



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Criminal Appeal 120 of 2007

PAUL ONGOCHO HEZEKIAH OBUNGA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from an order of the High Court of Kenya at Kisii (Gacheche, J.) dated 31st July, 2007

in

H.C.SUCCESSION CAUSE NO. 146 OF 2003)

JUDGMENT OF THE COURT

This is an appeal from the ruling or order of the superior court (*Gacheche, J.*) made on 31st July, 2007. In order to appreciate what is before the Court it will be necessary to give brief background facts that led to the order of the learned Judge.

The genesis of this appeal is a *Succession Cause No. 146 of 2003* filed in the High Court of Kenya at Kisii. The record of the superior court shows that on 24th April, 2007, the appellant herein, **PAUL ONGOCHO HEZEKIAH OBUNGA** appeared in person before the learned Judge. There were also **M. AKINYI** and **C.B. ACHIENG** who were described as “*beneficiaries*”. The said Akinyi is recorded as having addressed the learned Judge thus:-

“We have requested our uncle to go and obtain funds from Sony for the benefit of our mother’s estate, but to no avail. We need to have the money released to us. We are the two beneficiaries; there are 3 grandchildren who also need to inherit my mother.”

On her part, Achieng told the learned Judge:-

“I required money for school fees. We were informed that my uncle – Obunga collected the money from Sony which he has not given us.”

The record shows that the one who was described as the “*Petitioner*” addressed the learned Judge as follows:-

“I managed to get Shs.500,000/= from Sony Sugar Company. The balance is still held by the company. I distributed the money in accordance with my sister’s instructions. I have spent the total sum. My sister left a will.”

From the foregoing it would appear that the one described as the “**Petitioner**” is the appellant herein who is the uncle of the two “**beneficiaries**.”

After the foregoing statements from the two “**beneficiaries**” and the “**Petitioner**” the learned Judge made the following order:-

“I would like to see the will, which the administrator claims to have been executing. I would also like to have a full statement of the account. All these to be provided within the next 21 days. Matter to be mentioned on 17th May, 2007.”

The matter was, indeed, mentioned on 17th May, 2007 when the appellant is recorded to have stated:-

“I have yet to comply with orders of the Court issued on 24th April, 2007. I however have statement.”

The Court then stood over the matter to 30th May, 2007 but with the direction that the statement be filed and an affidavit.

On 30th May, 2007 the appellant appeared before the learned Judge and stated:-

“I have no letter to produce to court today.”

The learned Judge then made the following order:-

“I will indulge the petitioner for 7 days only. If he doesn’t produce the said will I will have no choice but to order that he repays whatever monies he has disbursed from the Estate as it will be then clear that he had no authority to deal with it in the manner that he said. Stood over to 7th June, 2007.”

Before that date (7th June, 2007) it would appear that there was an ex parte application before the learned Judge on 5th June, 2007. That ex parte application must have been filed by the appellant. We say so because in the record it is shown that *H. Obunga* appeared as the applicant in person. Nobody addressed the Court but the learned Judge made the following order:-

“Matter certified urgent due to the fact this matter is due for hearing on 7th June, 2007. Let the Deputy Registrar issue an order requesting the Chief Executive Officer of Sony Sugar Company Limited (sic) produce the Employment Form of Esther Onyango Obunga in this Court within the next 7 days. Penal Notice to issue. Stood over to 14th June, 2007.”

On 14th June, 2007 the matter came up but was stood over to 12th July, 2007.

The record shows that on 12th July, 2007 the appellant, **Dan Oyamo** – *H.R. & Administration Officer* and **Frederick Agoro** – *Legal Assistant*, appeared before the learned Judge. We take it that Mr. Dan Oyamo appeared as the Human Resources and Administration Officer of Sony Sugar Company while Mr. Agoro appeared as the Legal Assistant of that company. Although the record does not show that anybody addressed the learned Judge the following order was made:-

“I am not satisfied with the explanation by the paralegal officer – Mr. Agoro and the H & R.M. Officer. I would like a proper explanation of disbursements made so far – by the Chief Executive Officer. Such explanations together with reasons for the disbursements to be presented on 24th July, 2007 by the Chief Executive Officer. If he is not available the Warrant of Arrest will issue. Deputy Registrar to ensure compliance.”

What happened on 24th July, 2007 was, in our view, very important and hence we set it out in full:-

“24/7/2007

Coram: Gacheche, J.

H. Obunga – applicant in court in person

Mr. Ayuko – Chief Executive Officer – Sony Sugar

Company

Mr. Ondaba – Finance Manager – Sony

Cc – Mobisa

Mr. Ayuko: The deceased was entitled to ***Kshs.1,712,343/=*** made up as follows:-

- Final dues **Shs. 74,062/=**
- Group life benefit **Shs. 905,760/=**
- Pension withdrawal benefits **Shs. 594,559/=**
- Orphans pension **Shs. 69,442/=**
- Co-operative share cont **Shs. 47,500/=**
- Staff dev. Fund **Shs. 21,020/=**

Shs.1,712,343/=

4/2/2004 – Disbursed Shs.74,062/= to administrator/petitioner from group life.

