



**Otieno v Obado & 2 others (Environment & Land Case  
E011 of 2022) [2023] KEELC 613 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 613 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE E011 OF 2022  
MN KULLOW, J  
JANUARY 24, 2023**

**BETWEEN**

**TOM VICKY OTIENO ..... APPELLANT**

**AND**

**DAUDI OKOTH OBADO ..... 1<sup>ST</sup> RESPONDENT**

**JOHN ODONGO OBADO ..... 2<sup>ND</sup> RESPONDENT**

**SAMSON OBADO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By Notice of Motion dated May 20, 2022, the appellant/applicant sought the following orders: -
  - a. Spent.
  - b. That this honourable court be pleased to issue warrants of arrest against the respondents for breach of court's Stay Orders issued on April 20, 2022 and dated May 19, 2022.
  - c. A Permanent Order do issue restraining the Defendants/ Respondents, their agents, representatives and any person for that matter from trespassing, entering, accessing, erecting anything, using, alienating, selling, fencing and/or using in whatever form the land title Number Kanyamkago/ Katieno/133 pending the hearing and determination of the applicant's case.
  - d. Costs to be in the cause.
2. The application is based on the 9 grounds thereof and on the supporting affidavit sworn on even date by one Fredrick Nyamgeroh; a holder of duly executed Power of Attorney, authorized to swear the affidavit on behalf of the applicant. He avers that the Respondents have moved into the suit land and commenced the building of a perimeter wall with the intention of erecting permanent structures



against the orders for stay of execution issued by the trial court and he annexed photographs in support of the said averments.

3. As a result of the said illegal activities, the respondents have denied the Applicant access to the said suit property. He therefore maintained that there is need to have the respondents arrested for the breach of the court orders.
4. It is further his claim that even though the orders for stay of execution were issued by the trial court, he has since filed his Memorandum of Appeal which has a high probability of success. However, the said Appeal is still pending for hearing and/or directions.
5. It is also his contention that unless the orders sought are granted, the Appeal filed shall be rendered nugatory and he stands to suffer prejudice. He thus urged the court to allow the Application in the interest of justice.
6. The application was opposed. The respondents filed a replying affidavit sworn by the 1<sup>st</sup> respondent on the June 30, 2022 on his own behalf and on behalf of the 2<sup>nd</sup> & 3<sup>rd</sup> respondents. He averred that their advocate on record had not initiated any execution process on costs which was the only award granted vide the Ruling delivered on 20/04/2022 and whose effect was to strike out the suit with costs.
7. With regard to the issue of contempt; it is his contention that the instant Application had not been brought under the provisions of section 5 of the *Judicature Act* cap 8, which is the governing statute in contempt of court proceedings in Kenya. He further maintained that in the event that there was contempt, the subject Application ought to have been filed before the court that issued the orders allegedly disobeyed.
8. It is thus their claim that the Applicant was seeking to have permanent orders of injunction through the back door having failed to obtain the same in the trial court. He maintained that the Application was legally untenable and urged the court to dismiss the instant Application as allowing the same would be highly prejudicial to them.
9. The Application was disposed by way of written submissions. However, from a perusal of the court record, I have noted that only the Respondents filed their submissions, which I have read and taken into account in arriving at my decision. Be that as it may, I will proceed to render my ruling as hereunder;

#### **ANALYSIS AND DETERMINATION**

10. The sole issue arising for determination herein is whether the Application dated May 20, 2022 is merited and whether the applicant is entitled to the reliefs sought therein.
11. The law in contempt of court proceedings is to be found at section 5 of the *Judicature Act* and Rule 81.4 of the *English Civil Procedure Rules*.
12. The elements to be proved in contempt proceedings were discussed in the South African case of *Kristen Carla Burchell vs Barry Grant Burchell* where it was held that in order to succeed in civil contempt proceedings, the applicant has to prove;
  - i. the terms of the order,
  - ii. Knowledge of these terms by the Respondent,
  - iii. Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred...



