



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITUI**

**ELC CASE NO.1 OF 2021**

**(Formerly Machakos No.131 of 2015)**

**JOSHUA MUTUA KITHIUMA.....PLAINTIFF**

**VERSUS**

**ANGELINA MUTHEU MUTUA.....DEFENDANT**

**RULING**

1. This ruling relates to the Application dated 12<sup>th</sup> November 2019. The said Application is brought under Order 22 Rule 28(1) of the Civil Procedure Rule 2010 and Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. The Application is supported by the Affidavit of the Plaintiff/Applicant sworn on 12<sup>th</sup> November, 2019 and a Further Affidavit sworn on 28<sup>th</sup> July, 2021. The Application seeks the following orders;

**1. THAT this application be certified urgent.**

**2. THAT the Defendant /Respondent herein be detained in prison for a term not exceeding six (6) months for disobeying this Court's orders granted on 22<sup>nd</sup> September, 2017 and issued on 26<sup>th</sup> September, 2017 and served upon her on 29<sup>th</sup> September, 2019 or in the alternative, her property be attached.**

**3. THAT the OCS KWA VONZA police station ensures compliance with orders and that the applicant herein is in possession of the suit property YATTA B2/KWA VONZA/930 and collects rent as ordered by the court.**

**4. THAT the costs of this application be to the Plaintiff.**

2. This matter was commenced by way of a plaint dated 27<sup>th</sup> April, 2015 as Machakos ELC case No.131 of 2015 Joshua Mutura Kithuma – vs- Angelina Mutheu in the Plaint the Plaintiff sought the following orders;

i) A permanent injunction restraining the Defendant either by herself or her agent or servant from entering plot number 930 Kitui /Kwa Vonza and other property belonging to the Plaintiff.

ii) Special damages in the sum of Ksh. 15,800

iii) Any other or further relief that this Honorable Court deems fit to grant

3. Together with the Plaint, the Plaintiff filed a Notice of Motion dated 27<sup>th</sup> April 2015 in which he sought for a temporary injunction pending hearing and determination of the suit, the Defendant be restrained either by herself or her agent or servant from entering and collecting rent from YATTA B2/KWA VONZA/930 and denying and/or preventing yhr use of motor vehicle Registration number KAS 093 V.

4. The court record shows that on 7<sup>th</sup> May, 2015 the court allowed the Plaintiffs Application for a temporary injunction pending inter partes hearing of the application.

5. The record further shows that on 22<sup>nd</sup> September, 2017 the court allowed the Plaintiffs application dated 27<sup>th</sup> April 2014 in the following terms;

- a) That pending hearing and determination of the suit, the Plaintiff or his agent to collect rent from the parcel of land known as Yatta B2/Kwa Vonza/930.
- b) That the Plaintiff should not sell, transfer, change or alienate the suit land pending the hearing of the suit until further orders of the Court are granted.
- c) That each party to bear his/her costs.

6. The Plaintiff then filed an application dated 20<sup>th</sup> November 2017 seeking the Defendants committal to civil jail for a period not exceeding six (6) months for contempt of court orders issued on 26<sup>th</sup> September 2017. The Defendant was finally found guilty of contempt of Court and she was fined Kshs 50,000/- or alternatively serve six months in jail.

7. For the second time vide an Application dated 12<sup>th</sup> November, 2019 the Plaintiff sought to have the Defendant committed to civil jail for being in contempt of court. It is this application that is the subject matter of the ruling herein.

8. The Applicant claimsthat the Defendant is his estranged wife and she has filed a Divorce Cause No.5 of 2018 against him. He claims that the Defendant and his daughters have waged war of vendetta against him and destroyed his property. He further claims that the orders of injunction were issued against the Defendant on 26<sup>th</sup> September, 2017. The said orders were served on 29<sup>th</sup> September 2017 and the Defendant failed to adhere to them. That on 22<sup>nd</sup> May, 2019 the Court found her to be in contempt and fined her Kshs.50,000/=.

