Onwonga t/a Bwonwonga & Company Advocates & another v Ruga (Civil Appeal 228 of 2019) [2025] KECA 1495 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KECA 1495 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 228 OF 2019

W KARANJA, J MOHAMMED & LK KIMARU, JJA

SEPTEMBER 19, 2025

BETWEEN

WILLIAM N. ONWONGA T/A BWONWONGA & COMPANY ADVOCATES .... 1ST APPELLANT

PETER MUCHIRI KARIUKI T/A AIRWAYS AUCTIONEERS . 2ND APPELLANT

AND

MWANGI MUTAI RUGA .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri, (A. Mshila, J.) dated 4th July 2019 in HCCA No. 40 of 2017)

JUDGMENT

Background

1. This appeal arises from a suit in which Johnson Kareithi Njogu (the plaintiff in the trial court) sought general and special damages following the fatal injuries sustained by David Kareithi Njogu who was struck by motor vehicle registration number KAK 224T. The trial court, by a judgment delivered on 24th August 2010, entered judgment against New Rafiki Machinery and Wilfred Gitau Kungu (the defendants in the trial court) jointly and severally for Kshs.456,300.

2. Pursuant to the decree, Peter Muchiri Kariuki ta Airways Auctioneers (the 2nd appellant) attached, advertised, and sold motor vehicle registration number KAK 224T belonging to the respondent. This prompted the respondent to file an application seeking restitution of the vehicle. By a ruling dated 3rd May 2013, the court quashed the attachment and nullified the execution and sale. The respondent also sought compensation of Kshs.4,000,000 for the loss of the motor vehicle if not restituted, and Kshs.20,000 per day for loss of use from 16th May 2011.

3. The respondent's subsequent application was, on 3rd January 2014, directed to be filed before another court due to lack of jurisdiction. This application was later abandoned, leading to the filing of the current proceedings.

4. By a ruling dated 9th October 2017, the court declared the sale of the motor vehicle a nullity, quashed the attachment, and ordered William N. Onwonga ta Bwonwonga & Company Advocates (the appellants) to return the motor vehicle within 30 days, failing which they were to pay the respondent Kshs.6,000,000, having deprived the respondent of its use since 2011.

5. Aggrieved by the ruling, the appellants appealed to the High Court which held that the application was properly before the trial court, citing Section 91(2) of the *Civil Procedure Act*, which bars a fresh suit where restitution could be sought under Section 91(1). The court also found that the appellants, as officers of the court, had an obligation to comply with the restitution order before pursuing their rights.

6. The High Court declined to frame issues of res judicata and limitation for determination, noting that the appellants had not purged their contempt. The court further found the respondent's cross-appeal incompetent for having been raised in submissions, but nonetheless considered it under Order 42 Rule 32 and the appellant's alternative prayer.

7. On merits, the High Court found the trial court properly awarded interest on Kshs.6,000,000 from the date of the ruling until payment in full, despite lack of documentary proof of loss of use. It dismissed the appellants' grounds and upheld the interest award.

8. Dissatisfied by this decision the appellants lodged this second appeal raising six grounds, namely that the High Court erred in:

    a. failing to find the application res judicata;

    b. failing to hold it was statute-barred;

    c. failing to find that the Kshs.6,000,000 was a special damage requiring specific pleading and proof;

    d. holding the application competent;

    e. misapprehending the orders of 3rd January 2014; and

    f. failing to consider all grounds of appeal.

        1. The respondent filed a cross-appeal on 20th October 2019 seeking interest from the date of seizure of the lorry and loss of use from the same date.

Submissions

10. At the hearing of the appeal, the appellants were represented by learned counsel, Mr. J. M. Mwangi while the respondent appeared in person. The parties relied on their respective written submissions.

11. Counsel for the appellants submitted that the impugned application was res judicata, the respondent having filed a similar application within the primary suit which was dismissed by the ruling of 3rd January 2014.

