



REPUBLIC OF KENYA



**Unilever Tea Kenya Limited v Chirchir & 6 others (Environment & Land
Case 60 of 2018) [2022] KEELC 3076 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3076 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 60 OF 2018**

MC OUNDO, J

MAY 26, 2022

BETWEEN

UNILEVER TEA KENYA LIMITED PLAINTIFF

AND

PAUL CHIRCHIR 1ST DEFENDANT

DENNIS CHEPKWONY 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

ANDREW CHERUIYOT ROTICH 4TH DEFENDANT

CHRISTOPHER KIPLANGAT TUITOEK 5TH DEFENDANT

HENRY KIMAIYO ROTICH 6TH DEFENDANT

FRANCIS KIPKOGEI KEMBOI 7TH DEFENDANT

RULING

1. Coming before me for determination are two applications the first one dated 31st March 2021 is a lay man's application brought under the provisions of Order 40 Rules 1 and 2 of the *Civil Procedure Rules*, Section 3 and 3A of the *Civil Procedure Act* and all enabling provisions of the law where the Applicant seeks orders restraining Plaintiff from suing him as there is no cause of action against him, and secondly that the court do set aside all proceedings against him.
2. The said application is supported by the grounds therein and the supporting affidavit of Dennis Chepkwony the 2nd Respondent/Applicant herein sworn on 31st March 2021 as well as his submissions filed on the 15th November 2021.
3. The Applicant's contention while seeking to be struck out from the proceedings was that he was over 60 years of age and was not aware of anything pleaded in the Complaint as he lived peacefully with his family



on a different parcel of land. That the alleged offense as alleged by the Plaintiff had been investigated in 2018 wherein he had been absolved of any blame. That if the Plaintiff was not refrained by the court, the Applicant stood to illegally suffer irreparable loss and damage which could not be compensated or replaced through monetary means. That the allegations against him were baseless, false, malicious and a defamation of character.

4. The application was opposed by the Plaintiff/Respondent through their Replying Affidavit dated 20th June 2021 to which they deponed that the applicant's application was fatally defective and incompetent having been brought under the wrong provisions of the law. That the Applicant sought to rely on the preliminary outcome of a criminal case to prove that no civil suit existed against him which in this case did not preclude civil liability. That the application therefore is misconceived and intended to evade the course of justice and the same ought to be dismissed.

Determination of the application:

5. Indeed although the said application is brought pursuant to the wrong provisions of the law the same having been filed by a lay person I shall use my discretion as granted under Section 1B and 3A of the *Civil Procedure Act* and determine the same that notwithstanding.
6. The provisions of Order 1 rule 3 of the *Civil Procedure Code* provide as follows:

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.
7. The provisions of Order 1 rule 10(2) of the *Civil Procedure Code* provide as follows:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
8. From the above procedural rule, the court has unfettered discretion to admit or strike out of proceedings a party with or without there being an application to that effect. It is trite law that the court, upon satisfying itself that that a person whose presence before it may be necessary to assist it effectually and completely to determine all questions involved in a dispute, may enjoin such person to the suit.
9. Article 50 (1) of the *Constitution* of Kenya, states that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.
10. The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision



is made. In the case of *Onyango v Attorney General* (1986-1989) EA 456, Nyarangi, JA asserted at page 459:

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”

11. And in the case of *Mbaki & Others v Macharia & Another* (2005) 2 EA 206, at page 210, the Court of Appeal held as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

12. It is trite law that the trial of the Applicant in the criminal case cannot be affected by the present civil action against him for the obvious reason that the cause of action is neither rooted in his prosecution or subsequent acquittal. Indeed courts have now held that criminal and civil proceedings can run concurrently unless either of them is being employed to perpetuate ulterior motives or generally to abuse the due process of the court in whatever manner in which case no such evidence had been tendered in the present scenario. I therefore find no merit in the said application and proceed to dismiss it with costs.

