



Osango & 2 others v ganda (Sued as a Legal Representative of the Estate of Walter Ogada Onoka (Deceased) & 2 others (Environment and Land Appeal E046 of 2024) [2024] KEELC 6877 (KLR) (22 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6877 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E046 OF 2024
SO OKONG'O, J
OCTOBER 22, 2024**

BETWEEN

**RICHARD COURT OSANGO 1ST APPELLANT
PETER OUKO OSANGO 2ND APPELLANT
CONSOLATA SHIKUKU OSANGO 3RD APPELLANT**

AND

**JAHANES ASUNA OGANDA (SUED AS A LEGAL REPRESENTATIVE OF THE ESTATE OF WALTER OGADA ONOKA (DECEASED)) 1ST RESPONDENT
LAND REGISTRAR, KISUMU 2ND RESPONDENT
MONTENZUMA MONALISA FUNERAL HOME 3RD RESPONDENT**

RULING

1. What is before me is the Appellants' application brought by way of a Notice of Motion dated 6th July 2024 in which the Appellants have sought the following orders;
 1. Spent
 2. Spent
 3. That the court be pleased to grant stay of further proceedings in KISUMU CMELC No. E045 of 2023, Johanes Asuna Ogada v. Richard Court Osango & 4 others pending the hearing and determination of this appeal.
 4. That the costs of the application be in the appeal.



2. The application which is supported by the affidavit of the 2nd Appellant was brought on several grounds. The Appellants contended that the 1st Respondent had filed a suit against the Appellants at the lower court in KISUMU CMELC No. E045 of 2023, Johanes Asuna Ogada v. Richard Court Osango & 4 (the lower court) over a land dispute. The 1st Respondent sought and obtained a temporary order of injunction against the Appellants on 9th August 2023. The lower court issued an order restraining any dealings or construction on the suit land. The 1st Respondent thereafter filed an application seeking an order for the Appellants to be committed to civil jail for disobeying the said temporary order of injunction. The application was heard and the lower court in a ruling delivered on 12th June 2024 made a finding that the Appellants had indeed disobeyed the said order of injunction. They were dissatisfied with the said ruling and filed this appeal against the same. The lower court was now scheduled to sentence them. They were apprehensive that the lower court was likely to sentence them to serve a jail term which would be a total violation of their constitutional rights. They had an arguable appeal since the lower court found them in contempt of orders that were not extracted and served upon them and without them having been served personally with the contempt application.
3. The Appellants' application was opposed by the 1st Respondent through a replying affidavit filed on 1st October 2024. The 1st Respondent (hereinafter referred to only as "the Respondent") termed the application as lacking in merit and an abuse of the process of the court. The Respondent averred that the Appellants were represented in the lower court by an advocate who opposed the application for a temporary injunction that the Respondent had filed against the Appellants. The Respondent averred that the lower court delivered its ruling on the injunction application on 9th August 2023 in the presence of the parties and their advocates. The Respondent averred that since the Appellants and their advocates were present in court when the ruling was delivered, the Appellants were aware of the court order which restrained them from in any way interfering with all that parcel of land known as Kisumu/Korando/1895 (the suit property) pending the hearing of the lower court suit. The Respondent averred that the Appellants continued with activities on the suit property the said order of the lower court notwithstanding. The Respondent averred that upon being served with the application for contempt, the Appellants responded through grounds of opposition in which they raised frivolous grounds among them that the lower court had no jurisdiction to punish them for contempt. The Respondent averred that the Appellants' appeal did not have good prospects of success. The Respondent averred that the appeal was premature in that the Appellants had not been sentenced and should have waited to appeal against both conviction and sentence. The Respondent averred that the appeal was intended to bar the lower court from sentencing the Appellants to delay the determination of the lower court suit. The Respondent averred that the Appellants' contempt was continuing and that the court should refrain from interfering with the sentencing of the Appellants the Appellants having been found in contempt.
4. The Appellants' application was heard by way of written submissions. The Appellants filed submissions dated 15th September 2024. I have not seen on record the Respondent's submissions in reply. The Appellants cited Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000 and submitted that the guiding principles on whether or not to grant an order for a stay of proceedings on a decree or order appealed from are;
 1. The order is discretionary to be exercised in the interest of justice.
 2. Whether it is in the interest of justice to grant the order and if so, on what terms.
 3. The court should weigh the pros and cons of granting or not granting the order.



4. Among the factors the court should consider is the need for expeditious disposal of cases, whether the intended appeal is arguable, the optimum utilization of judicial time and whether the application has been brought timeously.
5. The Appellants submitted that they had an arguable appeal and that the appeal would be rendered nugatory if the stay sought was not granted. The Appellants submitted that the Respondent would not suffer any prejudice if the application was allowed and urged the court to exercise its discretion in favour of allowing the application.
6. I have considered the Appellants' application together with the affidavit filed in support thereof. I have also considered the affidavit filed by the Respondent in opposition to the application. Finally, I have considered the submissions by the advocates for the Appellants. Based on the principles that were enunciated in the case of *Global Tours & Travels Limited (supra)*, what I need to determine are; whether the Appellants have an arguable appeal, whether the appeal would be rendered nugatory if the stay sought is not granted and whether it would serve the interest of justice to grant the order sought. Before considering the merit of the application I wish to restate the law on contempt.
8. 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.”
9. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 the court cited the case of *Gulabchand and Popatlal Shah & Another*, Civil Application No. 39 of 1990 in which the Court of Appeal stated that:

“...It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors...”
10. In *Central Bank of Kenya & Another v Ratilal Automobiles Limited & Others* Civil Application No. Nai. 247 of 2006, the court stated that:

“Judicial power in Kenya vests in the Courts and other tribunals established under *the Constitution* and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.”
11. In *Awadh v. Marumbu (No 2)* No. 53 of 2004 [2004] KLR 458, the court stated that:

“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.”



12. In Micheal Sistu Mwaura Kamau v. Director of Public Prosecutions & 4 others [2018] eKLR the Court of Appeal explained the law on contempt of court 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).”

13. 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 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”

14. 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.

“...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 behooves him/her to report back to the client all that transpired in court that has a bearing on the client’s case.”



15. It was on the foregoing principles that the Respondent's application in the lower court was to be considered. It is not disputed that the Appellants did not file an affidavit in response to the contempt of court application in the lower court. As correctly contended by the Respondent in his replying affidavit, all the factual averments in the affidavit in support of the contempt application were not rebutted by the Appellants. The issues such as lack of service of the order and lack of personal service of the application now raised in the appeal were never raised by the Appellants in an affidavit before the lower court. The Appellants chose to respond to the contempt application through grounds of opposition. I have looked at the grounds on which the Appellants opposed the contempt application in the lower court such as lack of jurisdiction of the lower court to punish for contempt and lack of personal service of the order. I have to say based on the authorities cited above that the appeal before this court does not have good chances of success.
16. I am also not persuaded that the appeal would be rendered nugatory if the stay sought is not granted. The Appellants are yet to be sentenced. This court cannot speculate on the sentence the lower court would impose upon the Appellants. In the absence of a sentence, there is no basis upon which this court can find that the Appellants' appeal would be rendered nugatory. I also agree with the Respondent that granting of the order sought would delay the hearing of the main suit pending before the lower court.
17. Due to the foregoing, I am not persuaded that it will be in the interest of justice to grant the orders sought by the Appellants. For that reason, I decline to exercise my discretion in favor of the Appellants. I find no merit in the Notice of Motion application dated 6th July 2024. The application is dismissed with costs to the 1st Respondent.

DATED AND DELIVERED AT KISUMU ON THIS 22ND DAY OF OCTOBER 2024

S. OKONG'O

JUDGE

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

Mr. Ogenga for the Appellants

Mr. Onyango C. for the Respondents

Ms. J. Omondi-Court Assistant

