



Odhiambo & 3 others v Nyotumba (Environment and Land Appeal E053 of 2022) [2024] KEELC 196 (KLR) (23 January 2024) (Judgment)

Neutral citation: [2024] KEELC 196 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E053 OF 2022
GMA ONGONDO, J
JANUARY 23, 2024**

BETWEEN

**KENNEDY ODHIAMBO 1ST APPELLANT
WILLIAM ODERO 2ND APPELLANT
JOSEPH ODERO OCHIENG 3RD APPELLANT
PHILIP ODERO 4TH APPELLANT**

AND

GODFREY OSAGO NYOTUMBA RESPONDENT

(An appeal against the ruling of Hon. R.B.N Maloba, Principal Magistrate in Homa Bay Chief Magistrate’s Court Environment and Land Case number 038 of 2021 delivered on 25th October 2022)

JUDGMENT

1. The instant appeal was ignited by the ruling of Honourable R.B.N Maloba, SPM delivered on 25th October 2022 where she reasoned that the Notice of Motion dated 18th October 2021 (The application herein) by the plaintiff/applicant/respondent, Godfrey Osago Nyotumba, succeeded thus;
 - a. THAT the Honourable court be pleased to cite, Kennedy Odhiambo Malela, William Odero, Joseph Odero Ochieng and Philip Odero for contempt and order that they be imprisoned for a period of six months for disobedience of the court’s order dated 15th July 2021.
 - b. That the said Kennedy Odhiambo Malela, William Odero, Joseph Odero Ochieng and Philip Odero are jointly ordered to meet the costs of the application.



2. Being aggrieved at the said determination, the appellants through M/S Ongoso and Company Advocates, mounted the appeal by way of a memorandum of appeal dated 26th October 2022 based on the grounds, inter alia;
 - a. That the honourable trial magistrate erred in fact and law and misdirected herself by allowing an application filed under Section 5 of the *Judicature Act* in a lower court which are only a preserve of the High Court of Kenya and the Court of Appeal to enter a ruling of contempt of proceedings filed in a lower court.
 - b. That the honourable trial magistrate erred in fact and law by entering a ruling of contempt against the appellant on a non-existence rule of contempt pursuant to an application filed under Order 40 rule 3 (1) of the Civil Procedure Rules which is non-existent in law and thereon holds the appellant to be in contempt of court.
 - c. That the honourable trial magistrate erred in fact and law by entering a ruling of contempt against the appellant and sentencing them to 6 months under a vague order, to wit, Order 3 of the Civil Procedure Rules 2010 which was ambiguous in the circumstances and as such sentences the contemptuous to 6 months' civil jail.
3. On that score, the appellants have sought the orders as follows;
 - a. Dismissal of the said ruling and/or reversing the same which condemned the appellants to 6 months' civil jail
 - b. Costs of the appeal
 - c. Any other relief the Honourable Court deems just and fit to grant in the circumstances.
4. The appeal was heard by way of written submissions.
5. The appellants' submissions dated 13th March 2023, substantially related to application for stay of execution dated 16th January 2023 which was determined by this court's ruling rendered on 21st November 2023. The said application sought leave of the court to lodge appeal out of time, among other orders.
6. Further, the submissions referred to Article 159 (2) (d) of *the Constitution* of Kenya, 2010 as well as Sections 1A and 1B of the *Civil Procedure Act* Chapter 21 Laws of Kenya and the case of *Suleiman-vs-Amboseli Resort Limited* (2004) 2 KLR 589, to reinforce the same. Counsel for the appellant submitted that the impugned ruling holds no basis in law as the respondent's application was premised on repealed sections of the law and non-existent statutes. That thus, the application be reversed and the appeal be allowed accordingly.
7. On the other hand, learned counsel for the respondent filed submissions dated 16th June 2023 where reference was made to, among others, the respondent's application dated 18th October 2022 and the grounds contained in the memorandum of appeal. Counsel submitted that citing a wrong provision of the law does not vitiate an application and relied on Order 5 Rule 10 of the Civil Procedure Rules, 2010.
8. Also, counsel submitted that the order that gave rise to contempt of court application was issued in open court in the presence of the appellants. That the appeal is misconceived, bad in law and abuse of the process of the Honourable court, thus the same be dismissed with costs. To buttress the submissions, counsel referred to authoritative pronouncements including *David Bundi-vs-Timothy Mwende Muthee* (2022) eKLR and *Hadkinson-vs-Hadkinson* (1952) 2 ALL ER 562.



