



**Kutz International Limited v Gicheru & 4 others; Festus Okoth - OCS
Mlolongo Police Station (Interested Party) (Environment & Land Case
E086 of 2022) [2023] KEELC 20168 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20168 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E086 OF 2022
CA OCHIENG, J
SEPTEMBER 25, 2023**

BETWEEN

KUTZ INTERNATIONAL LIMITED PLAINTIFF

AND

DAVID GATHUNGU GICHERU 1ST DEFENDANT

PETER MAINA KARANJA 2ND DEFENDANT

AMOS MUIRURI 3RD DEFENDANT

PETER MUSYOKA 4TH DEFENDANT

THE REGISTRAR OF TITLES 5TH DEFENDANT

AND

FESTUS OKOTH - OCS MLOLONGO POLICE STATION INTERESTED PARTY

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 12th April, 2023 and the 1st and 2nd Defendants' Notice of Motion Application dated the 17th April, 2023.
2. In the Application dated the 12th April, 2023, the Plaintiff seeks for the following Orders:
 1. Spent
 2. That the 1st and 2nd Respondents be cited for contempt of the court orders dated 29th November, 2022 and consequently be committed to jail for a period to be determined by this Honourable Court.



3. That the Interested Party be ordered to show cause why he should not be personally punished for contempt of court for aiding and abetting the two respondents to perpetrate their contempt.
4. That the 1st and 2nd Respondents and Interested Party be compelled to show cause why they should not be punished for utmost disobedience of court orders.
5. That the 1st and 2nd Respondents be compelled to make reparations and compensate the Plaintiff for the damage caused on 24th March, 2023 in blatant disregard of court orders.
6. That the County Commander Machakos County be directed to take action in enforcement of the orders dated 29th November, 2022 and to take necessary steps to ensure that the Respondents keep off from the suit premises.
7. That costs provided for.
8. That this Honourable Court be pleased to issue any further or other order in the interests of justice.

PARA 3.

The Application is premised on the grounds on the face of it and the Supporting Affidavit of Raphael Mutua Kasaam, its property Manager. The Plaintiff states that in November last year, it instituted the instant suit and on 15th March, 2023, the 1st and 2nd Respondents were represented by one Kusow Advocate who was well aware of the orders issued. Further, that the 1st and 2nd Defendants instead of obeying the Court Order, proceeded to file another case in Milimani Magistrate's Commercial Court wherein they obtained ex parte orders. It contends that on 23rd March, 2023 around 4pm, the OCS Mlolongo visited the suit premises and purported to serve its workers with an ex parte order issued at Milimani Commercial Courts and ordered them to get out of the suit premises. It explains that the 1st and 2nd Defendants consequently descended on the suit premises in the wee hours of the 24th March, 2023 together with thugs and demolished the Plaintiff's boundary wall. It insists that the Defendants including the OCS were well aware of the orders issued by this Court but chose to ignore them. It states that the Orders in Milimani Commercial Court granted on 23rd March, 2023 were set aside on 27th March, 2023 after which the OCS Mlolongo was duly informed. Further, that in the Order of Milimani Commercial Court issued on 23rd March, 2023, it was expressly stated that; 'this is not an eviction or demolition order', yet the 1st and 2nd Defendants' with the assistance of the Interested Party used it, to demolish its fence. It avers that arising from the contemptuous actions of the 1st and 2nd Defendants, the Plaintiff's company has lost millions of money. It further states that it made a report to the Police but the Interested Party has shown open bias as he was the one who served the impugned Court Order from Milimani Court. It reiterates that the dignity and authority of the court must be protected at all times.

PARA 4.

The 1st and 2nd Defendants opposed the Application by filing a Replying Affidavit sworn by Peter Maina Karanja. They contend that the Application is misconceived and fatally defective and thus ought to be dismissed with costs. They aver that the suit filed in the Milimani Magistrate's Court was instituted before they were served with pleadings in the instant case. Further, that the suit in the Lower Court has since been withdrawn. They argue that the instant Application is fatally defective as it seeks orders against an Interested Party who is not a party to this suit. They argue that the Orders issued on 29th November, 2022 which they purportedly have disobeyed had not been served upon them on time thus lapsed automatically as at the time of service on 27th March, 2023 thus they cannot form the basis for contempt. They reiterate that there is no evidence that they disobeyed the court order which amounted to an eviction. They aver that they have been on



the suit land since 2004 and it is the Plaintiff who seeks to evict them. Further, that the Plaintiff demolished their chain link fence using goons and also injured as well as killed one of the workers.

PARA 5.

The Plaintiff filed a Supplementary Affidavit sworn by Raphael Mutua Kasaamwhere it insists that the 1st and 2nd Defendants were properly served on 6th March, 2023 after which they instructed a Counsel to appear on their behalf on 15th March, 2023. Further, that on the said date, their Counsel herein vehemently asked the Court to set aside the ex parte orders, hence he knew about the orders and it follows his clients also had knowledge of it. It reaffirms that the Milimani Magistrate's Commercial Court Case filed on 23rd March, 2023 was done with the full knowledge of the current matter, with the sole aim of subverting the orders issued herein. It reiterates that the aforementioned Milimani Suit was not withdrawn but dismissed after the Defendants' nor their Counsel failed to show up twice in Court. Further, that the OCS was served and it is upon him to respond.