13. The Applicant contends that despite there being an Order of Stay of Execution Orders issued by the trial court on 20/04/2022; the Respondents have commenced the building of a perimeter wall with the intention of erecting permanent structures in breach of the stay orders. He further contends that as a result of the said actions by the respondents, he has been denied access into the suit property.
14. The respondents on the other hand maintained that no execution process on costs had been initiated given that costs was the only positive award granted vide the Ruling of the trial court delivered on 20/04/2022.
15. The terms of the order and the knowledge of the said terms by the Respondents have not been disputed. What appears to be in dispute is whether there was willful disobedience by the respondents. From the foregoing, it is clear that the parties herein have taken rival positions on the import and interpretation of the trial courts; Ruling and the temporary Order of Stay of Execution issued on the 20/04/2022 and as a consequence whether there was been a willful disobedience of the said orders or not. While the applicant contends that the acts by the Respondents amount to contempt of the courts orders on stay of execution and which warrant their arrest and committal, the respondents' central response to the said allegations by the applicant is that there has been no willful disobedience of the order of court on their part.
16. I now seek to demystify the import of the trial court ruling delivered on the 20/04/2022 and the subsequent stay orders issued in order to clearly determine the 3<sup>rd</sup> condition to be proved in a claim for contempt of court orders has been met. An essential element in contempt proceedings is that the alleged contemnors must have committed a willful and deliberate disobedience or breach of the orders issued by the court.
17. R. Mwongo J. in the case of *Catherine Njeri Maranga v Serah Chege & another* [2017] eKLR cited with approval the case of *Western College of Arts and Applied Sciences v Oranga & others* (1976-80) 1 KLR, the court of Appeal for East Africa stated in respect of stay of execution, stated as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this court, in and application for stay, it is so ordered”
18. From a critical look at the trial court ruling; it is clear that the court did not order for anything to be done or to refrain from being done save for the costs of the suit. The said order for striking out is therefore incapable of execution since the same is a negative order. Neither of the parties was ordered and/or directed to do something or refrain from doing something. Further, the effect of the striking out the suit with costs is that, the only positive order flowing from the said ruling is the payment of the costs, to this end I agree with the Respondents.
19. Further, the applicant has not adduced any evidence to prove that the respondents have commenced execution proceedings as to the costs of the suit awarded, no copy of the bill of costs has been annexed or a certificate of costs of the assessed amounts has been annexed. It is therefore clear that there been no disobedience of the positive award which was stayed by the court, that is the execution of the costs of the suit payable.



20. This position was buttressed in the case of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] e KLR the Court of Appeal (Kantai J.A) held as follows:

“An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co. Advocates v National Insurance Corporation* (Civil Appeal No. 13 of 1984) where it was stated:

‘..... an order for stay of execution must be intended to serve a purpose ...’

21. Guided by the aforementioned decisions; it is the finding of this court that there was no willful disobedience of the stay orders issued on the 20/04/2022 and the Respondents cannot therefore be said to have been in contempt of the said orders. Consequently, prayer (b) in the Application is not merited and hereby fails.
22. The applicant has further sought for the grant of permanent restraining orders against the respondents, their agents, representatives and any person for that matter from trespassing, entering, accessing, erecting anything, using, alienating, selling, fencing and/or using the suit land. It is my humble view that such orders are not legally tenable at this stage. Further, and without prejudice to the foregoing, the same can only be granted upon the hearing and determination of the suit on merit unless the applicant has satisfactorily demonstrated why the same can be issued in the interim. The applicant herein has not adduced any proof to warrant the grant of the permanent orders at the interlocutory stage. Prayer (c) fails as well.
23. In view of the above, I find that the Applicant has failed to prove to the required standard his claim on contempt of court orders to warrant the grant of the reliefs sought.

## CONCLUSION

24. In the premises, I accordingly find that the Application dated May 26, 2022 is not merited and the same is hereby dismissed with no orders as to costs. However, since the Memorandum of Appeal has since been filed and further action or construction or development on the suit land may interfere with the subject land and render the Appeal nugatory; I hereby Order for the Status Quo to be maintained pending the hearing and determination of the Appeal. Further, the Respondents are hereby directed not to put up any permanent structures on the suit parcel and further to stop any ongoing constructions thereon.
25. The Appellant is hereby directed to file the Record of Appeal within 30 days. Parties are thereafter directed to file their respective submissions within 14 days for the Appellant and 14 days upon service for the Respondents. In default of strict compliance with the directions, the Status Quo Orders herein above issued shall be deemed to have lapsed.
26. Mention date on March 27, 2023 to confirm compliance and fix a judgment date. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 24<sup>TH</sup> DAY OF JANUARY, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**



**Ruling delivered in the presence of: -**

**Ms. Kijana for the Appellant**

**Mr. Singei for the Respondents**

**Tom Maurice - Court Assistant**

