



**Onyango v Muthoni & another (Environment & Land Case
191 of 2017) [2023] KEELC 17121 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17121 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 191 OF 2017
A NYUKURI, J
APRIL 26, 2023**

BETWEEN

PHILISTA PRUDENCE MINJA ONYANGO PLAINTIFF

AND

FLORENCE SHEILA MUTHONI 1ST DEFENDANT

OCS KAMULU POLICE STATION 2ND DEFENDANT

RULING

Introduction

1. Before court is a Notice of Motion dated 9th May 2022 filed by the Plaintiff/Applicant seeking the following orders;
 1. Spent.
 2. The Plaintiff/Applicant's advocate M/s Amboko & Company Advocates be granted leave to come on record after judgment.
 3. The Honourable Court be pleased to cite the 1st Respondent in contempt of the court's orders issued on 27th June 2019.
 4. Consequent upon Order (2) above being granted, the Honourable Court be pleased to order that the 1st Respondent be summoned to attend court on a date to be fixed by the court to show cause why she should not be committed to civil jail for a term of not exceeding six (6) months for disobeying the court's orders issued on 27th June 2019.
 5. That the Respondent be ordered to purge the contempt by removing the black cotton soil she disposed on the Applicant's land.



6. That this Honourable Court be pleased to issue such other consequential orders as may seem just and expedient.
7. The costs of this application be personally borne by the 1st Respondent.
2. The application is premised on the grounds listed on its face together with the affidavit sworn by the Plaintiff on 9th May 2022. The Applicant's case is that on 24th May 2019, this court delivered a judgment, upon which a decree was issued on 27th June 2019 to the effect that a permanent injunction was granted restraining the Defendant by herself, her servants, agent or whomsoever in any means howsoever from encroaching, trespassing, invading, uprooting mangoes, fencing, placing new beacons, alienating, disposing off or in any other manner interfering with parcel of land known as Mavoko Town Block 12/130. That the court further declared the Plaintiff as the sole owner of the aforesaid parcel.
3. The Plaintiff/Applicant further stated that although the 1st Respondent did not appear in this suit, the orders granted in the decree were served on her on 17th October 2019. Further that the 1st Respondent had disobeyed the decree of the court by dumping black soil on the suit land and purporting that the land is riparian land. That the decree has not been appealed against or set aside and that on 11th March 2022, the 2nd Respondent who had been directed to enforce the decree arrested Moses Njoroge David and Githiga Murage who are agents of the 1st Respondent who were found disposing black cotton soil into parcel Mavoko Town Block 12/130. She held the view that the 1st Respondent's acts had brought disrepute to the dignity of the court. She attached a copy of the judgment, an order issued on 21st January 2021, and a copy of the chargesheet against Moses and Githiga.
4. The application was opposed. Florence Sheila Wairimu Chogi filed a replying affidavit sworn on 30th June 2022. She stated that she was not the Defendant herein and denied being served with the decree issued in this case. She further stated that she is the registered proprietor of Mavoko Town Block 12/9334 measuring 2.10 Ha. Which she purchased in 2000. She maintained that parcel Mavoko Town Block 12/130 and Mavoko Town Block 12/9334 are separated by a river measuring 30 meters. Her position was that the issues raised were resjudicata as they were determined in the judgment. She maintains that the Applicant invaded her land which led to her obtaining orders of status quo on 22nd March 2022 in Machakos ELC Case No. E049 of 2021, and that it is the Applicant who is in contempt of the orders of the court. According to her, the persons charged in Makadara Law Courts were dumping black cotton soil on her parcel of land known as Mavoko Town Block 12/9334. The 1st Respondent annexed a copy of her National Identity Card, sale agreement, a copy of the title deed, an illegible map, judgment, orders of 15th December 2021 and 22nd March 2022 and a memorandum of appearance in Machakos ELC No. 49 of 2021.
5. In a rejoinder, the Plaintiff/Applicant filed a supplementary affidavit sworn on 3rd August 2022. She stated that the 1st Respondent is a party in this suit and was served with summons to enter appearance but only came to court after the application for contempt was served on her. She stated further that if the deponent of the replying affidavit was not a party to this suit, then her replying affidavit should be struck out. She maintained that the suit land was Mavoko Town Block 12/130 and not Mavoko Town Block 12/9334. She stated also that as the 1st Respondent alleged that their parcel is neighbouring the suit property, then there is a probability of encroachment on the suit property.
6. The application was canvassed by way of written submissions. On record are the Applicant's submissions dated 16th September 2022 and the 1st Respondent's submissions dated 11th October 2022; all of which this court has considered.



