



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. MISCELLANEOUS APPLICATION NO. 20 OF 2021

IN THE MATTER OF CONTEMPT OF COURT

BETWEEN

REGINA ODERO PUNDO

(Suing as the legal representative of the Estate of Getrude Anyango Owiny deceased...APPLICANT

VERSUS

CHRISTINE ORIMBO.....1ST DEFENDANT/RESPONDENT

JOSEPH OPIYO OTUOMA.....2ND DEFENDANT/RESPONDENT

RULING

The application before this Court is dated 4/8/2021 and seeks orders that Christine Orimbo and Joseph Opiyo Otuoma the 1st and 2nd respondents respectively, be cited for contempt of court pursuant orders issued on the 30th of June 2021. That Christine Orimbo and Joseph Opiyo Otuoma be committed to civil jail for a period of sic (6) months or any other period or any other sanction to issue that this Honorable Court may deem and appropriate. That this Honorable court does order the OCS Maseno Police Station to enforce the interim orders issued on 30th June, 2021. Cost of this Application be provided for. The application is based on grounds that the respondents have disobeyed and continue to disobey the Orders issued by this Honorable court on 30th June, 2021, restraining them from interfering in the suit properties know as KISUMU/OJOLA/2061; KISUMU/OJOLA/2063; KISUMU/OJOLA/2096;KISUMU/OJOAL/3019; KISUMU/OJOLA/2525; KISUMU/KANYAWEGI/583.

That the respondents are busy building and erecting structures on the aforementioned parcels despite being served with the penal order issued from this Honorable Court. That the actions of the respondent's amount to mocking the authority and jurisdiction of this Honorable Court. That the Applicants shall not be prejudiced if the orders sought were to be granted.

The application is supported by the affidavit of Regina Odero Pundo wherein she states that on 30th of June 2021 this Honorable court issued orders injuncting the respondents and third parties from interfering with the suit properties. That the penal order was served upon the respondents on 7th day of July 2021. The applicant laments that despite the respondents having knowledge of the interim injunction issued by the court, they have gone ahead and fenced the suit property and started building on the same.

The court can clearly see from the annexed photos marked R.O 003 which shows the state of the parcel as at 3/08/2021 the respondents continued to build upon the parcel despite the court injunction order being in force.

That the Respondents continued to build upon the parcel despite the court injunction order being in force and therefore she is will be apprehensive if the respondents are not punished, they will jeopardize the proceedings of this Honorable court and continue to subvert the authority of the court. The Respondents are busy disobeying this court's orders because they are fraudulently trying to succeed the said parcels in succession cause no. E003 of 2021. That the honorable court ought to assert itself and find them guilty of contempt of court and commit to jail for a period of six months.

In the replying affidavit of Joseph Opiyo Otuoma, he states that the court order dated 30/6/2021 was served on them and that the respondent's interest is only on Title Nos. KISUMU/OJOLA/2061, 2063 and 2096 which are their ancestral parcels of land and on which their homesteads are situated as well as their crops.

He deposes that their families have been in occupation of the parcels of land aforesaid ever since before land adjudication process which is over 40 years to date.

He contends that the applicant is guilty of non-disclosure of material facts relevant to the suit herein, since she did not disclose the fact that the respondents are in actual occupation of the particular suit properties mentioned herein above and there is no way the court order aforementioned can be implemented against them, since it would amount to evicting them from their homestead, at the preliminary stage, while the case is still pending hearing and determination.

He states that the applicant has not told the court the exact parcel of land to which the photographs annexed to her affidavit relate to, it is not enough to show photographs without pointing out to the court where exactly they have been taken from. That the Respondents are total strangers to the photographs which have been exhibited in the affidavit. That the application lacks basis and is premature, hence should be dismissed with costs.

Courts will not hesitate to punish a person who wilfully disobeys a court order. It has been held by courts time and again that the objective of the law on contempt is to protect the dignity of the court and uphold the rule of law. Anybody served with a court order is supposed to move the court in a respectful manner to explain why he is unable to comply or to seek stay or setting aside of such orders. There is no other option available to a person who is served with a court order. The person must abide unless there is an order either staying or setting aside those orders.

In the case of *Johnson Vs Grant*, 1923 SC 789 at 790 Lord President Clyde stated that:

“...The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.”

In *Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim J. (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & Another* Civil Application No. 39 of 1990 (unreported), where the Court of Appeal 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... In HADKINSON v. HADKINSON (1952) 2 All E.R. 567, it was held that: It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that 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 an order believes it to be irregular or void.”

In *Attorney General v. Times Newspapers Ltd.* [1974] A.C. 273, Lord Diplock stated:

“...There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.”

The Court of Appeal in *A. B. & Another -V- R. B., Civil Application No. 4 of 2016* [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in *Burchell v. Burchell*, Case No. 364 of 2005 where it was held:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

Again in *B. -V- Attorney General* [2004] 1 KLR 431 Ojwang, J (as he then was) stated that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

Ndolo J. in *Teachers Service Commission v Kenya National Union of Teachers & 2 Others* [2013] eKLR observed that-

“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.

A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

The Supreme Court in *Republic -V- Ahmad Abolfathi Mohammed & Another* observed that –

“It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal 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.”

The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she wilfully acted in a manner that flouted the Court Order.

[30] The question that begs an answer, thus, is: did the applicant wilfully disobey this Court’s Orders” The applicant showed the steps it took towards compliance with the Court Order. The deposition of Nyale Munga reveals the applicant’s effort in complying with the Court Order. He avers that as the respondents were foreign nationals, only the National Police Service could ensure their security and protection. It was deposed that the applicant had a special responsibility: to ensure the security of the respondents, which could only be guaranteed by the Kenyan Government through the National Police Service, at the Anti-Terrorism Police Unit, until their eventual removal from the country, as there was no extradition treaty between Kenya and Iran.”

Before the court punishes a person alleged to be in contempt, the person who alleges must prove the existence of a court order and the fact that it has been disobeyed. I have considered the evidence on record and the rival submissions and do find that the respondents have admitted that they were served with the court order dated 30/6/2021. The respondents have deposed that they have settled on KISUMU/OJOLA/2061, 2063 and 2096 for over 40 years an allegation that has not been controverted by the applicant. Their homesteads and crops are on the parcels said parcels of land. It is not clear on which parcels of land the photographs of the fence and structures that are being constructed were taken. The applicants are seeking to recover parcels of land including KISUMU/OJOLA/2061, 2063 and 2096. But have not specified which parcels of land the respondents occupy. It is not clear where and when the structures depicted in the photographs were taken. In this case I do find that the applicant has failed to prove to the required standards that the respondents are in contempt of the court order dated 30th June 2021. The upshot of the above is that the application is dismissed with costs. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 26th DAY OF NOVEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE