



REPUBLIC OF KENYA



Irungu & 4 others v Attorney General & 3 others (Environment & Land Case E022 of 2022) [2023] KEELC 19244 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19244 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E022 OF 2022**

**YM ANGIMA, J
JULY 27, 2023**

BETWEEN

GEORGE B IRUNGU & 4 OTHERS PLAINTIFF

AND

ATTORNEY GENERAL & 3 OTHERS DEFENDANT

RULING

A. The Plaintiffs' Application

1. By a notice of motion dated April 26, 2023 expressed to be based upon Sections 1A, 3, 3A of the *Civil Procedure Act* (Cap. 21 Laws of Kenya) and Order 51 rule 1 of the *Civil Procedure Rules, 2010*, the Plaintiffs sought the following orders:
 - a. Spent;
 - b. That the court finds the 4th respondent to have disobeyed the orders of this court of November 23, 2022 and he be held to be in contempt hence be jailed for a period of six months for interfering with the 5th applicant's peaceful use and occupation of the suit land.
 - c. That costs of the application be borne by the respondent.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit curiously sworn by the 1st Plaintiff, George B. Irungu on April 26, 2023 together with the exhibits thereto. It was contended that the 4th Defendant had deliberately disobeyed and violated the interim orders made by this court on November 23, 2022 by fencing off the 5th Plaintiff's house and interfering with her access thereto. It was also contended that the 4th Defendant had wrongfully confiscated the 5th Plaintiff's livestock from the suit property claiming they were on his land. It was further contended that the 4th Defendant was fully aware of the interim orders since



they were made in his presence and in the presence of his advocates on record in addition to service of the extracted order upon his advocates.

B. The 4th Defendant's Response

3. The 4th Defendant filed a replying affidavit sworn on May 9, 2023 in opposition to the application. He denied ever fencing the 5th Plaintiff's parcel of land or interfering with her access thereto. He also denied having confiscated any livestock belonging to the 5th Plaintiff. He denied that he was present in court when the interim orders were made and he also denied any service of those orders.
4. The 4th Defendant contended that the application for contempt was incompetent since no leave of court had been sought to institute the proceedings. It was further contended that the burden of proof in contempt of court proceedings was very high and that the Plaintiffs had not discharged that burden in the circumstances of the instant application. Finally, he asserted that he was not the registered proprietor of any parcel of land adjacent to the parcels allegedly owned by the Plaintiffs hence he was wrongly sued in the suit.

C. Directions on Submissions

5. When the said application came up for inter partes hearing it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiffs' submissions were filed on June 8, 2023 whereas the 4th Defendant's submissions were filed on May 11, 2023.

D. Issue for Determination

6. The court has considered the Plaintiffs' notice of motion dated April 26, 2023, the 4th Defendant's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main issue for determination herein is whether or not the Plaintiffs have proved the contempt alleged against the 4th Defendant.

E. Analysis and Determination

7. The court has considered the material and submissions on record. The Plaintiffs submitted that they had demonstrated to the required standard that the 4th Defendant was aware of the interim orders dated November 23, 2022 and that he had deliberately disobeyed the same without lawful justification or excuse. The Plaintiffs cited the cases of *John Lokopis & 5 Others -vs- West Pokot County Government & Another* [2022] eKLR and *Samuel M. N. Mweru & Others -vs- National Land Commission & 2 Others* [2020] eKLR in support of their application and urged the court to allow the same.
8. The 4th Defendant on his part submitted that the Plaintiffs had failed to prove the contempt alleged against him since there was no evidence that he was aware of the interim orders and there was no evidence to show that he had fenced the 5th Plaintiff's parcel of land or confiscated her livestock. He cited the case of *Christine Wangari Gachigi -vs- Elizabeth Wanjira Evans & 11 Others* [2014] eKLR in opposition to the application and urged the court to dismiss it with costs.



9. Although the 5th Plaintiff complained of alleged confiscation of her livestock the court has noted from the record that the interim orders made on November 23, 2022 were not concerned with any form of livestock which she may have had on the suit property. The relevant order stated as follows:

“The respondent shall not evict the 5th applicant from the suit property or interfere with her access and use of her house on the suit property pending inter partes hearing of the application.”
10. There being no allegation of any attempted eviction of the 5th Plaintiff then the only question which falls for consideration and determination is the question of alleged interference with her access to, and use of, the house on the suit property. The issue of the alleged confiscation of her livestock can be dealt with at the opportune time during the hearing of the application dated October 31, 2022 or at the trial of the suit.
11. The standard of proof in contempt of court cases has been the subject of numerous judicial pronouncements by the Court of Appeal. For instance, in the case of *Mutitika -vs- Baharini Farm Limited* [1985] KLR 229 at page 234 it was 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. ”
12. There is no doubt from the material on record that the 4th Defendant’s advocate was present when the interim orders of November 23, 2022 were made. In those circumstances, it is not necessary to demonstrate that the 4th Defendant was personally or physically present in court. The presence and knowledge of the advocate has been held to be sufficient knowledge on the part of the client. Consequently, the 4th Defendant cannot deny knowledge of the orders especially given that there is no affidavit by his advocate stating that he was not made aware thereof.
13. There is no doubt from the supporting affidavit and the photographs annexed thereto that there appears to be a fence of wooden poles and barbed wire erected round the 5th Plaintiff’s house. It would further appear that the fence was erected after he issuance of the interim orders because the fence does not appear in the earlier photographs annexed to the Plaintiff’s application for interim orders dated October 31, 2022.
14. The only puzzle to be resolved is who actually erected or authorized the erection of the fence. The 4th Defendant has sworn a replying affidavit denying having done so either personally or through his agents, servants or proxies. The supporting affidavit does not indicate when the fence was erected and who may have witnessed the erection and whether it was done during the day or night. This is exacerbated by the fact that there is no affidavit by the 5th Plaintiff herself whose access to the house is said to have been impeded or interfered with.
15. On the basis of the scanty material on record, it is quite possible that the fence was put up by the 4th Defendant or his agents. It is also quite possible that it was erected by someone else. In the premises, the court is not satisfied that there is adequate evidence on record to satisfy the burden of proof required in contempt of court proceedings. The 4th Defendant may be the likely offender but he can only be convicted where there is credible evidence linking him to the mischief complained of. The 4th Defendant shall consequently be granted the benefit of doubt. However, since he has disowned the



fence around the 5th Defendant's house and the court is unable to determine that it was erected on the basis of lawful authority, the court shall make an order for its demolition and disposal of the materials used.

16. The court has noted that the 4th Defendant raised the issue of leave to institute contempt of court proceedings. It was contended that the instant application was incompetent because the Plaintiffs had failed to obtain leave of court before filing it. This issue was considered and resolved by the Court of Appeal in the Christine Wangari Gachigi Case (supra) which was cited by the 4th Defendant as follows:

“It is clear from this summary that leave, now called “permission” is not required where committal proceedings relate to a breach of a judgment, order or undertaking. That position must be contrasted with the requirement in Rules 81.12...

We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book, that no leave is required before bringing an application like the one before us, for committal for contempt relating to breach of this court's order. The application is for that reason, incompetent and is struck out with costs.”

F. Conclusion and disposal orders

17. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have not proved the contempt alleged on the part of the 4th Defendant to the required standard. Accordingly, the court makes the following orders for disposal of the notice of motion dated April 26, 2023:
- a. The application for committal of the 4th Defendant for contempt of court is hereby declined.
 - b. The 5th Plaintiff is hereby authorized to demolish and remove the fence erected around her house and to dispose of the materials and debris as he may deem fit.
 - c. The OCS of Marmanet Police Station or the nearest police station shall provide security to the 5th Plaintiff for demolition and removal of the said fence.
 - d. Costs of the application shall be in the cause.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 27TH DAY OF JULY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

N/A for the Plaintiffs

Ms. Nyambura for the A.G. for the 1st – 3rd Defendants

Ms. Mwaura holding brief for Mr. AGN Kamau for the 4th Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

