



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 301 OF 2019

JOHN KAMAU NJOROGI

STEPHEN MUYA NJOROGI

(Suing as the Administrators of the Estate of

NJOROGI KAMAU(DECEASED)..... PLAINTIFFS

VERSUS

PETER KAMAU MUNENE..... 1st DEFENDANT

THE CHIEF LAND REGISTRAR..... 2nd DEFENDANT

THE ATTORNEY GENERAL.....3rd DEFENDANT

RULING

1. In the Notice of Motion dated 22nd October, 2021, the Plaintiff /Applicant has sought for the following orders:

- a) That the Honourable Court do find and hold that the 1st Defendant/Respondent herein has committed contempt of court for disobeying and defying the Orders made by this Honourable Court on 3rd October, 2019 and do direct;
- b) That the 1st Defendant/Respondent be fined such sums of money as this Honourable Court may direct and that the same be paid into court forthwith.
- c) That the 1st Defendant/Respondent be committed to and/or detained in prison for a term of Six(6) months for contempt.
- d) That there be an Order for attachment and sale of property belonging to the 1st Defendant/Respondent to the extent of such value as this Honourable Court may direct.
- e) That the 1st Defendant/Respondent be denied audience before this Honourable Court until such a time as he shall have purged his contempt by *inter alia*;
 - i. Removing at his cost the illegal guards and other personnel stationed on the suit property and undertaking not to enter upon or trespass on the suit property.
 - ii. Demolishing at his cost all the structures erected and being erected on the suit property.
 - iii. Delivering and surrendering to the Honourable Court for custody, original purported title held by the 1st Respondent in respect of the suit property, namely, Nairobi /Block 110/901.
- f) Ensuring that orders granted on 3rd October, 2019 be enforced through the assistance of the Officer in Charge of Kasarani Police Division(OCPD).
- g) That the costs of the Application be borne by the 1st Defendant.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of the 1st Plaintiffs who deponed that on 3rd October, 2019, this Court granted injunctive orders restraining the 1st Defendant from interfering with the Plaintiffs possession, occupation and proprietorship of the suit property herein being Nairobi/Block110/901.
3. It was deponed by the 1st Plaintiff that the 1st Defendant being well aware of the said orders applied to have the same set aside vide the Motion dated 16th October, 2019 and that when the matter came up for mention on 24th February, 2021, the 1st Defendant's aforesaid application and the Plaintiff's application for contempt of court dated 19th December, 2019 were withdrawn by consent of the parties on condition that the injunctive orders would remain in force.
4. The 1st Plaintiff deponed that the 1st Defendant has continued to trespass on the suit property by engaging armed intruders to restrict the Plaintiffs' access thereto and is constructing permanent structures thereon and that the 1st Defendant's actions constitute blatant disregard for court orders.
5. In response, the 1st Defendant filed a Replying Affidavit in which he deponed that he has always complied with the issued injunctive orders; that prior to the institution of the suit, there was a carwash on the suit property which is still operational; that he is not undertaking any construction on the suit property as alleged and that the Application is a ploy by the Plaintiff to dispossess him of his original title deed.
6. The Plaintiffs' counsel submitted that the 1st Defendant breached the court orders of 3rd October, 2019, which orders he was well aware of as evinced by his application dated 16th October, 2019 seeking to have them set aside; that the 1st Defendant's aforesaid application was by consent withdrawn on the 24th February, 2021 on condition that the injunctive orders would remain in force and that the 1st Defendant has hired goons to keep the Plaintiffs away from the property and is in the process of constructing thereon.
7. It was submitted that it is a principle of law that court orders must be respected and obeyed. Reliance in this regard was placed on the case of ***Trusted Society of Human Rights Alliance vs Cabinet Secretary for Devolution and Planning & 3 others [2017] eKLR***.
8. The 1st Defendant's counsel submitted that contempt of court constitutes willful defiance or disrespect towards the court as held in the case of ***Sam Nyamweya & 3 others vs Kenya Premier League Limited & 2 others [2015] eKLR***; that the elements to be established in proving contempt include: the terms of the order were clear and unambiguous and were binding on the Defendant; the Defendant had knowledge of or proper notice of the terms of the order; the Defendant has acted in breach of the terms of the order and the Defendant's conduct was deliberate.
9. While relying on the cases of ***North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi [2016] eKLR*** and ***Cecil Miller vs Jackson Njeru & Another [2017] eKLR***, counsel submitted that the Plaintiffs have not proved the contempt by the 1st Defendant who has in any event not trespassed onto the property nor carried out any constructions thereon.
10. It was submitted that the Plaintiffs have equally not proved the allegations of involvement of criminal gangs by the 1st Defendant and that the application and orders sought therein are intended to dispossess the 1st Defendant of his property and acquire his title thereof.
11. According to the 1st Defendant's counsel, the injunctive orders issued on 3rd October, 2019 lapsed on 3rd October, 2020 pursuant to Order 40 rule 6 of the Civil Procedure Rules which provides that 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 of the injunction, the injunction shall lapse unless for any sufficient reason the court orders otherwise.
12. To buttress this position, reliance was placed on the cases of ***Director of Public Prosecutions vs Justus Mwendwa Kathenge & 2 others [2016] eKLR*** and ***Erick Kimingichi Wapang'ana & another vs Equity Bank Limited & another [2015] eKLR*** where the Court of Appeal held that where a suit in respect of which an interlocutory injunction has been granted is not determined within 12 months from the date of the grant, the injunction is to lapse unless for some sufficient reason.
13. Counsel submitted that as a result of the lapse aforesaid, there were no orders capable of being disobeyed; that further, the failure by the Plaintiff to serve the 1st Defendant with the court orders of 3rd October, 2019 and allegedly varied on 24th February, 2021 containing the specified penal notice is fatal to their application for contempt.
14. This suit was commenced by way of a Plaint dated 16th September, 2019. The Plaint was filed contemporaneously with a Notice of Motion application of the same date in which the Plaintiffs sought for injunctive orders. The said Application was allowed by the court on the 3rd October, 2019 in the following terms:
 - a) ***That pending the hearing and determination of this suit or until further orders the 1st Defendant whether by himself, agents, servants or by any other person whomsoever is restrained by an order of injunction from entering into, trespassing upon, developing, building thereon, damaging, offering for sale, selling, transferring, charging, mortgaging, leasing, assigning, disposing, advertising or in any other manner whatsoever from interfering with the Plaintiffs' possession, occupation and proprietorship rights over the suit property known as Nairobi /Block/110/901 located in Thome Estate.***
 - b) ***That costs of this Application be provided for.***
15. According to the Plaintiff, the 1st Defendant in blatant breach of the aforesaid orders continues to trespass onto the property and has employed a gang of armed intruders to stop the Plaintiffs from accessing the premises; that further, the 1st Defendant is in the process of

