



Ndeti & another (Legal representatives of Idah Ndinda Ndeti (Deceased)) v Ndeti & another (Legal representatives of Dr Kivuto Ndeti (Deceased)) (Environment and Land Case Civil Suit 55 of 2015) [2022] KEELC 3590 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3590 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 55 OF 2015
SO OKONG'O, J
JULY 21, 2022
FORMERLY HCCC NO. 430 OF 1981

BETWEEN

ESTHER NGONDU NDETI 1ST PLAINTIFF
ALEX KIILU NDETI 2ND PLAINTIFF
LEGAL REPRESENTATIVES OF IDAH NDINDA NDETI (DECEASED)

AND

MICHAEL KYENDE NDETI 1ST DEFENDANT
CECILIA SITUMAI NDETI 2ND DEFENDANT
LEGAL REPRESENTATIVES OF DR KIVUTO NDETI (DECEASED)

RULING

1 On January 14, 1986, the dispute before this court was referred to a panel of elders under the chairmanship of the District Officer, Iveti South Division for arbitration. The elders conducted the arbitration exercise and rendered an award on May 13, 1986 which was read to the parties on September 18, 1986. On March 18, 2008, the plaintiffs brought an application under Order XLV rule 17(1) of the repealed *Civil Procedure Rules* for judgment to be entered in their favour in accordance with the said award. The plaintiffs amended their application for judgment on August 4, 2014. The amended application that was filed on August 18, 2014 sought the following orders;

1. “That if deemed necessary, the period for making this application and or for enforcement of the award and or judgement be extended.



2. That judgement be and is hereby entered in favour of the plaintiff as against the defendant in accordance with the arbitrators' award dated May 13, 1986 which was filed in court and read to parties on September 18, 1986
 3. That cost of this application be provided for.”
- 2 The application was opposed. In a ruling delivered on July 26, 2017, the court allowed the plaintiffs' application and entered judgement in favour of the plaintiffs against the defendants in accordance with the arbitrators' award dated May 13, 1986 together with the costs of the application. Following the entry of judgment as aforesaid, a decree was extracted on September 20, 2017. The decree was on the following terms:
1. “That it would be most unfair to have the plaintiff vacate the property in issue whose common use was granted by the defendant under family arrangements establishing PN Ndeti & Brothers, a limited liability company in which both are shareholders and the company contributed Kshs 20,000/- towards its full acquisition despite its registration in the name of the defendant.
 2. That the allotment of the property by equal shares to the plaintiff is not fair unless this is along other properties some of which are not in dispute now.
 3. That the defendant be and is hereby restrained from selling, whole or part or otherwise parting with the property LR No 7149/9 registered as IR 1872/2 or evicting the plaintiff from it until such time that PN Ndeti and Brothers a limited liability company is dissolved and each afforded appropriate shares of the assets forming the family company some of which though registered under individual members of the family have been jointly owned.
 4. That the house on the property and which the plaintiff is residing is by all sufficient evidence on record the property of the plaintiff.
 5. That each party to bear its own costs.”
- 3 What is now before me is a notice of motion application dated November 27, 2019 by the plaintiffs seeking the following orders;
1. That Cecilia Situmai Ndeti and Michael Kyende Ndeti be committed to civil jail for a period of 6 months for disobedience of the ruling delivered on July 26, 2017 and the decree extracted therefrom on September 20, 2017.
 2. That the costs of the application be provided for.
- 4 The application that was supported by the affidavit of Esther Ngundu Ndeti sworn on November 27, 2019 was brought on several grounds. The plaintiffs averred that despite being aware of the ruling of the court delivered on July 26, 2017 and the decree extracted therefrom that was duly served upon them, Cecilia Situmai Ndeti and Michael Kyende Ndeti (hereinafter referred to only as “the defendants”) proceeded to subdivide, sell and part with all that parcel of land known as LR No 7149/9, IR 1872/2(hereinafter referred to as “the suit property”). The plaintiffs averred that out of a property measuring over 100 acres, the defendants purported to allocate to the plaintiffs only 3 acres thereof. The plaintiffs averred that the authority and dignity of the court must be protected at all times.
- 5 The application was opposed by the defendants through separate replying affidavits sworn by Cecilia Situmai Ndeti and Michael Kyende Ndeti on October 20, 2020. The defendants contended that they are the judgment debtors herein while the plaintiffs are the decree holders. The defendants



contended that the plaintiffs had not explained how in their opinion the decree of this court was to be implemented and what action they had taken towards such implementation. The defendants averred that the plaintiffs were reluctant to implement the decree and were only ill bent on perpetually harassing the defendants and denying them their constitutional rights. The defendants averred that the High Court had already confirmed the Grant in respect of Dr. Kivuto Ndeti's estate and that the suit property had been absolutely vested upon Kivusit Holdings Limited (hereinafter referred to only as "Kivusit").

