



REPUBLIC OF KENYA



**Peter v Agunga & 6 others (Environment & Land Case 2 of 2021)
[2022] KEELC 13302 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 2 OF 2021
MAO ODENY, J
OCTOBER 7, 2022**

BETWEEN

MARY SYEVUTHA PETER PLAINTIFF

AND

ALFRED AGUNGA 1ST DEFENDANT

NAFTALI OWINO 2ND DEFENDANT

HARRISON CHARO SHUTU 3RD DEFENDANT

FRANCIS XAVIER ONGORO 4TH DEFENDANT

PAMELA AUMA OGOLA 5TH DEFENDANT

MAITHA MWAMURE 6TH DEFENDANT

REGISTRAR OF TITLES 7TH DEFENDANT

RULING

1. This ruling is in respect of 4 notices of motion dated August 30, 2021, October 14, 2021, October 25, 2021 and December 17, 2021 respectively.
2. The plaintiff/applicant filed a notice of motion dated August 30, 2021 seeking the following orders: -
 - a. Spent
 - b. The honourable vacation judge be pleased to review or vary the orders of the court issued on the August 26, 2021 by admitting the plaintiff's motion dated August 23, 2021 for hearing during the court's summer vacation and by granting the discretionary orders sought pending the hearing and determination of the application.
 - c. The costs of this application be provided for in the cause.



3. This application was supported by the affidavit of Conrad Atiang Advocate sworn on August 30, 2021. He deponed that upon transfer of this matter to this court, the suit which was intended to be consolidated with ELC 39 of 2020 was struck out and a month later, the 1st, 4th and 5th defendants commenced fresh construction on the suit property which construction is a threat to the plaintiff's portion encroached on by the defendants.
4. Counsel further deponed that on August 25, 2021 the plaintiff made an application for hearing of the plaintiff's amended motion dated August 23, 2021 under certificate of urgency of which some documents were missing from the plaintiff's bundle of documents namely page 2 of the certificate of urgency in support of the vacation application, and page 3 and 4 of the bundle.
5. It was counsel's averment that the omission led to the duty judge declining to certify the motion urgent and further declined to issue interim orders for injunction *ex parte*. Mr Atiang submitted that there is an error apparent on the face of the record by the omission that invites the court's intervention under section 80 of the [Civil Procedure Act](#) and order 45 of the Rules.
6. The 2nd application dated October 14, 2021 was filed by the 1st to 4th defendants seeking the following orders: -
 - a. That this honourable court be pleased to strike out with costs the plaintiff/ respondent's suit filed *vide* a plaint and/or an amended plaint dated June 16, 2020 and August 23, 2021 respectively for being scandalous and/or frivolous and/or vexatious and/or prejudicial and/or embarrassing and/or being an abuse of the court process.
 - b. That consequently the plaintiff's/ respondent's application and/or amended application filed herein for injunctive orders dated June 16, 2020 and August 23, 2021 be struck out alongside the main suit as prayed for herein above.
 - c. That the purported amendment done to the plaintiff's/ respondent's plaint as well as to the application filed herein be disallowed and/or expunged from the record and/or struck out.
 - d. That costs of this application and the entire suit be borne by the plaintiff/ respondent herein in any event.
7. The application was supported by the grounds on the face of the application as well as the supporting affidavit of Alfred Agunga sworn on the October 14, 2021 wherein he deponed that the plaintiff/ respondent filed this suit *vide* a plaint dated June 16, 2020 seeking for a permanent injunctive order and a mandatory order of injunction compelling the defendants to remove the gate erected on the western end of the plaintiff's property and that the original plaint sought for special damages, interest and costs of the suit.
8. The applicant further deponed that by the plaintiff/respondent's own admission, she stated that she had filed a similar suit in Malindi Court being CMCC No 34 of 2020 and that in June, 2020 another suit was filed by one Kache Harrison Shutu & 3 others against the applicant and the 2nd to 4th defendants for declaration of ownership rights over the suit premises being LR No 8897- Malindi. Further that the plaintiff/ respondent filed Miscellaneous Application No 8 of 2020 for the transfer of CMCC No 34 of 2020 to this court for consolidation with ELC No 39 of 2020 which application was allowed on the November 5, 2020.
9. The applicant also stated that due to the existence and pendency of the suit filed by the plaintiff herein, being CMCC No 34 of 2020, the 1st to 4th defendants who were also defendants in ELC No 39 of 2020 moved the court and sought for the latter suit ELC No 39 of 2020 to be struck out for being an abuse



