



**Mugun (Suing as Administrator of Estate of Kipsum Arap Mugun) v Busienei & 3 others
(Environment & Land Case 395 of 2013) [2022] KEELC 2976 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2976 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 395 OF 2013**

**SM KIBUNJA, J
MAY 25, 2022**

BETWEEN

**ROSALINE JEMELI MUGUN PLAINTIFF
SUING AS ADMINISTRATOR OF ESTATE OF KIPSUM ARAP MUGUN**

AND

**BENJAMIN BUSIENEI 1ST DEFENDANT
CHAIRMAN KESSES KELJI FARM 2ND DEFENDANT
MARK CHUMBA 3RD DEFENDANT
CORNELIUS LAGAT 4TH DEFENDANT**

RULING

[Notice of Motion dated the 25th January 2019]

1. The Plaintiff filed the notice of motion dated the 25th January, 2019 seeking for the following orders inter alia:
 - i. “spent.
 - ii. The 1st Defendant/Respondent be arrested and committed to civil jail for a period not exceeding 6 months for being in contempt of court orders granted on 24th July 2013, 15th October 2013 and subsequently confirmed on 15th October 2013.
 - iii. The Respondents actions of disobedience have greatly prejudiced the applicants’ interests, use and enjoyment of the suit parcel.
 - iv. The costs of this application be borne by the Defendants/Respondents.
 - v. The costs of this application be provided for.”



The application is based on the eight (8) grounds on its face marked (a) to (h), and supported by the affidavit sworn by Rosaline Jemeli Mugun, the plaintiff, on the 25th January 2019, inter alia deposing that her application for injunction dated the 18th July 2013 was granted on the 24th July, 2013 and after interpartes hearing on the 27th September, 2013 it was confirmed vide the ruling of 15th October 2013. That the 1st defendant was served with the orders, but in total disregard of the said orders, he forcefully ploughed the suit land on the 27th October 2018.

2. The Defendants opposed the application through the replying affidavit sworn by Benjamin Busienei, the 1st defendant, on the 5th February, 2019 wherein he deposed inter alia that the interim order that was issued by the Court on the 15th October, 2013 lapsed on 15th October, 2014 as the said order was not extended; that he has been, and still is in occupation for several years of the 20 acres of land, while the plaintiff and her children occupies 10 acres; and that he has never been served with the restraining court orders.
3. The directions on filing and exchanging submissions on the application were issued on the 3rd April 2019 and 12th November, 2020. The learned counsel for the Plaintiff and 1st Defendant filed their written submissions dated the 15th May, 2019 and 18th November, 2020 respectively.
4. The Plaintiff submitted that following the filing of the notice of motion dated the 18th July, 2013, the court issued interim orders on the 15th October 2013, restraining the Defendants from interfering with land parcel of land known as Plot No. 139, situated within Kesses Kelji Farm LR NO. 9621, measuring 20 acres. That at all material times the Defendants were aware of the existence of the aforementioned Order but in disregard of its existence, the 1st Defendant decided to plough the suit land, and to also construct a structure on it as is evidenced by the photograph annexed. The counsel cited the case of *Justus Kariuki Mate & Another v. Martin Nyaga Wambora & Anor* (2014) eKLR where the Court stated as follows:

“... the trial court was correct in holding that the law as then was in contempt of court had since changed; the law as it stands today is that Knowledge of an order is sufficient for purposes of contempt proceedings”

And the case of *Basil Criticos v. Attorney General And 8 Others*(sic) the learned judge pronounced himself as follows:

“... the law has changed as it stands today knowledge supercedes personal service where a party clearly (sic) acts and shows that he had knowledge of a court order; the strict requirement that personal service must be proved is rendered unnecessary.”

The learned counsel for the plaintiff further submitted that the aforementioned notwithstanding, the 1st Defendant was served with the said order as was demonstrated by a copy of the order and affidavit of service marked “RM 1b” and “RM 2”. The Plaintiff submitted that the order of the court was to be in force until final determination of the suit, and therefore the conduct of the 1st Defendant is in breach of the court order, and he should be held to be in contempt. In *Econet Wireless Kenya Ltd v. Minister For Information & Communication Of Kenya & Anor* {2005} eKLR the Court held as follows:

“It is essential for the maintainance of the rule and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and 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. 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 void...”

And the Plaintiff prayed that her application be allowed as prayed.

