



Yano v County Government of Elgeyo Marakwet; Cheboi & another (Affected Party) (Environment & Land Petition E001 of 2023) [2023] KEELC 22015 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND PETITION E001 OF 2023
L WAITHAKA, J
NOVEMBER 30, 2023**

BETWEEN

PIUS KIPTUM YANO PETITIONER

AND

COUNTY GOVERNMENT OF ELGEYO MARAKWET RESPONDENT

AND

ELIAS CHEBOI AFFECTED PARTY

JOAN JEPKOSGEI CHEBOSWON AFFECTED PARTY

RULING

1. On 20th March 2023, this court gave a conservatory order restraining the respondent (the County Government of Elgeyo Marakwet), together with its agents and servants from trespassing or interfering with the petitioner's quiet and peaceful occupation of the parcels of land known as Cherangany/Kapcherop/1300 and 1174.
2. Complaining that the order issued on 2nd June, 2023 was disobeyed by the respondent's officers namely Elias Cheboi and Joan Jepkosgei Cheboswony, the petitioner/applicant filed the notice of motion dated 5th June 2023, seeking to punish the said officers of the respondent for contempt of court.
3. The application is premised on the grounds on its face and is supported by the affidavit of the petitioner/appli-can't sworn on 5th June, 2023. Through the affidavit, the petitioner/applicant has *inter alia* deponed that the respondents' officers mentioned above, while aware of the court order issued by this court on 20th March 2023, in blatant disrespect of the order, deliberately trespassed onto the petitioner's land using a road grader machine, registration number KHMA 791C and maliciously expanded the unfinished road on the suit properties. It is the petitioner/applicant's case, that the actions of the respondent's officers complained of are calculated at undermining the rule of law and is



aimed at defeating the ends of justice. The acts of the contemnors complained of are also said to have caused the applicant substantial and irreparable loss.

4. The applicant has annexed the following documents to the affidavit sworn in support of the application: -
 - i. Copies of the court orders said to have been disobeyed by the contemnor's marked PKY-1(a) and PKY-1(b);
 - ii. Photographs of the equipment/machine used to commit some of the acts complained of marked PKY-2(a) and PKY-2(b);
 - iii. Copy of Occurrence Book report and copy of letter from the applicant's counsel marked PKY-3(a) and PKY-3(b) - (not letter but email extract forwarding a letter to the respondent's advocate. OB extract does not reflect any complaint made or recorded); and
 - iv. Photographs of stones said to have been brought to the site by the contemnors marked PKY-4(a) and PKY-4(b).
5. In reply and opposition to the application, the contemnors swore affidavits denying the applicant's contention that they intentionally disobeyed the court order herein.
6. In his replying affidavit sworn on 9th June 2023, the 1st contemnor, Elias Cheboi, acknowledges that the respondent sourced a contractor to maintain the road in question but *vide* paragraph 6 of the replying affidavit states that he had given clear instructions to Victor Yator (the Road's Officer) that the contractor was to skip and avoid the sketch of the road in dispute.
7. In paragraph 7 of her replying affidavit, the 2nd contemnor acknowledges that she was aware of the conservatory orders issued by the court in this matter and explains that it is that knowledge that informed his decision to give the instructions referred to herein above.
8. Maintaining that the acts complained about were not done with his instructions, the 1st contemnor denies having done or caused to be done the actions complained about.
9. *Vide* paragraph 11 of his replying affidavit, the 1st contemnor faults the applicant for dealing with the contractor's employee whom he says was not privy of the court order instead of dealing with the 2nd contemnor or the department of roads which was aware of the court order.
10. Terming the applicant's claim of threat, harassment and intimidation unfounded, the 2nd contemnor states that she has no knowledge of any such actions by the respondent's employees/officers and states that the applicant should report the suspects to the police instead of making unsubstantiated allegations against the respondent or its officers thereby tarnishing the good names of the respondent's employees.
11. The 2nd contemnor in her replying affidavit sworn on 12th June 2023, paragraphs 19, acknowledges that Victor Yator and she handed over to a new contractor the road in question and states that they instructed the contractor to avoid the section of the road in dispute. *Vide* paragraph 20 of her replying affidavit, the 2nd contemnor states that no dispute arose concerning the road maintenance exercise as none was reported to her for her intervention.
12. In paragraph 23 of her replying affidavit, the 2nd contemnor acknowledges that she was aware that there was a court order in place concerning the section of the road in question and in paragraph 24 denies having given instruction to the contractor or any other person to work on the section of the road in dispute.