9. That despite having been found to be in contempt of the Court orders the Defendant has continued to disobey the Court orders and not only has she continued to collect rent from Plot No. Yatta B2/Kwa Vonza/930 but she has also embarked on threatening him and the tenants in the premises and caused disturbance necessitating him to file various complaints at Kwa Vonza Police Station.

10. The Plaintiff claims that the Court did not issue orders in vain and the same ought to be obeyed by the parties they are directed to. The Plaintiff states that punitive measures ought to be taken to restore the Court's dignity and authority and for the rule of Law to be respected.

11. In the further affidavit of the Plaintiff sworn on 28<sup>th</sup> July, 2021 the Plaintiff claims that on 15<sup>th</sup> June, 2021 at around 11.24 a.m. he went to his plot and found the Defendant conducting business thereon. That on 14<sup>th</sup> June, 2021 he saw the Defendant entering the hotel on his Plot No.930. On the two occasions he instructed one Patrick Mulwa to take Photographs which are attached to the affidavit. He has also attached a certificate under Section 106 A and 106 B of the Evidence Act. He also attached an affidavit by one Muema Daniel Kasoi who is said to be the has worked for the Plaintiff at the plot number 930 for the last 13 years as a watchman or security guard. He claims that the Defendant normally goes to the suit plot every day and collects money from the hotel and butchery situated on thee said plot. That further she delivers vegetables and other groceries to the hotel and slaughtered goats.

12. The Plaintiff filed written submissions on 25<sup>th</sup> October, 2021

13. The Defendant filed a replying affidavit sworn on 3<sup>rd</sup> August, 2021 in which she stated that she vacated the Plot NO.930 Kwa Vonza marked on 15<sup>th</sup> May, 2018. She further stated that the premises are since operated by Mbithe Mutua and Mwongela Mutua in the name and style of New Highway Motel and Butchery. She denies the allegations made by the Plaintiff and Patrick Mutua.

14. She also challenges the photographs annexed to the Plaintiff further affidavit claims that the same are allegedly taken at odd hours and outside of curfew time.

### **Analysis and Determination**

15. Has the Plaintiff shown that the Defendant has acted in contempt of the orders of the court issued on 22<sup>nd</sup>September, 2017?

To begin with the said orders stated as follows:

- a) *That pending hearing and determination of the suit, the Plaintiff or his agent to collect rent from the parcel of land known as Yatta B2/Kwa Vonza/930.*
- b) *That the Plaintiff should not sell, transfer, change or alienate the suit land pending the hearing of the suit until further orders of the Court are granted.*
- c) *That each party to bear his/her costs.*

16. As submitted by the Plaintiffs' Counsel, the law applicable to contempt of court in the present circumstances is order 40 Rule 3 of the Civil Procedure Rules which deal with Consequence of breach and provides as follows;

**(1) "In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release."**

Order 22 Rule 28 of Civil Procedure Rules provides that

***“Where any party against whom a decree for the specific performance of a contract, for an injunction, has been passed, has had an opportunity of obeying the decree, and has wilfully failed to obey it; the decree may be enforced by his detention in prison, or by the attachment of his property, or by both”***

The Court is thus clothed with jurisdiction to deal with contempt of court.

17. I am also in agreement with the submissions on the essential elements of civil contempt in the case **Katsuri Ltd. –vs- KapurchandDeepar Shah (2016) eKLR**. Mativo J. stated

**“Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand*[22] have authoritatively stated as follows:-**

***“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -***

***(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;***

***(b) the defendant had knowledge of or proper notice of the terms of the order;***

***(c) the defendant has acted in breach of the terms of the order; and***

***(d) the defendant's conduct was deliberate.***

In relation to the present case it is important to see if the above test on proving the elements of civil contempt have been met in that;

A) Are the terms of the order clear and unambiguous and binding on the Defendant?

