



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

CIVIL SUIT NO. 2794 OF 1995(O.S)

1. NORMAN KARIUKI
2. KIRUUNGI KARUGU
3. NJOKI WAIRIMU
4. RICHARD MBURU MURIUKI
5. WILLIAM GICHIRA WAWERU
6. JACOB OYIENG OMBORI
7. JUANINA WAITHIRA WAWERU
8. JOYCE MUTHONI MBAU
9. MONICA WANZA WAMBUA
10. BEDAN MAINA
11. KIMAMUI WANJURI GIKONYO
12. HELLEN WAIRIMU
13. KIIO KIHORI
14. ALFRED OWUOR
15. MUTHONI WAKARIBA
16. STEPHEN MWANGI
17. PAUL KANGETHE
18. KATHOKA
19. MWENI NDOGO
20. PETER KIARIE
21. JANE WANGECHI
22. KANUINI KAMAU MWANGI
23. MWANGI NGAHU
24. DORCAS NJOKI
25. PENINA WANJIRU
26. MARGARET NJERI KIARIE
27. MARTIN NDEGWA
28. PETER KAGOCHI

29. SUSANA NYAMBURA.....PLAINTIFFS /RESPONDENTS

VERSUS

NDORONGO GATHERU.....1ST DEFENDANT

PETER KUNGU KAHARI.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

GATUNDU & MANGU FARM COMPANY LIMITED.....4TH DEFENDANT

RULING

A chronology of the events leading to the application filed herein by the 1st, 2nd, and 4th Defendants dated 8th April 2009 is as follows. The Plaintiff filed the suit herein against the Defendants by way of an Originating Summons dated 4th September 1995 April 2011. The Originating Summons sought orders *inter alia* for adverse possession in relation to two parcels of property namely LR No 8569 and LR No. 14847 (hereinafter referred to as the suit property). Judgment was given in favour of the Plaintiffs with regard to LR No 8569 by the Honourable Justice Angawa on 26 June 2008. The 1st, 2nd, and 4th Defendants in an application dated 24th February 2009 thereupon applied for stay of execution of the said judgment pending the hearing of their appeal, which stay was granted by the Honourable Justice Osiemo on 25th February 2009.

The 1st, 2nd, and 4th Defendants' application dated 8th April 2009 is brought under the provisions of sections 3A and 63 of the Civil Procedure Act, Order L Rule 1 and Order XXIX Rules 1,2, and 7 of the Revoked Civil Procedure Rules and section 5(1) of the Judicature Act. The said Defendants are seeking the following orders:

1. That a Notice to Show Cause be issued against Jacob Oyieng Ombori, Monica Wanza Wambua, Kimamui Wanjuri Gikonyo and Peter Kiarie to show cause why they should not be arrested and committed to civil jail for a period not exceeding six months for contempt of court and disobedience of a court order given by this Court on 25th February 2009.
2. That the Respondents against Jacob Oyieng Ombori, Monica Wanza Wambua, Kimamui Wanjuri Gikonyo and Peter Kiarie be arrested and committed to civil jail for a period not exceeding six months for contempt of court and disobedience of a court order given on 25th February, 2009.
3. An order do issue that all the structures erected on L.R. No. 14847 Kahawa Nairobi in contempt of the court order given on 25th February 2009 be demolished forthwith.
4. An order that the suit land L.R No. 14847 Kahawa Nairobi be preserved and the 1st, 2nd and 4th Defendants/Applicants be allowed entry into the suit premises for purposes of preserving and inspecting the suit land.
5. That due to the nature of the case, the service of the court orders be effected by the O.C.P.D Kasarani Police Station, Nairobi.

The grounds for the application are that the said Respondents were on 2nd March 2009 served with a Court Order given on 25th February 2009 for stay of execution pending appeal, and that in flagrant disregard, disobedience and contempt of the said court order, the said Respondents have continued to erect structures on the suit land L.R. No. 14847 Kahawa, Nairobi and have demolished the Applicants' permanent structures which have been on the land. Further, that in flagrant disregard, disobedience and contempt of the court order, the said Respondents have continued to demarcate and subdivide the suit land L.R No. 14847 Kahawa, Nairobi amongst themselves, and continued to prevent the Applicants from accessing their land and have threatened violence against them.

These grounds are deponed to in the supporting affidavit sworn on 8th April 2009 by the 1st Defendant on behalf of the other Applicants, wherein he states that the Court Order was served upon the Respondents on 2nd March 2009 by the Assistant Chief, Kahawa Location, and on their Advocate, S. G. Wachira. He has also annexed as evidence the aforementioned court orders, and photographs showing the structures erected by the Respondents, the structures demolished by the Respondents and the beacons erected by the Respondents. The 1st Defendant avers that the Respondents' acts are in contempt of court, have brought the authority and dignity of the court into disrepute and should be severely punished for their contempt of court and disobedience of a court order.

