



Ngode & 5 others (Suing for themselves and on behalf of the 48 Residents of the Kanyamedha/Kogony Community) v Kenya National Highways Authority & 2 others (Land Case 604 of 2021) [2023] KEELC 16789 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16789 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE 604 OF 2021
E ASATI, J
APRIL 13, 2023**

BETWEEN

**ERIC NGODE 1ST PLAINTIFF
JOHN AGONYO 2ND PLAINTIFF
PAMELA ODOLO 3RD PLAINTIFF
MARTIN OMONDI 4TH PLAINTIFF
PETER ATTITO 5TH PLAINTIFF
ISMAEL LISA 6TH PLAINTIFF
SUING FOR THEMSELVES AND ON BEHALF OF THE 48 RESIDENTS OF THE
KANYAMEDHA/KOGONY COMMUNITY**

AND

**KENYA NATIONAL HIGHWAYS AUTHORITY 1ST DEFENDANT
KENYA URBAN ROADS AUTHORITY 2ND DEFENDANT
NATIONAL LAND COMMISSION 3RD DEFENDANT**

RULING

1. This ruling is in respect of the applications dated 23rd November 2021 filed by all the Plaintiffs and 7th April 2022 filed by the 3rd Plaintiff.



The application dated 7th April 2022

2. The application dated 7th April 2022 was filed by the 3rd Plaintiff on 13th April 2022 pursuant to the provisions of sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Civil Procedure Rules, section 5 of the judicature Act and article 10 of the Constitution of Kenya 2010. The application sought for orders that;
 - a. The application be certified urgent and be heard ex parte in the first instance
 - b. The court be pleased to issue an urgent notice upon the Kenya National Highways Authority- Director General And The Kenya Urban Roads Authority- Director General to show cause why contempt of court proceedings should not be commenced against them
 - c. The court be pleased to cite the Kenya National Highways Authority- Director General And The Kenya Urban Roads Authority- Director General for contempt of court and commit them to civil jail and/or be ordered to purge the contempt of court on terms this court will deem just.
 - d. That the Respondents bear the costs of the application.
3. The applicant's (3rd Plaintiff's) case is that the ELC Kisumu on 1/12/2021 issued orders against Kenya National Highways Authority (KENHA) And Kenya Urban Roads Authority restraining them from demolishing structures on the suit property or evicting the Plaintiffs from the suit properties pending the hearing of the application dated 23/11/2021 and further emphasizing on orders of maintenance of status quo. That the contemnors had notice of the said orders given that a formal order was extracted and personally served on the Respondents and Affidavit of service filed. That the order was clear, unambiguous and binding upon the Defendants/Respondents. That contrary to the express terms of the order, the 1st and 2nd Respondents went on a property demolition spree and destroyed the Plaintiff's property namely the fence. That the Respondents have refused to obey the court order thereby scandalizing and therefore lowering the judicial authority and dignity of the court. That the authority and dignity of the court must be upheld for the safeguarding of the rule of law.
4. The 1st Respondent opposed the application on the grounds contained in the Replying Affidavit of Eng. Catherine Munyi. She deposed that pursuant to the provisions of sections 3, 4, 22, 23 and 24 of the Roads Act No. 2 of 2007, the Authority is established as a corporate body with the exclusive mandate and responsibility to manage, develop, rehabilitate and maintain National Trunk roads in Kenya. That the application relies on mere conjecture and utterly fails to isolate the conduct of the deponent that amounts to breach of the existing court order. That consequently, she is not an appropriate candidate to be cited for contempt in the matter. That the application is misguided, factually inaccurate and incompetent to the extent that it seeks to cite the deponent for contempt. That the applicant has not demonstrated that the 1st Respondent has wilfully refused and/or neglected to obey the court orders. That the application has been brought to court so as to frustrate the completion of the ongoing project. That the 3rd Plaintiff's perimeter wall had encroached the road reserve by 5m and that through consultative talks, the 3rd Plaintiff agreed to secede approximately 2m of her perimeter wall to allow for drain works to be partially complete.
5. The 2nd Defendant/Respondent opposed the application, too. Its case is that the application is misconceived, bad in law and incurably defective. That the applicant has not demonstrated how the 2nd Respondent has violated the court order That the applicant has failed to demonstrate that the current upgrading of the access road is being undertaken by the 2nd Respondent. That the 2nd Respondent has been misjoined in the proceedings and that it is in the interests of justice that the 2nd Respondent be



removed from the proceedings. That the applicant stands to suffer no prejudice if the order sought are denied. That the application is otherwise an abuse of the court process and should be dismissed

6. It was submitted on behalf of the applicant vide the written submissions dated 22nd February 2023 filed on behalf of the applicant by the firm of Amondi & Co advocates that the Respondents were served with the order of the court dated 1/12/2022. That the terms of the order were clear and unambiguous. That the Respondents have chosen to be in flagrant breach of the order and therefore utter disobedience of lawful orders of the court thereby disparaging the judiciary. Counsel relied on the cases of Nairobi JR Misc. Application 443/2017 Samwel M. N. Mweru & Others vs the National Land Commission & 2 Others [2020]eKLR and the book “Contempt in Modern New Zealand” to submit 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, and
 - iv. that the Respondent’s conduct was deliberate

The applicant further relied on the case of Sheila Cassatt Issenberg & another vs Antony Macharia Kinyanjui [2021]eKLR to submit on how a contemnor who is in breach of a court order of temporary injunction may be punished and the reason for the punishment.

