



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, ASIKE-MAKHANDIA & ODEK, JJA)

CIVIL APPLICATION NO. 47 OF 2019

BETWEEN

ROSE NAFUNA WANYAMA.....APPLICANT

AND

NUSRA NASAMBU CHIBANGA.....1ST RESPONDENT

AGATON WANYAMA alias MARK.....2ND RESPONDENT

(Being an application for contempt of court in relation to stay of execution orders issued by the Court of Appeal

at Eldoret (Githinji, H. Okwengu & J. Mohammed, JJA) on 2nd August, 2017

in Civil Application No. 49 of 2017 (UR 31/2017)

RULING OF THE COURT

The background facts leading to the application, the subject of this ruling, are simple and straightforward. The applicant filed suit in the Land and Environment court in Bungoma against the respondents claiming to be the sole owner of all that piece or parcel of land known as **W.Bukusu/E.Siboti/264** “the suit property”. The applicant claimed in the suit that the 1st respondent held the suit property in trust for her deceased husband and that she should transfer it to her as heir and personal representative of the estate of her deceased husband, a son of the applicant.

In response, the 1st respondent averred that the suit property solely belonged to her. She went on to state that following the death of her husband, she petitioned for a grant of letters of administration and the same were granted on 9th July, 1975 and by way of transmission, the suit property was transferred and registered in her name. The 1st respondent as already stated is a mother in law to the applicant whereas the 2nd respondent is a brother in law. In no time the 1st respondent decided to subdivide the suit property and give the applicant 5 acres, the 2nd respondent 5 acres and retain 1 acre for herself. She was however unable to go through with her plans as the applicant objected to the proposed subdivision and went ahead to lodge a caution on the suit property.

The learned Judge (**Mukunya, J.**) heard the suit and in a judgment delivered on 6th April 2016, agreed with the proposed distribution of the suit property by the applicant. In the premises, he dismissed the applicant’s suit and ordered each party to bear their costs. He further ordered that the caution lodged by the applicant over the suit property be removed forthwith.

This outcome prompted the applicant to file a motion on notice before this Court sitting at Eldoret pursuant to rules 5(2)(b) of this Court’s rules seeking stay of execution of the above judgment pending the hearing and determination of her intended appeal. The application was heard by **Githinji, Okwengu & J. Mohammed, JJ.A.** In a ruling delivered on 2nd August 2013, the Court was satisfied that the applicant had met the threshold required under **Rule 5 (2) (b)** of this Court’s rules and issued an order for stay of execution of the judgment pending the hearing and determination of the intended appeal. The stay was however conditional on the applicant filing the appeal, serving it on the respondents and prosecuting it within 12 months.

However, the applicant was unable to comply with the aforesaid timeline. It is then that the respondents proceeded to execute the decree of the High Court on March 2019, 8 months after the expiry of the 12 months granted in the order of stay.

This action prompted the applicant to file the instant application. The application is anchored on rules 5(2) (b), 42 and 47 of this Court’s rules. The applicant in the main prays that this Court be pleased to find that the respondents are in contempt of this Court’s orders issued on

2nd August 2017 and jail them for a period not exceeding 6 months. The grounds in support of the application are that by orders of this Court aforesaid, the execution of the judgment was stayed pending the hearing and determination of the intended appeal. That the said orders were served on the respondents. However, in total disregard of the said orders the respondents went ahead and executed the decree and subdivided the suit property.

In response, the respondents deposed that they never violated the court orders and therefore, they were not in contempt. They maintained that the orders of stay were conditional and remained in force for a limited period of 12 months within which time the applicant was to file, serve and prosecute the appeal. That by March, 2019 when they executed the decree, the applicant had not complied with any of the conditions set out in the order of stay aforesaid. That they executed the decree 8 months after one (1) year had lapsed.

The application was argued before us on 25th July 2019. **Mr. Wamalwa**, learned counsel appeared for the applicant whereas the respondents appeared in person. Mr. Wamalwa orally submitted that the respondents were in contempt of Court as they had gone ahead and executed the decree by subdividing the suit property, oblivious of the order of stay in place. He further submitted that the applicant was a widow with 5 children and will have nowhere to go if the execution of the judgment is carried through.

In reply, the respondents reiterated that the stay orders were in force for only 12 months. Given that the period expired before the appeal was filed and that the said subdivision was carried out after the expiry of the said orders, they could not be accused of contempt of Court.

Having considered the application, the affidavits in support and in opposition, as well as respective submissions and the law, we have to decide whether the respondents are in contempt of Court and whether the applicant is entitled to the prayers she seeks. In the case **Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others** [2018] eKLR this Court stated;

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another (supra). Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing.”

As a Court we do not take contempt of court orders lightly as they undermine the authority and dignity of the Courts. The reason behind contempt of Court proceedings is to ensure compliance of Court orders by the members of the public and any other entity that such orders are directed at. The principle was captured by this Court in the case of **Fred Matiang’i, the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others** [2018] eKLR; thus:-

“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.”

We appreciate that the nature of contempt proceedings are quasi-criminal in nature and attracts a prison term as punishment and we must, therefore, ensure that such proceedings are dealt with utmost care and circumspection. This view was emphasized by this Court in **Woburn Estate Limited v Margaret Bashforth** [2016] eKLR;

“We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed.”

It is not in dispute that this Court issued orders dated 2nd August 2017 against the respondents pursuant to an application made by the applicant seeking to stay the execution of the decree pending the filing and prosecution of the applicant’s intended appeal. However, the said orders were intended to be in force for 12 months from the date of issuance within which period the applicant was expected to file, serve and prosecute her intended appeal. The relevant part of the ruling was as follows;

“For the above reasons we allow the application and issue an order of stay of execution pending appeal for a limited period of 12 months within which period the applicant must file and serve the record of appeal and prosecute her appeal.”

From the foregoing, it is clear that the stay Orders were conditional as the Court intended them to last for the said 12 months and within which period the applicant was to file, serve and prosecute the appeal. By our computation and that of the respondent, those orders lapsed on 26th July 2018. The record is clear that the applicant neither filed, served nor prosecuted the appeal within the stipulated period. There can be no recourse for a party who willingly defies conditions set by the Court then runs back to the same Court for assistance when consequences of the said non-compliance are apparent.

The record nonetheless confirms the respondents’ position that they only executed the decree after the expiry of 12 months. In fact, they only did so eight months after the expiry of 12 months. By this time, the stay granted had lapsed. In light of the foregoing, we find that the respondents cannot be said to be in contempt of Court as the Orders had ceased to be of any effect by the time the decree was executed and therefore they cannot be accused of contempt of Court.

In the end, we are satisfied that the application lacks merit and is accordingly dismissed with costs to the respondents.

Dated and delivered at Eldoret this 17th day of October, 2019.

R. N. NAMBUYE

JUDGE OF APPEAL

ASIKE-MAKHANDIA

JUDGE OF APPEAL

OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR