



Cinatine Enterprises Limited v Athi River Housing Company Limited & another (Environment and Land Case Civil Suit 152 of 2019) [2022] KEELC 13470 (KLR) (13 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 152 OF 2019
SO OKONG'O, J
OCTOBER 13, 2022**

BETWEEN

CINATINE ENTERPRISES LIMITED PLAINTIFF

AND

ATHI RIVER HOUSING COMPANY LIMITED 1ST DEFENDANT

CADILLA LIMITED 2ND DEFENDANT

RULING

1. The plaintiff brought this suit against the 1st defendant through a plaint dated May 8, 2019 seeking among other reliefs, a permanent injunction restraining the 1st defendant from entering upon, selling, offering for sale, charging and/or in any other way whatsoever interfering with the plaintiff's ownership and/or quiet possession of House No 7 situated at Madaraka and one of the go-downs on the piece of land known as LR No 209/10638(IR 48328/1). The plaint was amended on October 1, 2019 to add the 2nd defendant to the suit. Together with the amended plaint, the plaintiff filed an application by way of notice of motion dated September 27, 2019 seeking a temporary injunction restraining the defendants from selling, offering for sale, transferring, charging or in any other manner disposing of or interfering with the plaintiff's quiet possession of all that piece of land known as LR No 209/18298 (IR 109923) pending the hearing and determination of the suit.
2. The 1st defendant appointed the firm of R M Mutiso & Co Advocates to act for it in the matter through a notice of appointment of advocates dated October 15, 2019. It is not clear whether the 2nd defendant was served with summons to enter appearance. From the record, the 2nd defendant has never appointed an advocate to act for it neither has it participated in the suit since it was added to the suit on October 1, 2019. The plaintiff's application for a temporary injunction dated September 27, 2019 was dismissed on June 16, 2020 for non-attendance.



3. On January 20, 2021, the plaintiff filed another application by way of notice of motion dated January 19, 2021 seeking among others, a temporary injunction restraining the defendants and their appointed auctioneer, Intime Auctioneers from carrying out the auction that was scheduled to take place on January 26, 2021 of the household goods that were attached and removed from the plaintiff's director's House No 7 situated on LR No 209/18298 IR 109923("the suit property") pending the hearing and determination of the suit and that the said goods be returned to the said house pending the hearing of the application inter-partes.
4. The plaintiff's notice of motion application dated January 19, 2021 came up for directions *ex-parte* on January 25, 2021 when the court directed that the same be served for mention on February 8, 2021 for directions on the hearing thereof. The court granted a temporary order until February 8, 2021 restraining the defendants and their auctioneers from auctioning or selling the goods that they had removed from the suit property.
5. On February 8, 2021, only the 1st defendant's advocate attended court. The said advocate informed the court that he was not aware of the plaintiff's application dated January 19, 2021. In the circumstances, the court did not give any directions on the said application and the interim orders that were granted on January 25, 2021 to last until that day lapsed.
6. On February 9, 2021, the plaintiff brought another application by way of notice of motion dated February 8, 2021 seeking among others a temporary injunction restraining the defendants and their appointed auctioneer, Intime Auctioneers from carrying out the auction that was scheduled to take place on February 10, 2021 of the household goods that were attached and removed from the suit property pending the hearing and determination of the suit and the setting aside of the order dismissing the plaintiff's earlier notice of motion dated January 19, 2021. The application came up for directions on February 9, 2021 when the court directed that it be served for mention on February 22, 2021 for directions. In the meantime, the court issued an order restraining the defendants and Intime Auctioneers from carrying out the auction that was scheduled to take place on February 10, 2021.
7. When the notice of motion application dated February 8, 2021 came up for directions on February 22, 2021, the plaintiff's advocate told the court that the application had been overtaken by events since the defendants had defied the court order made on February 9, 2021 and proceeded with the auction of the attached goods.
8. What is now before me is a notice of motion application dated April 19, 2021 brought by the plaintiff seeking an order that the auctioneer trading as Intime Auctioneers and Jimmy Sausi advocate be cited for contempt of the orders made by the court on January 25, 2021 and February 9, 2021 and be committed to jail for six (6) months and ordered to pay "a hefty" fine. The plaintiff sought a further order that the court be pleased to grant any other or further orders for the purpose of protecting the dignity and authority of the court and finally, that the costs of the application be borne by the alleged contemnors. The application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the plaintiff's advocate Isaac Rene on April 19, 2021.
9. The plaintiff contended that the order made on January 25, 2021 which was directed at the 2nd defendant was served upon the firm of Ochoki & Ochoki Advocates which was acting for the 2nd defendant in relation to the said auction that was stopped by the court in that it was the said firm that had instructed Intime Auctioneers to proclaim, advertise and sell the subject goods by public auction. The plaintiff averred that on January 26, 2021, Jimmy Sausi advocate from the said firm of Ochoki and Ochoki Advocates wrote to the said auctioneers advising them to disregard the said court order of January 25, 2021 and to proceed with the auction of the attached goods. The plaintiff submitted that the order made on February 9, 2021 in which the court reiterated the orders made on