- 6 The defendants averred that the plaintiffs participated fully in the High Court Succession Cause No 1587 of 2012 in which the said grant was issued and confirmed. The defendants averred that plaintiffs also participated in the proceedings in the Court of Appeal in which stay orders were sought against the orders that had been made by the High Court in the said succession proceedings dismissing objections to the confirmation of the said grant. The defendants averred that the plaintiffs were the appellants in the said Court of Appeal proceedings. The defendants averred that it was upon confirmation of the said grant in respect of the estate of Dr Kivuto Ndeti that the defendants through Kivusit Holdings Limited in compliance with the decree issued herein carved out for the plaintiffs a portion of the suit property on which the plaintiffs' house is situated.
- 7 The defendants denied that they disobeyed the decree of this court issued on September 20, 2017. The defendants contended that they were not served with the said decree. The defendants averred that Alex Kiilu Ndeti who is one of the plaintiffs resides on the said portion of the suit property that was carved out for the plaintiffs upon the dissolution of PN Ndeti and Brothers Limited and striking off the same from the register of companies. The defendants averred that the plaintiffs failed to disclose to the court that PN Ndeti and Brothers Limited had been dissolved and that the suit property did not form part of the assets of PN Ndeti and Brothers Limited. The defendants averred that the plaintiffs failed also to disclose to the court the fact that the plaintiffs were not evicted from the suit property and that they had refused to receive a title for the portion of the suit property on which their house is standing.
- 8 The defendants averred that the decree of the court did not state that the suit property was acquired by the plaintiffs and the defendants and that the defendants were holding the same in trust for the plaintiffs. The defendants reiterated that the plaintiffs had not told the court in what manner they wished to have the decree of the court implemented. The defendants averred that the plaintiffs' application was an afterthought and that the same was brought after the plaintiffs' application for injunction in a separate suit to stop the defendants from dealing with the suit property was dismissed. The defendants averred that they dealt with the suit property pursuant to a confirmed grant of letters of administration in respect of the estate of Dr Kivuto Ndeti that was issued by the High Court which the plaintiffs unsuccessfully attempted to revoke. The defendants averred that while dealing with the suit property as aforesaid, they took into account the decree of this court. The defendants averred that the plaintiffs' application was an abuse of the process of the court.
- 9 The plaintiffs' application was heard by way of written submissions. The plaintiffs filed submissions dated January 14, 2022. The plaintiffs submitted that the defendants were restrained by the decree of this court from selling the suit property. The plaintiffs submitted that the defendants in defiance of the said decree subdivided the suit property and registered subdivisions thereof in the name of Kivusit. The plaintiffs submitted that the defendants were all along aware of the decree of this court as they not only filed a notice of appeal against the same but also sought interpretation of the same. The plaintiffs submitted that personal service of the decree upon the defendants was not necessary in the circumstances. The plaintiffs submitted that they had proved that the defendants willfully disobeyed the decree of the court. The plaintiffs urged the court to allow the application so as to protect its dignity.



10 The defendants filed submissions dated January 28, 2022. The defendants submitted that the plaintiffs had not indicated in what manner they wanted the decree of the court to be implemented. The defendants submitted that the plaintiffs in whose favour the decree was made took no steps to execute the said decree. The defendants submitted that the plaintiffs had challenged their dealings with the suit property in many forums with no success. The defendants urged the court to dismiss the application by the plaintiffs as an abuse of the process of the court.

11 I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the affidavits filed by the defendants in opposition to the application. Finally, I have considered the written submissions on record. The issues arising for determination in the application before me are whether the defendants breached the decree of this court made on July 27, 2017 and issued on September 20, 2017 and if so, whether they should be punished.

12 In *Hardkinson v Hardkinson* [1952] ALL ER 567, the court stated that:

It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt."

13 In *Mutitika v Baharini Farm Ltd.* [1985] KLR 227 it was held that:

- i. "A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.
- ii. The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.
- iii. The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor."

14 In *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* (2018) eKLR the Court of Appeal set out the law on contempt as follows:

It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the *Contempt of Court Act* and the ruling of the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* (supra). Secondly, as this Court emphasized in *Jihan Freighters Ltd v Hardware & General Stores Ltd* and in *AB & Another v R B* [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See *Mutitika v Baharini Farm* (supra) and *Republic v Ahmad Abolfathi Mohammed & Another* (supra)."



