



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KITALE**

**ELC APPEAL NO. 2 OF 2020**

**JOHN LOKOPIS & 5 OTHERS.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**WEST POKOT COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COUNTY MINISTER FOR LANDS, HOUSING &**

**PHYSICAL PLANNING OF WEST POKOT**

**COUNTY GOVERNMENT.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

**(On punishment of the 2<sup>nd</sup> respondent for allegedly disobeying a court order)**

**Introduction**

1. This is an Application brought before the determination of another one dated **13/03/2020** which was filed immediately before the Appeal could be heard. The Appellants filed a Memorandum of Appeal against the ruling of the Senior Resident Magistrate, Kapenguria Law courts. In the earlier Application the applicants sought orders of injunction restraining the respondents from entering, trespassing on, interfering with the Plaintiff's/Applicants suit property pending the hearing and determination of the Appeal. The Magistrate delivered the ruling on **11/3/2020**. She disallowed the application and held that it did not disclose a *prima facie* case. The ruling is the subject of the Appeal.

2. Before the appeal could be fixed for taking of directions and admission to hearing, the Applicants brought the Notice of Motion dated **13/3/2020**. It was brought under Certificate of Urgency. It sought interim orders, as stated above, pending the hearing and determination of the Application and Appeal.

3. When the Application came up *ex parte* under certificate of urgency my learned brother Judge issued the following directions:

***“1. The instant application is certified urgent and service is hereby dispensed with in the first instance***

***2. That temporary injunction be and is hereby issued restraining and/or prohibiting the defendant /respondent whether by himself, his servants, employees, agents and/or by whomsoever from entering onto, trespassing, interfering with the plaintiff's/applicants from the suit property pending the hearing and determination of this application.***

***3. That inter-parties hearing on 30/6/2020.”***

4. The above orders gave rise to the Application which is before me for determination.

**The Application**

5. The Application was a Notice of Motion dated **05/07/2021** filed on the same date. It was brought under **Section 3A** of the **Civil Procedure Act, Order 40 Rules 1, 2, 3 and 10** of the **Civil Procedure Rules** and **“all other enabling provisions of the law.”** In it the specific prayers were:

**1. ...spent**

2. **THAT** this Honorable court be pleaded to cite and punish the 2<sup>nd</sup> Defendant/Respondent's county minister for lands, Housing and Physical Planning for disobeying and /or disregarding the lawful court orders issued and /or granted on 16/03/2020.

3. **THAT** Consequently (*sic*) to prayer 2 herein be granted that this Honorable be pleaded to issue warrants of arrest to bring to the 2<sup>nd</sup> Defendant/Respondent's county minister for lands, Housing and Physical Planning before this Honourable court for committal to civil jail for disobedience.

4. **THAT** Consequently (*sic*) to prayer 3 this Honorable be pleased to commit the 2<sup>nd</sup> Defendant/Respondent's County Minister for Lands, Housing and Physical Planning for a duration not exceeding 6 months and/or shorter period as the court may deem fit and expedient.

5. In the alternative the Honourable court be pleased to fine the 2<sup>nd</sup> Defendant/Respondent's County Minister for Lands, Housing and Physical Planning a sum of Kshs. 300,000/= as damages occasioned by the breach and/or disobedience of the lawful orders made on 16/03/2020.

6. **THAT** the cost of this application be provided for.

7. Any or further relief this Honourable court may deem fit and just to grant *suo moto*.

6. The application was premised on fourteen grounds. It was supported by an affidavit sworn by one **John Lokipis** on 5/7/2020. It was opposed by the Respondents through a replying affidavit sworn by one **Lucy Lobo** on 10/2/2022.

7. The grounds in support of the Application were repeated in the supporting affidavit. I will therefore not reproduce them, rather I will use the averments in the affidavit in support.

8. One **John Lokipis**, deponed that the Honourable Court issued orders on the 16/3/2020. The orders were to restrain and/or prohibit Defendants/Respondent's, whether by themselves, servants, employees, agents and/or by whomsoever from entering onto, trespassing, interfering with the Plaintiffs/Applications from the suit property pending hearing and determination of the Application, and the Appeal upon *inter partes* hearing of the Application. He annexed to the Affidavit a copy of the said Court Order and marked it as "JL-1." He contended that his advocates instructed a Court process server to serve the orders upon the Defendants/Respondents on 19/03/2020. He annexed to his Affidavit and marked as "JL-2" a copy of an Affidavit of Service sworn by one **Jackson Simiyu** to prove service.

9. He claimed that after that, the Defendant/Respondents entered the suit property and changed padlocks on the said property in Plot Numbers 5, 7, 12, 17, 19 at Makutano Bus Park, thus denying them access and allowed strangers into the suit premises. The strangers were busy making renovations in Plot No. 7. He deponed further that the Defendants/Respondents had altered the plot numbers from the previous ones, namely, 5 to 27, 7 to 32, 12 to 30, 17 to 50 and 19 to 33, without any lawful justification. To evince that, he attached photographs to prove as much and marked them as JL-3.

