



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT SIAYA

ELC CASE NO. 36 OF 2021

PAUL OMALLA (suing as the administrator ad litem of the

Estates of WILLIAM OPONDO OMALLA, AUGUSTINO

OMWANDA, HENRY MUTULA and DISMAS OTHWILLA.....PLAINTIFF

VERSUS

GABRIEL OCHONG ORIWO.....1ST DEFENDANT

PHILISTER ACHAPA OBUOR.....2ND DEFENDANT

RULING

Plaintiff's case

1. By way of a motion dated 4/11/2021 the plaintiff within the provisions of **Section 63 (c) the Civil Procedure Act** and **Order 40 Rule 3(1)(2) and (3) of the Civil Procedure Rules**, filed an application seeking the following orders against the 1st defendant;

a) Spent

b) Spent

c) Spent

d) The 1st defendant be and are (sic) hereby declared to be in contempt of court for disobedience of the court orders issued on 29/06/2019 by this honourable court.

e) The 1st defendant be committed to civil jail for such period as this honourable court shall deem necessary for being in disobedience of the said court orders.

f) The 1st defendant's properties be attached for purposes of securing compensation to the plaintiff as the court may deem fit.

2. The plaintiff's motion is mainly anchored on several grounds on the face of the motion. The motion is supported by the affidavit of the **Paul Omalla** dated 4/11/2021 together with annexures. The main ground of the plaintiff's motion is that the 1st defendant has disobeyed injunctive orders that were issued by the honourable on 27/06/2019 court.

1st defendant's case

3. The 1st defendant filed a replying affidavit dated 14/12/2021. The replying affidavit was anchored on the following main grounds; (i)he has not disobeyed court orders and, (ii)the motion is an abuse of court process, frivolous and meant to vex the 1st defendant. He urged the court to dismiss the motion with costs.

4. As directed by the court, the parties disposed of the motion by way of written submissions.

2nd defendants' case

5. From the record, the 2nd defendant has never participated in the proceedings and by its directions dated 6/10/2021, this court directed the plaintiff to serve the 2nd defendant with summons and pleadings but before the due date due to confirm compliance, the plaintiff filed the instant motion.

Applicant's submissions

6. The Plaintiff filed written submissions dated 16/11/2021. He contended that **Section 29** of the **Environment and Land Court Act** clothed this court with jurisdiction to handle contempt proceedings and that **Section 63 (a) and (c)** of the **Civil Procedure Act** and **Order 40 Rule 3 (1) of the Civil Procedure Rules** provided this court with jurisdiction to either attach the 1st defendant's properties or detain him in prison for a period not exceeding 6 months for disobedience of court orders. He submitted that the orders issued on 27/06/2019 were issued in the presence of the 1st defendant's advocates and consequently, the 1st defendant was privy to the orders issued by the court. He placed reliance on several authorities including; **Kiru Tea Factory Company Limited vs Stephen Maina Githinga & 14 others** that cited the South African case of **Kristen Carla Burchell vs Barry Grant Burchell Eastern Cape Division case number 364 of 2005** and **Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] e KLR**. He urged the court to allow the motion. He identified two issues as falling for determination; (i) whether the actions of the 1st defendant amounted to contempt of court and, (ii) whether the 1st defendant should be committed to civil jail for contempt of court.

The 1st defendant's submissions

7. The 1st Defendant filed written submissions dated 14/12/2021. He stated that contempt proceedings are quasi criminal in nature and therefore the proof required in such instances was much higher than that of a balance of probabilities. He urged the court to exercise its decision to commit him to jail with utmost care and as a last resort. He contended the plaintiff had failed to discharge proof that he was in contempt of court. He placed reliance on several authorities including **Gatharia K Mutikika vs Baharini Farm Limited [1985] KLR** and **Republic vs Justus Kizito Musali ex parte Honourable Silvester Lesamula Anami Miscellaneous Number 3 of 2017**.

Analysis and determination

8. Having considered the motion, supporting affidavit, replying affidavit, annexures and written submissions, this court is of the considered view that the only issue falling for determination is whether the plaintiff's motion is merited.

I will proceed to analyze the legal and jurisprudential framework on the issue.

9. **Order 40 rule 6** of the **Civil Procedure Rules** provides that by effluxion of law, injunctive orders lapse automatically after a period of 12 months from the date a court issues such orders unless for good and sufficient reason, the court extends such injunctive orders. This provision of law states 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 the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

10. It is the considered view of this court that the mischief that the Rules Committee intended to cure by providing such a provision of law was to ensure that litigants who have been issued with injunctive orders do not enjoy the orders for an inordinate period of time at the expense of timely conclusion of cases and putting undue hardship and inconvenience to other parties in the suit. This court is guided by the Court of Appeal decision of **Nguruman Limited v Jan Bonde Nielsen & 2 others 2014 eKLR** which held thus on the intent of this provision of law.

“the object of introducing rule 6 aforesaid in the 2010 Rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various machinations to delay the disposal of the suit. Rule 6 of order 40 was therefore a necessary and reasonable safeguard against such machinations. It is a condition that many jurisdictions have imposed in dealing with abuses of injunctive orders.”

11. It is not in dispute that the injunctive orders were issued on 27/06/2019, and by operation of law, these orders automatically lapsed 12 months after 27/06/2019 which would be sometimes around 28/06/2020. It seems the plaintiff was content to rest on his laurels and never moved the court to extend these orders and as it stands, with effect from 28/06/2020, there were no orders capable of being disobeyed because these orders were at the time nonexistent. This court is guided by the Court of Appeal decision in **Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & another [2018] eKLR** which held thus on a similar issue;

“...Order 40 Rule 6 that required that such an interlocutory order remain in force for a period of 12 months only, but subject to the court having the power to extend the interlocutory order beyond the 12 months, if there is sufficient reason for it to do so. In our view, such an extension cannot be done by way of a blanket order at the time the interlocutory order is issued. The need for the extension must be addressed by the court and justified at the opportune time”.

12. It is the finding of this court that the motion is frivolous, incompetent, an abuse of the court process and not merited. This court need not say more.

13. Ultimately, the court makes the following disposal orders: -

a) **The Notice of Motion dated 4/11/2021 is hereby dismissed.**

- b) Parties to comply with the directions issued by the court on 6/10/2021 within 30 days from today.
- c) Parties to put in comprehensive witness statements and indexed and paginated bundle of documents within 30 days from today.
- d) Matter to be mentioned before the Deputy Registrar to confirm compliance and further directions on 23/02/2022.
- e) Costs of the Notice of Motion shall be borne by the plaintiff.

RULING DELIVERED VIRTUALLY:

DATED, SIGND AND DELIVERED THIS 20TH DAY OF JANUARY 2022

IN THE PRESENCE OF:

MR. MAMBOLEA H/B FOR NYAMWEYA FOR APPLICANT

MS. ONYANGO FOR THE 1ST DEFENDANT

N/A FOR 2ND DEFENDANT

COURT ASSISTANT: SARAH OORO

HON. A. Y. KOROSS

JUDGE

20/1/2022