



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)**

**CIVIL APPLICATION NO. 4 OF 2016 (UR NO. 4/2016)**

**BETWEEN**

**AB.....1<sup>ST</sup> APPLICANT**

**HB.....2<sup>ND</sup> APPLICANT**

**AND**

**RB.....RESPONDENT**

*(An application for stay of execution pending the filing, hearing and determination of an intended appeal from the Ruling of the High Court of Kenya at Mombasa*

*(Family Division Court), (Thande,J.) dated 18<sup>th</sup> February, 2016*

*in*

*H.C.C. Suit No. 8 of 2014 (O.S.)*

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**RULING OF THE COURT**

Following the demise of **SPB** in July, 2014, there arose a heated and protracted dispute over the matrimonial property; pitting his widow (“*the respondent*”), against his estranged wife (“*1<sup>st</sup> applicant*”), and her son (“*2<sup>nd</sup> applicant*”).

According to the record, the 1<sup>st</sup> applicant was married to the deceased and the union was blessed with one issue, the 2<sup>nd</sup> applicant. The family lived together in the matrimonial home until 2006, when the couple divorced. Subsequently, the deceased married the respondent with whom he had two issues and resided in the matrimonial home until his demise. It is common ground that the 2<sup>nd</sup> applicant and his wife continued to live in the same matrimonial house alongside the deceased and the respondent and that notwithstanding the divorce, the deceased supported and maintained the 2<sup>nd</sup> applicant too, albeit in a separate dwelling elsewhere.

The 1<sup>st</sup> applicant, however, alleges that at some point, she and the deceased reconciled and patched up

their differences at which point she moved back into the matrimonial home. The respondent disputes that assertion and instead contends that the 1<sup>st</sup> applicant came into the matrimonial home after the deceased's demise, joined forces with the 2<sup>nd</sup> applicant, and unlawfully ejected her and her young children from the matrimonial home. This prompted her to institute **Mombasa High Court Suit No. 8 of 2014 (OS)** in a bid to enforce her rights to the matrimonial home and property, which sits on a parcel of land described as **[Particulars Withheld]** on **Mkomani Road, Mombasa**. Contemporaneously with the said suit, the respondent also filed an application dated 8<sup>th</sup> September, 2014, seeking two prayers:

***"I. An injunction to restrain the applicants from dealing in, entering, occupying, remaining upon, removing household goods and personal effects of the respondent and her children from the suit premises pending the hearing and determination of the Originating Summons and;***

***II. in the event that the applicants had evicted her, an order for the applicants to deliver to her the suit premises with vacant possession..."***

As we shall see shortly, that application in turn elicited and gave rise to plethora of other applications, ultimately culminating in what is before us. In determining that application which was vehemently opposed by the applicants, **Muriithi, J.**, in a ruling dated 15<sup>th</sup> June, 2015 granted orders in terms:

***"a) An order of mandatory injunction to restore the plaintiff to the matrimonial home on the suit property which she occupied with the deceased SB before his death in 2014 and***

***b) an order of prohibitory injunction restraining the defendants by themselves, their servants, employees , agents, assigns or otherwise howsoever from in any way interfering with or undermining the plaintiff's possession and occupation of the matrimonial home on [Particulars Withheld], Mkomani Road, Mombasa pending the hearing and determination of the suit.***

***c) For avoidance of doubt, this Court does not authorize the eviction of the 2<sup>nd</sup> defendant (meaning the 2<sup>nd</sup> appellant) at the portion of the house previously occupied by him during the life of his deceased father, SB. In the alternative, the estate will in accordance with the consent order of 27<sup>th</sup> November, 2009, in HCCC No. 93 of 2006, aforesaid pay for accommodation and maintenance of the 2<sup>nd</sup> defendant (meaning the 1<sup>st</sup> applicant), as provided therein.***

***d) Liberty to apply.***

Unhappy with the decision, the applicants lodged a Notice of Appeal in this Court. Thereafter, they filed an application seeking stay of execution of the ruling, pending the hearing and determination of the intended appeal. That application which again was vehemently opposed by the respondent was determined by a ruling rendered on 31<sup>st</sup> July, 2015, in which this Court declined to grant stay of execution. However, for the sake of clarity, this Court also varied order (c), aforesaid and directed that in addition to the restoration of the respondent in the suit premises as ordered by **Muriithi, J.**, the 1<sup>st</sup> applicant forthwith vacates the home, given the acrimonious relationship between herself and the respondent and in lieu thereof she be maintained by the estate at a separate dwelling as had been the case during the lifetime of the deceased.

