



REPUBLIC OF KENYA



**Nduku v Omusula & 2 others (Environment & Land Case 62 of 2016)
[2023] KEELC 19910 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19910 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 62 OF 2016
DO OHUNGO, J
SEPTEMBER 25, 2023**

BETWEEN

WILBERFORCE AMBUCHU NDUKU PLAINTIFF

AND

EVALINE OMUSULA 1ST DEFENDANT

NABAKOLI OMUSULA 2ND DEFENDANT

WAKUBA OMUSULA 3RD DEFENDANT

RULING

1. Judgment was delivered in this matter on June 26, 2019 in favour of the plaintiff as follows:
 1. An order of permanent injunction restraining the defendants jointly and severally either by themselves and or through their agents, servants, representatives and or any other person acting under their direction from trespassing, moving onto, alienating, depositing, building materials and or any other manner from interfering with the plaintiffs peaceful use and occupation of his parcel of land No. Marama/Shikunga/1146.
 2. No orders as to costs as the parties are relatives.
2. Later, the plaintiff filed Notice of Motion dated March 30, 2021, seeking the following orders:
 1. An order of committal be made against the Respondents to prison for such period as this Honourable Court may deem fit and just.
 2. That the O.C.S Butere Police station be directed to assist in enforcement of the decree herein.
 3. Any other order deemed expedient in the circumstances.



3. The application is supported by an affidavit sworn by the plaintiff/applicant. He deposed that following delivery of the judgment, the extracted decree was served upon the defendants on December 11, 2019 and that whenever he attempts to use the suit property, the defendants threaten him with dire consequences. That the defendants have refused to comply with the orders of the court. He annexed an affidavit of service sworn by Stephen Nerima Munyanya who deposed that he served all the defendants with the decree on December 11, 2019.
4. Subsequently, the plaintiff filed another affidavit on February 9, 2022 in which he deposed that at the time of filing the suit, he erroneously indicated the second and third defendants' names as per the heading above instead of Phanice Omusula and Boniface Makuba Omusula respectively and that the mistake made it difficult to execute the decree. He urged the court to allow him to rectify the names. So far, no amendment has been done.
5. The defendants opposed the application through a replying affidavit sworn by the Everlyne Nashirumbi Omusula who deposed that she is the first defendant, and that the plaintiff did not serve them with any pleadings. That the plaintiff filed the case through concealment of facts concerning the suit property with a view to disinherit her family. She added that the judgment ought to be set aside since the plaintiff has acknowledged that he sued the wrong people.
6. The application was canvassed through written submissions. Both the plaintiff and the first defendant filed submissions. I have carefully considered the application, the affidavits, and the submissions.
7. The law relating to contempt of court is that every person against whom an order is made by court of competent jurisdiction has a duty to obey it unless and until it is discharged. An allegation of contempt of court is a serious matter since it puts the liberty and or property of the contemnor at grave risk. It is for that reason that the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See *Mutitika v Baharini Farm Limited* [1985] KLR 229 and *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR.
8. To succeed in an application for contempt, the applicant must demonstrate wilful disobedience and the order said to have been disobeyed must be clear enough to leave no doubt as what is to be done or refrained from. See *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR.
9. The plaintiff has grounded his application on the affidavit of service sworn by Stephen Nerima Munyanya who claims that he served "all the defendants" with the decree on December 11, 2019 and that they "declined to sign arrogantly". The process server swore the affidavit on December 17, 2019. Despite his confident claims of service, the plaintiff swore another affidavit on 28th January 2022 and filed it on February 9, 2022, in which he admitted that the persons he sued as the second and third defendants were non-existent. Even going by the affidavit sworn by Everlyne Nashirumbi Omusula, it is apparent that none of the defendants in this matter was properly identified in the plaint. Thus, it is not clear who the plaintiff is accusing of contempt in Notice of Motion.
10. Litigants must always remember that it is not simply about filing a case in court and processing it through trial. Parties to a suit must carefully be identified, with a clear cause of action against each identified party. Once sued, each defendant must personally be served with summons to enter appearance. Equally, all subsequent pleadings and notices must be served on the parties personally or through their advocates on record. It is for that reason that litigants and their advocates must take a keen interest in the process servers that they instruct and the affidavits of service that those process servers submit. If no unmistakable evidence of service is exhibited in such affidavits, the instructing



litigant must insist on better evidence, without waiting for doubts to be raised by the opposite party, or by the court.

11. I am not persuaded that the applicant has satisfied the higher standard of proof that is required in contempt applications. I find no merit in Notice of Motion dated March 30, 2021 and I therefore dismiss it. In line with the judgment, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF SEPTEMBER 2023.

D. O. OHUNGO

JUDGE

