



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oreng v Ngoge (Miscellaneous Application E126 of 2022)  
[2024] KEHC 435 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 435 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
MISCELLANEOUS APPLICATION E126 OF 2022  
PN GICHOHI, J  
JANUARY 25, 2024**

**BETWEEN**

**ELIJAH MOIRONGO ORENGE ..... APPLICANT**

**AND**

**GEOFRREY NGOGE ..... RESPONDENT**

**RULING**

1. The Applicant, through the firm of F. Ondigo & Company Advocates, moved this Court by a Notice of Motion dated June 10, 2022 under a certificate of urgency and under section 1 A , 1B and 3A of the Civil Procedure Act, order 22 rule 20, (31(1) , 33 and 34 of the Civil Procedure Rules, article 27,28 and 29 of the Constitution of Kenya seeking orders that :-
  - a. Spent.
  - b. Spent.
  - c. That the order committing him to civil jail on a mention dated on 2<sup>nd</sup> June 2022 on the basis of an ex-parte hearing and ex-parte judgement dated 30.11.2021 and a notice to show cause dated 24<sup>th</sup> April 2022 and all consequential orders issued therein be set aside, and that he be granted leave to defend the suit since his defence was filed and also file a response to the application to show cause in Ogembo Civil Suit No. 290 of 2019 as well challenge the plaintiff's bill of costs.
  - d. Costs of the application be in the cause.
2. The grounds are on the face of the Application and supported by the Affidavit sworn by Elijah Moirongo Oreng (the Applicant) on 10<sup>th</sup> June 2022. He depones that he is a small-scale tea farmer earning between Kshs. 3,000 - 5,000 per month. That sometime in the year 2017/2018, the Respondent approached him with the idea of having himself and his brother employed with Teachers Service Commission (TSC). The applicant therefore introduced the Respondent to a TSC official who



agreed to help them at a cost. The Respondent gave the TSC official Kshs. 100,000/= for the two positions but only the Respondent got a letter. Further, the Applicant depones that the Respondent's brother did not get a letter as the TSC official is now retired and, in the circumstances, the Applicant arranged for a meeting with the TSC official who agreed to refund the money to the Respondent in small bits and this agreement was put in writing as proposed by the Respondent. The Applicant further stated that he started paying the Respondent the money and at the time of filing the suit, he had remained with a balance of Kshs. 35,000/= but not Kshs. 110,000/= as claimed by the Respondent.

3. Further, he depones that he was served with the summons to enter appearance and he filed a defence to the suit. Giving the history of the hearing of the suit, the notice to show cause and the eventual committal to civil jail, he states that the whole court process was flawed as he did not appear for the notice to show cause or under any warrant of arrest before committal to civil jail since the court did not ensure strict compliance with section 38 of the *Civil Procedure Act* and order 22 rules 31 (1) of the *Civil Procedure Rules* to determine the applicant's ability to pay.
4. The respondent opposed this application by a preliminary objection dated 19/7/2022 and filed through the firm of Nyamwange & Co. Advocates seeking orders that the Application be dismissed with costs on the grounds that:-
  1. The Application herein is incurably defective, incompetent and bad in law.
  2. The Application is not founded on any substantive pleading.
  3. The reliefs sought are substantive in nature which cannot be granted through a miscellaneous Application.
  4. The third relief is incapable of being granted.
  5. The Respondent also filed a Replying Affidavit dated 19<sup>th</sup> July 2022 where he depones that the Applicant is a judgement debtor in Civil Suit No. 290 of 2019 at Ogembo Law Courts and has never settled the decretal sum and made it impossible for the Respondent to recover the same hence necessitating the need to hold him in civil jail after all procedures were duly followed. That the Applicant was however not in jail as at the time of filing the Application and therefore, the orders being sought are impossible to grant.
  6. The Applicant did not file any submissions. The Respondent filed his, dated 13<sup>th</sup> May 2023 reiterating the contents of the Replying Affidavit. He submits that the Applicant ought to have invoked the provisions of Order 22 of the Civil Procedure Rules before the lower court.
  7. Further, he submitted that the Applicant ought to have sought leave at the lower court if he was not satisfied or move High Court through a constitutional reference if at all his fundamental rights and freedoms were infringed. That the constitutional provisions which include article 27, 28, 29 and 50 (2) of *the Constitution* of Kenya have been drawn haphazardly and randomly into this miscellaneous application and the same do not serve any probative value. He therefore urges the court to dismiss the application with costs.

### **Determination**

8. Having considered the material placed before this court, the broad issue for consideration is whether the orders sought herein are capable of being granted.
9. On the onset, it is not disputed that the order seeking that the Applicant be released from civil jail has been overtaken by events as this court, differently constituted, considered the Application and issued



an order dated 17<sup>th</sup> June 2022, directing that the Applicant be released from the civil jail at GK Prison Kisii pending the hearing and determination of the Application.

10. The third prayer being sought by the applicant is mouthful. He is seeking several reliefs therein thus making it ambiguous. First, he is seeking setting aside of the lower court's ex parte judgement dated 31/11/2021 to enable him defend the suit being Ogembo Civil Suit No. 290 of 2019.
11. It is obvious that the matter before the trial court was at the execution stage. He laments that he filed defence that raises triable issues but he was not served with the hearing notice of the main suit and that as a consequence, he was not heard on merit. Those are issues that he never raised before the trial court but there is no evidence that the Applicant moved the trial court at the first instance to seek setting aside of the judgment in order for him to defend the suit.
12. Further, he laments the trial court's non-compliance with the Civil Procedure Rules before, as a judgment-debtor, he could be committed to civil jail for non-payment of the debt. He claims that he was not served with the Notice to Show Cause before being committed to civil jail. He therefore seeks that "the process server William Ogwara, who allegedly served him with Notice to Show Cause be summoned to appear before court and be cross-examined on the manner service, if any, date, time, place and manner of identification of the debtor for the court to be satisfied as to the genuineness of the process."
13. If the Applicant was dissatisfied with the process leading to his committal to civil jail, there is no evidence that he ever moved the trial court at the first instance under Order 22 of the Civil Procedure Rules to challenge the execution where the issues he is now raising could be addressed.
14. In the circumstances, the reliefs sought herein are substantive in nature. The Applicant's attempt to stop execution and seek setting aside of the said judgment through a Miscellaneous Application before this Court is therefore untenable.
15. If the Applicant intended to appeal against the trial court's judgment, there is no indication that he made any attempt to do so. There is no substantive Application and Memorandum of Appeal to enable this Court deal.
16. In the upshot, this Court is satisfied that the Application herein is defective and the constitutional provisions invoked herein cannot cure that defect. The consequences thereof are that the orders sought are not capable of being granted by this Court in the circumstances. The Court therefore makes the following orders:-
  1. The Respondent's Preliminary Objection dated 19<sup>th</sup> July, 2022 be and is hereby upheld.
  2. The Application dated 10<sup>th</sup> June, 2022 be and is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of**

**N/A for the Applicant**

**N/A for the Respondent**

**Laurene Njiru/ Aphline Court Assistant**