January 25, 2021 was also served upon the said firm of Ochoki and Ochoki Advocates and Intime Auctioneers (“the auctioneers”) by e-mail. The plaintiff averred that in breach of the said court orders, the 2nd defendant through Ochoki and Ochoki Advocates and the said auctioneers proceeded to sell the plaintiff’s directors household goods by public auction on February 10, 2021. The plaintiff annexed to the affidavit in support of the application evidence showing that the alleged contemnors were served with the court order made on January 25, 2021. I have not seen evidence of service of the order made on February 9, 2021.

10. The application was opposed by the alleged contemnors. Jimmy Sausi opposed the application through grounds of opposition dated May 7, 2021, notice of preliminary objection dated July 2, 2021, a replying affidavit sworn on July 15, 2021 and notice of preliminary dated December 6, 2021. The auctioneer filed a replying affidavit “under protest” sworn on December 6, 2021.
11. In his grounds of opposition dated May 7, 2021, Jimmy Sausi Ochoki (hereinafter referred to only as “Sausi”) contended that neither he nor his firm, Ochoki & Ochoki Advocates was on record for any of the parties in this suit and as such the orders issued in this suit could not be served upon his firm. Sausi contended further that it was the defendants in the suit which should have been served with the order and not Ochoki & Ochoki Advocates. Sausi contended that he could not be held in contempt in a matter in which he had never held brief nor appeared for any party. Sausi termed the plaintiff’s application bogus, not merited and confusing.
12. In his replying affidavit, Sausi reiterated that neither his firm nor he in his personal capacity had acted for any of the parties in this suit. He averred that the plaintiff in the suit was represented by the firm of Onsando Ogonji & Tiego Advocates while the defendants were represented by R M Mutiso & Company Advocates. Sausi contended that the firm of Rene & Hans LLP Advocates which brought the present application was not on record for any party in the matter.
13. Sausi contended further that the distress for rent that the plaintiff sought to stop was being carried out pursuant to an order of the court that was made on September 16, 2020 in Misc Case No E5046 of 2020. Sausi averred that neither his firm nor he in his personal capacity was acting for any of the parties in Misc Case No E5046 of 2020. Sausi averred that the alleged plaintiff’s director, Hezbon Omondi in whose favour the injunctive orders restraining distress were sought before this court had sought similar orders in the lower court in MCCC No E5196 of 2020 and his application was dismissed on January 8, 2021. Sausi contended that instead of appealing the said decision of the lower court or seeking a review of the same, the plaintiff changed advocates and filed a similar application before this court. Sausi contended that the court was misled into granting the orders that have given rise to these proceedings.
14. In his second notice of preliminary objection dated December 6, 2021, Sausi contended that Hezbon Omondi who was a tenant on the suit property has added himself to this suit without leave of the court and filed the application before the court dated April 19, 2021. Sausi contended that the application was incompetent having been instituted by a stranger to the suit.
15. In his affidavit sworn on December 6, 2021, S O Juma trading as Intime Auctioneers stated that he was not served with the court orders made on January 25, 2021 and February 9, 2021 staying the sale of the goods that he had attached in distress for rent on the instructions of the 2nd defendant.
16. On July 19, 2021, the court directed that the plaintiff’s application dated April 19, 2021 be heard by way of written submissions and gave timelines within which the parties were to file their respective submissions. On March 3, 2022 the court extended the time within which the parties were to file submissions and reserved the ruling for today. As at the time of writing this ruling none of the parties had filed submissions.