9. Pursuant to the impugned ruling delivered in the presence of the appellants/defendants and counsel for both parties, an order was issued on 25th October 2022 with a penal notice. The same was to make the impugned ruling effectual hence, precipitating this appeal as noted in paragraphs 1 and 2 hereinabove.
10. In the foregone, the issues for determination in this appeal are as per the grounds of appeal which are condensed to whether this appeal is merited and the orders to issue thereby to meet the ends of justice.
11. Concerning jurisdiction of the trial court to entertain contempt proceedings, in the Halsbury's Laws of England 4th Edition Volume 9 at page 350, the term "Jurisdiction" means;

"....the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for decision....."
12. In Samuel Kamau Macharia and another-vs-Kenya Commercial Bank Ltd and others (2012) eKLR, the Supreme Court of the Republic of Kenya held;

"A court's jurisdiction flows from either the Constitution or legislation or both....."
13. So, did the trial court have jurisdiction in respect of the application? It is pretty clear that Section 6 of the Contempt of Court Act No.46 of 2016 stipulates the jurisdiction of subordinate courts to punish for contempt of court and it reads;

"Every subordinate court shall have power to punish for contempt of court on the face of the court in any case where a person-

 - a.
 - b. ...
 - c. Willfully disobeys an order or direction of a subordinate court." (Emphasis added)
14. Regarding the second ground, the appellants asserted that the application was brought under non-existent rule of contempt. Section 5 of the Judicature Act (Cap 8 Laws of Kenya) cited on the face of the application and at ground 2 of this appeal, was repealed by section 38 of the Contempt of Court Act No. 46 of 2016).
15. Besides, it is trite law that quoting a wrong provision of the law is hardly a sound basis for dismissing an application as the court has to exercise its discretion and be satisfied that no harm or prejudice is caused to the parties; see *Boyes-vs-Gathure* (1969) EA 385 and *Gatu-vs-Muriuki* (1986) KLR 211.
16. Furthermore, the application was brought under, inter alia, Section 10 of the Magistrates' Courts Act No. 26 of 2015. The learned trial magistrate made reference to the said section and stated that she was clothed with power to punish for contempt hence, the application was considerably generated further to the existing legal provisions.
17. Article 159 (2) (d) (supra) stipulates that;

"Justice shall be administered without undue regard to procedural technicalities."
18. Similarly, in *Kakuta Maimai Hamisi-vs-Peris Pesi Tobiko & 2 others* (2013) eKLR, the Court of Appeal observed, inter alia;



”We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation.”

19. Concerning the 3rd, 4th, 5th, 6th and 7th grounds of appeal, Order 3 of the Civil Procedure Rules pertains to commencement of suits. The trial court noted that the 1st to 4th respondents were in court on 15th July 2021 when the orders were given and they tried to urge the court to be allowed to continue with some of the prohibited activities. That therefore, they were aware of the orders which were succinct and that personal service was not mandatory as held in Basil Criticos-vs-Attorney General and others (2012) eKLR, among other cases. That the photographs produced in court showed fresh ploughing on the suit land reference numbers North Nyokal/Kowili/142 and 143 in disobedience of the restraint orders made on 15th July 2021.
20. In the Hadkinson case (supra) at page 569, Romer, L. J said;

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.....As long as it existed it must be obeyed.”
21. In conclusion, it is the finding of this court that the application was brought within the law governing contempt of court and that the learned trial magistrate has jurisdiction to entertain the same. The 1st to 4th respondents had knowledge of clear orders given by the said magistrate on 15th July 2021 which they disobeyed as demonstrated in the application which is not defective in form or spirit. That the trial court rendered the impugned ruling and issued orders as stated in paragraph 1 hereinabove which were within the law. I affirm the impugned ruling accordingly.
22. Thus, the instant appeal is devoid of merit. The same is hereby dismissed with costs to the respondent.
23. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 23RD DAY OF JANUARY 2024

G M A ONGONDO

JUDGE

Present;

1. 2nd appellant- present in person
2. Luanga, court assistant

