



REPUBLIC OF KENYA



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**U-Haul Vehicle Limited v Kiambu Dandora Farmers Co. Limited & 5
others; Mwangi & 6 others (Interested Parties) (Environment & Land
Case 39 of 2019) [2023] KEELC 20971 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20971 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 39 OF 2019
AA OMOLLO, J
OCTOBER 19, 2023**

BETWEEN

U-HAUL VEHICLE LIMITED APPLICANT

AND

KIAMBU DANDORA FARMERS CO. LIMITED 1ST DEFENDANT

DANDORA HOUSING SCHEME 2ND DEFENDANT

THE NATIONAL LAND COMMISSION 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

INSPECTOR GENERAL OF POLICE 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

AND

BEN MAINA MWANGI INTERESTED PARTY

ELIUD KINUTHIA KAMAU INTERESTED PARTY

EPHANTUS MAINA KIRAGU INTERESTED PARTY

GEORGE MAINA GITHUKU INTERESTED PARTY

WALLACE KAMAU MACHARIA INTERESTED PARTY

SAMUEL KAMAU NGUGI INTERESTED PARTY

PETER KAMAU MBUTHIA INTERESTED PARTY



RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 17th January 2023 seeking for the following orders;
 1. Spent;
 2. The Inspector General of Police, the 5th Defendant, be directed to forthwith provide the requisite assistance, aid and security to enable enforcement of the Court's orders of 26th November 2020.
 3. The 1st Defendant's members and/or directors be held in contempt of this Court's orders of 17th June 2019.
 4. In default, the 5th Defendant be summoned to appear before this Honourable Court to show cause why they should not be committed to civil jail for blatantly failing to comply with orders issued by this Honourable Court on 26th November 2020.
 5. This Honourable Court be pleased to hold that as a consequence of their acts of contempt, the 5th Defendant as well as the OCS Dandora Police Station shall be detained in prison for a period of 6 (six) months or such period as the Court may please.
 6. The Respondents be condemned to pay the costs of this application.
2. The application was premised on the grounds as outlined on the motion itself and the supporting affidavit sworn by Francis Njenga, the Property Manager of the Plaintiff. Mr Njenga deposed inter alia, that on the 17th June 2019 in the presence of all parties herein this Court made an order that there shall be no other or further developments or construction works on the properties in dispute namely L. R. No 209/9465, L. R. No 209/9466, L. R. No 209/9467 and L. R. No 209/9468 (herein after referred to as the suit properties). That in disobedience of this order, the 1st and 2nd Respondents by themselves and/or their agents, servants, employees, members or persons acting for and under them entered the suit properties and excavated, developed and erected constructions and structures on the suit properties which actions were meant to change the structure of the suit properties and remove the suit properties from the reach of the Plaintiff.
3. He deposed further that the continued constructions by the said 1st and 2nd Respondents are with the blessing of the Officer Commanding Dandora Police Station, an officer of 5th Defendant and the 5th Defendant itself which is in blatant disregard of this Court's order issued on the 17th June 2019. Mr Njenga avers that the Plaintiff filed the application dated 19th December 2019 seeking demolition of the structures unlawfully erected contrary to the order of the Court. That on 26th November 2020 further orders were issued requiring the Plaintiff to cause the order to be affixed on the unlawfully erected structures and the concerned persons to demolish the structures failing which the Plaintiff was to demolish the structures with the assistance of the Officer Commanding Dandora Police Station by providing requisite security.
4. That the Plaintiff in compliance affixed copies of the order on the unlawful structures and also published it in two daily newspapers. He deposes that upon the lapse of the duration provided, they



sought the assistance of the OCS Dandora Police Station on two occasions but the said officer refused to comply with the court order necessitating the filing of the application dated 26th January 2021 seeking orders for the OCS Dandora Police Station to be cited for contempt. That on 27th June 2022 the application was granted and the said officer was given thirty (30) days to purge the contempt.