5. The 1st Defendant submitted that he was not in court, and neither was his Advocate present in court on the 15th October, 2014 (sic) when the order in issue was issued. That he did not have notice of its existence, and as such he should not be held to be in contempt. That the order issued on the 15th October, 2014 (sic) automatically lapsed on the 15th October, 2014 (sic). That as the order in issue was not served upon him, he cannot be held liable for contempt of an order that he was not aware of. The 1st Defendant further submitted that he has always been in possession of the suit land thus an order of injunction would not serve the purpose of evicting him. That it is not sufficient for the Plaintiff to state that the Defendant has ploughed the suit land, but must demonstrate that he has ploughed land that was previously utilized by the Plaintiff. That the interim order issued by the court on the 15th October, 2014 (sic) was only valid for 12 months as the same was not extended by the court. That the application dated the 25th January, 2019 ought to be dismissed with costs to the 1st Defendant.
6. The following are the issues for the court’s determinations;
 - a. Whether the order(s) the plaintiff alleges the 1st defendant had disobeyed was in force.
 - b. Whether the plaintiff has established to the standard required that the 1st defendant had disobeyed the court order(s).
 - c. Who pays the costs of the application.
7. The court has after carefully considering the grounds on the application, the affidavit evidence tendered by both sides, the submissions by the learned counsel, the superior courts decisions cited thereon come to the following determinations;
 - a. That the record confirms that the suit herein was commenced vide a Plaint dated 18th July, 2013 that was filed contemporaneously with the notice of motion of even date, wherein the Plaintiff sought temporary injunction orders against the 1st, 3rd and 4th Defendants, restraining them “from entering into, fencing, ploughing, using, constructing on, taking possession, selling or in any other way dealing with the plaintiff’s parcel of land measuring approximately 20 acres on Kesses Kelji Farm LR. NO. 9621 Plot NO. 139,” initially pending the hearing and determination of the application, and main suit later. The record confirms that the application was slated for inter partes hearing on the 27th September, 2013 and on that date, the 1st Defendant and Counsel for the 1st, 3rd and 4th Defendants were not present in court. The orders issued on 27th September 2013 were subsequently extracted on 15th October, 2013 and are in the following terms inter alia:
 - i. “An Order of temporary injunction be and is hereby issued to restrain the Defendants from interfering with the Plaintiff’s possession of the 20 acres of land claimed on behalf of the estate of Kipsum Arap Mugun, pending the Hearing and determination of this suit.
 - ii. An Order of temporary injunction be and is hereby issued to restrain the Defendants from selling, leasing, charging or in any other way dealing with the suit land, until the final determination of this suit.
 - iii. The costs of the application shall be costs in the cause.”



b. That as it is clear that the 1st defendant and his counsel were absent when the said order was issued, the plaintiff was obligated to ensure the same was brought to his attention by serving an extracted copy upon him. The 1st defendant has deposed that he has never been served with the said restraining order. The plaintiff has at paragraph 5 of the supporting affidavit deposed that service was effected, and attached among others the affidavit of service sworn by Kenneth O. Oduor, a process server on the 25th September, 2013. The court has perused the said affidavit and going by the depositions at paragraphs 2 and 10, it deals with service made on the 8th August, 2013 and 24th August 2013 only. That as it is clear that the order issued on the 27th September 2013, was extracted on the 15th October 2013, then that order was not in existence when the affidavit of service sworn on the 25th September, 2013 was made. That the plaintiff's attempt to rely on an affidavit of service sworn long before the order in issue was made and extracted, as proof of its service is mischievous and misleading. That as the application and supporting affidavit were drawn and filed through counsel, the court wishes to express its view that for counsel to be part of a conceited effort towards misleading the court, such conduct is to say the least highly unethical and unprofessional. The court therefore finds that the plaintiff has failed to show that the restraining order issued on the 27th September, 2013 and extracted on the 15th October, 2013 has ever been served upon the 1st defendant. That to succeed in his application, the plaintiff must establish that the 1st Defendant's was aware of the order alleged to have been disobeyed, and that his conduct was in contravention of the order issued on 15th October, 2013.

c. That to start with, it is important to establish whether the order issued on 15th October, 2013 lapsed automatically after one year, by operation of 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, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

That provision uses the word “shall”, an indication that it is couched in mandatory terms, that the interlocutory injunction automatically lapses at the expiry of twelve months from the date of issue if the suit remains undetermined unless otherwise directed by the court on consideration of sufficient reasons.

d. That in the case of *David Wambua Ngii v Abed Silas Alembi & 6 Others* [2014] eKLR the court discussed the provisions of Order 40 Rule 6 at length as follows:

“It is important to first deal with the scope and purpose of order 40 Rule 6 of the *Civil Procedure Rules* on lapse of an injunction. Order 40 rule 6 of the Civil Procedure Rules could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure. So, a party who applies to have an injunction discharged in the circumstances obtaining in rule 6 is acting in accordance with the statutory obligation to assist the court attain the overriding objective of the law under Article 159 of *the Constitution*, section 1A and 1B of the Civil Procedure Rules. Except, however, an application under rules 6 of order



