



**Hassan (Suing as the special attorney of Enrico Quercioli) v Defabianis & 2 others
(Environment & Land Case 46 of 2020) [2023] KEELC 18022 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18022 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 46 OF 2020**

MAO ODENY, J

JUNE 9, 2023

BETWEEN

**ABDULRAHMAN SHEIKH HASSAN (SUING AS THE SPECIAL ATTORNEY
OF ENRICO QUERCIOLI) PLAINTIFF**

AND

THE ATTORNEY GENERAL 1ST DEFENDANT

MARIA ANGELA DEFABIANIS 2ND DEFENDANT

THE LAND REGISTRAR MOMBASA 3RD DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 9th March, 2022 by the Plaintiff seeking the following orders;
 - a. Spent
 - b. That this Honourable Court be pleased to grant the Plaintiff/ Applicant leave to cite the 1st Defendant/ Respondent, her agent, assignees, representatives and servants for contempt of Court pursuant to willful and open disobedience to the court Order issued herein on 30.4.21.
 - c. That upon such leave being granted, the 1st Defendant /respondent herein be cited for contempt and committed to jail for 6 months for showing contempt and open disobedience to the court order made on 30.4.21.
 - d. That warrants of arrest do issue against the 1st Defendant/ Respondent, her agent, assignee, representative and servant to appear before this court and show cause why she should not be committed to Six (6) months jail term for disobeying the Court Orders issued on 30.4.2021.



- e. That pending the hearing and determination of this Application, the Court Order issued herein on 30.4.2021 be and is hereby extended.
 - f. That costs of this application be borne by the 1st Defendant/ Respondent.
2. The application was supported by the affidavit sworn by Enrico Quercioli dated 9th March, 2022 where he deponed that he is the registered owner of a ground floor apartment standing on portion No. 1040 Watamu while the Defendant/ Respondent claims to be one of the beneficiaries owning the upper floor. That the houses share the same door and stairway leading to the balcony which houses the water storage tanks and the common area facilities.
 3. The Applicant further deponed that the Respondent unilaterally and mischievously with a view of barring him, his agents and or servants from accessing the balcony of the suit property, changed the padlock and locked the door refusing to hand over spare keys thereby denying him access to the only water tank that has since been leaking causing damage to his house.
 4. That the order issued on 30th April 2021 was duly served upon the Defendants but despite service, the 1st Defendant/ Respondent has disregarded the same by continuously interfering with, encroaching upon and/or damaging of the suit property by continuing with the illegal barricading of the access door to the roof top.
 5. According to him, the Respondent has made it difficult for him and his family, workers and or servants to access the roof top and effect repairs to the tank which has been blocked thereby not discharging water to the ground floor apartment. That the defendant/ Respondent has deliberately failed to obey the Court Order hence causing him irreparable loss and damage.
 6. In response the 1st Defendant/ Respondent filed a Replying Affidavit sworn on 31st June, 2022 and deponed that the injunctive orders issued on 30.4.2021 of restraining her, her servants, agents and/or any persons from acting under authority from trespassing, encroaching, selling, alienating, damaging, wasting, disposing off and or in any manner whatsoever interfere with the suit property Portion No. 1040 CR 46208 Watamu are not tenable and there is no cause of action.
 7. According to her, the Applicant has willingly refused to use all the applicable options to access the water tank at the roof top but insists on using the passage way in her apartment which invades her privacy and quiet possession.

Applicant's Submissions.

8. Counsel submitted that the jurisdiction to punish contempt of Court is captured under Section 5 of the *Contempt of Court Act*, 2016 and Section 29 of the *Environment and Land Court Act*.
9. Counsel also relied on the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* (2020) eKLR where the court enumerated what an Applicant has to prove to succeed in civil contempt proceedings namely; terms of the Order, Knowledge of these terms by the Respondent, and Failure by the Respondent to comply with the terms of the Order,
10. Counsel submitted that the order of the court was framed in clear and unambiguous terms and relied on the case of *Jiban Freighters Ltd v Hardware & General Stores Ltd* and in *A.B. & Another v R. B.* (2016) eKLR where the court held that for one to sustain a prayer or committal for contempt of court the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing.



11. Mr. Matini further relied on the cases of *Martin Macharia v Peterson Njoroge & 2 Others*; *Joseph Maritim & 2 Others (Interested Parties)* (2011) eKLR on knowledge of the terms of the order by the respondents and submitted that the order was served on the firm that was representing her as well as on the Respondent in person and further cited the case of *Basil Criticos v Attorney General and 8 Others* (2012) eKLR where the court held that the law has changed and as it stands today knowledge supersedes personal service and that where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary. In addition, he also relied on the Court of Appeal decision in *Shimmers Plaza Limited v National Bank of Kenya* (2015) eKLR.

1st Respondent's Submissions.

12. The Respondent submitted that the order dated 30th April, 2021 was served on the 1st Defendant on 23rd February, 2022 and the injunctive orders were not tenable as there is no cause of action. She relied on the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 Others* (2020) eKLR where the court discussed the applicable law on contempt that an Applicant has to prove the terms of the order and knowledge of these terms of the order.
13. It was her submission that there are essentially four elements that must be proved to make the case for civil contempt; that the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant, that the Defendant had knowledge of or proper notice of the terms of the order, that the Defendant has acted in breach of the terms of the order and that the defendant's conduct was deliberate.
14. She further submitted that the standard of proof in contempt of court applications is higher than that of balance of probabilities but lower than that of beyond reasonable doubt. She asserted that she lives on the upper floor and that she has not done any of the aforementioned actions in the order granted. Her explanation to changing the lock of the common door entrance was that after realizing that his house boy had lost the keys of the two doors entrance, she changed the key of the entrance to the upper apartment and after also realizing that the Applicant had the keys of the entrance to the upper apartment who was infringing on her security and right to privacy.
15. In addition, that the Applicant was directed to build an external access ladder which he has not done and thus the orders are not tenable and there is no cause of action.

Analysis And Determination.

16. I have considered the application before this court, the responses as well as the submissions by both parties.
17. I note that this court on 30th April, 2021 issued an order of Injunction against the Defendants/ Respondents in the following terms;

That pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the 1st Defendant, her servants, agents and/or any persons acting under the 1st Defendant's authority from trespassing, encroaching, selling, alienating, damaging, wasting, disposing off and or in any manner whatsoever interfering with the suit property referenced as Portion No. 1040 CR 46208, Watamu. The said order do especially restrain the 1st Defendant from proceeding with any actions as may lead to the revocation of the



Plaintiffs title with regards to the grounds floor title issued to the Plaintiff with respect to Portion No. 1040 CR 46208, Watamu.

18. The *Black's Law Dictionary* 9th Edition, defines contempt as:

The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

Section 29 of the *Environment and Land Court* is clear to the effect 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.

19. In the case of *North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi* (2016) eKLR where Justice Mativo stated that:

“writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated as follows: -

“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 -

- (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.”

20. The Applicant contends that the Respondent unilaterally barred him and his agents and or servants from accessing the balcony of the suit property, changed the padlock and locked the door refusing to hand over spare keys thereby denying him access to the only water tank that has since been leaking causing damage to his house.

21. It is not disputed that the order issued on 30th April 2021 was duly served upon the Defendants, the issue is whether the Defendant has disobeyed the order by changing the lock of the common areas and denying the Applicant access to the roof top.

22. The orders dated 30th April 2021 was clear an unambiguous on what the 1st Defendant was being restrained from doing. It specifically stated that

“pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the 1st Defendant, her servants, agents and/or any persons acting under the 1st Defendant's authority from trespassing, encroaching, selling, alienating, damaging, wasting, disposing off and or in any manner whatsoever interfering with the suit property referenced as Portion No. 1040 CR 46208, Watamu. The said order do especially restrain the 1st Defendant from proceeding with any actions as may lead to the revocation of the



Plaintiff's title with regards to the ground floor title issued to the Plaintiff with respect to Portion No. 1040 CR 46208, Watamu.”

23. The acts complained of do not emanate from the disobedience of the order dated 30th April 2021 as change of lock to access the roof top was not part of what the 1st Defendant was restrained from doing. If the Plaintiff is aggrieved by the change of lock, then he can approach the court for orders to be given access by explaining how he is entitled to access the rooftop of the building where the 1st Defendant's apartment is situated.
24. I find that the Plaintiff has failed to prove that the Respondent has acted in contempt of the court order dated 30th April 2021 but the 1st Defendant is also warned to act within the confines of the order and the law as an order granted by the court must be obeyed even if you do not agree with it. The Respondent has no authority to allege that the order granted was not tenable. Obey first then question the tenability later. The application is hereby dismissed with each party bearing their own cost.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF JUNE 2023.

M.A. ODENY

JUDGE

NB: In view of the *Public Order No. 2 of 2021* and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

