



**Simiyu v Kibera Chief Magistrates Court (Thereafter Bungoma Chief Magistrates Court) & 8 others (Civil Appeal (Application) E343 of 2021) [2023] KECA 1028 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KECA 1028 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E343 OF 2021  
HM OKWENGU, HA OMONDI & PM GACHOKA, JJA  
AUGUST 4, 2023**

**BETWEEN**

**TOME FRANCIS SIMIYU ..... APPLICANT**

**AND**

**KIBERA CHIEF MAGISTRATES COURT (THEREAFTER BUNGOMA CHIEF MAGISTRATES COURT) ..... 1<sup>ST</sup> RESPONDENT**

**THE JUDICIAL REVIEW DIVISION AT THE HIGH COURT OF KENYA NAIROBI-MILIMANI ..... 2<sup>ND</sup> RESPONDENT**

**THE BUNGOMA CHIEF MAGISTRATES COURT ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> CONTEMNOR**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> CONTEMNOR**

**COUNTY ASSEMBLY OF BUNGOMA ..... 3<sup>RD</sup> CONTEMNOR**

**CLERK COUNTY ASSEMBLY OF BUNGOMA ..... 4<sup>TH</sup> CONTEMNOR**

**COUNTY EXECUTIVE OF BUNGOMA ..... 5<sup>TH</sup> CONTEMNOR**

**THE COUNTY SECRETARY & HEAD OF PUBLIC SERVICE COUNTY GOVERNMENT OF BUNGOMA ..... 6<sup>TH</sup> CONTEMNOR**

*(Memorandum of Appeal under certificate of urgency from the judgment and decree (Ngaah J) delivered on 24th May 2021 in H.C. Misc. Contempt application No. E1093 of 2020)*



## RULING

1. By a notice of motion dated July 31, 2022, the applicant Tome Francis Simiyu who is in person has moved this Court under articles 1, 2, 3, 10, 22(1), 22, 23, 27, 33, 35, 41 47, 48, 50, 73, 232, 258 and 259 of the *Constitution of Kenya 2010* as read with section 7 and 8 of the *Fair Administrative Action Act* The prayers sought by the applicant in the motion are as follows:
  - (i) That this honourable court be pleased to order for stay of execution of the ruling and/or decree made on May 24, 2021 in JR E1093 of 2020 at Milimani Court until this appeal is heard and determined whichever way.
  - (ii) That this appellate court admits the appellant's contempt application against the contemnors (herein 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> defendants) and orders them to purge their contempt.
  - (iii) That the appellant be granted the costs of this appeal and the costs in the judicial review division at the high court of Kenya at Nairobi Milimani in respect of contempt application.
2. The motion is supported by grounds stated on the face of the motion and an affidavit sworn by the applicant on July 31, 2021. Although the grounds stated on the face of the motion and the affidavit are fairly lengthy, the background to the motion is fairly simple. The applicant moved to the high court judicial review division and obtained leave from the high court (Mativo, J. as he then was) on September 8, 2010 (orders issued electronically on September 9, 2010), for leave to file judicial review proceedings against the respondents with regard to criminal proceedings against him in Kibera Chief Magistrates Court Criminal Case No 810 of 2020.
3. The high court also ordered that the leave to file judicial review operates as stay of the criminal proceedings against the applicant. The order was in the following terms:

“That upon being granted the same do operate as stay of interdiction of the ex parte applicant by the County Assembly of Bungoma, the Bungoma County Assembly Service Board, (CASB), and the clerk of County Assembly of Bungoma.

That without prejudice to the generality of the foregoing, pending hearing and determination of the substantive application the leave herein granted shall operate as stay of the proceedings in criminal case no 810 of 2020, Kibera, or in any manner arresting, detaining, charging, prosecuting or in any manner instituting criminal charges against the applicant in any court in Kenya premised on the facts particularized in the same charge the subject of the said criminal case.”
4. By a notice of motion dated September 16, 2020 filed in the high court, the applicant sought to have the respondents committed to civil jail for contempt of the court orders that were issued on September 8, 2020. Upon the high court (Ngaah, J), hearing the application, he delivered a ruling in which he dismissed the motion, holding that the motion was incompetent and misconceived.
5. The applicant who is aggrieved by that order filed the current motion. He faults the learned Judge for dismissing his application and contends that the ruling has violated his constitutional rights and fundamental freedoms, and that if executed, the ruling will have far reaching negative consequences on his job, professional career and social economic livelihood. The applicant is apprehensive that unless the court stays the orders in the impugned ruling, the 6<sup>th</sup> and 7<sup>th</sup> respondents will carry out the illegal and irregular interdiction that will result in the applicant's denial of his employment and labour rights.



He faults the learned Judge for dismissing his application on technicalities, maintaining that the alleged contemnors were actually served with the stay orders that were issued by Mativo, J.

6. The applicant relied on *Shimmers Plaza Limited v NBK* [2015] eKLR, where the Court held that knowledge of a court order is sufficient to prove service and dispensed with personal service for purposes of contempt proceedings. The applicant also referred to various authorities in his application which we do not find appropriate to refer to as they are effectively arguments in regard to the substantive appeal.
7. During the hearing of the application, the applicant appeared in person. Although the respondents were all duly served on November 1, 2022 at 12.03 p.m. through email, none of them appeared in Court nor have they filed any reply to the motion.
8. The applicant is seeking an order for stay of execution. This Court has the power to grant such an order under rule 5(2)(b) of the *Court of Appeal Rules* 2022. However, the applicant has not moved the Court under this Rule but has invoked several articles of the *Constitution* and sections 7 & 8 of the *Fair Administrative Actions Act*, which would not be applicable at this stage.
9. Be that as it may, as already indicated above, the applicant seeks to stay execution of the ruling and decree made by the high court on May 24, 2021. The ruling dismissed the applicant's motion dated September 29, 2020. To that extent, the order made by the court was an order for dismissal.
10. In *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR, this Court dealing with an application for execution of a similar order of dismissal, had this to say.

“In the instant case, the high court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.”

11. Likewise, in this matter, the learned Judge of the high court declined to grant the orders for committal of the respondents. That order was a negative order which is not capable of execution. In regard to costs, the learned judge ordered costs to abide the outcome of the substantive motion. At this stage there is no order for costs in favour of the respondent and there is nothing to be executed against the applicant.
12. For the above reasons, we dismiss the applicant's motion. We make no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**M. GACHOKA CIArb, FCIArb.**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

