



Rotich & 14 others v Komen (Suing on behalf of Arror Maendeleo Women Group) (Environment and Land Appeal E019 of 2022) [2023] KEELC 22413 (KLR) (13 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E019 OF 2022
L WAITHAKA, J
DECEMBER 13, 2023**

BETWEEN

VINCENT ROTICH & 14 OTHERS & 14 OTHERS & 14 OTHERS & 14 OTHERS APPELLANT

AND

EMMY CHEBII KOMEN (SUING ON BEHALF OF ARROR MAENDELEO WOMEN GROUP) RESPONDENT

(Appeal against the decision of Hon. J Wanjala, CM dated 13th October 2022 in Kabarnet ELC Case No.E010 OF 2021)

JUDGMENT

1. On 13th October 2022, Hon. J Wanjala, CM allowed the respondent’s application dated 6th September, 2022 that sought to punish the defendant and the interested parties in the lower court case to wit Kabarnet ELC Case No.E010 OF 2021 for contempt of the orders issued on 19th August, 2022. The order had been extended on 16th September, 2021 to apply to the interested parties.
2. In allowing the application, the Learned Trial Magistrate inter alia observed:-

“The application was supported by the grounds on the face of the application and the supporting affidavit sworn by Emily Chebii Komen (Kabon) which indicates that despite the Respondent and Interested Parties having been served with the court order through their advocates Mr. Boiwo, they proceeded to dig a foundation to develop a massive permanent building on the suit property. The Applicant annexed photographs marked as EXK 5 (a) to (e) showing the said developments. She states that the actions of the Defendant and the Interested Parties are intended to threaten, dispossess and/or evict her and her tenants from the suit parcel of land so as to benefit themselves. That the actions of the Respondent and



the Interested Parties amount to wilful defiance and disrespect of the court orders and an affront to the authority of the court.

I believe that the Defendant became aware of the court order in the entire proceedings of this suit in March 2021 when he was served with the pleadings together with the orders. When the application to join the Interested Parties was heard the order was extended to them. They knew that the land in issue has a case in court. Mr. Boiwo was representing the Defendant and the Interested Parties. He had authority to receive the order on their behalf and he was under obligation as their lawyer to bring the order to their attention.

I believe that the Respondent/Defendant and the Interested Parties have disobeyed the court order and hence proceed to start to construct on the suit property. A court order is supposed to be obeyed. Order 40 of the Civil Procedure Rules states what can happen in case of disobedience of a court order.

Although the law under which the application was filed was repealed, we have the oxygen rules whose objective is to do justice to all.

I find the court order was disobeyed and I proceed to order that summons be issued to the defendant and the Interested Parties to appear before court and show cause why they should not be committed to civil jail for six months and or fined Kshs. 200,000/- for disobedience of a court order.

It is further ordered that the order of the court that was issued on 22nd August, 2022 and was served through Mr. Boiwo is still valid and binding on the defendant and the Interested Parties.

The costs of the application to be met by the Defendant and the Interested Parties.”

3. Aggrieved by the ruling and/or decision of the Learned Trial Magistrate, the defendant and the interested parties (hereinafter jointly referred to as the appellants) appealed to this court on the grounds that the Learned Trial Magistrate (TM) erred by:-
 1. Finding that they (the appellants) were in contempt of the court order issued on 19th August 2022, when there was evidence to the contrary; that the appellants were not aware of existence of the said order;
 2. Finding that service of the court order was effected on the appellants’ advocates when there was evidence to the contrary that the said advocate had been relieved of his duties and never bothered to inform the appellant about existence of the court order;
 3. Failing to find that the respondent’s application for contempt was defective;
 4. Failing to find that there was no cogent evidence exhibited by the respondent as proof of the appellants’ breach of the court order issued on 19th August 2022;
 5. Failing to find that the order issued on 12th March 2021 had lapsed and was unenforceable;
 6. Failing to find that the respondent could not fall back on an order they had disregarded and appealed against it and lost;
 7. Failing to find an amicable solution to the dispute when there was cogent evidence that the issue in contention was a boundary dispute and not erection of structures.
4. Pursuant to directions given on 26th June 2023, the appeal was disposed off by way of written submissions.



