



**Mohamed v Ogero & another (Environment & Land Case
E337 of 2022) [2023] KEELC 18888 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18888 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E337 OF 2022**

**AA OMOLLO, J
JULY 20, 2023**

BETWEEN

NASTEHO ABDI MOHAMED PLAINTIFF

AND

WILSON KAISOGO OGERO 1ST DEFENDANT

JOSEPH MOSOTI OMAMBIA 2ND DEFENDANT

RULING

1. The plaintiff/applicant filed notice of motion dated January 12, 2023 seeking for the following orders;
 1. The defendant, Wilson Kaisogo Ogero be detained in prison for a term not exceeding 6 months or for such period as the court shall deem fit.
 2. An order of sequestration, attachment and sale of personal properties be issued against, Wilson Kaisogo Ogero.
 3. The properties of the defendant, Wilson Kaisogo Ogero be attached for a period not exceeding 1 year or such period as this honourable court shall deem necessary for being in disobedience of the orders of tis honourable court.
 4. A declaration that the Wilson Kaisogo Ogero is guilty of contempt of court for failing, neglecting and/or willfully disobedience of the court order issued on November 1, 2022.
 5. Any other or further relief as this honourable court may deem fit and appropriate to grant.
 6. Costs of the application be provided for.
2. The application was supported by an affidavit sworn by Michael Osundwa Sakwa on January 5, 2023 stating that the plaintiff had instituted this suit against the defendants for trespass and on November 1, 2022, this court issued an order restraining the defendants and/or their agents/servants or persons



claiming through them from continuing with the construction on the suit property but the defendants have declined to stop the construction on the suit property as ordered hence instituting the contempt proceedings.

3. The application was opposed by the defendants *vide* replying affidavit sworn by Wilson Kaisongo Ogero on February 27, 2023 stating that the plaintiff's property which they refer to in all their pleadings is LR No 36/163/VII (original No 7/6) which the defendants are strangers to as they have been the proprietors of LR No 36/VII/163 Eastleigh, Nairobi. They contended that LR No 36/163/VII as referred to in the plaintiff's indenture of conveyance does not exist in the sequence of parcels in the area near their parcel in Eastleigh and it is different from the sequence of the already gazetted and those awaiting gazette in the area.
4. The defendants further stated that the plaintiff is aware that they entered into a joint venture agreement with developers to develop the property before they laid claim on the same and that they have not been in contempt as they are constructing on their land and not in the parcel claimed by the plaintiff.
5. The defendants stated that the plaintiff has not approached the court with clean hands because there exists several criminal complaints against him with the Directorate of Criminal Investigations (DCI) regarding interference with quiet possession of their property which cases are yet to be concluded. They added that the annexed photographs of the alleged disregard of the court orders are blurry, undated and do not show how they are related to the land parcel LR No 36/VII/163.
6. The defendants depose that on February 6, 2023, this court delivered its ruling in which the plaintiff's application from which the instant contempt orders are anchored on was disallowed.
7. The plaintiff filed submissions dated March 21, 2023 in support of his application and submitted that he had proved the elements of civil contempt as established by the High Court of South Africa in the case of *Kristen Carla Burchell v Barry Grant Burchell*, Eastern Cape division case No 364 of 2005 which case was cited with approval in the case of *Samuel M.N Mweru and others v National Land Commission and 2 others* [2020] eKLR which are terms of the order, knowledge of these terms by the respondents and failure by the respondents to comply with the terms of the order.
8. The plaintiff submitted that on November 1, 2022, the court issued a clear order of interim injunction restraining the defendants from continuing with constructions until the next court date of November 15, 2022. The plaintiff submitted that the defendants have always been aware of the said orders issued which were clear and unambiguous. The plaintiff argues that the defendants' actions of continuing with construction on the suit property with the knowledge of the court order enjoining them from doing the same was deliberate and was done in bad faith. They cited the case of *Samuel M.N Mweru & others v National Land Commission & 2 others* which emphasized that courts should not condone deliberate disobedience of its orders and should not shy away from its responsibility to deal firmly with proven contemnors.
9. The plaintiff submitted that the defendants have not denied continuing construction on the suit property despite the existence of court orders enjoining them against the same. He contended that what they have tried to do is claim that the property being claimed by the parties are different yet during a site visit organized by the lower court, the same suit property in dispute was pointed out. He added that even if the defendants' contention was that the order issued did not affect their property they were constructing on; they were obligated to obey the said order until they sought clarification from the court.