5. In his show cause, the said officer claims to be ready and willing to comply with the orders of the Court but was not getting the necessary help from his superiors; showing that it is the superiors, who are parties to this suit and are behoved to ensure enforcement of the orders of the court, who are in contempt of the court orders on demolition.
6. The Plaintiff asserted on advice from their counsel on record that the element of contumacy, which requires flagrant defiance of the authority of the court is no longer necessary to establish breach of a court order, what is required to be established with respect to the mental element for liability for contempt of court, is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order.
7. He stated that the 5th Defendant is mandated by Article 245(2)(b) of the Constitution to exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation and Section 8A of the National Police Service Act, provides that the 5th Defendant is to exercise independent command of the Police Service and be responsible for all matters relating to the command and discipline of the Service subject to disciplinary control of the Commission.
8. Further, that the 5th Defendant and its officers are required to uphold the national values, principles and objects set out in Articles 10, 232 and 244 of the Constitution. That the 5th Defendant and his officers are also mandated with enforcement of all laws and regulations with which they are charged, including enforcement of court orders, thus by refusing and/or neglecting to provide the requisite security to enable the enforcement of the court orders which were directed at its officers, the 5th Defendant acted contrary to the constitutional and statutory obligations and requirements. That the 5th Defendant actions amounted to a violation of the court order and in the interests of justice, the orders sought granted.
9. The 1st Defendant filed Preliminary Objection dated 12th June 2023 stating that by dint of Section 7 of the Civil Procedure Act, this matter is Res Judicata because this Court rendered its ruling on the 26th of November 2020 following an application dated the 3rd of June 2019 which is similar to the current application and seeks the same relief.
10. The 1st Defendant also filed a replying affidavit sworn Joseph Mvvangi Karanja, its Director stating that they are aware of the orders of the court issued on the 17th of June 2019 as well as the eventual ruling rendered on the 26th of November 2020. However, he contended that it is not true that Kiambu Dandora Farmers Company Limited either through its directors, agents, servants or members or any person acting for and under them entered into the subject suit properties and are erecting structures, excavating, developing on the suit property as alleged by the plaintiff/ applicant herein.
11. They contended that the photographs "FN-I" does not in any way confirm the location where the said photos were taken or that their members or employees were engaged in the construction activities on the suit properties. Also, the plaintiff/ applicant has not attached a certificate of production of electronic evidence as required. Further, that whereas the orders of the Court of 26th November 2020 are still in force, the Plaintiff has failed to demonstrate efforts it has put in place to ensure that it is enforced. Additionally, the plaintiff/ applicant has brought contempt proceedings as against Kiambu Dandora Farmers Company Limited, which is a juristic person and has not sought to lift the veil of incorporation.



12. The Honourable Attorney General filed grounds of opposition dated 27th March 2023 stating that the application as against the 5th Defendant and the OCS Dandora Police Station is res judicata, a fundamental principle of law that relates to the jurisdiction of the Court which may be raised as a valid defence to a constitutional claim even on the basis of the Court's inherent power to prevent abuse of process under Rule 3 (8) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure rules 2013](#).
13. Further, that the application violates all the principles of contempt proceedings since the impugned order is expressly as against the 1st Defendant, a juristic person, therefore the Plaintiff should seek to cite the directors of the 1st Defendant or firstly bring an application to lift/pierce the corporate veil relying in the case of [Katsuri Limited v. Kapurchand Depar Shah](#) (2016) eKLR and [Akber Abdullah Kassam Esmail v. Equip Agencies Ltd & 4 Others](#) Civil Appeal No 267 of 2004, (2014) eKLR.
14. They pleaded that the power to punish for contempt is a drastic power which must be exercised with caution and the right procedures must be followed and that the party who calls upon the Court to make a finding of contempt must show that he has himself complied strictly with the procedural requirements and his failure to do so cannot be answered by a mere assertion that the other side was aware or ought to have been aware of what the order required him to do.
15. The A.G. contended that the application offends Section 107 of the [Evidence Act](#), is an abuse of the Court process, un-procedural and lacks merit thus should be dismissed with costs.

Submissions

16. The Plaintiff/Applicant filed submissions dated 26th June 2023, first outlining the background of the matter. They submitted that the grounds of opposition by the 5th and 6th Defendants do not controvert issues of facts as raised in their affidavit and cited the Court of Appeal in [Daniel Kibet Mutai & 9 others v Attorney General](#) [2019] eKLR and [Faustina Njeru Njoka v Kimunye Tea Factory Limited](#) [2022] eKLR.
17. The Applicants relied on the Supreme Court decision in [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR in their submission that the application is not res judicata because in the application dated 26th January 2021, contempt was sought as against the OCS Dandora Police Station but the instant application is seeking for contempt orders against the 5th Respondent and for an order compelling it to provide security and assistance in the enforcement of the orders of the court.
18. The Applicants submitted that the 5th Respondent is a party to this suit and is mandated by Article 245(2)(b) of the [Constitution](#) to exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation. Further, under Section 8A of the [National Police Service Act](#), he is required to exercise independent command of the Police Service and be responsible for all matters relating to the command and discipline of the Service subject to disciplinary control of the Commission.
19. They further submitted that the 5th Respondent is to lawfully administer, control and manage the National Police Service as a disciplined Service and its officers are required to uphold the national values, principles and objects set out in Articles 10, 232 and 244 of the [Constitution](#) thus mandated with enforcement of all laws and regulations with which they are charged, including enforcement of court orders and in support cited the case of [Republic v Commissioner of Police an Another ex-parte Michael Monari & Another](#) [2012] eKLR.



20. They submitted that the OCS Dandora Police Station stated under oath that he has failed to receive support from his superiors demonstrating that the 5th Respondent, who is mandated by the Constitution and Statute to head the National Police Service has abdicated in the duty to provide support that is needed to enforce the orders of this court. Thus, this Court has the requisite powers to compel the 5th Respondent to offer the necessary support to enable the enforcement of its orders.
21. In support of their arguments, they cited the case of *Shah v Attorney General* (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543, as cited in the case of *Republic v Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 others* [2018] eKLR at paragraph 16 where it is postulated;
- “Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...”
22. The Applicant submitted that whereas Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government, the Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined; and the obligation to act is peremptory. They added that though the 5th Respondent is an independent institution, the court can interfere with or interrogate its actions where there is contravention of the Constitution. To corroborate this argument, they relied on the holding in the cases of *Kenya Commercial Bank Limited & 2 others v Commissioner of Police and Another*, Nairobi Petition No. 218 of 2012 (2013) eKLR, *Paul Ng'ang'a Nyaga v Attorney General & 3 Others* (2013) eKLR and *Samuel Oulula Wanguba v Director of Public Prosecution & another; Saicare Enterprises Limited* (Interested Party) [2019] Eklr.
23. They also relied in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] Eklr which discussed on elements that needs to be proved to establish contempt in civil proceedings and stated that the 5th Respondent failed to comply with the order directing the obedience of the orders of the court, thus should be held in contempt. They also cited the case of *Teachers Service Commission v Kenya National Union of Teachers & 2 Others* [2013] Eklr.
24. The 1st -7th Interested Party filed their submissions dated 24th July 2023 and stated that the Orders of 26th November, 2020 were temporary Orders issued in line with Order 40 rule 1 and 6 of the Civil Procedure Rules provides that where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the Court Orders otherwise. That a total number of about 31 months have since lapsed, thus the Court having not been moved to extend the said Orders, it cannot order for the enforcement of the “expired” order as there is no sufficient reason issued by this Court to extend them. In support, they cited the case of *CIC General Insurance Company Limited- v- Philis Mbula* (2019) Eklr which cited the case of *NSSF- v- John Ochieng Opiyo* (2006) Eklr where it was held that a Court cannot validate orders which upon expiry have ceased to exist.
25. They also relied in the case of *Erick Kimingichi Wapang'ana T/A Magharibi Machinaries Limited v Equity Bank Limited & Another* being Bungoma Civil Appeal Number 91 of 2011 at paragraph 6 where the court stated that the injunction orders alleged in the application do not exist as the same were extinguished by operation of law after the Applicant failed to extend them.



26. The Interested Parties contend that the injunction orders issued to the Plaintiff/Applicant were on the condition to expedite the hearing and disposal of the main suit. However, in the present case the Plaintiff has never been keen in expediting the hearing of this suit hence this Court also has to look at the duration it has taken just handling the applications instead of fast tracking the hearing of the main suit which will eventually resolve the dispute between the parties herein as to who is the owner of the suit premises.
27. In response to the 1st -8th Interested party's submissions, the Applicants filed supplementary submission dated 28th August 2023. They stated that the provisions of Order 40 Rule 6 of the Civil Procedure Rules 2010 were meant to punish a litigant who goes to sleep as soon as the orders are granted, as held in *David Wambua Ngii v Abed Alembi & 6 Others* (2014) Eklr, where it stated that,
- “it is important to first deal with the scope and purpose of Order 40 Rule 6 of the *Civil Procedure Rules* on lapse of an injunction. Order 40 rule 6 of the Civil Procedure Rules could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure.”

