



Ambala & another v Ambala & another; Butt & another (Contemnor) (Civil Appeal (Application) 116 of 2016) [2023] KECA 867 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KECA 867 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) 116 OF 2016
W KARANJA, MSA MAKHANDIA & AK MURGOR, JJA
JULY 7, 2023**

BETWEEN

MARVIN OPIYO AMBALA 1ST APPLICANT

CHIZI ADHIAMBO AMBALA 2ND APPLICANT

AND

ODUOR HAWI AMBALA 1ST RESPONDENT

OGOLA KODHEK AMBALA 2ND RESPONDENT

AND

FAROUK ASIF BUTT CONTEMNOR

HADIJA ASIF BUTT CONTEMNOR

(An application for contempt of the Court arising from the judgment and order of the Court of Appeal at Kisumu (Githinji, Okwengu & J. Mohammed, JJ.A.) dated 26th April, 2018 in Kisumu Civil Appeal No. 116 of 2016)

RULING

1. The applicant, Odhiambo Ambala appears in person in the notice of motion dated 30th December, 2020. He, the co-applicant and respondents in the Civil Appeal cited above are all siblings and some of the beneficiaries in the Estate of Aggrey Otieno Ambala, (“the deceased”) who was their father and who passed on, sometime on 8th June, 1985.
2. The applicant approached this Court by way of the aforesaid motion pursuant to the provisions of sections 5, 4, and 31 (j) & (k) of the Contempt of Court Act No. 46 of 2016, the inherent jurisdiction of this Court and all other enabling provisions of the law. He sought to have Farouk Asif Butt and his wife Hadija Asif Butt, hereinafter “the contemnors” appear before Court and show cause why they should



not be held in contempt of court in respect of the court's judgment dated 26th April, 2018 and if found in contempt, be committed to civil jail for a period not exceeding six months. However, we hasten to state that the High Court in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR declared the entire *Contempt of Court Act* aforesaid unconstitutional. It is obvious therefore, that the application is premised on non-existent law and therefore liable to be struck out in limine. The applicable law before the enactment of the said Act was as restated by this Court in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR to be English Law on contempt in force then. Despite this fatal omission on the part of the applicant, we shall nonetheless proceed to consider the application on its merit considering that the applicant is acting in person and is not a lawyer.

3. The application is premised on the grounds that the two contemnors were party to the appeal and were aware of this Court's judgment dated 26th April, 2018. They nonetheless failed to heed the orders whose effect was that the titles that had been issued in respect of land parcels LR Nos. 1160/286,287 and 288, hereinafter, the suit properties be cancelled, the effect of which was to revert them to the registered owner as at 29th June, 2016.
4. The motion was further supported by the affidavit of the applicant dated 30th December, 2020. In the said affidavit, he reiterates that in the judgment, this Court granted orders restoring the land title numbers of the suit properties to the original status in the register as of 29th June, 2016. The order was thereafter served on the Ministry of Lands, which communicated the same to the contemnors through a letter of 5th July, 2018. However, despite this, the applicant and his brothers have been denied access to the suit properties by the contemnors who have gone ahead to erect a signboard warning the public of the existing caveat on the suit properties. Despite several reports being made to the police to remove the contemnors, no action had been taken against them. Further, the applicant deposes that on 29th November, 2018, the 2nd contemnor being aware of the judgment, filed a civil suit being Nairobi Environment and Land Court Case No. 511 of 2018 against the 1st applicant and the Registrar of Titles. He claimed that her rights were infringed upon since she was not accorded a hearing, during the hearing of the appeal but concealed the fact that the same titles she was claiming, had been revoked by this Court.
5. That the 2nd contemnor is challenging the decision of this Court in respect of the titles that this Court had already cancelled whilst the 1st contemnor is hiding behind her as she acts in contempt of this Court under the guise of the pendantsuit. That it was clear that a notice had been given by this Court before rendering its judgment requiring parties to file a report of the status of the various titles and the 2nd contemnor through Mr. Ogado, learned counsel participated in the proceedings by filing the copies of the titles which have now been made the subject of the High Court suit. Further, for two years and eight months, the contemnors have refused to comply with this Court's orders and instead are trying to overturn the judgment in the lower court.
6. The contemnors did not file a reply to the application but when the same came up for plenary hearing on 23rd March, 2023 both parties were present and argued the application orally. Mr. Odhiambo, learned counsel for the applicant submitted that the Court's orders were very clear and unambiguous. That the new entries with regard to the suit properties' titles were to be revoked and entries before 2016 reinstated. However, the said orders were complied with by the Registrar of Titles but not the contemnors. In the judgment, it was noted that there had been transactions with regard to the suit properties, but that notwithstanding, this Court proceeded to revoke the said titles.
7. The applicant further submitted that after revocation, all efforts to remove the contemnors from the suit properties had been futile. To date, they continue to illegally and brazenly occupy the suit