The Respondents response is contained in a Replying Affidavit sworn on their behalf by Monica Wanza Kaloki on 4th May 2009, wherein she denies that there have been any new structures erected on the suit plot after the issuance of the Court's order of 25th February, 2009. The Respondent depones that some of the structures erected on the suit plot were built and completed during the period of over 7 months that lapsed between the date of the aforesaid judgment and the date of the stay of execution order alleged to have been disobeyed. Further, that the Applicant's application is misconceived and abuse of the court process, as there is no evidence of contempt of court, neither was the mandatory notice of penal consequences served upon the Respondent. The Respondents also averred that in any event the purported order lapsed on 11th March 2009, as the same was never extended to the next hearing date for the application being 4th May 2009.

The Respondents also relied on the Replying Affidavit sworn by the same Deponent on 4th March 2009, in opposition to the Applicants' application dated 24th February, 2009, seeking stay of execution of the judgment of 26th June, 2008. The Respondents in the said affidavit admitted to being in possession of the suit property, occupying and constructing on the same pursuant to the Court decree, and that they had proceeded to execute the decree by sub-dividing the suit property, which process of sub-division, allocation and registration of the suit land in favour of the Respondents was almost complete. The Respondents annexed to the said affidavit a copy of a letter dated 14th January 2009 from the Ministry of Lands & Settlement addressed to the Director of City Planning Nairobi City Council forwarding a subdivision scheme plan with respect to the suit property for approval as evidence.

The Applicants' Advocate filed written submissions dated 28th September 2010, wherein he submitted that there were structures put up on 9th August 2010 despite the court orders, as evidenced in the photographs annexed to their Further Affidavit sworn on 25th August 2010. The Applicants also submitted that the Respondents were aware of the court order of 25th February 2009, and were served with the order on 2nd March 2009. Furthermore, that the Respondent's Advocates on record S.G Wachira Advocates was served with a copy of the order on 26th February 2009, and an affidavit of service filed in court on 10th March 2009. The Advocate relied on the decisions of this Court (Kimaru J.) in **Gatimu Farmers Company v Geoffrey Kagiri Kimari HCCC (Nakuru) No. 302 of 2004** and **Julius Wanjala Kisiangani and 2 others vs City Council of Nairobi and others H.C. Misc App. (Nairobi) No 1299 of 2007** that disobedience of court orders cannot be explained away on technicalities.

The Respondents' Advocate on his part filed Written Submissions dated 12th October 2010 and Further Submissions dated 2nd February 2012, wherein it was submitted that the Applicants were guilty of inordinate delay in filing and prosecuting the application for stay of execution, and did not apply due diligence in preserving the *status quo*. Further, that the photographic evidence produced does not indicate when the structures were built or construction took place, and there is no proof that this happened after the order of stay of execution was granted on 25th February 2009. The Respondents also submitted that the orders of 25th February 2009 were not personally served upon the Respondents, and relied on the decisions in **Kariuki & Others vs Minister for Gender, Sports & Social Services (2004) 1 KLR 588** and **Duncan Manuel Murigi vs Kenya Railways Corporation (2008) eKLR** where applications for contempt of court were dismissed for lack of personal service of the court orders on the alleged contemnors. It was also submitted by the Respondents that the said order did not have a penal notice.

I have carefully considered the pleadings, evidence and submissions made with regard to the application before this Court. At the time of filing this application the law for contempt of court was provided for under section 63 of the Civil Procedure Act, Order XXXIX Rule 2(3) of the Revoked Civil Procedure Rules and section 5(1) of the Judicature Act. Section 63 of the Civil Procedure Act and Order XXXIX Rule 2(3) of the Revoked Civil Procedure Rules apply only in cases where an injunction granted by the court has been disobeyed. Section 5(1) of the Judicature Act applies to all cases of contempt of court, and provides that the High Court 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. It is therefore the finding of this court that the applicable procedure to this application is that provided for under section 5(1) of the Judicature Act, as the court orders alleged to be disobeyed were not injunction orders. The procedure adopted by the High Court of Justice in England is provided for in Order 52 of the Rules of the Supreme Court of England and was explained in great detail in the decision by Ouko J in **Godfrey Kilatya Kituku & 6 Others vs Malindi Municipal Council HCCC (Malindi) No 45 of 2005**.

The Respondents in this application have raised two issues for determination. The first issue is whether this application is competently before this Court for reasons of non-compliance with the procedure. The second issue is whether the Respondents are culpable of contempt of court, if it is found that the application is competently before the court. On the first issue of procedure, the Respondents have alleged that there was no personal service of the orders on them. The Applicants allege that such personal service was effected on 2nd March 2009 by the Assistant Chief, Kahawa Location and also on the Respondents' Advocate, S. G. Wachira.

