

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW
DIVISION
APPLICATION NO. E031 OF 2023

KOOPA KENYA LTD.....EX PARTE APPLICANT/RESPONDENT
-VERSUS-
COUNTY GOVERNMENT OF MOMBASA.....1ST RESPONDENT
COUNTY EXECUTIVE COMMITTEE MEMBER
FINANCE, MOMBASA COUNTY GOVERNMENT...2ND RESPONDENT

RULING

1. By a ruling dated 25 February 2025, this Honourable Court (Sewe, J.) found the County Executive Committee Member for Finance of the County Government of Mombasa, the 2nd respondent in this application, to be in contempt of a court order issued on 14 June 2024. The order which the contemnor was held to be in contempt of was a mandatory order compelling him to settle a decree of Kshs. 151,000,000/= together with interest and costs which the *ex parte* applicant had obtained against the County Government of Mombasa in this Honourable Court's constitutional petition no. 12 of 2017.
2. Consequent to holding the 2nd respondent or applicant in contempt of court, the court ordered:

***“(b) The County Executive Member, Department of Finance,
Mombasa County Government be and is hereby summoned to***

personally attend court to show cause why he should not be punished for contempt of court”.

3. In the wake of this order, a date was set for the 2nd applicant to appear in court to show cause why he should not be punished for contempt of court. In the meantime, the contemnor lodged a motion dated 10 March 2025 in which he has sought the following orders:

“1. That this Application be certified urgent and service upon the Ex-parte Applicant/Respondent be dispensed with in the first instance.

2. That the Honourable Court be pleased to arrest and/or stay further execution proceedings in the matter pending the hearing and determination of this instant Application.

3. That pending the determination of the grant to appeal out of time this Honourable Court be pleased to stay execution.

4. That this Honourable Court be pleased to grant the Applicant herein (Respondents) Leave to lodge an appeal out of time against the decision delivered on 25th February 2025 by Honourable Justice Olga Sewe.

5. That upon grant of leave to appeal out of time, the Notice of Appeal herein filed on 10th March 2025 herein be validated and be deemed as duly filed.

6. That after inter partes hearing of this Application this Honourable Court be pleased to stay execution pending appeal.

7. That this Honourable Court be pleased to issue further orders as shall meet the ends of justice.

8. That costs of this Application be provided for.”

4. The application is the subject of this ruling. Although two applicants have been named, the application is effectively by the 2nd applicant because he is the person that was cited for contempt of court.
5. The application is expressed to be filed under article 1(4) 47, 48, 50, 176 of the Constitution; sections 1A, 1B, 3A, 63, 66 and 95 of the Civil Procedure Act, cap. 21; Section 16 of the Government Proceedings Act, cap. 40 and Orders 40 rules 6,7 and 8 of the Civil Procedure Rules and Order 51 rule 1 and 15 of the same rules.
6. Mr. Jimmy Waliaula has sworn an affidavit in support of the application. He has introduced himself as the County Attorney of the County Government of Mombasa and the advocate on record for the applicant. The learned counsel has sworn that following the ruling delivered by on 25 March 2025, the matter was set for mention on 11 March 2025.
7. According to Mr. Waliaula, the ruling of 25 February 2025 was rendered in the absence of the applicant. Initially, the ruling was to be delivered on 30 January 2025 but it was not delivered as scheduled because Sewe, J. was on transfer to another station.

8. The impugned ruling only came to the applicant's attention when the County Executive Member, Finance was served with a court order and summons dated 6 March 2025 on 7 March 2025.
9. The 2nd applicant is aggrieved by the ruling of 25 February 2025 and now wishes to exercise his right to appeal. However, the delay in filing the Notice of Appeal is attributed to the Honourable Court delivering its ruling in the absence of the applicants.
10. It is sworn that the applicants have lodged their notice of appeal indicating their intention to appeal. It is in the interest of justice that time be extended to admit the Notice of Appeal dated 10 March 2025 as duly filed as the delay was not deliberate. It is urged that there is an impending threat of execution against the 2nd applicant and his liberty was at stake if the matter proceeded on 11 March 2025 as earlier scheduled.
11. A replying affidavit opposing the application was filed in that behalf by Richard Bell who swore that he is the director of the respondent. The affidavit largely chronicled the court events that culminated in the 2nd applicant being cited for contempt. The background was, of course, the respondent's petition in which it obtained a decree against the County Government of Mombasa; the subsequent proceedings for judicial review for the order of mandamus; the applicant's failure to comply with the order and settle the decree in terms of the certificate of order against judgment; and, ultimately, the order citing the applicant for contempt of

court. These events that comprise the factual basis of the application are not in dispute. The respondent's contention is that until the 2nd applicant purges his contempt, he has no right of audience.

12. As far as the date of the delivery of the ruling is concerned, the respondent's position is that the applicants failed to attend court when the ruling was delivered. In any event, Bell has been advised by his counsel, which advice he verily believes to be true, that all Court dates are nowadays updated and available on the Judiciary's Court Tracking System (CTS), which the applicant or his advocates, have access to. According to the respondent, no reason has been given why the applicants did not access the CTS so as to apprise themselves of the Court dates. It is, thus, the respondent's contention that the applicants were unaware of the ruling date is untenable.

13. As far as the applicant's quest to appeal is concerned, the respondent has contended that there's no evidence that the appellant's intended appeal is arguable or has chances of success because "*the contempt of court is blatant, clear and therefore beyond the realm of reasonable argument*".

14. Further, the applicants have not demonstrated how they stand to suffer any substantial loss if leave to appeal is denied; neither have they provided reason for the delay in filing the Notice of Appeal in good time.

