



Hakim & 6 others ((Suing in their own capacity and as the officials of the Villa Franca Residents Estate Association)) v Joz & another (Environment & Land Case E093 of 2022) [2023] KEELC 21844 (KLR) (29 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21844 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E093 OF 2022
JA MOGENI, J
NOVEMBER 29, 2023**

BETWEEN

**OJAY HAKIM 1ST PLAINTIFF
PETER NJUGUNA 2ND PLAINTIFF
MARTIN MUIA 3RD PLAINTIFF
BERNARD KOTONYA 4TH PLAINTIFF
DR OJWANG 5TH PLAINTIFF
STEVE BIKO 6TH PLAINTIFF
SARAH MAINA 7TH PLAINTIFF
(SUING IN THEIR OWN CAPACITY AND AS THE OFFICIALS OF THE VILLA
FRANCA RESIDENTS ESTATE ASSOCIATION)**

AND

**MUHAMAD JAMAL JOZ 1ST DEFENDANT
ELIAS KARANI NDAMBIRI 2ND DEFENDANT**

RULING

1. This is the Notice of Motion dated 25/08/2023 brought under Order 51 Rule 1 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act*, the inherent jurisdiction of the court and all other enabling provisions of the Law. It seeks orders: -

1. Spent



2. That the Honorable Court be pleased to issue a Notice to Show Cause to the 2nd defendant/respondent/intended contemnor ELISAS KARANI NDAMBIRI to show cause why contempt of court proceedings against him should not be instituted for disobedience of court order firstly issued on the 16th March, 2022 and confirmed on the 24th May, 2022 barring him from trespassing, entering and perforating, from constructing on the perimeter stone wall, occupying or carrying out business at the perimeter wall or dealing with any way whatsoever with the perimeter wall adjacent to parcel known as LR no. 3858/44 Villa Franca Estate
 3. That in default of the Notice to Show Cause, then the contempt of court proceedings be commenced against the said ELIAS KARANI NDAMBIRI for disobedience of the court orders above.
 4. That arising from the court orders in place the 2nd defendant be adjudged of contempt of court and put to civil jail for a period of not less than six months or ordered to pay fine or both or a sanction which the Honorable court may find it fit including at his own cost to restore back the Villa Franca perimeter wall adjacent to the LR no. 3858/44 Villa Franca Estate to the condition in which it was before the violation, perforation and/or intrusion.
 5. That upon the commencement of the contempt of court proceedings a warrant be issued to the OCPD Embakasi Police Station to effect the arrest of the contemnor Elias Karani Ndambiri and be brought to court for punishment
 6. That the Honorable court be pleased to issue an order to the OCPD Embakasi Police Station and OCS Villa Police Station to ensure effective execution of the court orders and directions as per the order given on the 24th May, 2022 by the court, among them to restrain the defendants from perforating the wall, construction on the perimeter wall and from carrying on business at the perimeter wall adjacent to parcel known as LR no. 3858/44 Villa Franca Estate and to close the businesses all together until the suit is heard and determined.
 7. That the defendant/contemnors be ordered to pay the costs of this application.
2. The grounds are on the face of the application and are set out in paragraph's (1) to (16).
 3. The application is supported by the affidavit of Martin Muia, the current chairman to the Villa Franca Residents Estate Association sworn on 25/08/2023.
 4. The application is opposed. There is a replying affidavit sworn by Elias Karani Ndambiri the 2nd Defendant/Respondent sworn on the 13/10/2023.
 5. The court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions. The plaintiff filed their submissions dated 2/11/2023 and the defendants filed their submissions dated 3/11/2023. The gist of the plaintiff's submissions was that the defendant was aware about the court order issued on 24/05/2022 but continued violating it by constructing on the perimeter wall. As part of the evidence of the disobedience the plaintiff produced in evidence pictures marked as "MM5".
 6. The gist of the defendant's submissions was that there was no court order since the court had directed that the matter in court had to be heard and determined by 24/08/2022. Therefore, the purposive reading of the said order meant that the timeframe given operated automatically and discharged the said orders after expiry of the stipulated timeframe which the applicants never extended during pre-trial nor never mentioned to the court.
 7. Both parties provided authorities that they have relied on to support the position they have advanced.



8. I have considered the Notice of Motion and the affidavit in support. I have also considered the replying affidavit, the rival submissions and the authorities cited. The issues for determination are:-
- i. Whether the 2nd Defendant is in contempt of the order issued on 24/05/2022.
 - ii. Who should bear costs of this application?
9. Section 5 of the *Judicature Act* 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 such power shall extend to upholding the authority and dignity of subordinate courts”
10. On the first issue as to whether the 2nd defendant is in contempt of the orders of the court issued on 24/05/2022, the court is guided by the provisions of section 5 of the *Judicature Act* which provides that:
- “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”.
11. Further, section 29 of the *Environment and Land Court Act*, 2011 provides:
- “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”.
12. The Court of Appeal in *Michael Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR explained:
- “It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. ...Secondly, as this Court emphasized in *Jiban Freighters Ltd v Hardware & General Stores Ltd* and in *A.B. & Another v R. B.* [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See *Mutitika v Babarini Farm* (*supra*) and *Republic v Ahmad Abolfathi Mohammed & Another* (*supra*).”
12. The order that is in question which was issued on 24/05/2022 states in part as follows:
- “That pending the hearing and determination of this suit, there is hereby issued an order of injunction restraining the 1st and 2nd defendants/respondents, and specifically the 2nd defendant whether by themselves, their agents, servant, employees, workers and/or workmen from trespassing from entering, from carrying out business at the perimeter wall and/or from dealing in any way whatsoever with the perimeter wall adjacent to parcel known as LR no. 3858/44, Villa Franca Estate or at all pending the hearing and determination of this suit and/or until further orders of the Honorable Court..”