The Court of Appeal has held that as a general rule no order of a court requiring a person to do or to abstain from doing any act may be enforced by committing the said person for contempt, unless a copy of the order has been served personally on that person. This was in the decision in **Ochino & Another v Okombo & 4 others (1989) KLR 165** following the earlier decision in **Mwangi Wangondu v Nairobi City Commission Civil Appeal No 95 of 1988**. The Court of Appeal further held that a copy of the order must be endorsed with a notice informing the person on whom a copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it. These decisions were also followed in the case relied on by the Respondents, namely **Kariuki & Others vs Minister for Gender, Sports & Social Services (2004) 1 KLR 588**.

Upon perusal of the court record, I found an affidavit of service filed 10th March 2009 and sworn on the same date by a process server by the name of Joshua Oguda, attesting to service of a court order dated 26th January 2009, a Notice of Motion dated 24th January 2009 and a Notice of Withdrawal of Application dated 24th February 2009 on the Respondents' Advocates, S.G. Wachira & Co. Advocates. The said orders and notices served were not annexed to the affidavit of service as was required under Order V Rule 15 of the Revoked Civil Procedure Rules. The Court order attached to the Applicants Supporting Affidavit and alleged to have been disobeyed is dated 26th February 2009, and it is therefore not clear if this is the order that was actually served on the Respondent's Advocate. There was no affidavit of service on file attesting to the service on the Respondents personally, or on the said Assistant Chief of Kahawa Location. It is therefore my finding that there was no personal service of the orders of this Court on the Respondents.

I am however not inclined to find this default fatal to the proceedings before the court so long as it can be shown that the Respondents were aware of the Court orders, as it is my view that the blatant disregard and disobedience of court orders should not be condoned, and the dignity and authority of courts should not be sacrificed at the altar of technicalities. Indeed Article 159(2) of the Constitution now enjoins courts to dispense justice without undue regard to procedural technicalities. It is also my view that the Respondents having participated in the application dated 24th February 2009 for the stay of execution of the judgment of the Honourable Justice Angawa given on 26 June 2008, were aware of the orders of the Court granted on 25th February 2009.

This Court will therefore proceed with the determination of the second issue of culpability, and in this respect this Court needs to be satisfied that the threshold of proof has been met by the Applicants. The

threshold of proof in contempt cases is higher than that in normal civil cases, and one can only be committed to jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability. The evidence provided by the Applicants is that of photographs alleged to have been taken at various dates following the filing of the application herein, to show that construction was continuing on the suit property. This evidence has been contested by the Respondents, who claim that it is impossible to know the dates when the said photographs were taken, as the photographs attached to the 1st Defendant's affidavit sworn on 8th April 2009 are undated, and the ones attached to his Further Affidavit sworn on 25th August 2010 have a date of 9th August 2010 superimposed on them.

Photographs are admissible as documentary evidence under section 35 of the Evidence Act as prove of the facts for which they are offered, if they are relevant to a material issue and are properly authenticated. The Applicants have produced the photographic evidence as a graphic illustration of their statement that the Respondents undertook construction on the suit property after the court orders of 25th February 2009. The Respondents on the other hand claim that the developments were put up before the said court orders, and have provided evidence to show that the sub-division of the suit property commenced before the court orders were granted.

In my view lack of dates on the said photographs is not fatal, as there are statements and submissions made by the Applicants as to when the said photographs were taken. However, upon examination of the photographs marked "NG3" annexed to the Supporting Affidavit sworn by 1st Defendant on 8th April 2009, the buildings in the said photographs as well as the location of the said buildings appears to be markedly different from the set of photographs dated 9th August 2010 and annexed to the Further Affidavit sworn by the 1st Defendant on 25th August 2010.

It is therefore not possible to determine if the buildings in the two sets of photographs of 8th April 2008 and of 9th August 2010 are the same, or are in the same location of the suit property, and more importantly this Court is therefore not able to determine on the basis of the said photographs whether there were any developments or changes made in the intervening period when the two sets of photographs were taken. Furthermore, since there is the possibility that the suit property may have also changed materially before the photographs were taken because of the Applicants' delay in bringing their application for stay of execution, it is the finding of this Court that the said photographs cannot be relied upon to accurately represent developments on the suit property before and after the court orders of 25th February 2009 were granted.

For the reasons given in the foregoing, I find that the Applicants have not proved the culpability of the Respondents to warrant their committal to civil jail, and their application dated 8th April 2009 is hereby denied.

The Applicants shall meet the costs of the application.

Dated, signed and delivered in open court at Nairobi this ____3rd____ day of ____May____, 2012.

P. NYAMWEYA

JUDGE