7. I have considered the application. As rightly submitted by the applicant, in order for the application of this nature to succeed the applicant must prove the existence of a court order whose terms are clear, unambiguous and binding upon the Respondent, secondly that the Respondents had knowledge or sufficient notice of the order and its terms, that nonetheless the Respondent breached the court order and that the conduct of the Respondent that is in breach of the order was deliberate.
8. On the existence of a court order, the 3rd Plaintiff/Applicant annexed to the application a copy of court order dated 1/12/2021. The relevant part of the order reads:

“in the meantime, I do grant orders that the Respondents are restrained from demolishing structures on the suit property or evicting the plaintiff from the suit property pending the hearing of the application. In essence I do direct that the status quo be maintained until the application.”

This leaves no doubt that there was a court order in place whose terms were clear, unambiguous and binding on the Respondents.

9. On whether the Respondents had knowledge of the order, the court record shows that the order was issued on 1/12/2021 in the presence of Kajo advocate for the Attorney General, Mr Amondi advocate for the Plaintiffs/Applicants and Mr Oduor advocate holding brief for Omondi for the 1st Respondent. The applicant avers in the Supporting Affidavit that the order was issued during an inter partes session of the court and in paragraph 9 of the same Affidavit that the Respondents had knowledge and proper notice of the terms of the order. A copy of the order attached to the Supporting Affidavit bears the receiving stamp of the 2nd Respondent showing that the order was duly received by the 2nd Respondent on 2nd December 2021. Service of the order or knowledge of its existence or its terms was not denied by the Respondents. I find that the Respondents had knowledge of the existence of the order and the terms thereof.



10. On whether the Respondents breached the court order, the applicant avers that the Respondents destroyed a perimeter fence belonging to the 3rd Plaintiff/ applicant. Photocopies of photographs were attached to the Supporting Affidavit to demonstrate the damage. In paragraph 7 of the Supporting affidavit, the applicant avers that despite being served with the court order, the Respondent's engineers, employees or agents moved into and destroyed the fence on 27th March 2022 thereby causing wanton destruction of the property and denying access to the 3rd Plaintiff's home. The photocopies of photographs attached to the application are totally unclear and illegible. There is no evidence as to who of the two Respondents did what acts of breach of the order. I find that the evidence placed before the court is not sufficient to prove breach of the court order by the Respondents. In *Philomena Wariga Waweru vs Duncan Wanyoike & 3 others* [2018] eKLR the court held that contempt of court is an offence which is quasi-criminal in nature. It ought to be proved satisfactorily. And in *Shimmers Plaza vs National Bank of Kenya Limited* [2015] eKLR the court held that there must be satisfaction beyond any shadow of doubt that the person alleged to be in contempt committed the acts complained of in full knowledge or notice of the order of court forbidding it. That the threshold is quite high as it involves deprivation of a person's liberty therefore the applicant has to prove all the facts relied on by way of evidence. In *Mutitika vs Baharini Farm Limited* [1985] KLR 227 the Court of Appeal of Kenya held that

“the court takes the view that where the liberty of the subject is or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved.”

11. As to whether acts of the breach were deliberate, this too has not been proved

Application dated 23rd November 2021

12. The application dated 23rd November 2021 was filed by the Plaintiffs/applicants alongside the Plaintiff. It was brought pursuant to the provisions of sections 1A, 1B, 3, 3A, 63(e), 80 and 99 of the *Civil Procedure Act*, Order 40 Rules 1, 2 and 4 and Order 51 of the Civil Procedure Rules 2010. The application sought for orders that:

- a. The application be certified urgent and heard ex parte in the first instance
- b. That the application be heard before the recess that was to start in December 2021
- c. That pending the hearing and determination of the suit, the court be pleased to issue temporary orders of injunction restraining the Defendants, their agents and/or persons acting under their authority from threatening/interfering with the Plaintiffs' quiet possession and otherwise demolishing and/or evicting them from the suit parcels.
- d. The court be pleased to issue orders of maintenance of status quo pending the hearing and determination of the suit.

13. The applicants' case is that the 1st and 2nd Defendants had deviated from the original map of the Kisumu Northern By-pass project under the National Urban Transport Improvement project (NUTRIP) and unlawfully and without due process purposed to construct the same on a different path thereby subjecting the Plaintiff's properties/homes/parcels which are private registered lands to the threat of demolition. That there is an imminent and continuing threat to the applicants that their properties, crops and trees may be wantonly destroyed by the 1st and 2nd Defendants who had already initiated the process of clearing vegetation and placing beacons. That the Respondents have not complied with



- the statutory threshold for compulsory acquisition of land. That there is no explanation as to why the road plan was diverted.
14. The 1st Respondent opposed the application vide the Replying Affidavit of Daniel Mbuteti sworn on 10th December 2021. The 1st Respondent's case is that the plaintiff's application fails to meet the terms, import, scope and threshold for grant of injunctive orders as held in the case of *Giella vs Cassman Brown Co. Ltd (1973) E.A 358* and other authorities on temporary injunctions. That if at all the Plaintiffs have a claim, its recourse if any would be in damages and/or compensation and not in grant of injunctive orders. That the Plaintiff's application is based on misrepresentations and material non-disclosure of pertinent facts. That any grant of the orders sought would cause great financial harm to the public's interest secured by incurring unnecessary costs through unwarranted shutdowns of the construction of the Kisumu-Chemelil-Muhoroni-Kipsitet Project Lot 1: Mamboleo junction 9A12)-Miwani section to the applicant's knowledge is to be developed by the 1st defendant on behalf of and for the benefit of the residents of Kisumu county, the country at large, being a critical link to the rest of the country and neighbouring countries that rely on the road for movement of cargo. That the authority stands to pay huge financial penalties, claims, interests and costs resulting from the injunctive orders if so granted by the court whereas the applicants will be easily compensated by damages if at all at the end of the trial the court determines that they are entitled to the orders sought. That the balance of convenience and the public interest weigh heavily in favour of dismissing the application. That the application lacks merit.
 15. The 1st Respondent stated further that it had filed a Notice of Preliminary objection seeking to have the application dismissed because the suit is fatally defective as it does not comply with the mandatory provisions of section 67(a) of the *Kenya Roads Act, 2007*. That under *the Constitution* of Kenya 2010, the mandate of construction and operation of national trunk roads falls squarely on the National Government to which the 2nd Respondent is the authority mandated to construct, upgrade, rehabilitate and maintain national trunk roads. That pursuant to the provisions of sections 3, 4, 22, 23 and 24 of the *Kenya Roads Act* No. 2 of 2007, the authority is established as a corporate body with the exclusive mandate and responsibility to manage, develop, rehabilitate and maintain national trunk roads in Kenya.
 16. That the disputed section of the project starts from KM 4+300 to KM 4+600 of the Lake Basin Development Authority Mall- Riat/Airport (E1117) round about. That the road was under the docket of the 2nd Defendant and was transferred to the 1st Defendant by the government of Kenya to undertake the upgrading of the said road.
 17. That in the year 1997 the Municipal Council and the locals entered into an agreement to widen the road reserve from 10 meters to 20 meters in a community participation meeting after which some people relocated and removed their structures to pave way for the widening of the road while others didn't. That the current cadastral maps show a road reserve width of 10 meters while the existing KURA road boundary posts give the road reserve a width of 20 meters.
 18. That the Plaintiff claim that the 1st Defendant has abandoned the original plan of the Kisumu Northern By-pass project is misconceived, ill advised, misplaced and intended to cause unnecessary panic to the greater public and paint the authority in unnecessary bad light. That the current project road in dispute and the Kisumu northern By-pass are two separate and independent projects.
 19. That the authority carried out public participation exercise on 24th November 2021 to engage the locals and get a way forward on the disputed section of the road. That the Notice of Motion is premature and an abuse of the court process and should be dismissed.



20. I have considered the application, the affidavits filed by the parties and the submissions made. The sole issue for determination is whether or not the applicants have made out a case for issuance of the orders sought. I have considered the grounds of the application visa-a vis the law on temporary injunctions. The guiding principles for grant of temporary injunctions as submitted by the parties were laid down in the case of *Giella vs Cassman Brown Co. Ltd (1973) 358* namely; that the Applicant must establish a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of convenience. A prima facie case was defined by the Court of Appeal in *Mrao Ltd vs First American Bank Kenya Ltd & 2 Others [2003] eKLR* as follows:

“a prima facie case in a civil Application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

21. The complaint of the applicants is that the Respondents abandoned the original plan of the project and diverted the road and thereby affecting private property belonging to the applicants. Although there are copies of title deeds and some photographs attached to the application, there is no evidence of the diversion of the access road from the original plan. There is no evidence connecting the suit lands to the road project being undertaken by the 1st Respondent. There is no evidence of the participation of the 2nd Respondent in the project. The grounds set out in order 40 Civil Procedure Rules and *Giella vs Cassman Brown* case have not been demonstrated. I find no basis to grant the application.

22. In conclusion I find that both applications lack merit. The application dated 23rd November 2021 filed by all the Plaintiffs and the application dated 7th April 2022 filed by the 3rd Plaintiff are hereby disallowed. Costs to abide the main suit.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 13TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Neville - Court Assistant.

Amondi for the Plaintiffs/Applicants

No appearance for the 1st Defendant/Respondent

Kajo for the 2nd Defendant/Respondent

No appearance for the 3rd Defendant/Respondent.