Determination:

17. I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the affidavits, grounds of opposition and notices of preliminary objections filed by the alleged contemnors in opposition to the application. The issues arising for determination in the application before me are, whether the alleged contemnors breached the orders that were made herein on January 25, 2021 and February 9, 2021 and if so, whether they should be punished.

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.”

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.”
18. 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).”

19. 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 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.”

20. It is on the foregoing principles that the plaintiff's application falls for consideration. I am not satisfied that the plaintiff has proved a charge of contempt against the alleged contemnors for various reasons. First, as I mentioned earlier in the ruling, the order of injunction made on January 25, 2021 lapsed on February 8, 2021 when the plaintiff's advocate failed to attend court for directions on the application dated January 19, 2021 and the order was not extended. The said order was therefore not in existence on February 10, 2021 when the auctioneer (the 1st alleged contemnor) sold the goods that had been distrained for rent by public auction. Even if the order was served upon the auctioneer, it had expired as at the time he conducted the public auction. I am in agreement with the plaintiff that the letter dated January 26, 2021 by Sausi (the 2nd alleged contemnor) to the 1st alleged contemnor was contemptuous of the court order of February 25, 2021. The 2nd alleged contemnor is an officer of this court. He cannot dare instruct an auctioneer to disregard a court order. Luckily for him, the order that he instructed the 1st alleged contemnor to disregard lapsed before it was disobeyed by the 1st alleged contemnor. The 2nd alleged contemnor cannot therefore be held liable for acts that were committed by the 1st alleged contemnor after the lapse of the order.
21. With regard to the order of February 9, 2021, the plaintiff has not proved that the order was served upon the defendants and the 1st alleged contemnor or that the alleged contemnors were aware of the order. The plaintiff has claimed that the alleged contemnors were served with the order through e-mail. The plaintiff placed no evidence before court showing that e-mail service was effected upon the alleged contemnors. The e-mail correspondence placed in evidence concerned the order made on January 25, 2021. It is also not clear to me why the orders issued herein were being served upon the 2nd alleged contemnor. It is not true as alleged by the plaintiff that the 2nd alleged contemnor is on record for the 2nd defendant herein. As mentioned earlier, there is no advocate on record for the 2nd defendant. Since the 2nd alleged contemnor is not acting for the 2nd defendant herein, I am unable to see the logic of



serving the 2nd defendant with an order issued in this suit through him. The order of February 9, 2021 was directed at the defendants in this suit and the 1st alleged contemnor. The plaintiff has not explained why it chose to serve the order if at all it effected service, that has not been proved, upon the 2nd alleged contemnor who was neither a party to the suit nor acting for any party in the suit. In the absence of evidence that the alleged contemnors were served with the order made on February 9, 2021 or that they were aware of the same, I find the acts of contempt alleged against the alleged contemnors not proved. For the 2nd alleged contemnor, the order was not even directed at him and there is no evidence that he wrote another letter instructing the 1st alleged contemnor to disregard this second order.

Conclusion:

22. In conclusion, the plaintiff's notice of motion application dated April 19, 2021 is dismissed. Each party shall bear its own costs.

DELIVERED AND DATED AT KISUMU THIS 13TH DAY OF OCTOBER 2022

S. OKONG'O

JUDGE

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

Mr. Rene for the Plaintiff

N/A for the Defendants

N/A for the 1st alleged Contemnor

Mr. Sausi the 2nd alleged Contemnor in person

Ms. J. Omondi- Court Assistant