However, it was later alleged by the respondent that in willful disobedience of these orders, the applicants denied her ingress into the home and deliberately demolished a portion of the house that would have been occupied by the respondent in a bid to make the home uninhabitable. In addition, she claimed, they moved all of her household goods out of the home to destinations unknown to her. Consequently, the respondent moved the High Court by an application dated 7<sup>th</sup> August, 2016, seeking an order to compel the applicants to purge their contempt and for their committal to jail, together with two others, for contempt of court.

That application was heard and allowed by **Thande, J.** in a ruling delivered on 18<sup>th</sup> February, 2016. The

learned Judge ordered the applicants to reconstruct the home to its state prior to the demolition; to pay the respondent Kshs.250,000/= per month as rent from the date of the order of 15<sup>th</sup> June, 2015 until the date when the respondent shall have been reinstated into the reconstructed home; and to return all household goods and effects removed from the suit premises. In addition the learned judge committed the applicants to civil jail for a period of 3 months without the option of a fine and directed the matter to be mentioned in 120 days in order for the court to confirm compliance with the order.

This ruling too did not sit well with the applicants who, after filing a notice of appeal, have come to this Court once seeking an order of stay of execution of the orders of Thande, J., pending the hearing and determination of the intended appeal.

The premise of the application is that the applicants have an arguable appeal because the learned Judge erred by failing: to consider the applicants' affidavit evidence indicating that they had not been in contempt; to appreciate that the County Government of Mombasa independently demolished the house; to find that the respondent was in contempt by attempting to obtain forceful entry into the home contrary to the order of the court; to find that the applicants had not taken any household goods from the home as alleged; to appreciate that for an application for contempt of court to succeed, service of the order in question together with a penal notice must be proved; and to hold that no such service was undertaken in this case as the order was never even extracted for service. The Judge was further faulted for granting prayers not sought for in the application, to wit, the payment of rent to the respondent which was in any event uncalled for because the respondent was not destitute and was residing in her own house in Nyali, and failure to appreciate that this being a civil matter, a party could not be condemned to jail without the option of a fine. The applicants thus contend that should stay of execution not be granted, their appeal shall be rendered nugatory as the 1<sup>st</sup> applicant is 66 years old and suffers from advanced cancer and is under constant chemotherapy treatment. As a result, her detention in civil jail would adversely affect her health further. On the part of the 2<sup>nd</sup> applicant, it was contended that he is the 1<sup>st</sup> applicant's primary caregiver and his detention would equally impact adversely on the 1<sup>st</sup> applicant.

The respondent resisted the application through an undated affidavit sworn by herself in whom she terms the present proceedings as an abuse of court process and simply another attempt by the applicants to avoid compliance with court orders. To begin with, she asserts that a similar application had been filed in the High Court, which was certified urgent, and the applicants ordered to effect service thereof which they have never done and the same remains pending. Granting the orders sought, they contend, will only aid the applicants' aggravation of an injustice as the respondent and her children continue to be rendered homeless. The respondent further laments that that despite their various intimations, the applicants are yet to file the appeal against the orders of 15<sup>th</sup> June, 2015. To the contrary, they had constantly frustrated her execution of the said orders, terming the said execution as mere '*commotion*' and taunting her to try and obtain '*serious orders*' instead. She reiterated that the applicants, in collusion with the police officers, forcefully took her household goods out of the home and when she raised objections, she was unlawfully detained in police custody.

A preliminary objection was orally raised at the hearing of this application by the respondent's learned counsel, **Mr. Kaluma**, who submitted that having failed to purge their contempt, the applicants ought not be heard on the application. Counsel further argued that from their own affidavit, the applicants concede that they were in the country at the time the committal orders were made, only for them to flee shortly thereafter to India with the sole intention of defeating the order for their committal to jail; that it was therefore not in doubt that they had willfully disobeyed all the orders issued so far and are yet to purge their contempt; that further evidence of their contempt was the fact that they demolished part of the suit premises and removed the respondent's household goods from the home a fact confirmed by the High Court Deputy Registrar, who visited the home and filed a report.