properties while holding documents, which are basically pieces of paper since they were revoked by the Registrar of Titles pursuant to the orders of this Court.

8. On his part, Mr. Mungu, learned counsel who appeared for Oduor Hawi Ambala now deceased, and 2nd respondent supported the application and reiterated that the dignity of the court and its orders must be upheld at all times hence the application ought to be allowed.
9. The contemnors in a rejoinder through Mr. Ogado, submitted that when the application for the contemnors to be cited for contempt was coming up for hearing, the contemnors were not served and therefore were not present in court on that day. That the five orders issued were very clear and what they intended to achieve was similarly very clear. Among the things to be enforced was the cancellation of the titles to the suit properties. It is clear that nothing was expected of the contemnors to do or avoid to do. Accordingly, they cannot be held in contempt of court.
10. Mr. Ogado further submitted that there was no order for the eviction of any party from the suit property, which the contemnors have disobeyed. That the 2nd contemnor was not a party to the suit in the High Court.

That her name appeared for the first time in the judgment. Given that the court that heard the matter was constituted as Family and Probate Court, it is trite law that a Family Court has very specific duties under The *Law of Succession Act*. These include the appointment of the administrator to the estate of the deceased, identifying the assets of the deceased and the rightful beneficiaries of the deceased's estate. Once that is done, it becomes functus officio. Otherwise, the right pertaining to any holding of any land is an issue that should be the subject of the ELC for determination.

11. The second contemnor had acquired the suit properties from the rightful beneficiaries who had sold her the same after they had obtained a confirmed grant of representation at the time. It is trite law that, where there is a confirmed grant and property has been transferred pursuant to it, then it is beyond the reach of a court to reverse that transaction unless it was fraudulently transacted and this was not the case here!.
12. It was Mr. Ogado's further submission that the applicant and his brothers, Ogola Ambala and the late Oduor Ambala had filed separate suits being Nos. ELC No. 242 of 2015, ELC 243 of 2015 and ELC 244 of 2015 against various parties in which they sought the determination of their rights to the suit properties. The suits were subsequently dismissed for want of prosecution. That further, there was a suit No. ELC No. 67 of 2020 filed by the applicants, seeking orders of eviction of 2nd contemnor from the suit property. Mr. Ogado submitted thus that the orders as they are, do not direct the 1st contemnor to do anything.
13. In totality, it was the submission of Mr. Ogado that there is no express order directing the contemnors to do any act or to vacate the suit property. Indeed, Farouk Butt is not even in possession of any of the suit properties and therefore, there is nothing that can be held against him.
14. As earlier stated with regard to Hadija Butt, counsel submitted that having not been a party to the suit, no order can legitimately be directed at her and none has been directed at her at this particular stage. Thus, there is nothing for her to comply with.
15. Lastly, Mr. Ogado submitted that this was an application for eviction disguised as an application to hold the contemnors in contempt.
16. The issues for determination in this application are: whether the contemnors are in contempt of this Court's orders; and, if the answer is in the affirmative, the appropriate punishment.



17. This Court in the case *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* (*supra*), restated the applicable law on contempt of court in this Country as that applicable in England on committal for contempt of court under rule 81 (4) of the *England Civil Procedure Rules*, which was adopted in this Country by virtue of section 5(1) of the *Judicature Act*.
18. For a party to succeed in an application for contempt of Court, at least four elements must be satisfied as was held in the case of *Kristen Carla Burchell v Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005. That is:
- “a) That the terms of the order (or injunction or undertaking) are clear and unambiguous and are binding on the Defendant.
 - b) That the Defendant has knowledge of or proper notice of the terms of the order.
 - c) The Defendant has acted in breach of the order.
 - d) The Defendant’s conduct is deliberate.”
19. It should be appreciated that contempt proceedings are quasi-criminal in nature as the liberty of a person is at stake. The standard of proof is therefore higher than in the normal civil proceedings, which is on a balance of probabilities but not beyond reasonable doubt as is required in criminal proceedings.
20. As to whether the terms of the Court order were clear and unambiguous, we note that the application emanates from the judgment of this Court, which was an appeal from the judgment of the High Court. The High Court had revoked two previous grants of letters of administration intestate that had been issued, set aside three previous court orders, and appointed three joint administrators of the estate of the deceased and redistributed the estate to the beneficiaries. After hearing the appeal, this Court, differently constituted decreed that:
- “
- “1. In the premises, the appeal is allowed;
 - 2. The Judgment of the High Court delivered on 29th June, 2016 is set aside in its entirety;
 - 3. For avoidance of doubt:
 - (a) the consent order of 3rd December, 2004 is restored, the grant dated 10th February, 2006, remains valid plus orders made on 2nd April, 2008 and 28th November, 2008.
 - (b) The cancellation of transfers of LR. Nos. 1160/286, 287 and 288 by the High Court is revoked. The Chief Land Registrar to restore entries relating to those three parcels of land and sub-divisions thereof on the Register as of 29th June, 2016.
 - (c) All transactions relating to LR. No. 1160/286, 287 and 288 and the respective sub-divisions and Assents after the date of the judgment of the High Court – that is after 29th June, 2016 are revoked and entries thereof to be restored as in (b) above.



4. The cross-appeal is allowed to the extent that the revocation of the transfer of LR. No. 1160/286 is set aside.
5. As this is a family dispute which has been raging for over 20 years, we order each party to bear his/her own costs of the appeal.”
To us, it is evidently clear that the above orders were very plain, clear and with no ambiguity at all.

21. As to whether the respondents had knowledge of the terms of the order, it is evident that the contemnors had full knowledge of the order. In his submission, counsel for the contemnors conceded:

“That the respondents are aware of the court order as Mr. Asif Butt made an application to review the same even though his application was dismissed. Secondly, Miss. Hadija Asif Butt is also fully aware of these particular orders as there is an application which was being referred to as second application in which she is seeking to set aside the orders made against her personally.”

Having admitted as much, we do not think we should dwell much on this issue.

22. On the third issue, it must be emphasized that Court orders are not made in vain and are meant to be complied with. Once a Court order is issued in a suit the same is valid unless set aside on review or appeal, as was held by this Court in *Refrigerator & Kitchen Utensils Ltd. v Gulabchand Popatlal Shah & Others* Civil Application No. Nai. 39 of 1990, *Central Bank of Kenya & another v Ratilal Automobiles Limited & Others* Civil Application No. Nai. 247 of 2006, and in *Wildlife Lodges Ltd v County Council of Narok and another* [2005] 2 EA 344 (HCK), wherein the Court in the latter case expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged. Disobedience of such an order would as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...”

23. From the evaluation of the facts and placed before us, it is clear that the orders that were granted by this Court did not in any way direct the contemnors to do or refrain from doing any act whatsoever. The appeal was successful and the mandate was bestowed on the Registrar of Titles to execute the judgment and decree. There was nothing directed at the contemnors to do or not to do in the judgment and decree which if they did or omitted to do would make this Court swing into action and find them in contempt.



24. We are satisfied and as correctly submitted by counsel for the contemnors that this application is meant to evict the contemnors from the suit property under the guise of contempt proceedings, when there is no such order in the decree that has been deliberately flouted. The applicants' remedy for the eviction of the contemnors from the suit properties lies elsewhere but not in contempt proceedings. Indeed, there is already a suit mounted by the applicants in the ELC to that effect. Further, it is quite apparent that the contemnors did not brazenly and deliberately act in breach of any court order. Finally, that the applicants and respondents have in the past filed suits to have the Court determine their interest in the suit properties and for the eviction of the contemnors from the suit properties, speaks volumes to the truthfulness and bona fides of the applicant in mounting this application.

25. In ultimate, we dismiss the notice of motion dated 30th December, 2020 with costs to the contemnors.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