On 18/2/2005 – Shs. 505,760/= to Administrator

Pension withdrawal benefits

6/7/2003 – Disbursed Shs. 594,559/= to Administrator

Orphans pension – Shs.69,442/= to Letty Achieng in February 2007.

Balance for payments – Shs. 468,520/=.

Benefits

- o Group life **Shs. 400,000/=**
- o Co-operative shares **Shs. 47,500/=**
- o Staff Dev. Fund **Shs. 21,020/=**

We undertake not to disburse any more funds. We regret the act and should not have disbursed before confirmation of the Grant. We would like the court to order the applicant to reimburse the sum received so far being **Shs.1,174,380/=**.

Applicant: I need time to peruse the form. I require one month.

Mr. Ayuko: He doesn't deny having received the money.

Court: The fact that the money was received by the applicant is not in doubt. His request for time is but a delaying tactic. He received the money before the grant was even confirmed and my only belief is that the said sum of **Shs.1,174,380/=** is held up safely in a bank account. I do order that he reimburses the said sum to Sony Sugar Company Limited within the next 6 days. Mention on 31/7/2007."

Come 31st July, 2007 and the record of what happened that day reads as follows:-

31/7/2007

Coram: Gacheche, J.

N/A for the petitioner, though the petitioner is in court.

Cc – Mobisa

Court: I have noted the contents of the letter from Sony. I also note that the orders of 24/7/2007 have yet to be complied with. In the circumstances I do order that the petitioner/administrator be placed in jail for 3 months for contempt of court. Warrant of Arrest to issue."

It is the foregoing order of 31st July, 2007 that provoked this appeal in which the appellant, through his advocates, filed a Memorandum of Appeal comprising eight grounds of appeal. This is the appeal that came up for hearing before us on 1st December, 2008 when Mr. E. Ondieki appeared for the appellant, while Mr. D.I. Musau, the learned Senior Principal State Counsel appeared for the State.

In his address Mr. Ondieki submitted that the learned trial Judge misdirected herself as to the law relating to contempt and that in this case there were no exceptional circumstances to warrant such a measure. It was further submitted that the Court acted *suo moto* when the matter had been listed for mention only. Mr. Ondieki went on to submit that the appellant was not given a chance to mitigate.

Mr. Ondieki then dealt with the next set of **grounds 3 & 5** of the Memorandum of Appeal. Under this set it was contended that this was not a case of contempt on the face of the court and that the appellant was condemned unheard. On this set of the grounds of appeal, Mr. Ondieki submitted that the sentence of 3 months imprisonment was excessive and unreasonable.

Lastly, Mr. Ondieki submitted on grounds 4 & 6. It was Mr. Ondieki's contention that the Judge was not moved by any party but merely gave summary orders. It was further submitted that the appellant thought that he was helping his sister's children.

Finally, Mr. Ondieki pointed out that the parties had reconciled and for that reason this appeal ought to be allowed.

On his part, Mr. Musau told us that he had nothing to say since the State never participated in the proceedings in the superior court.

We have endeavoured to set out the background to this appeal and it is now clear that this is a matter which started by way of a succession cause. We now know that the appellant's sister, one, **Esther Onyango Obunga** was an employee of Sony Sugar Company Limited and passed away leaving at least

two children. The appellant was of course, the uncle of these children. The appellant somehow managed to get **Shs.500,000/=** from the Sony Sugar Company Ltd. on the basis that his deceased sister had left a will and that he was executing the wishes of his late sister. That is where the problem started. The appellant had no valid authority to collect the money and the company, too, had no valid authority to release the money to the appellant. However, in appellant's opinion he was trying to assist his sister's children. The learned Judge on her part wanted to ensure fair play so that the money should go to the beneficiaries without intermeddling from other quarters. The learned Judge made a finding that the appellant had received the money even before the grant had been confirmed. She ordered that the appellant provides a statement of accounts showing how the money had been paid out to the beneficiaries. She then directed that the matter be mentioned on *31st July, 2007*. When the matter was mentioned on that day it would appear that the appellant failed to appear (*although the record shows that he was present*) and hence the order that he be sent to prison for 3 months for contempt of court. But it is to be observed that when that order was made there was no opportunity given to the appellant to explain why he failed to appear in court or if he was present why he had not prepared a statement of accounts.

Mr. Ondieki, submitted at length why this appeal should be allowed. Apart from the lengthy submissions supported by a number of decided cases, Mr. Ondieki told us that the parties had reconciled. We were, however, not told the terms of that reconciliation. On our part, all we can say is that when the matter was set down for mention it was improper for the learned Judge to impose a jail term on the appellant without inquiring what had led to his non-appearance or his failure to present a statement of accounts. From the record before us, all we discern is that the appellant failed to appear before the court for the mention of the matter. At worst he had disobeyed a court order but he was certainly not in contempt of court. There was no evidence of contempt on the face of the court.

In view of the foregoing, we are satisfied that this appeal should be allowed. Accordingly, the appeal is allowed and the order of the learned Judge made on *31st July, 2007* committing the appellant to jail for three months is hereby set aside. These are the orders of this Court.

Dated and delivered at Kisumu this 16th day of January, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR