



REPUBLIC OF KENYA



Mutula & 8 others v Ngunu & 3 others (Environment & Land Case 11 of 2018) [2023] KEELC 18172 (KLR) (14 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18172 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 11 OF 2018**

TW MURIGI, J

JUNE 14, 2023

BETWEEN

HANSON MUINDI MUTULA 1ST PLAINTIFF
TITUS MUTETI MUTISO 2ND PLAINTIFF
JONATHAN MWAKE MULI 3RD PLAINTIFF
ELIJA MAINGA KAMOSU 4TH PLAINTIFF
PATRICIA NDUKU MUINDI 5TH PLAINTIFF
STEPHEN S. K. KISILI 6TH PLAINTIFF
ROSE MUTETE MUTISO 7TH PLAINTIFF
ROSE MUKENE MUNYWOKI 8TH PLAINTIFF
MONICA NDUNGE KIATINI 9TH PLAINTIFF

AND

KENNEDY MUTUA NGUNU 1ST DEFENDANT
MBILO MALONZA 2ND DEFENDANT
THE CHIEF LAND REGISTRAR, NAIROBI 3RD DEFENDANT
MAKUENI COUNTY REGISTRAR 4TH DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated January 26, 2023 brought under order 40 rule 12 and order 51 rule 1 of the [Civil Procedure Rules](#) and sections 1A and 2A of the [Civil Procedure Act](#) and all other enabling provisions of the law in which the Applicant seeks the following orders:-



1. That the 1st and 2nd defendants be committed to civil jail for contempt of court or otherwise this Honourable Court be pleased to punish the contempt for failing to comply with orders/decree issue on November 19, 2014.
 2. That the cost of this application be borne by the 1st and 2nd defendants.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Hanson Muindi Mutula sworn on his own behalf and that of the Co-Plaintiffs on even date.

The Applicants Case

3. A summary of the applicants case is that on August 15, 2017, the court issued an order of injunction against the defendants pending the hearing and determination of the suit herein. That despite the orders being in place, the 1st and 2nd defendants deliberately disobeyed the orders by carrying out constructions on the suit property. The applicants urged the court to punish the 1st and 2nd defendants for being in contempt of the court orders.

The 1st Defendant's Case

4. Opposing the application, the 1st defendant vide his replying affidavit sworn on January 31, 2023 averred that he is the registered owner of land parcel No Emali Town Block 1/222. He denied carrying out constructions on the un-surveyed plot of land or on his own plot for that matter. He stated that he was aware of the orders issued by the Court on May 19, 2017 and has not disobeyed the same.

The 2Nd Defendant's Case

5. Opposing the application the 2nd defendant filed grounds of opposition dated February 9, 2023 on the following grounds:-
 1. That the application herein is frivolous, vexatious, fatally defective and an abuse of the court process.
 2. That the 2nd defendant is not aware of any orders interim or otherwise that were issued in this matter on November 19, 2014 as per prayer No. 1 in the application dated January 26, 2023.
 3. That I am aware of orders granted on May 19, 2017 in this matter restraining all the Defendants and the 2nd Defendant has never at any time disobeyed the same.
 4. That the Plaintiffs property is alleged to be as indicated in the attached plan MKN/70/34 URS Commercial Plort Makueni and the same is delineated thereof.
 5. That the Defendant has no development that he is carrying on MK/70/34 URS Commercial Plot Makueni or any un-surveyed plots in Emali township.
 6. That the application lacks merit and should be dismissed with costs.
6. The application was canvassed by way of written submissions.

The Plaintiffs Submissions

7. The Plaintiffs submissions were filed on February 13, 2023.
8. Counsel for the plaintiff outlined the following issues for the court's determination:-
 - i. Whether the contempt of court proceedings against the 1st and 2nd defendants are in order.



- ii. Who is to bear the costs of the application.
9. In defining contempt of court, Counsel cited the definition in Black's Law Dictionary. Counsel submitted that the court ought to punish the contemnors so as to safeguard the rule of law. Counsel further submitted that according to the photographs attached to the Applicants supporting affidavit, it is clear that there is ongoing construction on the suit property.
10. Counsel maintains that the 1st and 2nd defendants have tasked a third party to enter into the suit property and carry out the construction. She maintains that the suit property will be wasted if the 1st and 2nd defendants are not punished for contempt of the court.

The 1st Defendant's Submissions

11. The 1st Defendant's submissions were filed on March 1, 2023.
12. Counsel submitted that the order referred to in prayer No. 1 of the application refers to the order issued on November 19, 2019 while paragraph 4 refers to the order dated August 15, 2017 while the annexures relied upon by the applicants refer to the order issued on May 19, 2017. Counsel submitted that no orders were issued on May 19, 2014 that is capable of being disobeyed.

The 2nd Respondents Submissions

13. The 2nd Defendant's submissions were filed on 13th February, 2023.
14. Counsel submitted that the only issue for determination is whether the 2nd Defendant is in contempt of the order issued on August 15, 2017. Counsel submitted that the elements of civil contempt were defined in the case of *St Mary Academy Limited & another Vs Grace Njeri Mukora & Another Yvonne Jeruto & another* (contemnors) 2021 eKLR as follow:-
 - a. That the terms of the order were clear and unambiguous and were binding on the Defendant.
 - b. That the Defendant had knowledge or proper notice of the terms of the order.
 - c. That the Defendant has acted in breach of the terms of the order; and
 - d. That the Defendants conduct was deliberate.
15. Counsel submitted that the order issued on August 15, 2017 was ambiguous, nebulous and amorphous because the property is not specified.
16. Counsel contended that the 2nd defendant was not carrying out any construction on the suit property nor on any unsurveyed land in Emali Township. Counsel argued that the 2nd defendant is the registered owner of land parcel No. Emali Town Block 1/223 which bears no nexus with the suit property.
17. Counsel argued that the applicant has not met the threshold for the grant of the orders sought. Counsel submitted that the applicant averred that the 2nd defendant was not in breach of the order dated 19th of August, 2017. He maintains that the applicant wants them punished for an order that is non existent.

Analysis And Determination

18. Having considered the application, the affidavits and the rival submissions, the only issue that arises for determination is whether the 1st and 2nd Defendants are in contempt of the Court order issued on August 15, 2017.



19. The *Black's Law Dictionary* 9th Edition defines contempt of court as;
- “conduct that defies the authority or dignity of the court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
20. Section 5 of the *Judicature Act* confers jurisdiction on the superior Courts to punish for contempt and provides that;
- (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 such power shall extend to upholding the authority and dignity of subordinate courts.
 - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
21. The law guiding the present application is Order 40 Rule 3(1) of the Civil Procedure Rules which provides as follows;
- In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order 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 six months unless in the meantime the court directs his release.
22. The High Court of South Africa in the case of *Carla Burchell Vs Barry Grant Burchell* Eastern Cape Division Case No. 364 of 2005 held that in order to succeed in civil contempt proceedings, an Applicant has to prove;
- i. The terms of the order,
 - ii. Knowledge of these terms by the Respondent,
 - iii. Failure by the Respondents to comply with the terms of the order.
23. Back home, in the case of *Samuel M.N. Mweru & Others Vs National Land Commission & 2 Others* (2020) eKLR the Court set out the elements to be proved in an application for contempt of court as follows;
- “Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated “there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-
- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
 - b. The defendant had knowledge of or proper notice of the terms of the order;
 - c. The defendant has acted in breach of the terms of the order and
 - d. The defendant’s conduct was deliberate.”



24. The Applicants are seeking to have the 1st and 2nd defendants committed to civil jail for disobeying the court order issued on 15th August, 2017. The Applicant attached a copy of the order dated May 19, 2017 and issued on 15th of August, 2017. In the Applicants submissions, Counsel referred to the order issued on 15th August, 2017. The error on the date when the order was issued is a typographical error which does not go to the root of this application.
25. The first issue for determination is whether the terms of the order were clear and unambiguous. It is not in dispute that on 19th August, 2017, the Court issued an order of temporary injunction restraining the Defendants from either by themselves or through their agents, servants or howsoever from carrying out any works or from interfering with the Plaintiff's unsurveyed commercial plot at Emali Township pending the hearing and determination of the application and the main suit.
26. The order was unambiguous as it restrained the Defendants from carrying out any works or from interfering with the Plaintiff's unsurveyed commercial plot in Emali Township pending the hearing and determination of the application and the main suit. To this end I find that the order issued on 15th August, 2017 was clear and unambiguous.
27. The next issue for determination is whether the Respondents were served or had proper notice of the order. The 1st and 2nd Defendants admitted that they were aware of the order made on 19th May, 2017 and issued on 15th August, 2017. I am therefore satisfied that the Respondents were aware of the terms of the order.
28. On the issue of whether the 1st and 2nd Defendants deliberately breached the Court order, the Applicants have a duty to prove their case beyond the balance of probabilities. This is because Contempt of Court is in the nature of criminal proceedings and the liberty of the subject is usually at stake.
29. The Applicant must prove wilful and deliberate disobedience of the Court Order if they are to succeed as was held in the case of *Gatbaria K. Mutitika Vs Baharini farm Ltd* (1985) KLR where the court held that;
- “A contempt of court is an offence of a criminal nature. A man may be sent to prison. It must be proved satisfactorily.....It must be higher than prove 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 nature.”
30. Similarly, in the case of *Peter K Yego & Others Vs Pauline Wekesa Kode* ACC No. 194 of 2014 the Court held that;
- “it must be proved that one had actually disobeyed the court order before being cited for contempt.”
31. In the present application, the order of temporary injunction issued by the Court relates to the unsurveyed plot within Emali Township. The Applicant averred that the 1st and 2nd Defendants, in blatant disregard of the orders issued on 15th August, 2017, instructed a third party to carry out construction on the suit property. In this regard, the Applicants produced photographs to depict ongoing construction on the suit property.
32. The 1st and 2nd Respondents denied that they were carrying out construction on the suit property or on any other unsurveyed parcel of land.



33. In the case of *Mutitika Vs Babarini Farm Ltd* (1985) eKLR the Court of Appeal held that;

“In our view, the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities but almost not exactly beyond reasonable doubt..... the standard of proof beyond reasonable doubt ought to be left where it belongs, to criminal cases. It is not safe to extend it to an offence which can be said to be quasi criminal in nature.”

34. This Court has examined all the photographs annexed to the Applicant’s supporting affidavit. There is clear evidence that there is ongoing construction on the suit property. The Applicants had a duty to prove beyond a balance of probabilities that the 1st and 2nd Respondents are undertaking constructions works on the suit property or that they have instructed a third party to act on their behalf.

35. The Applicants did not adduce any evidence to demonstrate that the ongoing construction was being undertaken by the 1st and 2nd Respondents in blatant breach of the court order. The Applicants did not demonstrate that the 1st and 2nd Defendants have deliberately disobeyed the orders of the court.

36. In the end, I find that the Applicants have not proved to the required standard that the 1st and 2nd Defendants were in blatant disobedience of the court order issued on the 15th of August, 2017. Accordingly, the application dated 26th January, 2023 has no merit and the same is dismissed with costs to the 1st and 2nd Defendants.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14TH DAY OF JUNE, 2023.

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi.

Mrs. Isika for the Applicants.

Mbindyo for the 1st Defendant.

Nzaku for the 2nd Defendant.