The second Application.

13. The second application is dated the 10th December 2021 brought by the 4th and 5th Defendants/Applicants herein and pursuant to the provisions of Order 40 Rule 1 & 3 of the [Civil Procedure Rules](#), and Sections 1A and B, 3A, 29 and 63 of the [Civil Procedure Act](#).

14. The said Applicants seek for leave to commence contempt of Court proceedings against Mr. Joseph Mitei the co-operate director, M/s Winnie Achieng the legal officer and Mr. Stephen the contractor for being in contempt of Court orders issued on 18th May 2020 by the Court. That upon the court granting them leave to commence contempt of court proceedings, that warrants of arrest be issued against the said persons for committal to civil jail for six months and/or such short period as the court may deem fit and expedient.

15. The said application is supported by an Affidavit sworn by Andrew Cheruiyot Rotich the 4th Defendant/Applicant on the 10th December 2021 as well as the written submissions filed on the 31st January 2022.

16. The Applicants' application is premised on a consent order that had been recorded on 18th May 2020 wherein the court had directed that both parties do maintain the status quo and by the said orders it meant that no side should harvest trees on the disputed land being LR No. 9xxx/4 or put up structures or dispose the land or encumber it or interfere with it in a manner that was prejudicial or detrimental to the other side.

17. That despite the orders being in force and having been served upon the Plaintiffs, the above named persons, in total defiance of the court orders, have interfered with the suit land by harvesting trees covering an area of 5.25 acres for their own benefit which actions amounted to disregard and/or disobedience of lawful court orders and was bound to set a dangerous precedent. That further, these actions would cause irreparable loss to the Applicants.

18. The Applicants submitted that contempt of Court was defined in the Black's Law Dictionary. They also relied on the decided case in [Teachers Service Commission vs Kenya National Union of Teachers & 2](#)



- Others [2013] eKLR as well as the provisions of Section 5 of the Judicature Act and Section 63(e) of the Civil Procedure Act to submit that disobedience of an order of temporary injunction would normally attract punishment in the form of imprisonment or attachment and sale of a contemnor's property.
19. That the contemnor's herein were in breach of the court orders as the terms of the orders were clear and unambiguous and were binding. That they had knowledge and/or proper notice of the terms of the order but acted in breach of the same which conduct was deliberate. The Applicant thus sought for their application to be allowed so as to restore the dignity of the court.
 20. In response to the application the Plaintiff/Respondent herein vide their Replying Affidavits of 16th December 2021 and 19th January 2022 as well as their submissions filed on 17th March 2022 opposed the Applicants' application but confirmed that indeed the court had issued orders of status quo on the 18th May 2020. That pursuant to the said directives they had abided by the status quo and had refrained from interfering with the suit property in a manner likely to prejudice the other parties.
 21. They also conceded that in August 2021 some trees covering 0.5 hectares in the suit property had been felled on instructions of their newly recruited employee who was not aware of the existing orders of status quo, which action had given rise to the present application.
 22. They submitted according to their issues for determination that although it was trite law that the terms of the orders should be clear and binding on the alleged contemnors, yet the orders alleged to have been breached had not been directed to the parties herein cited who were not parties to the suit nor were they the persons who had violated the status quo orders. That since the Applicants had not cited Respondents' Company in their application, they could not purport to cite its officers in their personal capacities because the Respondent Company was a separate legal entity distinct from its officers. That the corporate veil had not been lifted and this therefore barred the Applicants from pursuing officers of its company in their personal capacity. Reliance was placed on the case of Geoffrey Kathuri Kison & 10 Others vs East African Portland cement Company Limited & 5 Others [2021] eKLR.
 23. That secondly, deliberate conduct, the key element of contempt, the Applicants had not tendered any prove whatsoever to show that the Respondents conduct had been deliberate and hence culpable. That the failure to prove the said beyond a reasonable doubt displaced the inference of contempt. That upon the new employee having been notified of the existing order, the felling of the trees had ceased and the trees had been left on the suit land, which demonstrated that the Respondents conduct was not fueled by *mala fides*.
 24. Third, the Plaintiff/Respondent submitted that the Applicants had failed to establish to the required standard of proof the test for contempt which were a pre-requisite to granting the orders sought. Their prayer to cite and punish the alleged contemnors should therefore be disregarded.
 25. Last but not least, the Respondent submitted that the Applicants were not entitled to an order of sequestration as prayed since the accidentally felled trees were still within the suit properties and no action had been taken by the Respondent to derive any benefit from them. The Applicants had not suffered any damage and therefore it would not be necessary to attach the Respondent's property to recover any loss as none had been occasioned. That should the suit to be decided in their favour the Applicants would be at liberty to derive benefit from the felled trees. The Respondents sought for the application to be dismissed with costs to pave way for the hearing of the main suit.