12. Counsel further submitted that the respondent's claim for Kshs.6,000,000 lacked legal foundation and was unsupported by documentary evidence, and that the proper course would have been for the respondent to institute a fresh suit for damages.

13. Counsel asserted that the application was statute-barred, having been filed more than three years after the conclusion of the primary suit.

14. In opposition, the respondent contended that the appellants' arguments infringed his constitutional rights under Articles 40(2)(a) and 159(2)(d) of *the Constitution*. It was the respondent's further submission that the appellants frustrated the court's overriding objectives by failing to comply with the restitution orders.

Determination

15. This is a second appeal. In the case of Stanley N Muriithi & another v Bernard Munene Ithiga [2016] KECA 821 (KLR), this Court held inter alia:

> "We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law.
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> In Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR (Civil Appeal No. 127 of 2007) Onyango Otieno, J.A. put it succinctly in the following words:
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> > "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

16. We have considered the record, the rival submissions made by the parties, the authorities cited, and the law. The issue for determination is whether the appellants have raised points of law to warrant this Court's consideration.

17. It is common ground that the trial court issued restitution orders or compensation of Kshs.6,000,000 in favour of the respondent. It is also common ground that the appellants failed to comply and instead filed an

appeal against the said orders.

18. The High Court held that the appellants did not come to the court with clean hands having failed to comply with the orders of the court, and therefore, the court did not consider the substance of the appellants' appeal. This prompted the appeal before us.

19. It is trite law that a litigant who cannot abide by court orders is undeserving of the court's discretion. This was reiterated in the case of John Njue Nyaga v Nicholas Njiru Nyaga & Another [2013] eKLR that:

> " It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings.' The applicant has not done so and is undeserving of the orders he seeks."

20. In the case of Ishmael Kagunyi Thande V Housing Finance of Kenya Limited [2007] KECA 322 (KLR), the Court held thus:

> "I have considered the matter fully and I think it is regrettable that the progress in the hearing and determination of this matter has been delayed by what are clearly dilatory manouvres on the part the applicant and his advocates. A party who seeks discretionary favours from the court must endear itself to the court by coming before it with clean hands. The very concession that an attempt was made to mislead the court on whether or not there was compliance with a court order is by itself grave enough to deny the applicant of favourable treatment. My order made on 1st February, 2007 was clear and mandatory. There was no compliance by the applicant and therefore the default consequences must take effect."

21. Similarly, in the case of Fred Matiang'i, the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna, Director of Public Prosecutions, Director of Criminal Investigations, Inspector General of Police & Law Society of Kenya [2018] KECA 789 (KLR), this Court held that:

> " When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities."

22. The trial court found the appellant to be in contempt of court. It follows, therefore, that once a party is found to have breached, disobeyed, or violated court orders such person will not be given an audience before the court until he first purges his contempt. In Hadkinson v Hadkinson [1952] 2 ALL ER 562, the English Court of Appeal returned these categorical holdings:

> "Held (per Somervell and Romer, L.JJ.), that it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged; that the mother in the present case had not brought herself within any of the exceptions to the general rule which debarred a person in contempt from being heard by the courts whose order he had disobeyed; and that she being in continuing contempt by retaining the infant out of the jurisdiction her appeal could not be heard until she had taken the first and essential step towards purging her contempt by returning the child within the jurisdiction.
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> Held Per Denning L.J,.: The fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice."

23. The appellants presented similar issues to this Court that they had previously raised before the High Court which in its discretion, chose not to address these matters as it found that the appellants did not come to court with clean hands. We see no reason to upset the High Court's findings on this issue as the High Court effectively addressed the matters before it.

24. Consequently, we find that the appeal and cross appeal lack merit and are hereby dismissed. Each party will bear its own costs of the appeal and the cross appeal.

25. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF SEPTEMBER, 2025.

W. KARANJA

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JUDGE OF APPEAL JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR