



**Omboto & another v Kenya Railways Corporation & 4 others (Environment & Land Petition 8 of 2019) [2024] KEELC 6308 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6308 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND PETITION 8 OF 2019  
SO OKONG'O, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**JOHANES AKELO OMBOTO ..... 1<sup>ST</sup> PETITIONER**

**GRADUS OMBOTO AKELO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF INTERIOR AND  
COORDINATION OF NATIONAL SECURITY ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**KENYA PORTS AUTHORITY ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Petitioners brought this petition against the Respondents on 16<sup>th</sup> August 2019. The dispute between the parties concerned all that parcel of land known as Kisumu/Municipality Block7/530 (hereinafter referred to as “the suit property”). The Petitioners averred that they were the registered owners of the suit property and that on 14<sup>th</sup> August 2019, the 2<sup>nd</sup> and 4<sup>th</sup> Respondents destroyed the Petitioners’ perimeter fence around the suit property. The Petitioners averred that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents claimed that the suit property belonged to the 1<sup>st</sup> Respondent which intended to give the same to the 4<sup>th</sup> Respondent to operate a new port. The Petitioners averred that the Respondents had violated their constitutional rights to own property and fair administrative action. The Petitioners sought several reliefs against the Respondents.
2. The 1<sup>st</sup> Respondent filed an answer to the petition and a cross-petition against; the Petitioners, a company known as Hodima Construction Company Limited from which the Petitioners acquired the



suit property, and the 3<sup>rd</sup> and 5<sup>th</sup> Respondents on 30<sup>th</sup> January 2020. The 1<sup>st</sup> Respondent averred that the suit property was owned by the 1<sup>st</sup> Respondent and that the title that was held by the Petitioners in respect thereof was illegal, fraudulent, null and void. The 1<sup>st</sup> Respondent similarly sought several reliefs against the Petitioners and the said Respondents to the cross-petition.

3. In a judgment delivered by the court on 5<sup>th</sup> May 2020, the court found that the Petitioners had acquired the suit property illegally and that the title held by the Petitioners was null and void. The court found further that the 1<sup>st</sup> Respondent had violated the Petitioners' constitutional rights and awarded the Petitioners Kshs. 5,000,000/- as damages and Kshs. 473,975/- per month from 14<sup>th</sup> August 2019 up to the date of the judgment being the lost rent.
4. Since the date of that judgment, the parties have been in and out of court with multiple applications. The first application was brought by the Petitioners through a Notice of Motion dated 8<sup>th</sup> May 2020. In the application, the Petitioners sought the review of the judgment of 5<sup>th</sup> May 2020. The Petitioners prayed that the petition be allowed in its entirety and the 1<sup>st</sup> Respondent's cross-petition be dismissed.
5. The 2<sup>nd</sup> application was brought by Hodima Construction Limited (Hodima) which was the 3<sup>rd</sup> Respondent in the cross-petition. Hodima's application was brought by way of a Notice of Motion dated 20<sup>th</sup> May 2020. In the application, Hodima sought an order setting aside the judgment of the court as against the Respondents in the cross-petition and all consequential orders. The application was brought on the ground that Hodima was not served with the cross-petition.
6. The 3<sup>rd</sup> application was brought by the 1<sup>st</sup> Respondent by way of a Notice of Motion dated 11<sup>th</sup> June 2020. In this application, the 1<sup>st</sup> Respondent sought a stay of execution of the judgment delivered on 5<sup>th</sup> May 2020 pending the hearing and determination of an appeal that the 1<sup>st</sup> Respondent had lodged in the Court of Appeal.
7. In a ruling delivered on 18<sup>th</sup> March 2021 on the three applications that were heard together, the court found no merit in the Petitioners' application for review dated 8<sup>th</sup> May 2020 and dismissed the same. Hodima's application dated 22<sup>nd</sup> May 2020 was similarly dismissed by the court. With regard to the 1<sup>st</sup> Respondent's application for stay, the court found the same to have merit and stayed the judgment delivered on 5<sup>th</sup> May 2020, the decree issued on 8<sup>th</sup> May 2020 and all consequential orders. The court made a further order that the status quo on the ground be maintained pending the hearing and determination of the appeal by the 1<sup>st</sup> Respondent. The court also restrained the 1<sup>st</sup> Respondent from evicting the Petitioners and/or taking possession of the suit property pending the hearing and determination of the said appeal by the 1<sup>st</sup> Respondent.
8. A few months after the said ruling, the Petitioners brought another application by way of a Notice of Motion dated 7<sup>th</sup> October 2021. In the application, the Petitioners sought an order that one, Captain Jotham Odera be found in contempt of the orders of the court made on 18<sup>th</sup> March 2021 and be committed to civil jail. The Petitioners averred that despite the said orders made on 18<sup>th</sup> March 2021, the said Captain Jotham Odera who was an agent of the Respondents had taken possession of the suit property. In a ruling delivered on 10<sup>th</sup> December 2021, the court found Captain Jotham Odera in contempt of court and sentenced him to pay a fine of Kshs. 200,000/- or serve a 30 days jail term.
9. The next application was brought by the Attorney General on behalf of the 2<sup>nd</sup> Respondent. In its application dated 13<sup>th</sup> May 2022, the Attorney General sought a temporary stay of execution of the said orders made on 10<sup>th</sup> December 2021 pending a ruling by the Court of Appeal on an application for stay of execution pending appeal that the Attorney General had lodged in the Court of Appeal. The court found no merit in the application and dismissed the same in a ruling delivered on 24<sup>th</sup> November 2022.