Analysis and Determination

7. I have carefully considered the application, the Applicant's supporting and supplementary affidavits as well as the 1st Respondent's replying affidavits together with the submissions. The issues that arise for determination are whether the firm of Amboko & Company Advocates ought to be granted leave to come on record for the Plaintiff in this matter and whether the Applicant has demonstrated that the 1st Respondent is in contempt of the judgment herein.
8. Order 9 rule 9 of the *Civil Procedure Rules* provides that where there is a change of advocate or when a party decides to act in person having previously engaged an advocate after judgment had been passed, then such change or intention to act in person can only be effected with an order of the court. In the instant case, the Plaintiff was represented by Nchoe, Jaoko & Company Advocates, who have been on record from the outset of this matter upto after judgment was entered herein on 27th June 2019.
9. As the Plaintiff has now instructed the firm of Amboko & Company Advocates to represent her, having previously engaged the firm of Nchoe, Jaoko & Company Advocates, it is therefore necessary that the change of advocates from Nchoe, Jaoko & Company Advocates to Amboko & Company Advocates, be effected by an order of this court. A party has a right to be represented by counsel of their choice. As no objection was raised whatsoever in relation to the prayer for change of advocate to grant leave to the firm of Amboko & Company Advocates to come on record for the Plaintiff/Applicant, the prayer is merited and therefore allowed.
10. As to whether the Plaintiff/Applicant has proved contempt of court order on the part of the 1st Respondent, the Applicant is duty bound to prove all the elements of contempt of court. The Blacks Law Dictionary 9th Edition defines contempt as follows;

The act or state of despising; the conduct of being despised. Conduct that defies the authority and dignity of a court or legislature. Because such conduct interferes with the administration of justice.
11. Essentially therefore, contempt consists of acts that defy the authority of the court thereby impairing the fair administration of justice. Courts punish for contempt to uphold the authority and dignity of the court, promote the rule of law and maintain public confidence in the court's role in the administration of justice.
12. In discussing the importance of obeying court orders, in *Econet Wireless Kenya Limited v. Minister for Information and Communication of Kenya & Another* [2005] KLR, the court stated as follows;

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.
13. As contempt proceedings are quasi-criminal proceedings, the standard of proof is higher than that of balance of probability but below beyond reasonable doubt; for the reason that the alleged contemnors



liberty is at stake. In the case of *Gatharia K. Mutikika v. Baharini Farm Limited* [1985] KLR 227, the court held as follows;

A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.....It must be higher than proof on a 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 criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge.

14. To prove contempt of a court order, the Applicant must show that the order in issue is in clear and unambiguous terms; that the Respondent was made aware of the terms of the court order; that the Respondent acted in violation/disobedience or breach of the terms of the order and that the disobedience was wilful. In the case of *Samuel M. N. Mweru & Others v. National Land Commission & 2 Others* [2020] eKLR, the court restated the elements for proof of contempt as follows;

40. It is an established principle of law that in order to succeed in civil contempt proceedings, the Applicant must prove;

1. the terms of the order,
2. knowledge of these terms by the Respondent,
3. failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements, the presence of wilfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.

15. In the instant matter, the Applicant states that the decree issued on 27th June 2019 was served on the 1st Respondent on 17th October 2019. Florence Sheila Wairimu Chogi who responded to the application denied being the 1st Respondent namely Florence Sheila Muthoni. She stated that she has never been a party in these proceedings. She also denied being served with the decree as alleged or at all.

16. I have considered the application and I note that although the Applicant stated in her supporting affidavit that she served the 1st Respondent with the decree on 17th October 2019, no return of service was attached to the supporting affidavit to prove that allegation. The Applicant's attempt to provide the affidavit of service by way of supplementary affidavit cannot remedy the failure as the 1st Respondent had no opportunity to respond to the same and neither was there evidence of service of the same on the Respondent. In any event, the attached copy of the affidavit was never filed in court. In the premises, I am not convinced that the 1st Respondent was made aware of the decree of this court.

17. In addition, the Respondent stated that her name was Florence Sheila Wairimu Chogi and not Florence Sheila Muthoni. She attached a copy of her Identity Card. While the questions of whether parcel Mavoko Town Block 12/130 and Mavoko town Block 12/9334 is one parcel; and whether Florence Sheila Muthoni is one and the same person as Florence Sheila Wairimu Chogi is an issue pending determination in Machakos ELC No. 49 of 2021, it is therefore not conclusive whether the alleged dumping of black cotton soil was in respect to parcel Mavoko Town Block 12/130 or Mavoko Town Block 12/9334. The suit property can only have one registration number. The Plaintiff alleged that if the two parcels are neighbouring each other as alleged by the Respondent, then there is a possibility that there was encroachment. Proof of contempt is higher than on a balance of probability



and therefore the Applicant's position points to inconclusiveness on where exactly the black cotton soil was dumped.

18. In the premises, the Applicant has failed to prove contempt to the required standard as against the 1st Respondent. I therefore dismiss the application. Each party shall bear their costs.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Makundi for 1st Respondent

No appearance for Plaintiff

Ms Josephine – Court Assistant