15. And even if it was to be assumed that the appeal is arguable, the respondent contends that the appeal would not be rendered nugatory

because what is at stake is a notice to show cause why no punishment should be meted against the contemnor for disobeying orders of this Honourable Court. The decree, it is contended, has not been set aside and the applicants would, therefore, have to settle the decree irrespective of the outcome of the intended appeal.

16. According to section 5 (2) of the Judicature Act, cap. 8, one may appeal, as of right, against any order meting out punishment for contempt. In order to understand the context in which the order to punish for contempt is issued, it is necessary that I reproduce the entire section 5 here; it reads as follows:

5 (1) The High Court shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

(2) 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.

What this implies is that except for the order meting out punishment for contempt, one needs leave of the court to appeal against any other order in contempt of court proceedings.

17. The order in issue in this application is the order citing the applicant for contempt. In granting the order, the learned judge held as follows:

“(25) In the result, I am satisfied that the applicant has proved to the requisite standard that the 2nd respondent, as the accounting officer, is in contempt of the court order issued herein on 14th June 2024. Consequently, the Notice of Motion dated 22nd July 2024 is hereby allowed and orders granted as hereunder:

(a) That the County Executive Member, Department of Finance, Mombasa County Government, be and is hereby cited for contempt of the Court Orders issued on 14th June 2024.

(b) The County Executive Member, Department of Finance, Mombasa County Government be and is hereby summoned to personally attend court to show cause why he should not be punished for contempt of court.”

18. The punishment proposed by the respondent in its application was for the arrest and committal to civil jail of the 2nd applicant for a period not exceeding six months or until such a time that the contempt has been purged.

19. To the extent that the applicant’s liberty is at stake, the court would be enjoined to hear him on an application for leave to appeal against the order of 25 February 2025. Subject to the directions of the court, the

applicant would have made the application orally immediately after the delivery of the ruling. But there is no evidence on the court record showing that the applicant was present in court or on the virtual platform when the ruling was delivered. Neither is there any evidence notifying the applicant that the impugned ruling would be delivered on a date other than the scheduled date. In these circumstances, I wouldn't fault the applicant for failure to make the application for leave in time to file an appeal against the impugned ruling.

20. The respondent has argued and forcefully so, that the applicant need not be heard until he has purged the contempt. If it is accepted that it is open to a contemnor to challenge an order citing him for contempt through an appellate process, then the argument that he has to purge his contempt before he is heard on an application for leave to file the appeal would be untenable.

21. Nowhere is it suggested in section 5 of the Judicature Act, which is the primary law on contempt in Kenya, that this Honourable Court's order citing for contempt is final and not appealable. The order can be appealed against and, as far as I understand the respondent's submissions, the applicant's intended appeal would be questioning, among other things, personal service of the order that the contemnor is alleged to be in contempt of. I gather this from paragraph 21 of the respondent's submissions where it has been urged as follows:

“21.It is our humble submission that the Respondents/Applicants Application contains no arguable grounds as these issues have already been heard and determined by this Honorable Court and Ruling delivered on 25th February 2025. On the issue of notice, this Honorable Court opined that there was a shift from the stringent requirement of personal service in favour of proof of knowledge of order. The Respondents/Applicants were held to be fully aware of the order and this Application is just a ploy to further frustrate the Ex-parte Applicant.”(Emphasis added)

22.No doubt, the question whether personal service of the contemnor was mandatory or could be dispensed is a question that the Court of Appeal would or may inquire into. Needless to say, contempt of court proceedings are quasi-criminal in nature and if the punishment sought by the respondent to be meted out against the 2nd applicant is anything to go by, the ultimate outcome of the proceedings is likely to impinge on the liberty of the 2nd applicant. Amongst the several questions the Court of Appeal may grapple with is whether, in these circumstances, the procedural safeguards in contempt of court proceedings such as personal service of the order said to have been breached are mandatory.

23.For these reasons, I am persuaded that notwithstanding that the applicant has been cited for contempt of court, he can still be heard on an application for leave to appeal against the contempt order. I am also

persuaded that failure to seek leave in time to file the appeal was as a result of circumstances beyond the applicant's control. I find the applicant's application to be merited to the extent that the prayer for leave to lodge an appeal against the ruling of 25 February 2025 is viable.

24. As far as the prayer of stay of execution and the related prayers are concerned, order 42 Rule 6 (1) of the Civil Procedure Rules which the applicant has invoked and on which the prayer for stay is grounded provides guidance on whether this particular prayer is ripe. This rule reads as follows:

6. Stay in case of appeal

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to

the appellate court to have such order set aside.(Emphasis added).

25. My understanding of this rule is that it presupposes that an application for stay of execution in the court appealed from can only be made if the appeal has been filed. Thus, where, as in the instant case, the applicant has invoked Order 42 rule 6 of the Civil Procedure Rules, this Honourable Court can only entertain an application for stay of execution pending appeal in the Court of Appeal when the appeal has, in fact, been filed. It follows that without the appeal, an application for stay of execution is premature. The appeal is yet to be preferred and, without it, this Honourable Court has no basis of entertaining the application for stay.

26. For the foregoing reasons, the applicant's application succeeds only to the extent that leave is granted to the applicant to file the appeal against the decision of this Honourable Court rendered on 25 February 2025. The appeal shall be filed and served within seven days of the date of this ruling. Since the application has only partly succeeded, parties will bear their respective costs. Orders accordingly.

Signed, dated and circulated on the CTS on 20 February 2026

Ngaah Jairus

JUDGE