



Ngaruiya v Mutuku (Being sued as the Chairman for and on behalf of Runda Paradise Residents Association) (Environment & Land Case E128 of 2021) [2023] KEELC 16643 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E128 OF 2021**

**JG KEMEL, J
MARCH 23, 2023**

BETWEEN

MUNGAI NGARUIYA PLAINTIFF

AND

THADDEUS MUTUKU DEFENDANT

**BEING SUED AS THE CHAIRMAN FOR AND ON BEHALF OF RUNDA
PARADISE RESIDENTS ASSOCIATION**

RULING

1. On November 10, 2021 the plaintiff filed his suit against the defendant seeking orders inter alia that the defendant has no contractual relationship with the plaintiff and the actions of the defendant purporting to demand service charge from the plaintiff are irregular, illegal, null and void and amounts to trespass of his property. He has urged for a permanent injunction restraining the said defendant from interfering with his quiet possession of the premises namely Maisonettes Nos 39 and 66 erected on LR No 12825/190 (the suit properties). In addition, he seeks general damages for trespass alongside costs of the suit.
2. He avers that he acquired the suit properties by way of lease agreements with MAHA Properties Ltd on one hand and Runda Paradise Management Ltd on the other at the cost of Kshs 20 Million. That Runda Paradise Management Ltd has the mandate and obligation to manage the common areas of the areas of the estate of Runda Paradise for and on behalf of the plaintiff and all other home owners within the estate.
3. The plaintiff avers that despite the mandate of the management company, on the November 3, 2021 he received a demand letter from the defendant purporting to demand outstanding service charge from the plaintiff. In addition, he alleges that the defendant threatened to terminate and or withhold the



services being water, electricity, garbage collection to the plaintiff. He alleges that access to his premises has been curtailed by the defendant's agents at the main gate.

4. On May 8, 2022 the defendant denied the plaintiff's claim and added that the plaintiff owns additional maisonettes being 60, 64, 72 and 75. That Runda Paradise Management Company Ltd (Management Company) and Runda Paradise Residents Association (the Association) entered into an agreement and appointed the association to collect service charge, administer, manage and account for all the services in the estate. That the defendant is mandated with the management of common areas and service charge collected from home owners.
5. It is the defendant's case that the plaintiff owes Kshs 870,000/- which amount continues to accumulate on a monthly basis for services which have already been consumed by the plaintiff. Simultaneous with the filing of his plaint, the plaintiff filed a notice of motion dated November 9, 2021 seeking inter alia temporary injunction restraining the defendant from trespassing or in any manner interfering with his quiet possession, use, enjoyment of maisonettes 39 and 66. This application was compromised by the consent of the parties on February 22, 2022 in the following terms;

“Pending the hearing and determination of the suit, an order of temporary injunction be and is hereby issued restraining the defendant/respondent jointly and severally or their agents, successors, assigns or personal representatives or anyone acting on their behalf from dealing, trespassing, entering, managing and or in any manner whatsoever interfering with the plaintiff/applicant's quiet possession, use and enjoyment of Mansionettes Nos 39 and 66 erected on LR No 12825/190 (original number 12825/44)Kiambu, on condition that the plaintiff will continue to deal with the management company as he has done before including paying of any service charge upon the demand or invoice by the management company.’

6. On March 15, 2022 the defendant through their counsel Josephine Righa & Co Advocates served the plaintiff's advocates N K Mugo & Co Advocate with a demand letter requiring immediate and unconditional settlement of the invoice dated February 28, 2022 and in default the plaintiff would be held in contempt of the court orders. The invoice dated February 28, 2022 is annexed thereto and authored on the letter head of the management company.
7. The alleged non-compliance of the above court orders has triggered the application of August 31, 2022 filed by the defendant seeking the following orders;
 - a. The honorable court tribunal (sic) be pleased to cite Mr Mungai Ngaruiya in contempt of the orders of the honorable court given at Thika on February 22, 2022 and issued on March 25, 2022.
 - b. Consequently, upon order 2 being granted, the honorable court be pleased to order that Mungai Ngaruiya be summoned to attend the Hon court to show cause why he should not be committed to civil jail for a term not exceeding six (6) months for disobeying the Hon court's orders issued on March 25, 2022.
 - c. Consequently, upon order 2 & 3 above being granted, the honorable court's orders issued on March 25, 2022.
 - d. The costs of the application be provided for.
8. The motion is premised on the grounds thereat and supporting affidavit of even date of Thaddeus Mutuku, the chairman of the defendant company. It is averred that the plaintiff filed an application dated November 9, 2021 and settled in terms of para 5 above. Copy of the court order is annexed as