10. He further claimed that after the issuance of court orders on 16/03/2020, the Applicants were unable to operate any businesses normally due to the Covid-19 Pandemic and moved away. When they tried to resume they were shocked to learn about the Respondents illegal actions. He stated that despite the respondents having knowledge of the orders of 16/3/2020, they disobeyed them. Further, despite serving the respondents with notice of intention to commence contempt of court proceedings against them, they refused to purge the contempt. He attached the notice to the affidavit of service to his affidavit and marked them as "JL-4."

11. He stated that this Honourable court had the power to cite and punish the Defendants/Respondents for disobeying and/or disregarding the lawful orders issued on 16/03/2020. He asked the court to issue warrants of arrest to bring the 2<sup>nd</sup> Respondents' County Minister for Lands, Housing and Physical Planning before it and for committal to civil jail for disobedience. He prayed that in the alternative to committal to civil jail, the court fines the respondents the sum of Kshs.300,000/= as damages occasioned by the breach and/or disobedience of the Court orders. He prayed that their application be allowed.

### **The Response**

12. The Respondents filed a replying affidavit dated 10/02/2022 filed on 15/02/2022. One Lobo Lucy described herself as the defendants' Municipal Manager. She deponed that the entire application was misconceived, vexatious, frivolous, lacked merit, made in bad faith and an abuse of the due process and the same ought to be dismissed with costs. Her contention was that vide a meeting held on 14/9/2001 by the works town planning Committee, a list of applicants for kiosks was tabled before the committee for consideration and approval. After lengthy deliberations some 12 individuals were approved to construct kiosks at the bus stage. She annexed a copy of the Minutes of the 15<sup>th</sup> meeting held on 14/9/2001 and marked it as marked LL1. The Applicants together with others subsequently approved went ahead to construct but most of them did shanty kiosks instead of permanent structures as agreed. Owing to that fact, the construction of the shanty structures was subsequently stopped by the defunct Municipal Council leaving only the permanent stalls.

13. She deponed further that the Council was not in a position to construct the permanent structures then. Vide the 2<sup>nd</sup> meeting of finance staff and General Purpose Committee held in March 2003, the construction of Kiosks at the bus park was discussed. It was resolved that former Councilors and some staff construct permanent kiosks using their own money but the Council to supervise the works and give technical assistance. She annexed a copy of the minutes and marked them as LL2.

14. She pointed out that in the said meeting it was noted that 21 permanent kiosks had already been built and the occupants paid a monthly rent of Kshs. 500/= to the now defunct Municipal Council of West Pokot and 21 more applicants were approved and issued with letters of

allocation of space to construct permanent buildings at a costs **Kshs. 50,000** each. She deponed much on how other processes were to follow. It is worth of note that much of the depositions were not relevant to the instant Application hence needed not to be summarized herein. She prayed that the application be dismissed with costs.

### Submissions

15. Parties were directed to canvass the application by way of written submissions. The applicants did. However, as I write this ruling, there are none on behalf of the Respondents.

### Issues, Analysis and Determination

16. I have carefully, considered the application, the rival affidavits both in support and opposition, the submissions filed as well as the authorities and the law cited. In doing so, I note that the respondents' replying affidavit did not answer the issues raised in the application dated 5/7/2021. However, in my view, they sought to respond to the application dated 13/3/2021. Be that as it may, I am duty bound to determine the merits or otherwise of the instant Application. I find that the issues for determination are:

a) *Whether the application is merited.*

b) *What orders to issue and who to bear the cost of the Application?*

17. Starting with the first issue, I define the term "contempt". **Brian A. Garner in Black's Law Dictionary (Eleventh Edition) Thompson Reuters, 2019** defines contempt of court as:-

*"Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."*

18. In the case of **HADKINSON -V- HADKINSON (1952) 2 All ER. 567**, it was held that:

*"It is plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void." (Also see the case of **Katsuri Limited Vs Paurchand Depar Shah (2016) eKLR**).*

19. I agree with the holding in the above mentioned decisions. It is well settled that every court order should to be obeyed by the person to it is directed. One obeys it, regardless of whether it was irregular, and then raises a challenge to it, and unless it is set aside, it has to be obeyed.

20. The power to punish for contempt of Court, in courts of this level, is provided for under the Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya. A number of other legislations provide for the power to punish for contempt of Court. There exists an avalanche of case law on the powers of the Court to punish such conduct. I will not go to the history and import of the entire process and reasons behind the exercise of such power but it is rich in history. However, it is work noting that under the parent statute that establishes this Court, power is given to it to punish for the offence of contempt of Court. Under Section 29 of the Environment and Land Court Act it is stipulates:

*"...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."*

21. Having laid the basis for understanding why courts in Kenya can punish for contempt of court orders, I now turn to address the issues raised in the Application.

a) *Whether application was merited*

22. In order to find out whether the application is was merited, three quick important points need to be considered first: was there an order to be obeyed? If so, was it served? If the answer to the two is in the affirmative, was it obeyed? As I stated in the introduction to this ruling, the Application relates to alleged disobedience of a court order issued on 16/3/2020. The applicants asked this Court to cite the Respondents for contempt of the order. The order was issued in the interim and the Court directed that the application that gave rise to it be heard *inter parties* on 30/6/2020. The orders were to be in place from the date of issue to 30/06/2020 when they could have been extended.

