



Dena & 111 others v Kalume & 4 others (Environment & Land Case 299 of 2013) [2022] KEELC 13414 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13414 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 299 OF 2013
LL NAIKUNI, J
SEPTEMBER 29, 2022**

BETWEEN

MASHA BIRYA DENA & 111 OTHERS PLAINTIFF

AND

FRANCIS KAHINDI KALUME 1ST DEFENDANT

POLA KALUME KITSAUMBI 2ND DEFENDANT

BILLY KALUME 3RD DEFENDANT

ESTHER NZIGO KALUME 4TH DEFENDANT

DANIEL MBOGO 5TH DEFENDANT

RULING

I. Introduction

1. The Honorable Court is to make a determination of the Notice of Motion application dated 14th December, 2021 filed herein by the Plaintiffs/Applicants but bearing two Supporting affidavits as shall be dealt with herein below. The said application was brought under the provisions of Sections 1, 1A, 1B and 3A of the [Civil Procedure Act](#) Cap. 21 and Orders 40 Rule 3 of the [Civil Procedure Rules](#), 2010.

II. The Plaintiffs/applicants Case

2. The Plaintiffs/Applicants sought for the following orders:-
 - a. Spent
 - b. That the 2nd Defendant Pola Kalume Kitsaumbi be found in breach of the status quo order made by this Court, pending the hearing of the ongoing trial proceeding on 16th February,



2022 and hence be found guilty of contempt of this Court's Order and hence ordered to be detained in prison for a term not exceeding six (6) months or as the Court may deem fit.

c. That the 2nd Defendant be ordered to pay for the costs.

3. As indicated above, the application is premised on the grounds, testimonial facts and averments made out under two (2) Supporting Affidavits one (1) being of eight (8) Paragraphs sworn and dated on 14th December, 2021 by Geoffrey Mutinda Nzou while the other is a six (6) Paragraphed one sworn and dated the even date by Masha Biryana Dena together with one (1) annexure marked as "MBD - 1" annexed thereof.

a. The Supporting Affidavit by Geoffrey Mutinda Nzou

4. Mr. Nzou averred that he was one of the Plaintiffs/Applicants in this matter hence duly authorized to swear the said Affidavit on his own behalf. He deposed that the suit commenced hearing on 9th November, 2021 wherein 1st Plaintiff testified as per the Court records. He held that on that day, only two (2) witnesses testified whereupon it was stood over to 16th February, 2022.

He pointed that on the 11th November, 2021 two (2) days after testifying, he saw the 2nd Defendant/Respondent - Pola Kalume Kitsaumbi and Boniface Kalama at about 1.30 pm came to his premises with some two (2) other individuals unknown to him and informed him that the beacons which separated their boundaries cut across his house and hence they verbally informed him that his house would be demolished to allow the boundaries to be demarcated.

5. According to him, he strongly protested their actions and informed them that the subject matter was an issue which was still pending in Court and their actions would be breaching the "Status quo Order" that the Court had granted to the Plaintiffs/Applicants pending the hearing and final determination of the suit. However, he held that the 2nd Defendant /Respondent shouted him down and stated that the same was of no consequence to the actions they had intended to take within the next fortnight which included demolition of his premises to create the said boundary.

6. He informed Court that indeed the 2nd Defendant/Respondent being a party to this suit was aware of the orders granted by this Court on 11th November, 2021 and hence the consequences of the breach to any such Court Order.

b. The Supporting Affidavit by Masha Biryana Dena

7. Mr. Dena held that he was the Plaintiff/Applicant in this matter and had the full authority of all the 111 Plaintiffs/Applicants to file this suit and plead on their behalf. The Plaintiffs/Applicants were members of the Mtwapa Land Tenant Association.

He deposed that within the last week of September 2021 the 2nd Defendant/Respondent at night caused demolitions of the business premises of Mr. Shadrack Chiguta one of the Plaintiff/Applicant herein despite being aware of the Court Order granted on 11th November, 2021. He argued that the 2nd Defendant/Respondent had acted in contempt and his actions of proceeding with the demolitions while being fully aware of the suit was illegal. He annexed a bundle of photographs demonstrating the demolitions marked as "MBD-1".

III. The 2nd Defendant/respondent Replying Affidavit

8. On 10th March, 2022, the 2nd Defendant/ Respondent filed a nine (9) Paragraphed Replying Affidavit sworn- (Thump printed) and dated 7th March, 2022 and one (1) annexure marked as "PKK-1" annexed thereof.



He deposed that he was the 2nd Defendant/Respondent herein and hence competent to swear the affidavit. He denied ever having gone to the premises of Geoffrey Mutinda Nzou as alleged and according to him the said affidavit was full of falsehoods. He refused that Mr. Shadrack Chiguta was one of the Plaintiff/Applicant in this suit. He further denied having ever demolished any house or business premises as alleged in the said affidavits.

9. He argued that he was being accused of being in contempt of an order of the Court which had never been served upon him and neither been brought to his attention whatsoever. He held that the suit before Court concerned Plot Nos. Mn/III/743, 744, 745, 746 & 747 respectively whereby he was not a registered owner to any of these properties.
10. According to him, the Plot known as Plot No. Mn/III/742 belonged to Kalume Kitsaumbi (deceased). He informed Court that pursuant to the Orders granted by Court in High Court Succession Cause No. 165 of 1981, the said plot was sub-divided into various plots and hence the said Plot No. Mn/111/742 did not exist any longer. He annexed a letter dated 6th January, 1998 marked as “PKK - 1” addressed to the Public Trustee by Mr. Edward Kiguru a licensed Surveyor who carried out the subdivision following instructions by the Public Trustees who were duly appointed Legal Administrators to the Estate of the late Kalume Kitsaumbi.

IV. Submissions

11. On 17th February, 2022, in the presence of all the Parties herein, the Court directed that the said Notice of Motion Application dated 14th December, 2021 be canvassed by way of Written Submissions. Despite of this direction none of the Parties complied with this direction hence the Court has been compelled to proceed on with rendering its ruling without the said vital pleadings.

V. Analysis And Determination

12. I have keenly perused the filed pleadings by the Parties being the Notice of Motion Application dated 14th December, 2021, the two (2) Supporting Affidavits and the Replying Affidavit. I have also considered the relevant Provisions of the Constitution of Kenya, 2010 and Statutes.

In order to arrive at an informed and remarkable decision on the matter, the Honorable Court has framed the three (3) salient issues for its determination. These are:-

- a. Whether the Plaintiffs/Applicants through the Notice of Motion Application dated 14th December, 2021 have met the fundamental threshold for Contempt of Court.
- b. Whether indeed the 2nd Defendant and/or any other named person herein were in Contempt of this Court's Order granted on 11th November, 2021 and if so what are the consequences as provided for by law.
- c. Who will bear the cost of this application.

Issue No. a). Whether the Plaintiffs/Applicants through the Notice of Motion application dated 14th December, 2021 have met the fundamental threshold for contempt of Court.

13. It is now well established that Court Orders are never granted in vain. Indeed, the Court wishes to underscore that Court do guard them jealously. Parties have no option but to obey them.

The only variations in the event Parties are not in agreement with the said Orders, is to move Court for review, setting aside and/or varying the said orders or in the extreme prefer an appeal but for heaven sake not to disobey the orders.



The consequences for such breach are extremely severe bordering on criminality.

14. Legally speaking, the Honorable Court has decided to look into the concept of the Contempt of court in details. Contempt of Court is that conduct or action that defies or disrespects authority of court. Black Law Dictionary 9th Edition defines it as:-

“The act or state of despising the conduct of being despised conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with administration of Justice”

Properly put, contempt is the conduct that impairs the fair and efficient administration of justice. From the very onset, this Court takes cognizance to the fact that the *Contempt of Court Act*, No. 46 of 2016 was declared constitutionally invalid and nullified in 2018 for lack of public participation as required under Articles 10 and 118 (b) of *the Constitution* and for encroaching on the independence of the Judiciary as founded in the case of “*Kenya Human Rights Commission v Attorney General & Another* (2018) eKLR. In the given circumstances, this court is compelled to revert to the provision of the law that operated before the emanated of the *Contempt of Court Act* – the *Judicature Act* and the Supreme Court Rules of England.