Determination:

28. The background of the application and responses thereto has been given in the summary presented herein above. From the foregoing, I frame two (2) issues for determination;
- i. Whether the application is res judicata or
 - ii. Whether the orders sought can be granted.
29. Both the 1st, 5th and 6th Defendants stated that the present application as res judicata. These defendants went further to explain the doctrine of res judicata. I have perused the court record and in particular the applications dated 18th December, 2019 filed by the plaintiff/Applicant.
30. In the notice of motion application dated 16th December, 2019, the plaintiff sought five (5) prayers; whereof prayer (a) – (c) sought for orders that the court does find the directors of the 1st defendant was in disobedience of the court's order of 17th June, 2019 and to proceed to punish them for the contempt. Prayer (d) sought for demolition of the structures constructed in contravention of the court order; and (e) asked the court to order officers of the 5th Defendant to enforce the above orders.
31. Justice Okong'o rendered himself on the application (of 16.11.2019) vide a ruling dated 26th November, 2020 and declined to grant prayer (a) to (c) which had sought to find the directors of the 1st Defendant guilty for contempt. However, the orders for demolition of the illegal structures put up on the properties listed was granted, and the court directed the 5th Respondents through the OCS Dandora Police Station to provide the plaintiff with the necessary security during the demolition exercise.
32. In the present application, the plaintiff has asked under prayer 3 for an order that the 1st Defendant's members and or its directors be held in contempt of this court's orders of 17th June, 2019. The prayer



is indeed similar to the prayers sought in the motion dated 16th December, 2019 thus contravenes the provisions of section 7 of Civil Procedure Act on res judicata. Section 7 provides that;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...” (underline mine for emphasis).

33. The plaintiff pleaded that he complied with the orders of 26th November, 2020 by affixing copies of the order on the illegal structures and a publication on the daily newspapers. When the O.C.S Dandora failed to provide security as directed, the plaintiff again moved the court vide the application dated 26th January, 2021.
34. The application dated 26th January, 2021 was determined on 27th June, 2022 in favour of the plaintiff. Okong'o J. made the following orders;
 - i. The OCS Dandora Police Station Inspector Peterson Kunga is found guilty to be in contempt of the orders made on 26.11.2020
 - ii. The said Officer is given 30 days from when the Plaintiff notifies him in writing to purge the contempt.
 - iii. The matter was fixed for mention on 21.9.2022 to confirm if the contempt was purged
35. In this current application the plaintiff has asked for two orders against the 5th Defendant;
 - i. to provide the requisite assistance, aid and security to enable the enforcement of the orders of 26th November, 2020.
 - ii. The 5th Defendant be summoned to show cause why they should not be committed to civil jail for failing to comply with the orders of 26th November, 2020.
36. The orders of 26th November, 2020 was clear that the 5th Respondent was to provide security through the O.C.S Dandora Police Station. Once the order was granted, the Plaintiff/Applicant could only apply for variation of the terms of the order of 26th November, 2020 so that the same is specifically directed at the 5th Defendant. Instead of the variation, he filed the present application asking the court to grant the orders. This particular prayer cannot be said to be res judicata since previously no application had been made as against the 5th Defendant.
37. In light of the prayer seeking to have the 5th Defendant provide security during the execution of the orders of 26.11.2020, it cannot on the same breath apply to have the 5th Defendant punished even before the orders are granted. In essence, prayer under nos. (4) and (5) of the application is premature.
38. As pleaded in the grounds of opposition by the 5th and 6th Defendants, that to punish for contempt is a drastic power which must be exercised with caution, and the right procedures must be followed. In this case, the procedure has not been followed because the Plaintiff/Applicant has not exhibited by way of correspondence to the 5th Defendant (post the date of show cause of the O.C.S Dandora Police Station) seeking for provision of security to enforce the orders of 26th November, 2020.



39. In conclusion, the application dated 17th January 2023 succeeds only in terms of prayer 2. I make the following orders;

- a. Prayers 3-5 is dismissed with costs to the Defendants.
- b. The Inspector General of Police (the 5th Defendant), be and is hereby directed to forthwith provide adequate security and assistance to the Plaintiff within 30 days of receipt in writing of the Plaintiff's readiness to execute the orders of 26th November 2020 requiring the demolition of the structures constructed on L.R. Nos 209/9465, 9466, 9467 and 9468

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023

A. OMOLLO

JUDGE