23. I perused the record and noted that nothing transpired on 30/6/2020. The parties did not move the Court on that date or so soon after. The next entry on the record after the interim orders were issued was on 11/1/2021 when the matter was fixed for mention on 15/7/2021. A quick calculation of the length of time shows that the matter remained dormant for 6 months and 11 days (that is to say, from 30/6/2020 to 11/1/2021). Therefore, the interim orders granted on 16/03/2020 were never extended beyond the date when they were made to last to, that is to say, on 30/06/2020 (*emphasis mine*). Without any extension, they ceased to exist and no party can be said to have breached what is non-existent.

24. About interim injunctions and final ones, the law provides for how the Courts should deal with them. Order 40 Rule 4 (2) of the Civil Procedure Rules states that “An *ex parte* injunction may be granted only once for not more than fourteen days and 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”. If the law is interpreted literally then the interim orders issued on 16/03/2020 automatically lapsed on 30/03/2020 by operation of the law but since the Court granted the interim orders and fixed the *inter partes* hearing of the application on 30/06/2020, it should be taken that the orders lapsed on that specified date.

25. In essence the Court is saying herein that *ex parte* injunctions only last longer than 14 days if a court extends them or if parties consent to the extension beyond the initial fourteen (14) days and even so that should happen only once for a further fourteen (14) days. Beyond the twenty-eight (28) cumulative days the life of an *ex parte* injunction expires. What the Rules are silent on is how long orders of injunction granted during *inter partes* hearing should last. Be that as it may, once, the *ex parte* injunction is confirmed after the *inter partes* hearing, it lasts only one year. This is stipulated under Order 40 Rule 6 of the Civil Procedure Rules. The said Rule 6 is explicit on the validity of court orders issued on temporary basis but confirmed in the end. It 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 the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

26. The only reasonable conclusion this Court arrives at is that there were no orders in existence that the Applicants can convincingly state that they were disobeyed. Moreover, the Applicants do not state when the said orders were disobeyed. They only deposed that the Respondents were served. Although the affidavit of service annexed to the Affidavit shown that the process server, one Jackson Nyongesa Simiyu, indeed served the orders on 19/03/2020, it is not clear when the alleged contemnors committed the disobedience complained off. The Applicants do not allege that it happened between 19/03/2020 and 30/06/2020 when the interim orders were in place. All that they allege, in paragraphs 6 and 7 of the Supporting Affidavit is that “the Respondents entered the suit property and changed padlocks on the said property in Plot Nos. 5, 7, 12, 16, 17 and 19 at Makutano Bus Park” and “allowed strangers to make renovations in Plot No. 7. And that they have “altered the plot numbers (from) 5 to 27, 7 to 32, 12 to 30, 17 to 50 and 19 to 33.” But if it would be taken that it happened by way of the “general notice of eviction” which was marked JL 4 in the Affidavit sworn by John Lokopis on 13/03/2020 as compared with the annexure JL 4 of the affidavit sworn by the same person on 5/07/2021, which is a copy of a demand/letter dated 08/02/2021 restating the position of the orders issued on 16/03/2020 and that the Applicants would be instituting contempt proceedings, then the activities of the Respondents did not occur within the pendency of the interim orders in question. I say so because any evidence presented by a party has to be carefully evaluated and contextualized as a whole. It is inconceivable that contemptuous actions could have taken place before 30/06/2020 and a complaint thereto be raised whether in writing or otherwise on 08/02/2021 as evidenced by the Applicant’s depositions. That would mean seven months and eight days would have passed before the complaint which ultimately gives rise to the instant Application. With due respect, the nature of contempt of Court proceedings being of a criminal nature require proof beyond reasonable doubt. The Applicants never proved the complaint herein to the required standard. Moreover, the Applicants never moved the court for extension of the interim orders issued on 16/3/2020.

27. Having, found that there were no orders in place when the alleged actions of disobedience took place, I find further that the Applicants did not show sufficient cause to warrant this court to embark to determine whether the nature of disobedience and punishment therefor. Therefore again, this Court will not go further in discussing whether or not the other specific conditions precedent to proving contempt of court were satisfied or not.

28. The conclusion of the whole matter is that the application dated 5/7/2021 is not only unmerited, but misplaced, misleading, frivolous, scandalous, vexatious and an abuse of the process of the Court. I dismiss it with costs to the Respondents.

29. For purposes of case management of the case, since from the record it is clear that the Applicants never prosecuted the application dated 16/03/2020 to date, it is not in the interest of justice that the same be urged further, two years later. Rather, the parties should hasten the preparation of the record of appeal and compliance with Order 42 of the Civil Procedure Rules. For that reason, this matter shall be mentioned on 05/05/2022 to confirm compliance and for further orders and directions.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 18TH DAY OF MARCH, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE