willfully disobeyed the said order. Instead, it presumed disobedience of the court order of 25th November 2024 and without allowing the applicant herein to present his mitigation, proceeded to convict and sentence him. Clearly, the process taken by the trial court violated the non-derogable right to a fair hearing under Article 50 of *the Constitution*, which renders the findings, the fine and the sentence both irregular and illegal.

30. In addition, according to the trial court, there was no room for mitigation before sentence. As was held by the Court of Appeal in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014] e KLR, in punishing for contempt, the court exercises ordinary criminal jurisdiction. This position is anchored on provisions of section 5 (2) of the *Judicature Act* which provide that an order of the High court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court. That means that in sentencing for contempt, the court ought to be guided by the *Criminal Procedure Code*. Section 216 of the *Criminal Procedure Code* allows for mitigation before sentence and provides as follows;

Evidence relative to proper sentence or order

The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made.

31. Therefore, consideration of mitigation before sentence is part of what the court ought to undertake as part of the due process for a convicted contemnor. However, in the instant case, this process was not undertaken by the court.

32. For the above reasons, and in the circumstances of this case, it is my finding that this is a proper case for the court to call for the record of the trial court and revise the decision of the trial court made on 18/12/2024 as that decision is beyond redemption by an appeal process as no merit-based interrogation was done in regard to the respondent's application for contempt dated 03. 12. 2024. The process undertaken by the trial court was illegal, unprocedural and contrary to the basic tenets of the right to a fair hearing protected under Article 50 of *the Constitution*.

33. In the premises, I find and hold that the application dated 13th January 2025 is merited and the same is hereby allowed as follows;

    a. An order of revision is hereby issued that the applicant's conviction for contempt of court order and sentence against him to pay a fine of Kshs. 200,000/= or serve a jail term of 6 months vide the ruling issued on the 18th December, 2024 by Hon. Z.J. Nyakundi (Senior Principal Magistrate) in Kakamega MC ELC No. E285 of 2024 – Antony Shivenga Alielo v Iddi Chamawi Omwongo is hereby quashed and or set aside.

    b. The court hereby orders that Kakamega MC ELC Case No. E285 of 2024 shall be reallocated to another magistrate in the station, other than the magistrate that made the orders of 18/12/2024, for hearing and determination.

    c. The applicant shall have the costs of the application.

34. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 26TH DAY OF JUNE, 2025.

A. NYUKURI

JUDGE

In the presence of;

Mr. Momanyi for the applicant

Mr. Antony Shiveka Alielo the respondent in person.

Court Assistant: M. Nguyai