13. The reason that I have reproduced the contents of the order is to show that the order was clear and unambiguous. Any right thinking man/woman would be able to deduce and understand what the ruling meant to safeguard. The court issued an injunction barring any construction on the wall or the wall adjacent to the name title LR no. 3858/44. The ruling also ordered that the matter be heard on priority within two (2) months and the parties were referred to the Deputy Registrar for Pretrial.
14. The respondent's point of contention is that the injunctive order expired after the two months since according to him the order was based on the two months' period within which the suit had to be heard.
15. It was incumbent upon the applicant to prove that the 2nd defendant deliberately disobeyed the orders issued on 24/05/2022. The applicant alleged that the 2nd defendant continued construction and in fact perforated the wall. He attached copies of photographs allegedly of the continued construction and perforation of the perimeter wall.
16. For contempt of court proceedings to succeed the applicant must prove that
 - (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 as was held in the case of *Kristen Carla Burchell v Barry Grant Burchell*, Eastern Cape Division Case no. 364 of 2005.
17. In the case of *Kiiru Tea Factory Co. Ltd v Stephen Maina Githiga & 14 Others* [2019] eKLR the Court of appeal observed thus:-

“in *Basil Criticos v Attorney General & 2 Others* [2016] eKLR Lenaola J (as he then was) confirmed the paradigm shift saying;

“ “...the law has changed. And as it stands today knowledge, supersedes personal service.....where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary”.
18. In the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR J Mativo held that, in order to succeed in contempt proceedings, the applicant has to prove the following:

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“That the terms of the order were clear and unambiguous and binding to the Defendant; that the defendant had knowledge of or proper notice of the terms of the order; that the Defendant has acted in breach of the terms of the order and the Defendant's conduct was deliberate”.
19. The Defendant/Respondent has not stated that the terms of the Ruling dated 24/05/2022 were unclear and ambiguous. He has stated that according to his purposive interpretation the order had lapsed since the two months that the case was supposed to be heard had expired.
20. In the case of *Geoffrey Kathiri Kisin & 10 Others v East Africa Portland Cement Co. Ltd & 5 Others* [2021] eKLR the Court of Appeal observed that:-

“ It is trite law that to commit a person for contempt of court firstly, the court must be satisfied that the person has deliberately and willfully disobeyed a court order that he was aware of. Secondly, the order of the court that is alleged to have been disobeyed must be clear



and precise so as to leave no doubt as to what a party was supposed to do or refrain from doing (see *A. B & Another v R. B.* [2016] eKLR. Lastly, the standard of proof in committal proceedings is higher than proof in a balance of probabilities but not as high as proof beyond reasonable doubt....”.

21. I am guided by the above authorities.
22. Further the court order which I have reproduced at paragraph 12 cleared stated “.....pending the hearing and determination of this suit and/or further orders of the Honorable Court.” The 2nd defendant has not demonstrated to this court that the suit has been heard and determined or that the court has issued further orders in addition or in variance to what the court issued on 24/05/2022. I find the argument of the 2nd defendant about purposive interpretation misleading to himself and deliberately so.
23. It is the duty of the Defendant to obey the said orders. In the case of *Wildlife Lodges Ltd v County Council of Narok & Another* [2005] 2 EA, 344, it was observed that there is an 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.
24. I find that the 2nd defendant has willfully and deliberately disobeyed the orders of 24/05/2022. He has raised the issue of having the suit heard and determined within 2 months as being a reason to consider. This is neither here nor there.
25. In conclusion, I find that the 2nd defendant is in contempt of the order of this court issued on 24/05/2022. I find merit in this application and I grant the following orders namely: -
 - a. That the Defendant do purge the contempt of the orders issued on 24/05/2022.
 - b. That the Defendant is hereby directed to remove the structures and foundations he has erected on LR no 3858/44 and to restore the suit property and the beacons and boundary marks to their original condition within thirty (30) days from the date of this ruling. Failure to which he will serve six (6) months imprisonment.
 - c. That costs of this application be borne by the 2nd Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2023.

MOGENI J

JUDGE

In the virtual presence of:

Mr. Martin holding brief for Mr. Arusei for Plaintiffs

Mr. Oguye for 1st Defendant

Mr. Ochola for 2nd Defendant