Under the provisions of Section 5 of the *Judicature Act*, Cap. 8 of the Laws of Kenya confers jurisdiction on the superior courts to punish for contempt provides thus:-

“The High Court of Appeal shall have the same powers to punish for contempt of court as is for the time being possessed by the High Court of England and that power shall extend to upholding the authorities and dignity of sub - ordinate courts.

15. Additionally, under the provision of Section 27 of the *Environment and Land Court Act*, No. 19 of 2011 provides 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 (Kshs. 20,000,000/=) to imprisonment for a term not exceeding two years or to both”

In the case of “*Charity Mpano Ntiyine v China Communication Constructions Company Limited & National Environment and Management Authority* (2017) eKLR”. Court held that there are three elements that must be proved in contempt proceedings. These are:-

- a. Applicant must demonstrate terms of orders
- b. Applicant must demonstrate knowledge of terms by the Respondents and
- c. Applicant must demonstrate failure of Respondent to comply with the court order.

16. Additionally, Under the provision of Order 40 Rule 3 of *Civil Procedure Rules*, 2010 provides that cases of disobedience or of breach of any terms of a temporary injunction the court granting that 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 of not exceeding six (6) months unless the court directs his release.

The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court observance and respect of due process of law, preserve



an effective and impartial system of justice and maintain public confidence with administration of justice by court. Without sanctions of contempt there would be a serious threat to the rule of law and administration of justice for a party to be cited for contempt he must have violated and/or disobeyed an order that was directed at him.

17. The reason why Courts punish for contempt is to uphold the dignity and authority of the Court, ensure compliance with the directions of the Court, observance and respect of due process of law, preserve an effective and impartial system of justice and maintain public confidence in the administration of justice by Court. Without sanctions for Contempt, there would be serious threat to the rule of law and administration of justice for a Party to be cited for contempt, he/she must have violated and/or disobeyed an Order that was directed at him/her.

Issue b) Whether indeed the 2nd Defendant/Respondent and/or any other named person herein were in Contempt of this Court's Order granted on 11th November, 2021 and if so what are the consequences as provided for by law.

18. Under this Sub – heading, having clearly laid out the legal principles for Contempt proceedings as stated herein above, the Honorable Court has to address itself to the fact and surrounding inferences in the instant case. The Plaintiffs/Applicants have discerned that this Court granted its Orders on 11th November, 2021 to the effect that “the status quo on the suit property be maintained until this matter is heard and finally determined”. Although they never attached a copy of the said Order on neither of the two (2) Supporting Affidavits. Knowledge is a question of fact and one must be aware of the terms of the Order. It's common knowledge the 2nd Defendant/Respondent who is being cited was aware about the Orders as he is a Party to the ongoing proceedings. Hence, the defence by the 2nd Defendant/Respondent that he was never brought to his attention or served on him is mischievous, irrelevant and immaterial to say the least.
19. The Plaintiffs/Applicants have submitted that on night of 11th November, 2021 the same day the 1st Plaintiff had testified in Court they saw the 2nd Defendant and another person called Boniface Kalume and others at about 1.30pm (sic) having gone to his premises and demanded to demolish the premises alleging that the beacons which separated their boundaries cut across the Plaintiff/Applicant house, from the evidence adduced and the documentary exhibits attached marked as “MBD-1” being a bundle of photographs, it is alleged that the 2nd Defendant/Respondent and other individuals made good their threat as they proceeded to demolish the suit property. Mr. Masha Birya Dena- The Plaintiff/Applicant holds that the demolished premises was a business building belonging to one Shadrack Chiguta.
20. The act of Contempt of Court is in the nature of criminal proceedings and therefore, proof of a case against a Contemnor is higher than that of balance of probability. This is because liberty of subject is usually at stake and the Applicant must prove willful and disobedience of the Court, if he/she were to succeed. This was aptly stated in the case of “*Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227, that:-

“ A Contempt of Court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a 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 criminal cases. It is not safe to extend it to offences which can be said to be quasi - criminal in nature.