40 of the Civil Procedure Rules involves discretion of the court. Towards that end, I am in agreement with the observation of Munyao J in the case of *Filista Chamaiyo Sosten v Samson Mutai* (supra). I should think factors which should guide the court in the exercise of discretion under Order 40 rule 6 of the CPR include but not limited to; 1) if the injunction was obtained by concealing facts which if were put to the judge in first instance would have affected his judgment in granting the injunction; 2) the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction; 3) the general conduct of the holder of the injunction is such that the court is impelled to discharge the injunction, and here I suggest instances where the injunction is being used to intimidate the Defendant or achieve an altogether different purpose from which the injunction was issued; 4) the sustenance of the injunction will cause an injustice, and here occurrence of substantial loss to the defendant is important, for instance an injunction obtained against a company which completely halts the operations of the company will be serving a different altogether purpose from the intention of law in granting equitable relief. This list is not intended to be exhaustive. What amounts to sufficient cause will really depend on the peculiar circumstances of each case.”

The court takes cognisance of the fact that temporary or interlocutory orders are not meant to be in force forever, but for only one year unless otherwise directed, as they are merely supposed to temporarily preserve the subject matter of a suit pending the hearing and determination of the dispute by a court of law. The Plaintiff has not advanced any justifiable explanation why she never took the necessary steps to have the order extended before its expiry on the 27th September, 2014.

- e. The Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others*(2014) eKLR made the following observation in relation to the provisions of Order 40, Rule 6 of the Civil Procedure Rules:

“Without going into the details we, with respect, agree with the submissions of all learned counsel that the object of introducing rule 6 aforesaid in the 2010 Rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various machinations to delay the disposal of the suit. Rule 6 of order 40 was therefore a necessary and reasonable safeguard against such machinations. It is a condition that many jurisdictions have imposed in dealing with abuses of injunctive orders. A neighbouring example to demonstrate this will suffice. In Tanzania, their order 38 rule 3 of the Civil Procedure Rules provides that an interlocution injunction can only be in force for a period not exceeding six months unless extended by court. The extension on the other hand is restricted to period which in aggregate must not exceed one year. The extension, the rule provides, will be upon the court being satisfied that the applicant has diligently been taking steps to settle the matter complained of and that the extension is in the interest of justice, necessary or desirable. Again, it provides that for the order of injunction to be discharged, varied or set aside, it has to be on application by an aggrieved party.”

The court takes note of the fact that the Plaintiff obtained the order in issue herein on 15th October, 2013 while the instant application was filed on 25th January, 2019, which was about five (5) years later. The plaintiff has however not explained why she had not taken any deliberate steps towards prosecuting her claim to its logical conclusion, before the expiry of the twelve months from the date of the order, or soon thereafter.



- f. That in the case of *Kibirech Arap Chemiron & Another v Co-operative Bank Of Kenya Limited* [2019] eKLR the court held as follows:

“Order 40 Rule 6 is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not so lapse.”

And in the case of *Maxam Limited & 2 Others v Heineken East Africa Import Co. Ltd & 2 Others*[2017] eKLR the court held that;

“I must however also appreciate that Order 40 Rule 6 of the Civil Procedure Rules anticipates that where an interlocutory injunction has been issued on merit then the suit is to be determined and the parties respective rights asserted within one year of the interlocutory order being made. The Rule appreciates and seeks to ensure that neither party is placed at an indefinite hardship through an intermediary order. The mischief was to guard against sluggish and dawdling litigants who seek to delay the prosecution of their claims: see *Nguruman Ltd v Jan Bonde Neilsen & 2 Others* [2014]eKLR. In my view however, the rule was not intended to occasion injustice to either party and thus a mere lapse of twelve months alone should never be enough to see the interlocutory order vacated.”

That having given due considerations to the foregoing decisions of the various superior courts, and the facts presented by both sides in this matter, the court finds that the order the plaintiff alleged the 1st defendant has disobeyed lapses after one year from the date of issue as provided in Order 40, Rule 6 of the Civil Procedure Rules. The said order has not been extended by this court, and in the circumstances, I find that the Plaintiff application for contempt of court orders has no merit, as it seeks to enforce compliance of an order that lapsed and hence non-existent.

- g. That as the application dated 25th January, 2019 is found to be without merit, the 1st defendant who participated in its hearing is entitled to costs under the provision of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.
8. That flowing from above, the plaintiff’s application dated the 25th January, 2019, is without merit and is dismissed with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 25TH DAY OF MAY, 2022

S.M.KIBUNJA,J.

ENVIRONMENT & LAND COURT - ELDORET

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: Absent

DEFENDANTS: Absent

COUNSEL: Mr. Tarigo for Kipsei for Plaintiffs

Ms. Bosibori for Wabwaba for Defendant.....

COURT ASSISTANT: ONIALA



S.M.KIBUNJA,J.

ENVIRONMENT & LAND COURT - ELDORET

