



Attorney General (Suing on behalf of the Ministry of Education to defend the public property of Mrima Secondary School) v Macharia (Environment & Land Case 177 of 2021) [2022] KEELC 13785 (KLR) (12 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13785 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 177 OF 2021
LL NAIKUNI, J
OCTOBER 12, 2022**

BETWEEN

ATTORNEY GENERAL PLAINTIFF

SUING ON BEHALD OF THE MINISTRY OF EDUCATION TO DEFEND THE PUBLIC PROPERTY OF MRIMA SECONDARY SCHOOL

AND

PAUL ABEL MACHARIA DEFENDANT

RULING

I. Preliminaries

1. The Honorable Attorney General as the plaintiff/applicant herein moved this court through the notice of motion application dated March 4, 2022. The application was premised under the provision of sections 1A, 1B, 3A and 63(c) of the Civil Procedure Act cap 21, order 40 rule 3 Civil Procedure Rules and all other enabling provisions of the law.

II. The Plaintiff/Applicant's Case

2. The plaintiff/applicant seeks the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That this honorable court do find that Paul Abel Macharia, the respondent herein to be in contempt of orders issued by this honourable court on October 7, 2021 and affirmed on April 5, 2022;



- d. That upon finding contempt, the honourable court be pleased to commit the said Paul Abel Macharia to civil jail for at least six months;
 - e. That the said development be demolished to the ground as the place was when the court issued the stay order on October 7, 2021.
 - f. That costs of this application be provided for in any case.
3. The said application is founded on the grounds, testimonies and the averments on the 15 paragraphed supporting affidavit of Repher S. Mutulis sworn and dated on March 4, 2022 and one (1) annexure marked as “RSM - 1” annexed thereto.
 4. The deponent has deposed that he is the principal in charge of Mrima Secondary School, employed by the Teachers Service Commission to manage its resources and hence duly authorized and competent to swear this affidavit on his behalf. She has deposed that on August 26, 2021, they filed an application seeking orders of injunctions against the defendant herein. On October 7, 2021, the honourable court issued orders where the Hon Justice L.L Naikuni issued an injunction as follows:

“That this honourable court issues an injunction order for status quo to be maintained on land parcel known as Mombasa/i(mainland South) 3036 and the defendant/respondent, his agents, servants, employees and or persons claiming under or in trust for them, for entering into remaining upon accumulating building or other materials, undertaking construction of permanent or temporary structures, upon or otherwise committing acts of waste, equitable or otherwise, cultivating, fencing or in other manner pending the hearing and determination of this application inter-parties.
 5. She averred that the advocate for the defendant/respondent. The defendant/respondent herein were present during the session when the court issued the stay orders on October 7, 2021. These orders have not been set aside, stayed or appeal preferred and they are therefore binding on all the parties. The above orders are very clear and prevented the defendant/respondent from entering, remaining or otherwise howsoever from interfering with the suit property. Despite the orders having issued and the defendant/respondent and her advocate knowing of the existence of the court orders the defendant/respondent has deliberately disobeyed the said orders and instructed some people to enter into the suit property and continue the construction of the permanent on the suit property and continue with the construction of the permanent structure. A bundle of the photographs recently taken on September 9, 2020 from the suit property is attached and marked as “RSM – 1” clearly shows the continued developments as compared to the photographs of the suit property as at August 26, 2021 when the orders were issued.
 6. She deposed that their efforts to engage Paul Abel Macharia to stop deliberate actions meant to disobey the honourable court have been futile. She was advised by her advocates on record that when contempt of court order is alleged, the honourable court must deal with that issue of contempt as a matter of priority.
 7. She contended that court orders must be obeyed at all times otherwise the ability of the honourable court to administer justice and uphold the rule of law is put in question. Where allegations of contempt of court orders is made, the court need to act urgently and deal with alleged contemnors otherwise the whole justice system is put into disrepute. Justice will only be served if the orders of the honourable court are obeyed and honored. He urged the court to grant the prayers sought in the interest of justice.



