



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 648 OF 2014

VITALIS OTIEGO ODIDA.....PLAINTIFF

=VERSUS=

MARTIN CHENGO.....DEFENDANT

RULING

1. This is the Notice of Motion dated 26th March 2021 brought under section 1A, 1B and 3A of the Civil Procedure Act, Section 5 of the Judicature Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

2. It seeks orders:-

1. Spent.

2. That this honourable court be pleased to personally summon and issue a notice to show cause against the defendant/respondent- Martin Chengo – to show cause why contempt of court proceedings should not be commenced against him and why he should not be punished for contempt of court and/or for blatant disobedience of this honourable court's order issued on the 11th of June, 2020.

3. That this honourable court be pleased to find upon hearing of the notice to show cause that the Defendant/Respondent – Martin Chengo- is in contempt of court and/or has blatantly disobeyed this honourable court orders issued on the 11th of June, 2020.

4. That this honourable court be pleased to order and direct that the Defendant/Respondent-Martin Chengo – be committed to civil jail for a period of six (6) months for contempt of court and/or issue such penal orders as the court may deem just and reasonable for the blatant disobedience of this honourable court orders issued on 11th June 2020.

5. That this honourable court be pleased to direct the Defendant/Respondent to purge the contempt herein of the orders issued by the honourable court as issued on the 11th of June 2020 by directing the Defendant/Respondent to remove structures and foundations that the said Defendant/Respondent has erected on the Plaintiff's property L.R. NO 209/20594 and further to restore the suit property and the beacons and boundary marks to their original condition.

6. That the honourable court do issue such other and further orders as it may deem fit to protect the dignity and integrity of this honourable court and the orders issued herein.

7. That costs of the Application be borne by the Defendant/Respondent.

3. The grounds are on the face of the application and are set out in paragraph's (a) to (j).

4. The application is supported by the affidavit of Vitalis Otiego Odida, the Plaintiff/Decree Holder sworn on the 26th March 2021.

5. The application is opposed. There is a replying affidavit sworn by Martin K. Chengo the Defendant/Judgment Debtor sworn on the 22nd July 2021.

6. The court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

The Plaintiff's Submissions

7. They are dated 25th August 2021. They raise four (4) issues for determination:-

(i) Whether the application is properly before court.

(ii) Whether the terms of the order were clear and unambiguous and were binding on the Defendant.

(iii) Whether the Defendant was aware of the Judgment and he Decree.

(iv) Whether the Defendant/Respondent is deliberately in breach of the orders issued by this honourable court.

(v) Whether the Plaintiff is deserving of the prayers sought.

8. The court has since held in the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 others [2014] eKLR** that leave is not required where committal proceedings relate to a breach of Judgment, order or undertaking. He has also relied on the cases of **Samuel M. N. Mweru & Others vs National Land Commission & 2 Others [2020] eKLR**; **Woburn Estate Ltd vs Margaret Bushforth [2016] eKLR**.

9. This application is properly before court to ensure compliance with such orders given by itself and preserve its own dignity and authority and power given under the law.

10. The judgment delivered by the court for the Plaintiff against the Defendant was in clear and unambiguous terms. The orders arising therefrom were also binding given the fact that they were issued by a court of competent jurisdiction and in accordance to the law to the Defendant specifically. The said orders are binding unless and until the said judgment is overturned by an Appellate court or set aside, which has not been done to date.

11. The decree emanating from the judgment was served upon the Defendant's advocate on the 13th July 2020. The Advocate on record was duly authorized as the agents of the Defendant and their service was sufficient to constitute service to the Defendant. The Defendant was also served with the decree by registered post to the Defendant's known postal address on 11th June 2020.

12. The actions by the Defendant were not accidental but rather deliberately calculated to delay and/or deny the Plaintiff the fruits of a judgement entered in his favour. He has relied on the case of **Basil Criticos vs Attorney General & 8 Others [2012] eKLR**.

13. The Defendant has failed to prove why he has not instituted an appeal for a whole year from the date the notice of appeal was filed.

14. The Defendant is in contempt of court and it is in the interest of justice that the court should summon him personally to show cause why contempt proceedings should not be commenced against them. He prays that the application be allowed.