- 15 In *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, the court stated as follows:

We now revisit the issue of service. Was there service of the order said to have been disobeyed on the respondent? There is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect. In that respect, this case can be distinguished from *Justus Kariuki Mate & Another v Hon Martin Wambora* (Wambora case) supra cited by learned counsel for the applicant. On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra). Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of *Basil Criticos v Attorney General and 8 Others* [2012] eKLR 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”

This position has been affirmed by this court in several other cases including the *Wambora case* (supra). It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty.

.....Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.”

- 16 It is on the foregoing principles that the plaintiffs' application falls for consideration. I am not satisfied that the plaintiffs have proved a charge of contempt against the defendants for various reasons. As submitted by the defendants, the plaintiffs were the judgment creditors while the defendants were the judgment debtors in the decree that was issued by the court on September 20, 2017. This means that the duty was on the defendants to comply with the decree. The defendants have contended that they have complied with the decree of the court. The plaintiffs think otherwise. The plaintiffs have not told the court how they wanted the decree to be implemented. The plaintiffs have accused the defendants of subdividing and selling the suit property contrary to the decree of the court. The suit property had to be subdivided one way or the other. The defendants have contended that after subdividing the suit property, they allocated to the plaintiffs a portion thereof where the plaintiffs' house stood. The plaintiffs have contended that the suit property measured over 100 acres and that the portion thereof which the defendants purported to allocate to them measured a paltry 3 acres. The plaintiffs have not told the court what proportion of the suit property they were entitled to under the decree and how allocation to them of the said 3 acres violated the terms of the said decree. I am not in agreement with the plaintiffs that the mere subdivision or sale of the suit property violated the decree of the court. The dispute between the parties was over the division of the suit property. This means that the parties



had to divide the suit property one way or another. The decree did not give a formula on how the division was to be done. The defendants did it in the way they thought was proper. I am of the view that the plaintiffs had a duty to fault the division by the defendants by proffering an alternative mode of division and justifying the same. The plaintiffs have not done so. I have also noted that the defendants were restrained from selling the suit property until PN Ndeti and Brothers was dissolved. The evidence before the court shows that the said company was dissolved in 1997. The plaintiffs have not commented on the effect of this dissolution on the limb of the decree that stopped the sale until the company was dissolved. I am of the view that if the plaintiffs felt that the defendants had not implemented the decree in accordance with the terms thereof, their remedy lied on moving the court for appropriate directions or orders to compel the defendants to comply rather than rushing to court for an order for committal.

- 17 The other reason why I find no merit in the plaintiffs' application and why I agree with the defendants that the same is an abuse of the process of the court is that the plaintiffs failed to disclose to the court that they were aware that the defendants were dealing with the suit property pursuant to some orders that were given in Nairobi High Court Succession Cause No 1587 of 2012. The plaintiffs had a duty to disclose that they challenged the grant that was issued to the defendants in the said cause in which the suit property was among the assets of Dr Kivuto Ndeti deceased which were up for distribution to his beneficiaries. The plaintiffs did not disclose that their application seeking revocation of the said grant was dismissed and that the grant was subsequently confirmed with the suit property being vested on Kivusit. The plaintiff did not also disclose that they filed an appeal against the decision of the High Court dismissing their application and that their application in the Court of Appeal for stay of confirmation of the said grant by the High Court was dismissed. The High Court having made a decision allowing the defendants to deal with the suit property which order has not been varied or set aside, the defendants' acts of dealing with the suit property pursuant to the said order cannot be said to be contemptuous of the orders that were issued herein. The plaintiffs had a duty to bring to the attention of the High Court these proceedings and the decree that was issued herein which I believe they did. The High Court was supposed to consider the same which that court also did. The High Court found no reason to defer to the decree issued herein and dismissed the plaintiffs' application seeking to stop the confirmation of the said grant. I am of the view that having lost in the High Court and having taken the battle to the Court of Appeal, it was not open to the plaintiffs to open another battle front before this court. This court has no jurisdiction to vary the orders that were issued by the High Court on the basis of which the defendants subdivided the suit property.
- 18 I have said enough to show that the application before me is not for granting. That is however not to say that the decree of this court is not to be complied with or implemented. My view is that the implementation is affected by the orders that were made by the High Court and the Court of Appeal which the plaintiffs have to deal with. The plaintiffs are also still at liberty to move this court if there is anything more that the court can do for them which will not be in conflict with the said orders made by the High Court and the Court of Appeal.
- 19 For the forgoing reasons, the notice of motion dated November 27, 2019 is dismissed with costs to the defendants.

DELIVERED AND SIGNED AT NAIROBI THIS 21ST DAY OF JULY 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kioko h/b for Mr. Mutua for the Plaintiffs



Mr. Bundotich for the Defendants

Ms. C. Nyokabi-Court Assistant