PARA 6.

In the Application dated the 17th April, 2023, the 1st and 2nd Defendants' seek the following orders:

SUBPARA 1.

Spent

SUBPARA 2.

That pending the hearing and determination of this Application, this Honourable Court be pleased to stay its orders issued on 29th November, 2022.

SUBPARA 3.

That this Honourable Court be pleased to discharge, set aside and/or vacate the orders issued on 29th November, 2022.

SUBPARA 4.

That the costs of this Application be provided for.

PARA 7.

The Application is premised on the grounds on the face of it and the Supporting Affidavit of the 2nd Defendant Peter Maina Karanja. They confirm that this Court issued orders on 29th November, 2022 restraining the Defendants from entering, trespassing, alienating, surveying, transferring, interfering, offering for sale and developing the suit land. They claim the orders were issued through material non-disclosure, fraud and misrepresentation as the Plaintiff is not the lawful registered proprietor of the suit land. Further, that the orders despite being issued ex parte were not served upon them but the same were purportedly served on 6th March, 2023. They insist that the Court Order and pleadings were only served on their advocate on 27th March, 2023 which was twelve days after the matter had been mentioned on 15th March, 2023. They reiterate that the Court Order has greatly prejudiced them as they are in possession of the suit land since 2004. Further, that the Court Order was issued without proof of recent search certificate, no evidence of the Plaintiff being in possession of the suit land and the Plaintiff having used a fake title which is being challenged.

PARA 8.

In opposing the instant Application, the Plaintiff filed a Replying Affidavit sworn by Khatib Abdullah Ashraf. It deposes that the parties have been mixed up in this matter. It contends that the Application is incompetent, fatally defective, an abuse of court process, scandalous, frivolous, vexatious and a waste of court's time. It explains that the two Defendants' Application is a copycat of their Application which they made in Milimani Commercial Courts seeking to set aside orders that the said Defendants had obtained in deceit. It



avers that the Defendants were finally served when they showed up at the suit premises. It insists that the Defendants' advocates have never served their Notice of Appointment of Advocates. It states that the issues raised relating to ownership are the same presented to this court for determination. It reiterates that it has presented documentation on ownership, possession and insists that it has always been in possession of the suit land. Further, that is why the two Defendants demolished its perimeter fence in a bid to gain illegal entry.

PARA 9.

The two Applications were canvassed by way of written submissions.

Analysis and Determination

PARA 10.

Upon consideration of the Plaintiff's Notice of Motion Application dated the 12th April, 2023 and the 1st and 2nd Defendants' Notice of Motion Application dated the 17th April, 2023 including the respective Affidavits as well as rivaling submissions, the following are the issues for determination:

Whether the 1st and 2nd Defendants including the Interested Party should be cited for contempt of the court orders issued on the 29th November, 2022.

Whether the Orders issued on 29th November, 2022 should be set aside.

11. The Plaintiff in its submissions to the Application dated the 12th April, 2023 stated that the 1st and 2nd Defendants had knowledge/notice of the order as they got an advocate to represent them on 15th March, 2023. It argues that the orders issued on 29th November, 2022 were disobeyed and relied on its averments as per the respective affidavits. On the Application dated the 17th April, 2022, it argued that the said Application is an abuse of the court process and has been overtaken by events as the Defendants have already responded to the Application dated the 25th November, 2022. It relied on the averments in its Replying Affidavit and the entire record. To support its averments, it relied on the following decisions: Civil Case No. E 018 of 2021 (*OS*) *DKG v EG* [2021] eKLR; *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] eKLR and *Standard Resource Group Ltd v Badawy & 2 Others* [2017] eKLR.
12. The 1st and 2nd Defendants in their submissions to their Application insist that the ex parte orders granted on 29th November, 2022 were not served within three (3) days as required by law but were purportedly served on 6th March, 2023. Further, the 1st and 2nd Defendants advocates were only served on 27th March, 2023. They argue that the ex parte Order automatically lapsed. They insist that the Plaintiff is guilty of material non-disclosure as it is neither the lawful owner of the suit land nor has it ever enjoyed possession. They reiterate that the interim orders of injunction granted amounted to an eviction. On the Application for contempt, they insist that the order purported to have been disobeyed was not served upon them on time thus lapsed automatically as at the time of service on 27th March, 2023 hence cannot form the basis for contempt. Further, there is no evidence that the 1st and 2nd Defendants disobeyed the Court Order which amounted to an eviction. To support their averments, they have relied on the following decisions: *Samuel Maina & 4 Others v Murugi Kanyeki Ngobu* [2016] eKLR; *Signature Tours & Travel Limited v National Bank of Kenya Limited* [2017] eKLR; *Fatuma Mohamed Abdi & Another (Suing as their guardian ad litem and next friend of Amina Chawahir Said & Fatuma Shukri Said) v Michael Barasa Mangeni* [2020] eKLR; *Jonathan Kipyegon Maina V John Kiptonui Matingwony & 4 others* [2017] eKLR; *Esther Kakonyo Wanjohi v Julian Wambui Gakuru* [2018] eKLR; *Benjamin Barasa Wafula v Attorney General & 14 Others* [2018] eKLR and *Francis Nyaga Njeru v China Road & Bridge Corporation & 3 others* [2021] eKLR.



13. As to whether the 1st and 2nd Defendants including the Interested Party should be cited for contempt of the court orders issued on the 29th November, 2022.
14. The Plaintiff seeks to have the 1st and 2nd Defendants as well as the OCS Mlolongo Police Station cited for contempt claiming they disobeyed the orders of this Court issued on 29th November, 2022. For the avoidance of doubt, I wish to reproduce the said Orders:

“That pending the hearing and determination of this Application, this Honourable Court has issued an order of temporary injunction restraining the Defendant/Respondents whether by themselves, their servants, agents, their buyers/potential buyers, or anybody claiming under them including other parties from entering, trespassing, alienating, surveying, transferring, interfering, disposing, sub dividing, offering for sale, selling, developing, constructing or in any other way dealing with the property known as Land Reference No. 23412 Grant number IR 77750 situated in Mlolongo, Mavoko Sub county.”

15. The Plaintiff confirms the Order was served upon the 1st and 2nd Defendants on 6th March, 2023. Further, that after service of the said Order, the 1st and 2nd Defendants including their agents procured an ex parte order in Milimani Chief Magistrate’s court, invaded the suit land and destroyed the fence.

[Black’s Law Dictionary \(Tenth Edition\)](#) defines contempt of court as follows:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

16. The law of contempt in Kenya is anchored on Section 63(c) of the [Civil Procedure Act](#) which provides as follows:

“In order to prevent the ends of justice from being defeated, the Court may, if it so prescribed, grant a temporary injunction and in case of disobedience, commit the person guilty thereof to prison and order that his property be attached and sold.”

17. Further, Section 29 of the [Environment and Land Court Act](#) stipulates thus:

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.”

While Section 4(1) (a) of the [Contempt of Court Act](#) defines civil contempt as “willful disobedience of any judgement, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court.”

18. In the case of [North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi](#) (2016) eKLR Justice Mativo (as he then was) 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.”



See also the case of *Ochino & another v Okombo & 4 others* [1989] eKLR.

Order 40 Rule 4(3) of the Civil Procedure Rules which is couched in mandatory terms is explicit on validity of an ex parte order and stipulates thus:

In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.”

19. In *Benjamin Barasa Wafula v Attorney General & 14 others* [2018] eKLR, it was held that:

“It is clear therefore that the plaintiff cannot cling onto the lapsed order of injunction to have the defendants punished for disobedience thereof. In the case of *Erick Kimingichi Wapang’ana & Another v Equity Bank Ltd & Another* [2015] eKLR, the Court of Appeal held as follows: “Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months “unless”, as the Rule further provides, “for any sufficient reason the Court orders otherwise.” Emphasis added. It must be clear by now, therefore, that there is no order upon which the plaintiff can purport to cite any of the defendants herein for contempt or have them arrested for disobeying the orders issued by MUKUNYA J on 7th March 2017.”

See also the case of *Esther Kakonyo Wanjohi v Julian Wambui Gakuru (2018) eKLR and Samuel Maina & 4 Others v Murugi Kanyeki Ngobu* (2016) eKLR.

20. In this instance the Plaintiff confirms serving the 1st and 2nd Defendants on 6th March, 2023. From the Affidavit of Service, there is no indication if there was a Penal Notice attached to the Order served. Since the Court Order was served more than three months after it had been issued ex parte, I find that the Defendants were indeed not aware of it, nor its terms until the 6th March, 2023. As per the legal provisions cited above while associating myself with the decisions quoted and applying them to the circumstances at hand, I find that since the Plaintiff failed to adhere to the set timelines to serve the ex parte order within three days from the 29th November, 2022 when it was issued, the said order automatically lapsed by operation of law and hence the 1st and 2nd Defendants including the Interested Party cannot be cited for contempt for a non-existent order.

21. As to whether the Orders issued on 29th November, 2022 should be set aside.

22. The 1st and 2nd Defendants have sought to set aside the orders issued on 29th November, 2022. I note as per the impugned Order dated the 29th November, 2022, the Plaintiff was supposed to serve in three days which it failed to do, hence the orders automatically lapsed by operation of the law. I hence find that there is no order to set aside since the same had already lapsed.

23. Be that as it may, noting that the 1st and 2nd Defendants have also presented a Certificate of Title claiming ownership of the suit land, I will direct that the obtaining *status quo* be maintained so that whoever is on the suit land remains thereon pending the determination of the Notice of Motion dated the 25th November, 2022.

24. In the foregoing, I find the Notice of Motion Application dated the 12th April, 2023 unmerited and will disallow it. I further find the Notice of Motion Application dated the 17th April, 2023 merited but will not make the orders as sought as they have been overtaken by events.



25. I make no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF
SEPTEMBER, 2023**

CHRISTINE OCHIENG

JUDGE