The Defendant's Submissions

15. They are dated 22nd October 2021. He submits that due to the gravity of consequences that ordinarily flow from contempt proceedings it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order. He has relied on the case of **Sheila Cassatt Issenberg & Another vs Anthony Machatha Kinyanjui Kajiado HCCC 19 of 2020**.

16. The Defendant has filed a memorandum of appeal and he is apprehensive that since the Plaintiff is a retiree he may not be able to refund the Defendant the sum of Kshs.200,000/- awarded as damages if, the Defendant pays him. The Plaintiff has not demonstrated that he is in a stable finance position to refund the said money in the event that the Defendant's appeal is successful. He prays that the application be dismissed with costs.

17. 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 Defendant is in contempt of the orders arising from the judgment dated 11th June 2020.

(ii) Who should bear costs of this application?

18. **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”.

In the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others [2014] E KLR**, the Court of Appeal held that leave is not required where committal proceedings relate to a breach of a judgment, or order, or undertaking. I agree with the Plaintiff's submissions that this application is properly brought before this court.

19. After hearing both parties this court reserved judgment in March 2020. During that period court operations had been suspended due to the emergence of the covid-19 pandemic. Later on after the court operations resumed, parties were duly notified of delivery of the said judgment and the same was delivered virtually on 11th June 2020 in the absence of both parties.

20. The Defendant had all along been represented by counsel M/S J. W. Wanjohi & Co. Advocates. The Decree was served on the said advocates on 13th July 2020. The Defendant was therefore aware of the said Judgment and the consequential orders.

21. It is on record that on the 23rd June 2020 he lodged a Notice of Appeal. The Defendant/Respondent confirms so in his replying affidavit. In the case of **Kiiru Tea Factory Co. Ltd vs Stephen Maina Githiga & 14 Others [2019] e KLR** the Court of appeal observed thus:-

“...in Basil Criticos vs Attorney General & 2 Others [2016] e KLR 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”.

22. In the case of **Samuel M. N. Mweru & Others vs National Land Commission & 2 Others [2020] e KLR** J Mativo held that, in order to succeed in contempt proceedings, the applicant has to prove the following:-

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. The Defendant/Respondent has not stated that the terms of the Judgment dated 11th June 2020 were unclear and ambiguous. Similarly in the case of **Geoffrey Kathiri Kisin & 10 Others vs East Africa Portland Cement Co. Ltd & 5 Others [2021] e KLR** 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 vs 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....”.

I am guided by the above authorities.

23. In paragraph 13 of the replying affidavit the Defendant deposes:-

“That I am very apprehensive to pay the Plaintiff a sum of Kshs.200,000/- as was ordered since he is a retiree senior citizen and/need to be assured that he can refund me my money once the Court of Appeal overturns this impugned judgment.”

The above averments are unsupported. There is nothing to show that the Plaintiff would not be able to refund the Kshs.200,000/-. The same demonstrate the Defendant's unwillingness to obey this court's orders.

24. In paragraph 4 he deposes:-

“That I have built on my plot and I have not developed anything on the disputed area. There are no debris to be cleared or any purpose of any wall to be built. My building has formed the fence on both sides. The order of rebuilding the fence is therefore not practical or necessary”.

The above averments are further a demonstration of the Defendant's unwillingness to comply with the court's orders.

25. This court has already found that the Defendant's acts amounted to trespass on the Plaintiff's plot and awarded damages. The findings on the judgment dated 11th June 2020 have neither been set aside and or vacated.

26. It is the duty of the Defendant to obey the said orders. In the case of **Wildlife Lodges Ltd vs 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.

27. I find that the Defendant has willfully and deliberately disobeyed the orders of 11th June 2020. He has raised the issue of delay in being supplied with the proceedings. This is neither here nor there. The Defendant has failed to justify why he has not preferred an Appeal to date.

28. In conclusion, I find that the Defendant is in contempt of the order of this court issued on 11th June 2020. 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 11th June 2020.

(b) That the Defendant is hereby directed to remove the structures and foundations he has erected on the Plaintiff's property LR

NO 209/20594 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 the Defendant/Judgment Debtor is fined Kshs.200,000/- in default to serve four (4) months imprisonment.

(c) That costs of this application be borne by the Defendant/Judgment Debtor.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 17TH DAY OF FEBRUARY 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Makori for the Plaintiff

Mr. Rono for Mr. Musungu for the Defendant

Steve - Court Assistant