- of the court process and the same was struck out on July 16, 2021. He also asserts that the present suit is an abuse of the court process as CMCC No 34 of 2020 is still pending and thus the plaintiff should not have filed this suit.
10. That since the purported amendments to both the application and the plaint are intended to introduce new parties, the capacity in which the plaintiff is suing and new causes of action, the plaintiff/ respondent was mandatorily required under order 8 rule 3 of the Civil Procedure Rules to apply for leave of the court for such amendments to be deemed as properly on record.
 11. The applicant urged the court to strike out with costs the present suit as it is an abuse of the court process.
 12. In response to the application dated October 14, 2021, the plaintiff/ respondent filed a replying affidavit where she deponed that the current application is based on a misapprehension of facts as CMCC No 34 of 2020 transferred to this court vide an order of November 5, 2020 and given a new case No being Malindi ELC No 2 of 2020 the suit herein. It was the respondent's testimony that she has not filed any other suit other than CMCC No 34 of 2020 which was transferred to this court and is the current suit.
 13. The plaintiff filed an application dated December 17, 2021 seeking the following orders; -
 - a. Spent
 - b. That pending the hearing and determination of this application *inter partes*, the 1st and 5th defendants be restrained by an order of injunction from undertaking any further construction works on Plot No 8897 registered under CR 25828, the suit property.
 - c. That upon the grant of prayer (2) above, the OCS Malindi Police Station be directed to ensure compliance of the said order.
 - d. That Mr Alfred Agunga and Pamela Auma Ogola be cited for contempt of court orders dated October 4, 2021 for their act of having unlawfully, illegally and contemptuously undertaking major construction works of a building on the suit property.
 - e. That Mr Alfred Agunga and Pamela Auma Ogola, be committed to prison for a period of 6months for contempt of court order dated October 4, 2021.
 - f. That the personal property of Mr Alfred Agunga and Pamela Auma Ogola, be sequestered for contempt of court order dated October 4, 2021.
 - g. That the costs of this application be provided for.
 14. The application was supported by the affidavit of Mary Syevutha Petersworn on the December 17, 2021. She averred that the court issued an order dated October 4, 2021 directing that the *status quo* of the suit be maintained which order was served upon the defendants but despite being served, the 1st and 5th defendants have disregarded the court order and unlawfully undertaken major construction works of a building on the suit property.
 15. In response to the application the 1st, 3rd and 4th defendants/ respondents filed grounds of opposition and stated that the application misconceived as the plaintiff/ applicant has failed to provide any proof of service of the status quo and the extent to which the said orders are applicable.