III. The Respondent's Case

8. On April 7, 2022, the defendant/respondent filed its 7 paragraphed replying affidavit sworn by Paul Abel Macharia and dated on the same day. He deposed that he had read and understood the plaintiff/applicant's application dated March 4, 2022 together with the supporting affidavit and further affidavit thereto and wished to reply to the applications.
9. He deposed that the application is bad in law as he had never been sufficiently informed of any orders. The annexures marked "RSM – 1" on the supporting affidavit and all other annexures on the further affidavit referring to the houses under construction do not belong to him but they belong to another person who is not a party in this suit. He attached and marked annexure b-1 on which he has distinguished the house under construction and his house.
10. He deposed that he has never proceeded with the construction of his house since the case commenced and his house is clearly captured in the plaintiff's list of documents at pages 14 and 15 and as well captured at exhibit "RSM – 1". He attached and marked "b – 2", "b - 3" and "b - 4" which clearly shows that his construction has stalled. He prayed for the dismissal of the application.

III. Submissions

11. On June 8, 2022, when all the parties appeared before this court, directions were provided to the effect that the notice of motion application dated March 4, 2022 be canvassed by way of written submissions. Pursuant to that the court reserved the ruling dated for September 23, 2022 to deliver the ruling accordingly.

A. The Plaintiff's/applicant's Submissions

12. On June 14, 2022, the advocates for the plaintiff/applicant the Attorney General filed their written submissions in support of their application dated March 4, 2022. The learned counsel submitted that in summary, the plaintiff's application seeks to have the defendant herein held to be in contempt of court orders issued by the court on October 7, 2021.
13. The court issued stay orders restraining any one from entering into, remaining upon, accumulating building or other materials, undertaking construction of permanent or temporary structures, upon or otherwise committing acts of waste, equitable or otherwise, cultivating, fencing or in other manner howsoever interfering with the plaintiff's quiet enjoyment, use and possession of parcel of land known as land parcel No LR No Mombasa/1(mainland Sound)/3036 pending the hearing and determination of this suit.
14. The learned counsel submitted that the plaintiff's advocate was present in court when the court issued the said stay orders. The same is brought out in the replying affidavit of the defendant/respondent under the averments of paragraph 3 when he states that he has never been sufficiently informed of the court orders. Upon consideration of the affidavit evidence by the plaintiff, the honourable court issued interim orders to maintain the status quo pending the inter parties hearing of the plaintiff's application. According to the photographs annexed in the application and the further supporting affidavit, it is clear that despite the court issuing the stay orders on October 7, 2021, the applicant had annexed different photographs showing the continued building of the said building on the parcel of land in question.
15. The learned counsel submitted that upon being served, the defendant/respondent filed his replying affidavit sworn by himself dated April 7, 2022. The defendant denies that he was not sufficiently made aware of the court orders. However, he noted in paragraph 4 and 5 of the replying affidavit that he has never built his house and that the house in question belongs to another person not in the suit. There



are no ways about the fact that the defendant knew about the court orders issued on October 7, 2021, it is either he knew about the court orders or not. By the fact that the advocates for the defendant was present when the court issued the orders is evident enough that the defendant knew of the said court orders.

16. The learned counsel submitted that it is without doubt that the property in question is the same that was annexed when the plaintiff filed the application for stay. In the said application the defendant never denied the ownership of the house in question. The property in question belongs to the defendant and he should not get away with defying court orders just because he denies ownership of the property. Going by the two applications that have been filed in this suit, it is clear that the defendant owns the property when it suits him and disowns it when it suits him.
17. The learned counsel submitted that there are three issues for determination which are whether the defendant knew of the existence of the stay orders issued by the court on October 7, 2021 and whether the property in question belongs to the defendant. It was his submission that from the court records it is clear that the advocate for the defendant was present on October 7, 2021 when the court issued the stay orders on the suit property pending the hearing and determination of this suit. Going by the above, the defendant cannot claim that he was not aware of the existing court order as his advocate was present in court.
18. The learned counsel made reference to the case of "[*James Gitau Mwara v Attorney General & another*](#) (2015) eKLR" where the court held that:-

“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. This is the position in other jurisdictions within and outside the commonwealth.”
19. The learned counsel submitted that based on the above, it is only clear that the defendant was aware of the court orders issued on October 7, 2021.
20. It was the learned counsel’s submission that in the application dated August 26, 2021, the plaintiff sought through photograph number 17 showing a half - constructed house with a man in front of the house, the same picture is annexed in the application before court showing the house when the order was given by court and the current picture showing the house completed and roofed. In the earlier application the defendant/respondent filed a replying affidavit however did not at any point deny the ownership of the house in question. The defendant/respondent had the opportunity to deny ownership of the said building but he did not.
21. The counsel submitted that it could not be now that the house had been finished and habited that the defendant/respondent now wanted to deny the ownership of the house in question. The deponent for the plaintiff averred to the extent that the defendant was seen on numerous occasions giving orders and providing materials for the house to be built. Based on the above it is only clear that the defendant is the owner of the property in question and there are no two ways about it. The disobedience to court orders is a criminal act and allowing the defendant get away with the same would only lead to portraying the court as a weak institution without authority to enforce its orders. In conclusion, he urged the honorable court to find the defendant/respondent was in contempt of court orders. Further, that there be an order issued to cause the demolition of the house and the defendant /respondent herein be sent to civil jail to serve a term specified by court for the offence of being in contempt of court orders.



