



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ndugo v Ntikaya Enterprises Limited (Environment & Land Case
1124 of 2014) [2022] KEELC 32 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 32 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1124 OF 2014**

OA ANGOTE, J

APRIL 28, 2022

BETWEEN

MICHAEL MAINA NDUGO PLAINTIFF

AND

NTIKAYA ENTERPRISES LIMITED DEFENDANT

RULING

1. Vide a Notice of Motion dated 24th March, 2020, brought pursuant to the provisions of Sections 1A, 1B, 3A and 63(c) of the [Civil Procedure Act](#) and Order 40 Rule 3 of the [Civil Procedure Rules, 2010](#), the Plaintiff/Applicant seeks the following orders:
 - i. That the Honourable Court be pleased to cite the Defendant with Contempt of Court for persistent disobedience of the orders made on the May 30, 2019 by this court in its judgement.
 - ii. The Defendants' Managing Director one James Waithaka Chege be arrested and be committed to civil jail for a period not exceeding six months for non-compliance with the said court orders.
 - iii. Costs of this Application be provided for.
2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Michael Maina Ndugo, the Plaintiff herein of the same date. The Plaintiff deponed that on May 30, 2019, this court issued permanent injunctive orders restraining the Defendant and its agents from interfering with his peaceful and quiet possession of the suit property and further ordered the Defendant to facilitate the transfer of the suit property in the Plaintiff's name.
3. It was deponed by the Plaintiff that the orders of May 30, 2019 aforesaid were served upon the Defendant on August 5, 2019 together with the penal notice and that despite knowledge of the orders, the Defendant has refused to comply with the aforesaid orders.



4. In response, the Defendant filed Grounds of Opposition and a Replying Affidavit both dated February 14, 2022. It was contended vide the Grounds of Opposition that the application has been brought in bad faith, is fatally defective and constitutes an abuse of the court process; that the application has been brought in violation of Section 5 of the Judicature Act and that the Applicant has not identified each alleged act of contempt and the grounds on which the committal application is made.
5. The Replying Affidavit was sworn by James Waithaka Chege, a Director of the Defendant who deponed that the application has been instituted prematurely; that in compliance with the decree issued by the court on the May 30, 2019, the Defendant surrendered the title of the original parcel of land to the Lands Registry in order to facilitate sub-division and acquisition of titles; that the Defendant's efforts in obtaining the said title documents have been derailed culminating in a delay in the completion of the transfer of the suit property and that the court ought to consider the efforts made by the Defendant in complying with the said orders, which compliance should be guided by the procedures of the Ministry of Lands & Physical Planning.

Analysis and Determination

6. Upon consideration of the application and the Affidavits herein, the only issue that arises for determination is:

i. Whether the Defendant is in contempt of the court orders issued on 30th May, 2019 and if so; what are the appropriate orders to issue?

7. At the onset, the court notes that the Defendant is seeking to impeach the validity of the present application. According to the Defendant, the application is fatally defective and constitutes an abuse of the court process because the same has been lodged in violation of Section 5 of the Judicature Act and further, that the Applicant has not fully identified the alleged acts of contempt and the grounds upon which the committal application is made.
8. The basis upon which the Defendant contends that this application contravenes Section 5 of the Judicature Act, is unclear. The Section merely provides that the High Court and the Court of Appeal have jurisdiction to punish for contempt of court in the same way the High Court of Justice in England does in order to protect the authority and dignity of subordinate courts.
9. The question of whether or not the alleged acts of contempt have been specifically laid out will be considered by the court in making its determination on whether the applicant has made his case for contempt.
10. This suit was commenced by way of a Plaint dated 19th August, 2014 wherein the Plaintiff sought as against the Defendant permanent injunctive orders restraining the Defendant or any party claiming under it from interfering with his peaceful and quiet possession of the suit premises being Plot No 1352 situate on L.R 8480/2; orders directing the Defendant to process and/or facilitate the transfer of the suit plot to the Plaintiff's name and costs of the suit with interest at court rates.
11. In its judgment of May 30, 2019, the court found that the Plaintiff had proved his case on a balance of probabilities and allowed his claim. A decree was subsequently issued on July 29, 2019. According to the Plaintiff, the Defendant in blatant breach of the aforesaid orders continues to interfere with his quiet possession of the suit property and has declined to transfer the suit premises to him.
12. On its part, the Defendant, through its Director, denies the allegations of contempt maintaining that they have abided by the orders of the court; that in compliance with the said orders, the Defendant



surrendered the title of the original parcel to the Lands Registry in order to facilitate sub-division and acquisition of title and that the delay in compliance with the said orders cannot be attributed.