Arising from the above legal ratio this Court finds that in the present application, the Plaintiffs/Applicants have not sufficiently demonstrated that the 2nd Defendant/Respondent deliberately



disobeyed this Court Order of 11th November, 2021 or at all. In saying so the Court has based its reasoning from the following grounds:-

18. Firstly, apart from the bundle of photographs, they have not produced any other empirical evidence to connect or associate the 2nd Defendant/Respondent being willfully and deliberate disobedience of the Court order of 11th November, 2021.

Besides, there is no relation and/or connection of these photographs to the suit property.

Secondly, the 2nd Defendant/Respondent has argued that suit was concerned with parcels of land known as Plot Nos. MN/III/ 743, 744, 745, 746 and 747 whereby he was not a legally registered owner to any of these properties. Indeed, he has further contended that the parcel of land known as Plot No. MN/III/742 belonged to the late Kalume Kitsaumbi and from the High Court Succession Cause No. 165 of 1981 the said parcel was long time sub-divided and distributed to the beneficiaries of the estate meaning that the said parcel was nonexistent. These are extremely weighty and triable issues to be fully adduced during the full trial. Be that as it may this Court found it difficult to fathom the reason the Plaintiffs/Applicants never sought leave of Court to rebut all these assertions through filing a Supplementary Affidavit under Order 51 of the Civil Procedure Rules, 2010. As it were now these facts remain unchanged.

Thirdly, in his Supporting Affidavit- Mr. Masha Birya Dena holds to be swearing it on behalf of the 111 members of the Mtwapa Land Tenant Association. He holds Mr. Shadrack Chiguta is amongst the 111 members of their Association. Indeed he avers that it's Mr. Chiguta's business premises and that of Geoffrey Mutinda Nzou- the other Plaintiff/Applicant who swore an affidavit that was demolished. As a matter of fact, Mr. Nzou's property was left intact and apart from the threat to demolish that never happened.

18. I have keenly assessed the Register of Members for the Association whereby the names Shadrack Chiguta does not feature or appear at all. The closest name on the register is of one Shadrack Ngali a holder of the National Identity Card bearing number 4580841.

Certainly, these cannot be one and the same person. Mr. Chiguta is not a party to this suit to warrant this Court granting the orders sought. In saying so the Court considers that Contempt proceedings are a serious undertaking because a Court exercising this jurisdiction is minded to ensure the orderly functioning of Society and rule of law. On conviction, the alleged Contemnor in this case the 2nd Defendant/Respondent stands to lose his/her liberty. It should not therefore be taken lightly. These ingredients have not been established.

Issue c) Who will bear the cost of this application?

18. It is trite law that issues of costs are at the discretions of the Court. Costs means the awards granted to a Party after the legal action, cause, process and proceedings in any litigation.

The Provision of Section 27 (1) of the *Civil Procedure Act* Cap. 21 provided that, the costs follow the event. The event here means the results of the legal action, cause, process and proceedings.

18. Although the Notice of Motion Application dated 14th December, 2021 fails to succeed, but in the interest of justice, equity and conscience it's just, fair and reasonable that each Party bear their own costs.

VI. Conclusion & Disposition

18. In conclusion and having critically taken into account all the framed issued and given circumstances of this case herein and the material placed before the Court, I am not satisfied that the Plaintiffs/



Applicants on neither the preponderance of probability nor have they proved their case to the required standard. For this reason I proceed to make the following orders:-

- a. That the Notice of Motion Application dated 14th December, 2021 be and is hereby dismissed for lack of merit.
- b. That for expediency sake this matter be fixed for hearing within the next ninety (90) days from this date hereof from where it left; indeed, the next hearing date be on 27th and 28th February, 2023 without failure.
- c. That each Party to bear their own costs.

RULING DELIVERED, SIGNED AT MOMBASA AND DATED ON THIS 29TH DAY OF SEPTEMBER, 2022

JUSTICE HON. (MR) L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

- a. Mr. Ben - Court Assistant.
- b. Mr. Martin Tindi Advocate for the Plaintiffs/Applicants;
- c. Mr. Omollo Advocate for the 1st, 2nd, 3rd & 5th Defendants/Respondents.
- d. Mr. B. Kongere Advocate for the 4th Defendant.