10. The defendants filed submissions dated March 30, 2023 stating that the plaintiff has not shown that the defendants willfully disobeyed any undertaking given by the court in regard to their parcel of land as there was no notice issued to them in respect to parcel number LR No 36/VII/163 and because the plaintiff is claiming LR No 36/163/VII. Further, they submitted that the plaintiff has not provided sufficient evidence showing his relation to the defendants land. That the photographs alleged to be those of the parcel of land by the plaintiff are blurry and do not show the nexus with their parcel.
11. The defendants submitted that they cannot be said to be in contempt of any court orders since the orders of injunction issued on the November 1, 2022 were set aside and that the said orders were not issued against their parcel of land but the one the plaintiff is claiming which land is different.

Analysis

12. I have read through the plaintiff's notice of motion and the supporting affidavit thereof, the defendants' replying affidavit and the submissions filed by the parties. The plaintiff filed this suit through a plaint dated October 6, 2022 and under certificate dated October 6, 2022 which came for hearing on November 1, 2022 when this court issued an order restraining the defendants from continuing with the construction until the next court date of November 15, 2022. It is on the basis of the orders issued on November 1, 2022, that the plaintiff filed the instant motion for contempt. The plaintiff's application dated October 6, 2022 was dismissed and the orders issued on November 1, 2022 set aside. The respondents argued that due to the dismissal of the application of October 6, 2022, the contempt now does not lie.
13. The question this court shall determine are twofold;
 - i. Whether the contempt application does lie
 - ii. If answer to (i) is yes, whether the applicant has proved the contempt.
14. In the case of *Samuel M.N Mweru & others* cited supra, it was held *inter alia* that, "it is the plain and unqualified obligation of every person against whom an order is made by a court of competent jurisdiction to obey it until and unless that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends to cases where persons affected by the order believes it to be irregular or void"
15. Before the plaintiff's application was dismissed, there existed a valid court order issued on November 1, 2022. The application dated January 12, 2023 for contempt was filed before the dismissal of the motion of October 6, 2022. Thus, the complains of disobedience were raised while there existed a valid court order that had not been discharged or set aside. Would the subsequent discharge of the said orders remove the powers of this court to punish the respondents where the disobedience is proved? I think not, because the respondent was under an obligation to obey the court order whether it was irregular or otherwise. They are liable to be punished if the contempt is proved regardless of the fact that the application for temporary injunction was subsequently dismissed.
16. The next question is whether or not the applicant has proved the disobedience. The applicant has gone to great lengths in explaining that the respondents were aware of the order (since it was made in the presence of their counsel). In proving the disobedience, the applicant annexed copies of photographs showing people undertaking some construction. The respondent contradicted the evidence by stating that the photographs are undated and in any event they were carrying on construction on their plot which is different from parcel no No 36/163/VII being claimed by the plaintiff.



17. The respondents are deemed to have been aware of the court order by virtue of the same having been made in the presence of their advocate. In the case of *Shimmers Plaza Ltd v National Bank* (2015) eKLR it was held that where a party is represented by an advocate, the party is deemed to have knowledge of the order, if the advocate is aware of the court order. In the case before me, the order was issued in the presence of the respondent's counsel so they deemed to have been aware of the order alleged to have been disobeyed.
18. The order required the respondents to restrain from undertaking any construction works on the suit property pending the determination of the application. The respondents argued that the photos relied upon by the applicant was undated but they did not state whether those photos referred to the suit premises prior to the issuance of the order. Secondly, the respondent qualified the impugned construction stating that they were being undertaken on their parcel of land which argument does not justify the action of disobedience. Taking cognizance of the fact that the applicant had moved the court contending that the activities were going on the plot, the question of whether or not the plot belonged to the respondent was pending the determination of the application/suit.
19. I am therefore satisfied that the applicant provided evidence of disobedience of a lawful court order. irrespective that the application was eventually dismissed did not divest this court of its powers to punish for contempt that was valid at the action complained of was undertaken. Consequently, I find merit in the application and allow it in terms of prayer 4 of the motion. The 1st respondent shall appear before this court on a date to be given to this court for showing cause and sentencing. The costs of the application is awarded to the plaintiff/applicant.

SIGNED DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JULY, 2003

A. OMOLLO

JUDGE