13. The *Black's Law Dictionary (Ninth 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.”

14. The court takes cognizance of the fact that the *Contempt of Court Act*, No. 46 of 2016 was declared unconstitutional by the Court in *The Kenya Human Rights Commission v Attorney General & another* [2018] eKLR case. In the circumstances, the court is mandated to revert to the substantive law governing contempt proceedings prior to the enactment of the Contempt of Court Act, which is the *Judicature Act*. Section 5 thereof provides as follows:

“(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.”

15. Further, Section 29 of the *Environment and Land Court Act* 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.”

16. 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.”

17. Contempt proceedings are classified as quasi-criminal in nature due to the severe consequences it attracts and 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 v 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.”

18. It is an established principle of law that 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 the terms of the court order by the Respondent; failure by the Respondent to comply with the terms of the order and a deliberate conduct by the Respondent in disobeying the said orders.
19. In the cases of *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjobi* (2016) eKLR and *Republic vs Attorney General & another Ex parte Mike Maina Kamau* [2020] eKLR, 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.”
20. Having perused the Judgment of the court and the resultant orders, the court finds that its terms were clear and precise and their import was to restrain the Defendant or any person under its authority from interfering with the suit property. The court further ordered for the transfer of the suit premises to the Plaintiff.
 21. With respect to knowledge of the court orders, the Plaintiff asserts that the decree and penal notice were served on the Defendant. Indeed, the Defendant admits knowledge of the terms of the Judgment and Decree. The only question to be answered by the court is whether the Defendant is in deliberate breach of the terms of the Judgment.
 22. The Plaintiff asserts that the Defendant, despite the issuance of the court orders, persists in harassing and interfering with his quiet possession of the suit plot. The nature and form of



this interference and/or harassment has not been stated neither has any evidence been adduced in this respect. That being so, the court is unable to make a finding that the Defendant is in contempt of the injunctive orders.

23. With respect to the refusal by the Defendant to transfer the suit plot to the Plaintiff, the court is alive to the fact that the suit plot is within a larger property owned by the Defendant and must be excised from the larger portion before the transfer thereof. The Defendant has stated that the original title has been surrendered to the Lands Registry for sub-division.
24. To that end, the Defendant has adduced to what it refers to as the “surrender form”. A keen look at what has been adduced by the Defendant reveals that the same is dated 2nd February, 2010 and is with respect to an application for change of user. Indeed, the said document cannot be said to have been lodged pursuant to the orders of this court of May 30, 2019.
25. The procedure for application of sub-division and subsequent transfer of land entails several processes. The document adduced herein does not aid the Defendant in defence of this application, and there being no evidence to show the process of sub division of the land having been initiated, the Defendant cannot purport to lay blame at the foot of the Ministry of Lands and Physical Planning.
26. This matter having been concluded in 2019 whereupon the Defendant was ordered to transfer the suit property to the Plaintiff, there is no evidence to show that any single step has been made by the Defendant in an attempt to comply with the said order. Worse still, the Defendant’s director is attempting to hoodwink the court by annexing irrelevant conveyancing documents on his Affidavit. Such casual disregard for court orders undermines the dignity and authority of this court and the rule of law.
27. For those reasons, the court finds that the application dated 24th March, 2020 is meritorious. The court finds that the Defendant is in contempt of court and proceeds to issue the following orders;
 - a. An order be and is hereby issued for James Waithaka Chege, the Defendant’s Director, to appear before this court for mitigation.
 - b. The Plaintiff shall have the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH APRIL, 2022

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for the Plaintiff

Mr. Nyanjwa for the Defendant

Court Assistant – John Okumu

