



**Mugambi v Mwaita & 3 others (Civil Suit E429 of 2022)  
[2023] KEELC 21377 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21377 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL SUIT E429 OF 2022  
JA MOGENI, J  
OCTOBER 23, 2023**

**BETWEEN**

**HOWARD MURURU MUGAMBI ..... PLAINTIFF**

**AND**

**SAMMY KOMEN MWAITA ..... 1<sup>ST</sup> DEFENDANT**

**TAIWA HOLDINGS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**DINAH CHELAL ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. By Notice of Motion dated 10/07/2023 the Plaintiff/ Applicant sought for the following orders: -
  - a. Summons be issued against the OCPD Karen Police Division to appear before this Honorable Court and show cause why they should not be committed to civil jail for contempt of court on such term as the court may deem just;
  - b. the OCPD Karen Police Division, be cited for contempt of court and be committed to civil jail for contempt of court for a term of Six (6) months until she purges the contempt and complies with the orders of this Honourable Court issued on 23<sup>rd</sup> May 2023 and/ or she be ordered to purge the contempt on terms this court deems fit;
  - c. In lieu of the second prayer, the OCPD be cited for Contempt of court and be fined a sum of at least Two Hundred Thousand Shillings (Kshs. 200,000/=).
  - d. This Honourable court do make any such other or further reliefs as it may deem fit for purposes of enforcing the temporary injunction issued by this Court on 23<sup>rd</sup> May 2023.
  - e. The OCPD Karen do pay the costs of these contempt proceedings.



2. The application is based on the statutory statement and the Verifying Affidavit of Howard Mururu Mugambi. The Statement has eight (8) grounds thereof. The applicant herein avers that on 23/05/2023 he was granted injunctive orders pending the hearing and determination of the instant suit.
3. It is the Applicant's contention that the OCPD Langata Police Division despite being served the orders of the court defied the Orders and barricaded the suit property making it impossible for the plaintiff to access the suit premises.
4. He further alleges that the OCPD has colluded with the 1<sup>st</sup> defendant who has been allowed to bring their goons who have surrounded the suit property thus denying the applicant access to the property. That the OCPD claims to have been served with alternate orders which he has however not been able to show the applicant and thus he has disobeyed the orders served upon him by the applicant
5. The applicant contends that the action of the OCPD is calculated to assist the 1<sup>st</sup> defendant whose application of 30/05/2023 for site visit by the court would serve to portray the 1<sup>st</sup> defendant to be the one in occupation of the suit property and not the applicant. Further that the disobedience of the lawful issued court order puts the court into disrepute.
6. The action of the OCPD is a clear violation of this Honorable Court's Order.
7. The application was not opposed despite the court's direction for parties to file their responses on 25/07/2023. No written submissions had been filed by the time of writing this Ruling.

#### **Issues for Determination**

8. I have taken into account the entire application, the Statement made under Order 52 Rule 2(2) of the Rules of the Supreme Court of England and the Grounds raised therein, Consequently, it is my considered view that the only issue for determination arising therefrom is whether the Application dated 10/07/2023 is merited and I shall proceed to discuss the same as hereunder;

#### **Analysis and Disposition**

##### **Whether the Application dated 10/07/2023 is merited.**

9. Section 5 (1) of the *Judicature Act* vests this court with the jurisdiction to entertain contempt proceedings and provides as follows;

“The High court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

10. Contempt is defined in the Black's Law Dictionary as;

“Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”



11. In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another*, Ibrahim J (as he then was) in addressing the issue on contempt made the following sentiments: -

“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. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by 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.”

(See also *Wildlife Lodges Ltd vs. County Council of Narok and Another* [2005] 2 EA 344 (HCK))

12. It is common ground that this court granted an injunction on 23/05/2023 whose effect was to preserve the title of title of the suit property and restrain any interference with the title until the hearing and determination of this suit. The nature of the said order was to preserve the substratum of the suit. There are two parties claiming the same suit property and this cannot be determined without hearing both parties.
13. The elements to be proved in contempt proceedings are well established; in order to succeed in civil contempt proceedings, the applicant has to prove;
- i. the terms of the order,
  - ii. Knowledge of these terms by the Respondent,
  - iii. Failure by the Respondent to comply with the terms of the order.
- Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred...
- (See *Charity Mpano Ntiyione vs China Communications Construction Company Limited & National Environment Management Authority* [2017] eKLR)
14. The terms of the order are not in dispute; the same were clear and unambiguous and the terms were binding on the parties mentioned in the said order. The Order in question which is a restraint Order has the effect of preserving the property in dispute pending the trial.
15. The second element is on the knowledge of the terms of the order by the OCPD Langata Division. It is the Applicant’s position that the even though the OCPD Langata Division Ms. Monica Kimani was served with the order she chose not to obey it. I note that the process server filed an affidavit of service dated 13/07/2023 where he avers to have served the OCPD with the order delivered on 23/05/2023 and the instant application.
16. Further, the process server, Mr Felix Omondi Owino filed in court an affidavit of service dated 2/06/2023 where he depones that he served the Court Order dated 23/05/2023 upon the OCPD Langata Division Ms. Monica Kimani who received and even signed on the face of the Court Order copy of the Process Server which has been filed in court. It is therefore clear that the OCPD was served personally and knowledge about the Order and what was expected of her.
17. The 3<sup>rd</sup> element to be proved is whether there was a deliberate failure by the Defendant/Respondent to comply with the terms of the orders. Contempt proceedings are quasi-criminal in nature. The



threshold/ burden of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability. (See Mwangi H.C. Wangonde vs Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998.

18. Similarly, Lord Denning in *Re Bramblevale Ltd* [1970] 1 CH 128 at page 137 stated that;

“A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”

19. Section 28 (1) (b) of the *Supreme Court Act* makes it an offence for a person to willfully and without lawful excuse, to disobey an Order of the Court. This section allows this Court to punish for contempt. It is, therefore, evident that the willful disobedience of a Judgment, decree or Order properly constitutes contempt of Court.

20. There are many judicial pronouncements on the necessity to punish for contempt, some which I cite here below which affirm the principle of punishing contemnors such as *Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another* [supra] where 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.”

21. In *Att-Gen. 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.”

22. There are also the cases of *A.B. & Another v R.B.*, Civil Application No. 4 of 2016 [2016] eKLR, *Burchell v. Burchell*, Case No.364 of 2005, *B. v. Attorney General* [2004] 1 KLR 431 and the case of *Mutitika vs Baharini Farm Limited* [1985] KLR among others.

23. The common thread in all the above cases is 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.

24. As already stated, the standard of proof in contempt cases is a bit higher than that in civil cases due to the fact that this is a quasi-criminal act. In the case of *Mutitika v. Baharini Farm Limited* [supra] 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.”

25. The reason for this high standard of proof is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. Therefore, it is important that 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 applicant to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.
26. The question that begs an answer, thus, is: did the OCPD Langata Division willfully disobey this Court’s Orders? The applicant showed the steps it took towards ensuring that the OCPD Langata Division was in the know concerning this court’s Order. The process server one Felix Omondi filed an affidavit of service that showed that the Order was served and was received by the OCPD in person.
27. At the same time in the letter by the Applicant’s Counsel to the Office of the Director of Public Prosecution dated 16/05/2023 states in part that the OCPD (Karen) which the applicant made an oral application to indicate it is OCPD Langata who ordered both parties to keep off the property to allow for the investigations to establish the true owner. That the property is under police guard.
28. This to me points to an OCPD who is ensuring law and order and preservation of the suit property until legal processes are undertaken to establish the rightful owner of the suit property.
29. The process-server has deponed that he served the OCPD with the order of this Court dated and issued on 23/05/2023 and the instant application. The Plaintiff’s complaint is that even after being served with the said order, the OCPD did nothing to prevent people, who he alleges are goons of the 1<sup>st</sup> defendant from invading the suit property.
30. I do note however that there is no evidence before the court to show that the applicant/plaintiff brought to the attention of the OCPD the alleged contemptuous actions of the people who were disobeying the court order. Considering that it is not in the province of the OCPD to guard the suit land for 24 hours every day, it was upon the applicant to bring to the attention of the OCPD, in writing, and with full particulars of the activities that were being undertaken on the land. The Plaintiff seems not to have done that.
31. Before I give my disposal orders let me quickly add that this matter has unnecessarily too many Applications. Indeed, it seems that the parties herein are contended in filing one Application after the other instead of fixing the matter for hearing to enable the court determine the issue of ownership of parcel of land known as LR 13791/3 Karen. Indeed, in its Ruling dated 23/05/2023 this Honorable Court directed as follows:

“The parties are now referred to the DR for PTC to prepare the suit for hearing on a priority basis.”

32. I urge the parties to consider doing so instead of filing application upon application.

### **Disposal Orders**

33. The failure by the applicant/plaintiff to give cogent evidence on the date when the alleged acts of trespass accrued, and evidence showing that he brought to the attention of the OCPD the alleged contemptuous actions by the trespassers or as stated goons of the 1<sup>st</sup> defendant, I find the Application dated 10/07/2023 to be unmeritorious. The Application is dismissed but with no order as to costs.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 23<sup>RD</sup> DAY OF OCTOBER, 2023.**

.....

**MOGENI J**

**JUDGE**

In the virtual presence of:-

Mr. Kamket holding brief Mr. Nanda for the 1<sup>st</sup> Defendant

No appearance for the Plaintiff /Applicant

No appearance for the 2<sup>nd</sup> -5<sup>th</sup> Defendant

Court Assistant: Sagina

.....

**MOGENI J**

**JUDGE**