On their part, the applicants through their learned counsel, **Mr. Kiragu**, contend that there are exceptions to the general rule that contemnors should not be heard until they have purged their contempt. One such exception, he submitted, was where the alleged contemnor has sought to challenge the order he is said to have disobeyed on appeal. Secondly, where he challenges the jurisdiction of the court that gave the order

and lastly, where he seeks to defend himself. In counsel's view, an application for stay of execution is also a way of defending oneself and the power to deny a litigant audience should be exercised with caution, bearing in mind that a litigant is entitled to the right to be heard under **Article 159** of the **Constitution**. In conclusion, he submitted that should this Court be minded to allow the objection, the applicants should be allowed time and temporary stay of execution to comply with orders.

We have duly considered the application and the submissions respective of learned counsel. It is not in doubt that the applicants are yet to comply with any of the orders issued in these proceedings, and in particular, the orders of 15<sup>th</sup> June 2015. Indeed, in the applicants' own supporting affidavit sworn on 3<sup>rd</sup> September, 2015, the 1<sup>st</sup> applicant admitted demolishing a portion of the home. She rendered herself thus:

***"30. That in response to paragraph 18 of the affidavit, I am informed by the 1st defendant that following the events of 1<sup>st</sup> August, 2015, they cannot reside with the plaintiff and share the same living room and kitchen and such the house is being altered to make necessary provisions for the above with the sole intention of accommodating the plaintiff".***

Notably, this affidavit came long after the decision of this Court directing the 1<sup>st</sup> applicant to move out of the home and the reinstatement of the respondent therein. Instead, and in blatant disregard of that order and earlier orders of the High Court and to frustrate their enforcement, the respondent contends, the applicants chose to demolish a section of the house. The fact of demolition of the house was confirmed by the report of the Deputy Registrar of the High Court dated 23<sup>rd</sup> November 2015. Thereafter, the respondent contends, that the applicants sought refuge in India beyond the jurisdiction of this Court.

The straightforward issue before us is whether we should hear the applicants in their application for stay of execution of the order of the High Court committing them to jail for contempt of court before they have purged their contempt. We affirm that under our constitutional framework, there is no general rule that a court cannot hear a person in contempt of court before they have purged their contempt. The importance of the right to fair hearing which is expressly underpinned by Article 50(1) of the Constitution, and in particular the right to access the court for purposes of ventilating a grievance cannot be gainsaid. A general rule curtailing those rights in all and sundry cases of contempt of court would not easily pass constitutional muster. Way back in 1952, Lord Denning, LJ. articulated the balancing act that is required when a court is confronted with two contending principles of great legal and constitutional moment pitting, on the one hand the need to uphold the constitutional right to fair hearing, and on the other the need to protect and uphold the rule of law without which civilized society is in peril. *In Hadkinson v. Hadkinson, [1952] 2 All ER 567*; the eminent Law Lord stated:

***"I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed".***

In this jurisdiction, this Court has emphasized the sacrosanct nature of the right to be heard in the context of contempt of court applications. Speaking for the majority, *Githinji, JA* expressed himself as follows in *Rose Detho v. Ratilal Automobiles Ltd & 6 Others, CA No. 304 of 2006 (171/2006 UR)*:

***"Thus, there is no absolute legal bar to hear a contemnor who has not purged the contempt...and whether the court will hear the contemnor is a matter for the discretion of the court depending on the circumstances of each case."***

The reason why, depending on the circumstances of each case, the court must retain the discretion, albeit to be exercised sparingly, to decline to hear a contemnor is because our entire constitutional edifice is predicated on respect for the rule of law. The moment a party hacks at that foundation, the entire system

is threatened. The Constitutional Court of South Africa, in ***Burchell v. Burchell Case No 364/2005*** underlined the importance to the rule of law, of compliance with court orders in the following terms:

*“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”*

In the application before us, there are orders issued by the High Court and affirmed by this Court more than six months ago directing the applicants to give the respondent possession of her matrimonial home. Not only have the applicants refused to comply with those orders, but the home or part of the home where the Court ordered the respondent to be restored have been demolished in circumstances that *prima facie* suggest the applicants complicity or involvement. The applicants have in the meantime conveniently retreated to India from where they seek stay of the orders of the High Court.

In the peculiar circumstances of this case where the rule of law is at risk of being deliberately undermined, we decline to hear the applicants until they have complied in full with the orders of the High Court or until further orders of that court. Accordingly, we uphold the preliminary objection and award costs to the respondent. It is so ordered.

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of April, 2016.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**