- TM-1. That the management company invoiced for the outstanding service charge on February 28, 2022 through his advocates, N K Mugo & Co Advocates *vide* a letter dated March 15, 2015 – see annexure TM-2 & TM-3 respectively. That despite such service and knowledge of the court order, the plaintiff to obey the court order eroding this court’s dignity hence the application.
9. In opposition, Mungai Ngaruiya, the plaintiff herein swore his replying affidavit on October 3, 2022 and termed the defendant’s application unmerited *ab initio*. He admitted that the parties reached and recorded a consent that was adopted as an order of the court on February 22, 2022 thus compromising his application dated November 9, 2021 restraining the defendants from inter alia interfering with his quiet possession and enjoyment of house Nos 39 and 66. That the said temporary injunctive orders were conditional to the plaintiff dealing with the management company as before including paying any service charge upon demand or invoice by the said management company.
 10. It is therefore his view that both parties had specific duty/responsibility to enjoy protection by the court. It is his case that the applicants disobeyed the court orders by disconnecting water, denying his agents, servants and employees free access to the properties including withholding garbage collection to his detriment. The guards at the gate acting on express instructions of the defendant actively denied him access. He denies being involved by the management company with respect to service charge and the letter March 15, 2022 was never served on him albeit being addressed to his advocates on record and making reference to an alleged invoice dated February 28, 2022. In addition, he argues that the impugned letter of March 15, 2022 did not give instructions to his counsel to forward or serve him with the invoice and further the applicant has not given any reasons why they did not serve the invoice upon him directly or any evidence showing that he had instructed his advocates to receive such invoice or communication regarding the suit properties.
 11. The respondent was emphatic that the applicant has no locus to bring the instant application on grounds that it’s neither a beneficiary of the order of February 22, 2022 nor has it brought its proceedings on behalf of the management company. In any event the applicant avers that he is the chairman of the association and duly authorised as such by the association. He has not demonstrated any authority to file this suit by the management company. In conclusion he urged the court to dismiss the motion dated August 31, 2022 for being unmeritorious with costs.
 12. Directions were taken to canvass the application by way of written submissions. At the time of writing this ruling, only the plaintiff had filed his submissions and list of authorities both dated December 5, 2022 through the firm of NK Mugo & Co Advocates.
 13. The plaintiff submitted that the applicant is not a beneficiary of the court order of February 22, 2022 and lacks the requisite locus standi in these proceedings. On whether the application is merited, the plaintiff argued that the court order was conditional upon him dealing with the management company and not the applicant. That it is actually the applicant who is in breach of the court order by interfering with the plaintiff’s peaceful enjoyment of the suit properties. That he has not disobeyed the court order since there is no complaint to that effect from the management company. He urged the court to dismiss the motion with costs.
 14. The main issue for determination is whether the application is merited.
 15. In determining so, the starting point is to underscore the relevance of court orders. This Hon court in the case of *James Muchina Wandutu v County Government of Murang’a & 5 others* [2019] eKLR emphasised that every person against whom a court order is made against has unqualified obligation to obey the order however unpalatable the order maybe. The Supreme Court in its ruling in *Teachers Service Commission v Simon P Kamau & 19 others* [2015] eKLR reiterated that the courts have been



given the powers to punish for contempt, in order to uphold the dignity of the courts. An aggrieved party may appeal against the decision of the court which imposes penalty for contempt.

16. Black's Law Dictionary 10th Edition at page 360 defines contempt as follows;

“contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

17. Section 29 of the Environment and Land Court Act provides that any person who refuses, fails or neglects to obey an order or direction of the court given under this act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.

18. Section 63 (c) of the Civil Procedure Act provides as follows;-

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed

—

a. ...

b. ...

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”

19. Order 40 rule 3 of the Civil Procedure Rules provides the consequences of contempt which includes in case of disobedience or breach of any terms of court order, an order for the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding 6 months. This goes to show that the punishment for contempt is not light seeing that other than attachment of the property of the guilty contemnor, the liberty of the contemnor is also at stake.

20. The standard of proving contempt of court was aptly discussed in the case of Gatharia K Mutikika v Baharini Farm Limited [1985] KLR 227 where it was held that contempt of court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is so because liberty of the alleged contemnor is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed.

21. In the case of Republic v Attorney General & another Ex parte Mike Maina Kamau [2020] eKLR the court citing with approval the High Court case of South Africa in the case of Kristen Carla Burchell v Barry Grant Burchell, Eastern Cape division case No 364 of 2005 case of outlined the ingredients for proving contempt of court that an applicant for contempt of court should prove that the terms of the order were clear and unambiguous and binding on the defendant; that the defendant had knowledge or proper notice of the orders; that he acted in breach of the terms of the order and that his conduct was deliberate.

22. The facts of this case are fairly straight forward as already enumerated in the introductory paragraphs of this ruling. The plaintiff has vehemently impugned the defendant's locus standi to lodge the instant application. While the issue of locus standi goes to the root of a case, the record before court speaks for itself in so far as the issue is concerned. The issue of locus standi is in the nature of a preliminary objection and is capable of disposing the suit in its entirety, however in applying the threshold for



preliminary objections set out in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*, [1969] EA 696, the objection would fail for not being a pure point of law. For this court to analyse and determine its veracity or otherwise, it must analyse facts of the case and call for evidence at the hearing.