IV. Analysis And Determination

22. The honorable court has keenly considered all the pleadings filed, to wit the notice of motion application dated March 4, 2022 filed by the plaintiff/applicant, the supporting affidavit and the replying affidavit by the defendant/respondent herein, the written submissions and the authorities cited. In order to arrive at an informed, fair and balanced decision, the issues for determination by this honorable court are three (3) as follows:-

- a. Whether there was any valid court order issued by this court on October 7, 2021 and so if the orders were served against the defendant or the defendant was aware of it.
- b. Whether the defendant is guilty of contempt of court order issued on October 7, 2021 and hence deemed to bear the consequences of disobedience of a court order.
- c. Who will bear the costs of the application.

Issue No. a) Whether there was any valid court order issued by this court on October 7, 2021 and so if the orders were served against the defendant or the defendant was aware of it.

23. Under this sub heading, the honorable court wishes to point out that it is now well established that court orders are never given in vain nor an abstract formality. They are sacrosanct. They are real and living tissues. And like any other tissues it has to be fed and watered. They breathe and require oxygen supplied in them throughout. Without it they would die. They are guarded jealously. They are there to be obeyed. Should anyone have a different view, there are legal avenues to either seek for them to be varied, set aside, reviewed or appeal against. But certainly not to disobey them. These statements are not mere metaphorical. It has been the practice of this court to ensure that all court orders have to be implemented so that the decree holder may enjoy the fruits of his labour. It falls that any acts of the disobedience of the court orders tantamount to the offence of contempt of court.

24. In the case of "*Johnson v Grant* (1923) SC 789 at 790 Clyde L J noted:-

“The phrase ‘contempt of court’ does not in the least describe the true nature of the class of offence with which we are here concerned.... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged.”

25. In addition to that, the case of "*ECONET Wireless Limited v Minister for Information & Communication of Kenya & another* [2005] eKLR it was held that:

“Where an application for committal for contempt of court orders is made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious- a contemnor would have no right of audience in any court of law unless he is punished or purges the contempt.”



26. The law guiding the present application in the instant case is brought under the provision of order 40 rule 3(1) of the Civil Procedure Rules, 2010 which stipulates that:-

“In cases of disobedience, or of breach of any such terms, the court granting an 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 not exceeding six months unless in the meantime the court directs his release.”

27. Thus, on whether there was any valid court order issued by this court on October 7, 2021, the court finds that indeed on the October 7, 2021 this court issued interim orders to this effect;

“That this honourable court issues an injunction order for status quo to be maintained on land parcel known as Mombasa/i(mainland South) 3036 and the defendant/respondent, his agents, servants, employees and or persons claiming under or in trust for them, for entering into remaining upon accumulating building or other materials, undertaking construction of permanent or temporary structures, upon or otherwise committing acts of waste, equitable or otherwise, cultivating, fencing or in other manner pending the hearing and determination of this application inter-parties.”

28. Clearly, on October 7, 2021, this honorable court granted order numbers 1 and 2 of the notice of motion application dated August 26, 2021. It will be noted that the said orders were solidified by a ruling on the same application dated February 21, 2022. Plainly, the orders were injunctive in nature restricting the defendant/respondent from causing any construction of his house or any structures on the suit land until the suit was heard and determined.

29. Undoubtedly, at the time of issuing these orders, the parties to the suit were the plaintiff/applicant and the defendant/respondent whereby court discerns parties had full knowledge of the court orders. Indeed, they were all present in court. The parties have not disputed that there was a valid order issued by this court. This issue thus rests.

30. On the third issue of whether the said order was served against the defendant/respondent or whether the defendant/respondent was aware of the orders on October 7, 2021. The defendant’s advocate on record was in court on the said date when the order was made. Likewise, that issue is also settled. The law being organic as it is, has already grown to a higher level. The issue of personal service is no longer a requirement. On this point, the honorable court wishes to rely on the legal ratio founded in the now famous case by Court of Appeal of “Shimmers Plaza Limited v NBK (2015) eKLR” approved the growing jurisprudence right from the High Court that reiterated that knowledge of a court order suffices to prove service and dispenses with personal service for the purposes of contempt proceedings. The Court of Appeal in the above Shimmers Plaza case cited with approval Hon Lenaola J in “Basil Criticos v Attorney General & 8 others (2012) eKLR where the learned judge pronounced himself thus:-

“.....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.”