Determination.

26. The Applicants have sought leave to commence contempt of Court proceedings against Mr. Joseph Mitei the Plaintiff /Respondent's co-operate Director, M/s. Winnie Achieng Plaintiff /Respondent's



the legal officer and Mr. Stephen their contractor, for being in contempt of a consent order of 18th May 2020.

27. 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.”

28. The laws guiding the present Application is Order 40 Rule 3(1) of the *Civil Procedure Rules* which 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.

29. Section 5(1) of the *Judicature Act* which provided that:

“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 that power shall extend to upholding the authority and dignity of subordinate Court s.”

30. Section 29 of the *Environment and Land Court* is clear to the effect that;

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

31. It is an established principle of law as was held in the case of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005 that in order to succeed in civil contempt proceedings, the Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.

32. From the proceedings herein the terms of the impugned consent order were as follows:

“Both parties are ordered to maintain status quo. And by status quo is meant that no side should harvest trees on the disputed land. No party should put up structures or dispose of the land or encumber it or interfere with it in a manner prejudicial or detrimental to the other side.”

33. To me, these terms were clear, unambiguous and binding. Further the Respondents had knowledge and/or proper notice of the same and indeed they have acknowledged the fact that indeed there was a valid order of status quo which they were aware of but which after the order had been issued, had not been complied with as the trees had been accidentally and not deliberately felled by one of their new employees who upon being informed of the order, had ceased felling any more trees which were still *insitu*.

34. I have also considered the fact that the persons whom the Applicants sought to cite for contempt were Mr. Joseph Mitei, Ms. Winnie Achieng and Mr. Stephen who are officers and/or employees of the Respondent yet the Respondent, being a separate legal entity distinct from its officers has not been cited for contempt in the application. Secondly the alleged contemnors were not parties to these proceedings in their personal capacity. The Respondent being legal entity, the proper procedure for



the Applicant would have been to first to apply to lift the corporate veil before seeking to cite the above captioned persons in their personal capacities. The failure by the Applicants therefore to cite the Respondent for contempt and to lift its corporate veil had denied them the chance to cite Mr. Joseph Mitei, M/s. Winnie Achieng and Mr. Stephen for contempt as officers of the Respondent. See the Court of Appeal decision in the case of Geoffrey Kathuri Kison & 10 others (*Supra*)

35. The standard of proof in cases of contempt of Court was well established. in the case of *Mutitika v Baharini Farm Limited* [1985] KLR 229, 234 where the Court of Appeal held as follows:

“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.”

36. Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. It is not like any other ordinary matter. Indeed the Supreme Court of Kenya in *Republic v Ahmad Abolfathi Mohammed & Another* [2018] eKLR held that;

“The 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.”

37. In the end, I find that the Applicants have not proved to the required standard that the Respondent’s officers herein cited were in brazen disobedience of the Court order issued on 18th May 2020. I decline to grant the orders sought and dismiss the Notice of Motion dated the 10th December 2021 with cost.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 26TH DAY OF MAY 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