10. Instead of waiting for the hearing and determination of the appeal pending in the Court of Appeal, the parties have continued in the same trajectory. I have before me once again, two applications, the first one, by the 1<sup>st</sup> Respondent and the second one by the Petitioners. In their application dated 9<sup>th</sup> August 2023, the 1<sup>st</sup> Respondent sought an order for the review and/or variation of the ruling of 18<sup>th</sup> March 2021 to define the status quo order made in that ruling to mean that the rent collected from the tenants residing on the suit property be paid to the 1<sup>st</sup> Respondent or in the alternative, that the rent be deposited in court until the appeal before the Court of Appeal was heard and determined. The application was brought on the grounds that the court had in its judgment delivered on 5<sup>th</sup> May 2020 found that the 1<sup>st</sup> Respondent was the lawful owner of the suit property. The 1<sup>st</sup> Respondent averred that in its ruling of 18<sup>th</sup> March 2021, the court had made among other orders, an order restraining the 1<sup>st</sup> Respondent from evicting the Petitioners from the suit property pending the hearing and determination of the appeal pending in the Court of Appeal. The 1<sup>st</sup> Respondent averred that the suit property had tenants who were paying rent to the Petitioners and that the Petitioners had no legal justification for continuing to collect rent from the suit property the court having made a finding that the suit property was owned by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent averred that in its ruling of 18<sup>th</sup> March 2021, the court did not consider the issue of the rental income that was being collected from the tenants on the suit property. The 1<sup>st</sup> Respondent averred that it had been prejudiced by the said orders made on 18<sup>th</sup> March 2021 since it had been unable to collect rent from the suit property although the property was found by the court to belong to it. The 1<sup>st</sup> Respondent averred that the orders of 18<sup>th</sup> March 2021 should be reviewed and varied to indicate that the rent from the suit property shall be collected either by the 1<sup>st</sup> Respondent or be paid in court pending the hearing of the pending appeal in the Court of Appeal.
11. The Petitioners opposed the 1<sup>st</sup> Respondent's application through a replying affidavit sworn by the 1<sup>st</sup> Petitioner on 8<sup>th</sup> September 2023. The Petitioners averred that the orders of stay granted by the court on 18<sup>th</sup> March 2021 were granted on the 1<sup>st</sup> Respondent's application in which it sought among others a stay of execution of the judgment that had been made in its favour. The Petitioners averred that the terms of the order made on 18<sup>th</sup> March 2021 were clear that the Petitioners were to remain in possession of the suit property and the 1<sup>st</sup> Respondent was restrained from evicting it from the property. The Petitioner averred that they were entitled to receive rent from the tenant on the suit property pending the determination of the appeal to the Court of Appeal. The Petitioners averred that the application was brought after inordinate delay and that no valid grounds had been put forward to warrant the granting of the orders sought. The Petitioners averred that an attempt by the employees of the 2<sup>nd</sup> Respondent to interfere with the Petitioners' possession of the suit property was met with an application for contempt of court that was allowed by the court and appropriate orders issued.
12. The 1<sup>st</sup> Respondent filed a further affidavit dated 25<sup>th</sup> September 2023. The 1<sup>st</sup> Respondent averred that in its ruling of 18<sup>th</sup> March 2023, the court did not consider the issue of rent which was being paid by the tenants in occupation of the suit property. The 1<sup>st</sup> Respondent averred that the court only dealt with the issue of possession of the suit property which the Petitioners had continued to enjoy. The 1<sup>st</sup> Respondent averred that the said orders needed to be reviewed to correct the ambiguity in the same. The 1<sup>st</sup> Respondent averred that the orders sought would not prejudice the Petitioners in any way as they will remain in possession of the property.
13. The Petitioners' application was brought by way of a Notice of Motion dated 1<sup>st</sup> September 2023. In the application, the Petitioners sought orders that Captain Jotham Odera and one, Evans Gatende be committed to civil jail for a period not exceeding six months and/or be fined as the court may determine on its discretion for disobedience of the order issued on 18<sup>th</sup> March 2021. The application was brought