Appellants' Submissions

5. In their submissions filed on 5th September 2023, the appellants have given a detailed chronology of events leading to the issuance of the orders appealed from and identified the following as the issues for the court's determination:-
 - i. Whether the Respondent's application for contempt was defective;
 - ii. Whether the order issued on 12th March 2021 had lapsed; and
 - iii. Whether the Appellants were in contempt of the court order issued on 12th March 2021.
6. On whether the respondent's application for contempt was defective, it is pointed that the respondent's application for contempt, which is untitled and undated, was brought under Section 1A, 1B and 3A of the Civil Procedure Act; Order 51 Rule 1 of the Civil Procedure Rules and Sections 4, 6, and 28 of the Contempt of Court Act 2016 and submitted that the application was defective as it was premised on a repealed Act.
7. The respondent is faulted for failing to invoke the correct provisions of the law namely Order 40 rule 3(1) of the Civil Procedure Rules which bestows the lower courts with jurisdiction to punish for contempt.
8. It is the appellants' case that the respondent having failed to cite the correct provisions of the law cannot fall back on the provisions of Section 1A, 1B and 3A of the Civil Procedure Act to cure the defect in the application.
9. The Appellants have further submitted that the application ought to have been struck out for being defective in content, law and form.
10. On whether the order issued on 12th March 2021 had lapsed, the appellants have made reference to the order issued on 16th September 2021 which they describe as a temporary order to be renewed and/or extended from time to time and pointing out that the order was not extended on 21st October 2021 submit that the order had expired.
11. It is the appellants' case that it was erroneous for the respondent to purport to fall back on a none existent order, extract it and purport to enforce it after his appeal against the said order was dismissed.
12. The Learned Trial Magistrate is said to have misapprehended the temporary orders issued on 12th March 2021 and extended on 16th September 2021 to imply that they were to be in force until the respondent's application was heard and determined which was not the case.
13. The court is said to have admitted that it was aware that the order had lapsed but decided to take refuge in Article 159(2)(d) of the Constitution when it stated;

“In my view the order is still valid because no body raised the issue of expiry until the defence counsel raised it during submissions”
14. The Learned Trial Magistrate is faulted for extending the order without application by the respondent to revive them. Based on the decision in Nairobi JR No. 50 of 2012-Kenya National Chamber of Commerce and Industry v Kiprono Kittony & Others (2016) eKLR where an application for contempt was dismissed on the ground that the order on which the application was premised had lapsed, the appellants maintain that there was no order in force capable of being disobeyed when the respondent purported to extract it, hence the appellants were not in contempt.



15. As to Whether the appellants were in contempt of the court order issued on 12th March 2021, the appellants have made reference to the evidence given in support of the allegations that the appellants had erected structures in the suit property, in particular, the appellants have made reference to the photographs annexed to the supporting affidavit of the respondent and terming the photographs similar to those tendered in support of the application dated 7th June 2021, which was withdrawn, the appellants submit that there was no cogent evidence capable of proving that they breached the order of 16th September, 2021. It is pointed out that the photographs have no indication in terms of date as to when they were taken.
16. It is further submitted that it was not open to the respondent to enforce the orders issued on 16th September, 2021 because she had preferred an appeal against the orders, which appeal she lost.

Respondent's Submissions

17. In his submissions filed on 4th October 2023, the respondent has identified the following as the issues for the court's determination:-
 - i. Whether the respondent's application for contempt is defective?
 - ii. Whether the order issued on 12th March, 2021 and extended on 16th September 2021 to bind the defendant in favour of the plaintiff binding the interested parties had lapsed?
 - iii. Whether the appellants were in contempt of the court order issued on 12th March 2021?
18. On whether the respondent's application for contempt is defective, it is conceded that the application was brought under the wrong provisions of the law but submitted that the court's have in the spirit of Article 159(2)(d) of the *Constitution* and sections 1A and 1 B of the *Civil Procedure Act*, held that failure to cite correct provision of the law is not fatal and would not per se warrant a dismissal of the application. In that regard reliance is placed on the case of *Waiguru & Another v Karua & 2 Others* (Petition 5 of 2018) KESC 38 (KLR) 16 July 2021 (ruling), where it was inter alia held that reliance on a repealed section of law did not render the application fatal.
19. As to whether the order issued on 12th March, 2021 and extended on 16th September 2021 to bind the defendant in favour of the plaintiff and binding on the interested parties had lapsed; it is noted that the respondent does not address the issue as framed but submits that for interest of justice, the court found it fit to extend the orders hence still enforceable against the defendant and the interested parties.
20. On whether the appellants were in contempt of the court order issued on 12th March 2021, the respondent maintains that the order in question was served on the appellants' advocate on record at the time and submitted, without demonstrating how the alleged breach was proved, that she satisfactorily proved to the court that the appellants were in contempt of an existing court order.
21. As to whether it was open for the respondent to extract and enforce an order she had appealed against, it is submitted that the appeal was on joinder of the interested parties and not on the order of injunction.