31. This court finds that the defendant/respondent had full knowledge of the court’s orders taking that his advocates were present when the orders were issued. Therefore, the argument on personal service being effected was unnecessary.



32. On the last issue as to whether the defendant/respondent is guilty of contempt of court order issued on October 7, 2021. The honorable court is guided by the Scottish case of "[*Stewart Robertson v Her Majesty's Advocate*](#), 2007 HCAC 63, where Lord Justice Clerk stated that:
- “Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”
33. Further, Romer L.J in the case of "[*Hadkinson v Hadkinson*](#) (1952) ALL ER 567 stated that:
- “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 even void”
34. From the foregoing authoritative court’s precedents, it is trite that contempt of court proceedings and applications are subtle bordering on criminality as they are criminal in nature. It would impose criminal sanctions if a conviction followed.
35. In the instant case, undisputedly, I find that indeed the defendant/respondent herein had the full knowledge of the court orders of October 7, 2021. Thus, the willful and deliberate action of the defendant/respondent to continue causing the construction of structures on the suit land was an affront and ran afoul of the terms of the court orders issued on the October 7, 2021 which had restrained him from interfering with the designated use of the suit property eve after the court ruled on the application granting the plaintiff an injunction. The acts of omission and commission by the defendant/respondent purely amounts wanton disrespect, dishonor and despise of not only the sacred institution established by law but also the law itself. Courts are citadel for dispensing the truth and justice and at no time should they be prone to organs of ridicule, caricature, sarcasm or art of street and cheap comedy for entertainment. These core virtues must be respected by all persons and at all times and costs whatsoever.
36. Thus, to protect the dignity and authority of the court of law, this honorable court shall stamp its foot down. it shall be extremely and robustly astute, firm and stern on any person who dares to deliberately disobey any court orders or attempts to scuttle the court and the due process of the law. The defendant/respondent herein and his acts as has been graphically spelt out here is not in any way an exception to this rule. Nay! Far from it. The honorable court while making the final orders in this application, wishes have the case of the defendant/respondent as a demonstrative example setting pace to others out there who may be planning to follow this unacceptable trajectory. Let them be fore warned. I dare say no more.

V. Conclusion & Disposition

37. Ultimately, the upshot of this elaborate analysis and based on the inherent powers vested in me under the provisions of sections 1, 1A, 3, 3A and 63(c) of the [*Civil Procedure Act*](#), cap 21, section 3 of [*Environment and Land Court Act*](#), No 19 of 2011 and order 40 rule 3 of the [*Civil Procedure Rules, 2010*](#) I proceed to allow the prayers sought from the notice of motion application dated March 4, 2022 as the same is meritorious. For avoidance of doubt, I proceed to make the following orders/directions: -
- a. Thatthe notice of motion application dated March 4, 2022 is hereby allowed as against the defendant



- b. That the defendant/respondent herein be and is hereby found to be in contempt of court orders given on October 7, 2021 and thus court proceeds to punish him for contempt.
- c. That an order made against the defendant/respondent herein having been found to be contempt be and is hereby condemned to pay a fine of a sum of Kenya shillings two hundred thousand (Kshs 200,000/-) instantly and/or in default to serve a term of two (2) months in civil jail effective immediately.
- d. That the plaintiff/applicant granted leave of 21 days to cause to be prepared and file a valuation report and building structures report by the government land valuer and the public works building surveyor.
- e. That matter to be mentioned on November 17, 2022 for progress made and further orders on the hearing of the main suit which should be within the next ninety (90) days from the date of this ruling.
- f. That costs shall be in the cause.

It is so ordered accordingly.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA IN OPEN COURT THIS 12TH DAY OF OCTOBER 2022.

**HON. JUSTICE (MR.) L.L. NAIKUNI, JUDGE
ENVIRONMENT AND LAND COURT AT
MOMBASA**

In the presence of:-

- a. M/s. Yumnah/Mr. Omar – the Court Assistant
- b. Mr. Wagah Advocate for the Plaintiff/Applicant
- c. Non Appearance for the Defendant/Respondent

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