13. Concerning the gravel/stones said to have been delivered in pursuit of the actions complained of, it is the 2nd contemnor's contention that they are on another section of the road and not on the disputed section of the road.
14. The 2nd contemnor challenges the application on the ground that she is not a party to the suit and that she has wrongly been described as an "Affected Party," when no such party is known by law.
15. The respondent's roads inspector, Victor Yator, swore an affidavit corroborating the averments contained in the 1st contemnor's replying affidavit. Vide paragraph 5 of his affidavit, Victor Yator states that the 2nd contemnor and he handed over the road to a new contractor and gave him clear instructions not to work on the section of the road in disputes; that after receiving the applicant's complaint, he warned the contractor not to trespass or work on the disputed section.
16. The applicant filed a supplementary affidavit, sworn 15th June 2023, denying the 2nd contemnor's claim that the actions complained of were done by him and/or carried out with his approval. According to the applicant, the 2nd contemnor *vide* paragraph 4 and 5 of his replying affidavit concedes to his actions of disrespecting the court order.
17. It is the applicant's case that the contemnors cannot escape blame by claiming that the acts complained of were done by an independent contractor or the independent contractor's employee when they were responsible for procuring the independent contractor.
18. Lamenting that his complaints to the police have not been acted upon, the applicant maintains that the orders issued in this application should be served upon the OCS Kapcherop Police Station for enforcement.
19. Pursuant to orders given by this court to the effect that the application shall be disposed off by way of written submissions, parties filed submissions, which I have read and considered.
20. The sole issue arising from the application, the responses filed in respect thereof and the submissions is whether the applicant has made up a case for being granted the orders sought.

The Applicant's Submissions

21. Concerning that issue, the applicant through his submissions filed on 15th June 2023, submits that the requirements for an application for contempt of court order namely, existence of a valid court order requiring the contemnor to do or refrain from doing a particular activity; that the order was not ambiguous; that the order was served upon the contemnor or that the contemnor had knowledge of the order and that the contemnor willfully disobeyed the court order have been established; that the contemnors willfully disobeyed the court orders herein since they confirm in their replying affidavits that they were aware of it and that the contemnors cannot hide in the excuse that they are not the ones who hired the contractor or caused the independent contractor to carry out the acts complained of as they procured, aided and facilitated the independent contractor to commit the acts complained of.
22. The applicant further submits that the explanation offered by the contemnors that they instructed the contractor to skip the section of the road in question is incapable of holding any water as a road grader is not a helicopter to fly over one point to another in a bid of escaping the point in dispute; that no sketch has been produced to demonstrate how the impugned works were to be carried out without interfering with the applicant's suit land as alleged and that the applicant has made a case for being granted the orders sought.



The Respondents Submissions

23. In their submissions filed on 26th June 2023 the respondents have given an overview of the cases urged by the parties and identified the issues for the court's determination to be whether the affected parties are in contempt and whether the affected parties can be held in contempt on account of an independent contractor who overstepped his instructions.
24. On whether the affected parties are in contempt of the court orders on which the application for contempt is premised, an explanation of the circumstances leading to the alleged contempt of the court order is given and submitted that the applicant has not proved that the contemnors maliciously, willfully or deliberately disobeyed the order; that the applicant has not established clearly and precisely what the contemnors are in contempt of and that the applicant has failed to establish that there was an interference with due administration of justice.
25. Arguing that there is need for viva voce evidence and cross examination of the parties, particularly the applicant for the court to get the true picture of the whole matter; and that given an opportunity, they would prove that the applicant is a person out to get the contemnors punished without a just cause; the contemnors claim that there is no evidence that they were served with a penal notice warning them of consequences of failure to obey the order as by law required. It is the contemnors' case that failure to serve them with an order with penal notice is fatal to the application for contempt.
26. It is further submitted that the order on which the application for contempt is premised is imprecise hence incapable of forming the basis for punishing the contemnors. In that regard, it is argued that the order doesn't talk about the road but trespassing or interfering with the petitioner's quiet and peaceful occupation of Cherangany/Kapcherop/1300 and 1174.
27. As to whether the contemnors can be held in contempt on account of an independent contractor who overstepped his instructions, it is submitted that they cannot and stated that there are extenuating circumstances given by the contemnors.
28. On costs, it is reiterated that the applicant has not met the threshold for grant of the orders sought and the court is urged to dismiss the applicant's application with costs.

Analysis and determination

29. I have carefully read and considered the case urged by the applicant and the response offered by the contemnors. I have also read and considered the submissions by the parties and the law applicable.
30. I note that the contemnors have not disputed having had knowledge of the orders they are said to have disobeyed or caused to be disobeyed by a third party.
31. I have also considered the explanation offered by the contemnors concerning the circumstances surrounding disobedience of the order. It is my considered view that the excuse offered by the contemnors cannot hold.
32. The contemnors cannot be heard to say that the orders were disobeyed by a third party yet they were the ones with full responsibility of ensuring that the court order was fully complied with. There was no evidence whatsoever of any measures taken by the contemnors to ensure compliance with the court order.
33. In the circumstances, I am satisfied that the applicant has made up a case for issuance of a notice to show cause on the contemnors namely Elias Cheboi and Joan Jepkosgei Cheboswony to appear before the court and show cause why they should not be punished for wilful disobedience of the order issued



by this court on 20th March 2023. Consequently, I issue a notice requiring Elias Cheboi and John Jepkosgei Cheboswony to appear before me on 6th December 2023 and show cause why they should be punished for disobedience of the aforementioned order of the court.

34. Orders accordingly.

RULING READ, DELIVERED, DATED AND SIGNED AT ITEN THIS 30TH DAY OF NOVEMBER, 2023.

L. N. WAITHAKA

JUDGE

