



REPUBLIC OF KENYA



Mukora & 5 others v Ndiho & 2 others (Environment & Land Case 1222 of 2014) [2023] KEELC 16322 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1222 OF 2014**

**J OMANGE, J
MARCH 16, 2023**

BETWEEN

**STEPHEN GITAU MUKORA 1ST PLAINTIFF
JOAN NYOKABI MUNGAI 2ND PLAINTIFF
KEVIN MWAURA MUNGAI 3RD PLAINTIFF
ERIC KIARITHA MUNGAI 4TH PLAINTIFF
FAITH WAHU MUNGAI 5TH PLAINTIFF
SAMUEL MWAURA FELIX KARIUKI 6TH PLAINTIFF**

AND

**MUNGAI NDIHO 1ST DEFENDANT
PAULINE NJERI NDIHO 2ND DEFENDANT
SARAH WANJIRU NDIHO 3RD DEFENDANT**

RULING

1. This suit relates to the Properties known as Kabete/Lower Kabete/2581 and 2582.
2. The 1st plaintiff is the 1st defendant's brother, while the 2nd - 5th plaintiffs are the 1st defendant's children. The 6th defendant is a purchaser of the property while the 2nd and 3rd defendants are siblings of the 1st plaintiff and 1st defendant- sons of the late Robert Mwaura Ndiho. The Plaintiffs' claim against the Defendants is for the cancellation of titles to the suit properties and the properties be instead divided amongst the parties.



3. What is now before this court is the plaintiffs' notice of motion application dated September 21, 2022 seeking the following reliefs:
 - a. Spent
 - b. The defendants/respondent be summoned in open court to show cause why they should not be committed to civil jail for contempt of court orders dated 25/5/2015 and 2/3/2016.
 - c. The defendants/respondents to revert to status quo ante the suit properties Kabete/Lower Kabete/2581 and 2582.
 - d. Costs of this application be provided for.
4. The Application is based on the grounds that appear on the face of the motion and the 1st plaintiff's affidavit in support thereto, being that on May 25, 2015, this court issued status quo orders, which were served upon the Land Registrar, Kiambu yet the defendants caused a new road to pass through the suit properties, that the defendants have fenced the suit property and commenced construction thereon.
5. The plaintiffs assert that status quo orders were made on May 25, 2015, and later confirmed by a ruling of December 2, 2016. However, the 6th Plaintiff visited the property and discovered some activities akin to construction going on, in contempt of the said orders.
6. The plaintiffs exhibited a copy of the said orders of May 25, 2015, a copy of the encumbrance section indicating registration of the order, a copy of an order issued on March 18, 2016, a Certificate of search as at September 20, 2022 and Pictures of the site.
7. The application was served upon the defendants who filed a replying affidavit by Pauline Njeri Ndiho-the 2nd defendant. She opposed the application and asserted that the application was not specific as to which defendant was in contempt and should be summoned.
8. The 6th plaintiff swore a further affidavit in response to the 2nd defendant's replying affidavit reiterating his supporting affidavit. He contended that the orders of the court had been made in the presence of the parties' Advocates thus there was no need for personal service.
9. The plaintiff filed written submissions in support of their Application. Parties filed their respective submissions.
10. I have considered all the pleadings, exhibits and arguments filed in this application. The only issue for determination is whether the defendants should be held in Contempt of the court orders of May 25, 2015 and March 18, 2016.
11. Contempt of court is provided for under section 5 of the [Judicature Act](#). Section 5 thus provides as follows: -
 - "(1). The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of justice in England, and that power shall extend to upholding the authority and dignity of the subordinate courts."



12. Additionally, section 29 of the *Environment and Land Court Act* provides as follows;

“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.”

13. In order for one to be found to be in Contempt of Court, it must be established that the court order was valid, that the same was brought to the alleged contemnor’s attention and the alleged contemnor made some deliberate step to breach the same. As was held in the case of *Samuel M. N. Mweru & others v National Land Commission & 2 others* [2020] eKLR, where the Learned Judge held,

“38. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’[40] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. [41] Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).[42]

39. These requirements – that is the refusal to obey should be both willful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces.[43] Honest belief that non-compliance is justified or proper is incompatible with that intent.”

14. An applicant for a motion of contempt of court must establish two things: one, knowledge and understanding of the existence and content of orders preventing certain conduct by the alleged contemnors; and two, that such contemnors willfully acted contrary to these express court instructions.

15. The importance of obedience to Court orders cannot be gainsaid. In the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Ibrahim, J. (as he then was), underscored the importance of obeying court orders, stating:

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. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void. (emphasis)

16. Therefore, all court orders are important. Willful disobedience to an order of court must be punished provided that the order is still valid.

17. It is always critically important to ascertain the validity of any court order. This is because a finding of contempt of court may lead to the loss of liberty of a contemnor. Contempt of court orders are



meant to safeguard the dignity of the court and not necessarily to punish the contemnors. If the court finds that a party is in contempt of court, then it would not hesitate to punish the said contemnor. The elements of contempt must be proved above the probabilities as it involves the curtailment of a person's freedom or imposing a fine on the person. This means that the court must be satisfied that the elements have been proved.

18. The standard of proof in cases of contempt of court was explained in *Mutitika v Babarini Farm Limited* [1985] KLR 229, 234 where the Court of Appeal held that, "In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."
19. In the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR the court extensively discussed the issue of the burden and standard of proof for contempt thus:-

"...there must be "willful and deliberate disobedience of court orders." There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it."
20. In this case, the order of the court is said to have been issued on May 25, 2015 out of an interlocutory application, same as the one issued on March 18, 2016 emanating from the ruling of 2nd December 2015. The order exhibited to be issued on May 26, 2015 clearly state that they would be until inter partes hearing on June 8, 2015. Similarly, the ones issued on March 18, 2015 were expressed to subsist until July 22, 2016. The plaintiffs have not pointed out whether there were extensions that subsisted until the date of the alleged actions of contempt.
21. Orders made pending the hearing and determination of the suit are time bound. an order of injunction lapses by operation of the law under Order 40 Rule 6 if the suit is not determined within one year from the date of the order. The order provides as follows:

Order 40 Rule 6 – Lapse of injunction

A suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.
22. The Court of Appeal in *Erick Kimingichi Wapang'ana & another v Equity Bank Limited & another* [2015] eKLR held as follows:

"Rule 6 of Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months "unless," as the Rule further provides, "for any sufficient reason the court orders otherwise." In this case there was no subsequent order extending the injunction. Having been issued on October 11, 2011, the injunction order therefore lapsed on October 12, 2012..."



23. Under Order 40 Rule 6, the plaintiffs were required to fix the suit for hearing and determination within 12 months from the date of the injunction orders in issue. If this is not possible, then a formal application for the extension of the orders should be made, failing of which it lapses by operation of law.
24. The purpose of the above rule is to ensure that parties do not use the orders in place to delay the determination of a suit.
25. In this case, it is clear that the suit has not been heard and determined within 12 months of the orders in issue. No application for extension of the validity of the orders has been made. They therefore lapsed by operation of law, and thus cannot be the basis for citation for contempt of court. Further, the plaintiffs have not shown this court why any status quo ante should be reverted to.
26. In view of the foregoing, I find that the Application lacks merit and is dismissed. Costs shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF MARCH 2023.

JUDY OMANGE

JUDGE

In the presence of:-

Mr. Mugu for Plaintiffs/Applicants

No appearance for the Defendants