on several grounds. The Petitioners averred that the orders made by the court on 18<sup>th</sup> March 2021 which restrained the 1<sup>st</sup> Respondent from evicting the Petitioners from the suit property were served upon Captain Jotham Odera who was stationed on the suit property and the OCPD Kisumu Central. The Petitioners averred that despite being served with the order, the said Captain Jotham Odera and one, Evans Gatende had barred the Petitioners from accessing the suit property. The Petitioners averred that it was in the interest of justice that the two be punished for their contempt of court to deter lawlessness. In their affidavit in support of the application, the Petitioners contended that Captain Jotham Odera and one, Evans Gatende had taken possession of the suit property.

14. The Petitioners' application was opposed by the 1<sup>st</sup> Respondent through a replying affidavit of Stanley Gitari dated 25<sup>th</sup> September 2024. The 1<sup>st</sup> Respondent contended that none of the alleged contemnors were servants or agents of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent averred that the 1<sup>st</sup> Respondent was a stranger to the acts of contempt alleged in the Petitioners' application. The 1<sup>st</sup> Respondent denied that the 1<sup>st</sup> Respondent or its agents had evicted the Petitioners from the suit property. The 1<sup>st</sup> Respondent denied that the 1<sup>st</sup> Respondent had committed acts of contempt. The 1<sup>st</sup> Respondent urged the court to dismiss the Petitioners' application.
15. The two applications were heard together through written submissions. The 1<sup>st</sup> Respondent filed submissions dated 19<sup>th</sup> February 2024 while the Petitioners filed submissions dated 2<sup>nd</sup> April 2024. I have considered the two applications together with the affidavits filed in support thereof. I have also considered the submissions filed by the advocates for the parties and the authorities filed in support thereof. I will consider the two applications one after the other starting with the 1<sup>st</sup> Respondent's application for review.
16. The only issue for determination in the 1<sup>st</sup> Respondent's application dated 9<sup>th</sup> August 2023 is whether a sufficient basis has been laid to justify a review of the court order made herein on 18<sup>th</sup> March 2021. The court's power to review its orders and decrees is provided for in Section 80 of the [Civil Procedure Act](#) as follows:

“ Any person who considers himself aggrieved –

  - a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or
  - b. By a decree or order from which no appeal is allowed by this Act.

May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
17. Order 45 of the Civil Procedure Rules lists specific grounds upon which an application for review can be made as follows:
  - a. Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed.
  - b. Where there is a mistake or error apparent on the face of the record.
  - c. For any other sufficient reason



18. The Court of Appeal set out the requirements to be satisfied by an applicant seeking review in Francis Origo & another v. Jacob Kumali Mungala, Eldoret CA No. 149 of 2001[2005]eKLR as follows:

“...it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.”

19. Similarly, in Kenya Power & Lighting Company Limited v. Benzene Holdings Limited t/a Wyco Paints, Nairobi C.A 132 of 2014[2016]eKLR, the requirements were set out as follows:

“To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay.”

20. The scope of the court’s jurisdiction to review its own orders was defined in John [Kamau Rubangi v Kenya Reinsurance Corporation, Civil Appeal No. 208 of 2006](#)[2012]eKLR as follows:

“It is important to bear in mind that Order 44 Rule 1 of the Civil Procedure Rules sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground of review. All these are grounds of appeal.”

21. The 1<sup>st</sup> Respondent did not come out clearly in the application as to the basis or ground upon which its application was made. I will take it that the application was based on “any other sufficient reason”. Sufficient cause was defined in Attorney General v Law Society of Kenya & another [2017]eKLR as follows:

“Sufficient cause or good cause in law means:

22. ...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See Black’s Law Dictionary, 9th Edition, page 251.

23. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

24. I am not satisfied that the 1<sup>st</sup> Respondent has shown sufficient cause to warrant the review of the orders made herein on 18<sup>th</sup> March 2021. The orders sought to be reviewed were made on the 1<sup>st</sup> Respondent’s application for a stay of execution pending appeal. The 1<sup>st</sup> Respondent was aware that there was a tenant on the suit property who was paying rent to the Petitioners. The 1<sup>st</sup> Respondent was aware that the court had made a declaration that the title held by the Petitioners in respect of the suit property was



illegal, null and void. For reasons that are not clear, in its application, the 1<sup>st</sup> Respondent sought a stay of execution of the entire judgment including the part of the judgment that was in its favour. I am of the view that if the 1<sup>st</sup> Respondent wished that the court should determine the issue of rent collection, the issue should have been raised in the said application for stay. The court cannot be called upon to review its decision on an issue that was within the knowledge of a party and in respect of which the party had an opportunity to raise at the time the order sought to be reviewed was made. The court cannot allow parties to litigate or bring applications in piecemeal. I therefore find no merit in the 1<sup>st</sup> Respondent's application. I also agree with the Petitioners that the application was brought after an inordinate delay which delay was not explained. The 1<sup>st</sup> Respondent's application is therefore for dismissal.

25. The disposal of that application takes me to the Petitioners' Notice of Motion dated 1<sup>st</sup> September 2023 seeking an order that Captain Jotham Odera and one, Evans Gatende be committed to civil jail for a period not exceeding six months and/or be fined as the court may determine on its discretion for disobedience of the order issued on 18<sup>th</sup> March 2021. In *Hardkinson v. Hardkinson* [1952] ALL ER 567, the court stated that:

“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 unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying 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.”

In *Mutitika v. Baharini Farm Ltd.* [1985] KLR 227 it was held that:

- i. “A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.
- ii. The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.
- iii. The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.”

35. In *Micheal Sistu Mwaura Kamau v. Director of Public Prosecutions & 4 others* (2018) eKLR the Court of Appeal set out the law on contempt as follows:

“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. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See *Mutitika v. Baharini Farm* (supra) and *Republic v. Ahmad Abolfathi Mohammed & Another* (supra).”



26. In *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, the court stated as follows:

“We now revisit the issue of service. Was there service of the order said to have been disobeyed on the respondent? There is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect. In that respect, this case can be distinguished from *Justus Kariuki Mate & Another vs Hon. Martin Wambora* (Wambora case) supra cited by learned counsel for the applicant. On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra). Kenya’s growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of *Basil Criticos Vs Attorney General and 8 Others* [2012] eKLR pronounced himself as follows:-

“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary”

27. This position has been affirmed by this Court in several other cases including the Wambora case (supra). It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.

28. ...Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client’s case.”

29. It is on the foregoing principles that the Petitioners’ contempt of court application falls for consideration. It is not in dispute that the court issued an order on 18<sup>th</sup> March 2021 restraining the 1<sup>st</sup> Respondent from evicting the Petitioners from the suit property. The burden was on the Petitioners to prove that the said order was disobeyed by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent has denied that it has evicted the Petitioners from the suit property. The 1<sup>st</sup> Respondent has averred that the suit property is occupied by a tenant who is paying rent to the Petitioners. In their application and the affidavit filed in support thereof, the Petitioners claimed that the alleged contemnors had taken possession of the suit property. The Petitioners did not state when and how the alleged contemnors took possession of the suit property. One of the alleged contemnors, Captain Jotham Odera had been found guilty of contempt of court and was sentenced. The court found that he had taken possession of the suit property contrary to the said court order. If he continued in possession of the suit property, the Petitioners did not need to file a fresh application to cite him for contempt. They should have simply called for further punishment. It is however doubtful if the said alleged contemnor is still in possession of the suit property. In their submissions, the Petitioners raised a completely new charge of contempt. The Petitioners claimed that the 1<sup>st</sup> Respondent had approached one of their existing tenants to enter into a new lease with it and to pay rent to it. It is not clear how this approach to the said tenant amounted to taking possession of the suit property or evicting the Petitioners from the suit



property. It is also not clear how the alleged contemnors were involved in the approach that was made to the said tenant. It is not disputed that the alleged contemnors are not agents or servants of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> alleged contemnor is a police officer. It has not been explained to the court how the said police officer was involved in the 1<sup>st</sup> Respondent's internal business affairs. In any event, there is no evidence that the 1<sup>st</sup> Respondent entered into a lease with the said tenant of the Petitioners in respect of the premises which it was occupying. The issue of the Petitioners having been evicted from the suit property cannot therefore arise. A case has therefore not been made to warrant the grant of the orders sought by the Petitioners.

30. The upshot of the foregoing is that the Notice of Motion application dated 9<sup>th</sup> August 2023 by the 1<sup>st</sup> Respondent and the Notice of Motion dated 1<sup>st</sup> September 2023 by the Petitioners have no merit. The same are dismissed with no order as to costs.

**DELIVERED AND DATED AT KISUMU ON THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2024**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Petitioners

Ms. Moraa for the 1<sup>st</sup> Respondent

Ms. Swaka for the 4<sup>th</sup> Respondent

Ms. J. Omondi-Court Assistant