constructing permanent houses and other structures on the suit property.

16. On his part, the 1st Defendant denies any allegations of contempt maintaining that he has abided by the orders of the court; that he has not trespassed onto the suit property nor is he constructing any structures thereon; that the only structure on the property is a carwash which has been on the property prior to the filing of the suit and that the present application is a malicious attempt by the Plaintiff to dispossess him of his title.

17. The Contempt of Court Act, 2016, having been declared unconstitutional by the High Court, [see *The Kenya Human Rights Commission vs Attorney General & Another [2018] eKLR*] the substantive law governing contempt proceedings is the **Judicature Act, Section 5** of which provides;

“(1) 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.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

18. Additionally, section 29 of the Environment and Land Court Act under the title *offences* provides as follows;

“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.”

19. With respect to the present Application, **Order 40 Rule 3(1)** of the **Civil Procedure Rules** is instructive and stipulates as follows: -

“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.”

20. The **Black’s Law Dictionary (9th Edition)** defines contempt of Court as:-

“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

21. It is a cardinal principle of law that courts do not act in vain and their orders must at all times be respected. As articulated by the Court of Appeal in *Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR*;

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”.

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

22. It is trite that contempt of court proceedings are *quasi-criminal* in nature due to the severe consequences that it attracts. Consequently, the standard of proof in such proceedings is higher than the balance of probabilities in civil cases although not as high as beyond reasonable doubt. As stated by the Supreme Court in *Republic vs Ahmad Abolfathi Mohammed & another [2018] eKLR*;

“The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the 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 an offence which can be said to be quasi-criminal in nature.”

The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”

23. As correctly submitted by the parties, in order to succeed in civil contempt proceedings, the applicant has to prove that the terms of the order were clear, unambiguous and binding on the Respondent; knowledge of these terms by the Respondent and deliberate failure by the Respondent to comply with the terms of the order.

24. Indeed, in the cases of *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi (2016) eKLR* and *Republic vs Attorney General & another Exparte Mike Maina Kamau [2020] eKLR* cited by the parties, Mativo J relied on the exposition by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-

"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."**

25. The court has perused the injunctive order that it issued and finds that its terms were clear and precise. The import of the injunctive order was to restrain the Defendants or any person under their authority from interfering with the suit property. The court is convinced that the 1st Defendant had the requisite knowledge of the order.

26. The record shows that the 1st Defendant in reaction to the injunctive orders approached this court vide an application dated 16th October 2019 seeking to set aside the said orders, a clear sign that he was aware of the orders. Indeed, counsel for the 1st Defendant was present on 24th February, 2021 when the court decreed that *the injunctive orders issued on 3rd October, 2019 to remain in force until conclusion of the suit.*"

27. There being irrefutable evidence that the 1st Defendant or his advocate was aware of the terms of the Order, it follows that even if the 1st Defendant was not served with the penal notice as alleged, the same does not render the application for contempt defective. Indeed, several judicial decisions have upheld the position that personal awareness of an order supersedes personal service of the court orders. In the case of *Basil Criticos vs Attorney General and 8 Others [2012] eKLR*, Lenaola J (as he was then) persuasively pronounced himself as follows:

"...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"

28. With respect to the proof of breach of the court orders, the Plaintiffs attached photographs allegedly showing the ongoing construction on the suit property. Having keenly analyzed the said photographs, it is the finding of this court that the same are inadequate to aid the application for contempt.

29. It would have been prudent for the Plaintiffs to contextualize the photographs to enable the court determine whether the actions captured in the photos occurred at a time when the injunctive order had already been issued. Further, there would be need to establish who took the photographs and if indeed the activities in the photographs were being undertaken on the suit property. That was not done.

30. With respect to the 1st Defendant's contention that there were no orders capable of being breached because the same had lapsed pursuant to the provisions of **Order 40 Rule 6** of the **Civil Procedure Rules**, the court notes that this issue was not deponed to and constitutes a new issue raised by the 1st Defendant by way submissions.

31. In any event, the orders of the court were clear that the injunctive orders will remain in force until the suit is heard and determined. The court having made the said order, it does not matter that the suit has not been determined within 12 months from the date when the said order was made. If the 1st Defendant feels that the orders of the court have now lapsed due to the operation of the law, he is at liberty to file an application to set aside the said orders. However, as long as those orders are still on record, the 1st Defendant must obey them.

32. The upshot of the foregoing is that the application dated 22nd October, 2021 is unmerited and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF MARCH, 2022.

O. A. ANGOTE

JUDGE

In the presence of:

Ms Kibore for Njoroge for the Plaintiff

Mr. Ndege for Angwenyi for the Defendants

Court Assistant - Okumu