The court gave the orders complained of on 22<sup>nd</sup> September 2017 and the same were issued on 26<sup>th</sup> September 2017. If the said orders as set out above are given a literal meaning, the same are clearly directed to the Plaintiff, the Defendant is not required by the orders to do anything or to refrain from doing anything. The orders do not direct the Defendant to refrain from entering the premises. If the intention of the Court was for her not to enter the premises the Court would have said so in no uncertain terms. I find that the orders are clear and not ambiguous.

B) Did the Defendant have knowledge of the order?

From the averments made in the supporting affidavit, the Plaintiff has not adduced evidence that proves that the Defendant had been served with the Court order. However, considering that there was a previous application for contempt and the defendant had been found guilty. I will find that the Defendant had knowledge of or proper notice of the terms of the orders.

C) Has the Defendant acted in breach of the orders?

18. As I have found at paragraph A) above the order of the court was directed at the Plaintiff who was directed to collect rent from the suit premises. The Defendant was not required to do or refrain from doing anything. The question that arises is what attempts the Plaintiff made to collect rent from the tenants and whether the tenants were served with the court order. Further, did the Plaintiff contact the said tenants and/or demand rent from them and did they state that they had been paying rent to the Defendant and that she has been receiving the rent contrary to the terms of the court order?

19. I find that the accusation levelled against the Defendant that she has continued to collect rent from the suit premises has not been substantiated. Further the accusation that she has threatened the Plaintiff and the tenants has also not been proved as the reports to the police did not end in criminal charges being preferred against the Defendant. It is also not clear how the Defendant could be threatening the tenants and at the same time collecting rent from them.

20. The Defendant claims that she is not in possession of the suit premises and she has not been carrying on business thereon. Indeed, she states that the persons in possession are her daughters by names Mbithe Mutua and Mwangeli Mutua and who are also the Plaintiffs daughters. While highlighting submissions the Defendant gave the names of her daughters as Shirleen Mwangeli Mutua and Linah Mbithe Mutua. It is noted that these are the same names that the Plaintiff had given to the police in his report made on 16<sup>th</sup> June, 2019 and 17<sup>th</sup> June, 2019. I am inclined to believe that the persons carrying on business on the premises are the said children of both the Plaintiff and the Defendant Shirleen Mwangeli Mutua and Linah Mbithe Mutua.

21. I further find that the photographs attached to the further affidavit of the Plaintiff and said to have been taken by Patrick Mulwa are not reliable evidence of the Defendants presence in the suit premises as their authenticity is doubtful. The said Patrick Mulwa confirms that the telephone that he used to take the photographs was operating properly except for the time appearing on the photograph. I find that the said claim is not credible for the reason that if the telephone was not working well at the time shown on the photographs, it can also not be trusted to deliver reliable images as alleged.

22. I do agree with Counsel for the Plaintiff's submissions that Orders of Court should be obeyed and willful disobedience of Court orders is

punishable in order to safe guard the rule of law. I also agree that punishment for contempt has nothing to do with the integrity of the judiciary or the Court or even the personal ego of the Judge. The same is about safeguarding in the administration of justice.

23. However, the standard of proof in matters of contempt of Court is well established. It must be higher than proof on a balance of probability, almost but not exactly beyond reasonable doubt **Mutitika –vs- Bahanini Farm Ltd. (1985) KLR 229**. This is because the charge of contempt is akin to a Criminal Offence. A party may lose his liberty. The court held as follows;

*"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. it is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."*

For the reasons given above in I find that the Plaintiff has failed to prove to the standard required by law that the Defendant is in contempt of the court orders given on 22<sup>nd</sup> September 2017 and issued on 26<sup>th</sup> September 2019. I find that the application dated 12<sup>th</sup> November 2019 lacks merit and the same is hereby dismissed with costs to the Defendant.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 19<sup>TH</sup> DAY OF JANUARY 2022**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

**RULING READ IN OPEN COURT IN THE PRESENCE OF-**

**C. NZIOKA.....COURT ASSISTANT**

**MR MAKUNDI.....FOR THE PLAINTIFF/APPLICANT**

**DEFENDANT/RESPONDENT IN PERSON.....FOR THE DEFENDANT/RESPONDENT**