23. Firstly, it is the plaintiff who sued the defendant as the chairman of the Runda Paradise Residents Association – see para. 2 of the plaint. In the lease agreement for the Plaintiff’s acquisition of the suit properties dated November 10, 2020, it is an express term of the agreement that the plaintiff purchased the houses for a lease period of 99 years starting March 1, 2014 less 30 days thereof. In the said lease, the head management company is described as the Runda Paradise Management Co Ltd while the secondary company is Runda Paradise Management A Ltd. It is also an express term that the company undertakes the management of common areas of the estate in accordance with terms of the agreement *inter alia* that the plaintiff would pay for the requisite service charges. See clauses D, 1.1.28, 4, 7, 22 and 23 of the lease agreement.
24. There is an agreement marked TM1 annexed to the replying affidavit of the defendant sworn on the January 26, 2022 which in the main is unchallenged and is between Runda Paradise Management Company Limited (the manager) on the one hand and Runda Paradise Residence Association (Association) on the second hand. The mandate of the management company is to manage and run the affairs of Runda Paradise Estate. The association is comprised of the registered owners of the houses and in the interim (pending the official handover by the manager- developer) is charged with administering service charge included in appendix A which interalia include security services, utility bills for common areas.
25. Is there any connection between the plaintiff and the defendant herein? The answer is found in MG-1 being the Sublease agreement dated November 10, 2020 between the Plaintiff and MahaProperties Ltd annexed in the plaintiff’s supporting affidavit sworn on November 9, 2021. Page 23 of MG-1 enumerates provisions on service charge thus;

- “ 2. Performance of the services and payment of the service charge
 2. 1 subject to the lessee paying to the head management company the charges and all other amounts required to be paid by the lessee under this sub-lease and otherwise complying with the terms, conditions, covenants and stipulations of this sub-lease the head management company shall (directly or through the requisite secondary management companies) perform the services throughout the term provided that the head management company shall not be liable to the lessee nor shall the lessee have any claim against the head management company or any of the secondary management companies in respect of.
 2. 1.1 any failure or interruption in any of the services by reason of necessary repair, replacement, alteration or maintenance of any equipment or apparatus or their damage or destruction or by reason of mechanical or other defect or breakdown or other inclement conditions or shortage of fuel, materials, water or labour, any causes beyond the head management company’s or the requisite secondary management company’s control or other circumstances amounting to force majeure or acts of god provided and to the extent that any such failure or interruption could not have been prevented or shortened by the exercise of proper care, attention, diligence and skill by the head management company or the requisite secondary management company or those undertaking the services on behalf of the head management company or the requisite secondary



management company and the head management company or the requisite secondary management company uses and continues to use its reasonable endeavours to restore the services in question; or [emphasis added]

2. 1.2”

26. From the clause 2.1.1. above it is expressly stated that the besides the management company, there are other affiliated organs that can be tasked to conduct the affairs of the management company. The court finds that there is a nexus between the defendant and the association which is owned by the house owners.
27. Besides, the plaintiff himself entered into a consent with the defendant equally through his counsel on February 22, 2022. That consent has not been set aside, appealed, reviewed or vacated by a court of competent jurisdiction. it is therefore valid and enforceable.
28. Is the plaintiff guilty of contempt? To answer the question the ingredients set out in para. 21 above have to be satisfied. To begin with, since recording the said consent which was adopted a court order on February 22, 2022, the plaintiff has not demonstrated that the order is ambiguous, vague or unintelligible to warrant non-compliance. If there was any difficulty with its compliance, the plaintiff was and still is at liberty to apply to court.
29. The second aspect is to determine whether the plaintiff had knowledge of the order. The plaintiff was and still is duly represented by counsel on record. In fact the plaintiff has not denied knowledge or existence of the said order and therefore the question of knowledge is answered in the affirmative. What the plaintiff is contesting is the service of the invoice upon his counsel but has not offered any iota of evidence of his compliance with the order in terms of payment of the outstanding service charges. The invoice dated February 28, 2022 indeed is authored on Runda Paradise Management Company Ltd Letter head. The invoice was served upon the plaintiff’s counsel who is a legally recognised agent of the plaintiff and deemed to be acting in the plaintiff’s best interests.
30. Lastly, is the plaintiff’s disobedience wilful and deliberate? The plaintiff has not refuted default of complying with the court order but argued that he was only required to deal with the management company and not the defendant. Further as already stated no evidence of payment even to the said management company has been availed before this court to demonstrate his good will or compliance if at all. The plaintiff cannot be allowed to speak from both ends of his mouth and enjoy protection of this court *vide* the exiting temporary injunctive orders with unclean. He who seeks equity must do equity and do so with clean hands.
31. The upshot of the foregoing is that the court finds that the plaintiff is guilty of contempt. The application is merited and allowed except for the prayer for costs.
32. Final orders for disposal;
 - a. The plaintiff, Mr Mungai Ngaruiya is granted 15 days to purge the contempt from the date of this ruling failing which he should appear before this honourable court on April 17, 2023 to show cause why he should not be committed to civil jail for disobedience of court orders issued on the February 22, 2022.
 - b. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23RD DAY OF MARCH, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI



JUDGE

Delivered online in the presence of;

Ondiek for the Plaintiff

Ochieng HB Ogeta for Defendant

Court Assistants – Kevin/Lilian