Analysis and Determination

22. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In



that regard, see *Selle & another v. Associated Motor Boat Co. Ltd* (1968)E.A 123 and *Mwanasokoni v. Kenya Bus Service Ltd (1982-88)1 KAR and Kiruga v. Kiruga & Another* (1988)KLR 348.

23. As pointed herein above, the appellants were aggrieved by the decision of Hon. J. Wanjala CM made in Kabarnet CMC ELC case No. 10 of 2021 finding them to be in contempt of the orders of the court issued on 12th March 2021 and which had been extended to the interested parties vide the Order issued on 19th August, 2022. The Order in question was in the following terms:-

“That pending the hearing and determination of this application, this honourable court is hereby pleased to issue a temporary injunction restraining the defendant, his agents, employees or any other person acting under his instructions from entering, fencing or developing or ejecting the plaintiff’s tenants from land parcel registration number 13877/1.”

24. Whilst the appellants’ have contended that the order was temporary in nature hence requiring to be extended every other time the matter was in court, it is the view of this court that the order was express to run for the period the application was pending. There was therefore, no need to apply for its extension every other time the matter was in court. That said, I hasten to point out that the order as given, contravenes the provisions of Order 40 Rule 4(2) of the *Civil Procedure Rules* which require that an ex parte injunction may be granted only once for not more than 14 days and that it shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.

25. By dint of the provisions of Order 40 Rule 6 of the *Civil Procedure Rules*, the order, by operation of law, lapsed on 12th March 2022, a year after it was issued. In that regard, see the said provision of the law which provides as follows:-

“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 grant, the injunction shall lapse unless for sufficient reason the court orders otherwise”.

26. Also see the case of *Barclays Bank of Kenya Limited v. Henry Ndungu Kinuthia & another* (2018) e KLR where the Court of Appeal observed:-

“A plain reading of Order 40 Rule 6 is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months is where the court has given a sufficient reason why the interlocutory injunction should not so lapse”.

27. In the circumstances of this case, there is no indication that the court extended the injunction order after it lapsed on 12th March, 2022. It therefore follows, that the application for contempt dated 6th September 2022 was premised on orders which had by operation of law lapsed, hence incapable of forming a basis for grant of the orders sought.

28. Turning to the merits of the application, and in particular, the question as to whether the plaintiff/applicant proved that the appellants were in contempt of court, it is the considered view of this court that the plaintiff/applicant, did not prove to the required standard of proof that the appellants were indeed in contempt of the order of the court they are accused of having disobeyed. It is the considered view of this court, that the affidavit evidence relied on by the plaintiff/applicant in proof of her contention that the appellants had disobeyed the court order in question, was incapable of proving



the following facts, which facts needed to be proven before it could be said that they had proved their case against the appellants. These are:-

- i. When service was effected on the Appellant's counsel;
 - ii. When the acts they are accused of having done in disobedience of the court order were done; and
 - iii. When the photographs relied on in support of their claim were taken.
29. Considering that the appellants had denied doing the acts they are accused of having done, it is the view of this court that the plaintiff/applicant ought to have provided cogent evidence to prove that the appellants had indeed done the acts they are accused of having done in disobedience of the order of the court and when.
30. The upshot of the foregoing is that the Appeal has merit and is allowed as prayed in the memorandum of appeal dated 25th october 2022.

Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF DECEMBER, 2023.

L. N. WAITHAKA

JUDGE