1st 3rd and 4th Defendants' Submissions

16. Counsel for the 1st 3rd and 4th defendants in respect to the application dated October 14, 2021 submitted that the plaintiff/respondent filed a suit in the subordinate court, being MCELC No 34 of 2020 (Malindi), Syevutha Peter =vs= Alfred Agunga & 3 others, seeking for both permanent and mandatory injunctive orders in respect of a parcel of land described as LR No 8897, CR No 25828 whereby the defendants therein are now the 1st to 4th defendants herein.
17. Mr Kenga stated that the plaintiff/respondent herein also filed an injunctive application in the matter but before its determination, she moved the court *vide* ELC Miscellaneous Application No 8 of 2020 to have the said suit transferred to the superior court for consolidation with another related matter, being ELC No 39 of 2020 (Malindi), Kache Harrison Shutu & 3 others =vs= Harrison Charo wa Shutu and 4 others and upon grant of the said application, the said two suits were consolidated.
18. Counsel further stated that upon filing of a notice of preliminary objection by one Shabirali Farkruddin, in the consolidated suit, being ELC No 39 of 2020 (Malindi), aforementioned for striking out of the said suit, the suit as consolidated was struck out for being an abuse of the court process on July 16, 2021.
19. It was counsel's submission that from the above, the plaintiff's/ respondent's suit as consolidated was affected by the striking out orders and therefore there is no suit for prosecution and/or trial hence the suit is non-existent.
20. On the 2nd application on contempt of court against the 1st 3rd and 4th defendants/respondents counsel submitted that they filed a joint grounds of opposition to the application.
21. Mr Kenga submitted that whereas it is true that the court issued *status quo* orders on September 29, 2021, the said orders were to the effect that the suit property is not sold or transferred to a third party as explained and/or elaborated through the correspondences produced by the plaintiff/respondent as annexure MSP-3.
22. Counsel further submitted that the court should examine what the *status quo* was when the injunctive application dated June 16, 2020 and amended on August 23, 2021 was filed in order to make a fair finding as to whether there is any disobedience of the status quo orders. That a reading of paragraph 12 of the affidavit in support of the injunctive application clearly confirms that the construction work commenced on June 13, 2020 and when the plaintiff/respondent moved the court through the amended injunctive application, construction work was already on-going and that explains why the application sought for injunctive orders, including mandatory injunction.
23. Counsel therefore stated that the above shows that the *status quo* obtaining on the suit premises at the time the *status quo* orders were made was that there was on-going construction on the suit premises hence the respondents did not disobey the court order.
24. Mr Kenga relied on the cases of *Fatuma Abdi Jillo v Kuro Lengesen & another* [2021] eKLR and *Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another* [2020] eKLR where the court stated that *status quo* orders seek to maintain the current state of affairs as opposed to injunctive orders which seek to restrain an opponent from doing a certain act and such order of injunction would be irrelevant if the event meant to be restrained has already taken place. Counsel further submitted that it may be ambiguous when *status quo* orders are issued without specification as to the status obtaining at the time of making such orders.
25. Counsel therefore urged the court to dismiss the application for contempt with costs to the defendants.



26. Counsel for the 5th defendant associated himself with the submissions of the 1st, 3rd and 4th defendants.

Analysis and Determination.

27. The issues for determination in the 4 applications are as follows; -

1. Whether this court should review the orders issued on August 26, 2021.
 2. Whether the plaint and the amended application of August 23, 2021 should be struck out.
 3. Whether this court should issue injunctive orders restraining the 1st and 5th defendants from undertaking any further construction works on Plot No 8897 registered under CR 25828, the suit property.
 4. Whether the 1st and 5th defendants should be cited for contempt of court orders dated October 4, 2021.
28. The plaintiff /applicant asked the court to review orders issued on this court should review the orders issued on August 26, 2021 where court declined to grant temporary orders of injunction when the matter was presented to court under certificated of urgency.
29. It should be noted that an application to review the orders of Justice Naikuni was heard on September 1, 2021 where Justice Olola declined to review the said orders and directed that the application be served on all parties for *inter partes* hearing on September 29, 2021.
30. The orders sought to be reviewed were that the court did not grant interim orders when the matter was filed under certificate of urgency during vacation. It is not seeking for substantive orders. The applicant should be dealing with the substantive application for injunction not dwelling on the issue that there were some pages to the application for certification for the matter to be heard during High Court vacation rules. As far as the court is concerned is that the application is spent and will deal with the substantive application for injunction and for contempt of court.
31. On the issues as to whether the amended plaint and the amended application of August 23, 2021 the 1st to 4th applicants submitted that the plaintiff filed a similar suit in Malindi being CMCC No 34 of 2020, Mary Syevutha Peter vs Alfred Agunga, Naftali Owino, Harrison Charo Shutu and Xavier Ongoro. That thereafter, the plaintiff filed a Miscellaneous Application No 8 of 2020 for the transfer of CMCC No 34 of 2020 to this court for consolidation with ELC No 39 of 2020 which application was allowed.
32. From the ruling of this court dated November 5, 2020 the court ordered that CMCC No 34 of 2020 be transferred to the Environment and Land Court and upon being transferred, CMCC No 34 of 2020 be consolidated with Malindi ELC No 39 of 2020. It should be noted that the order of transfer of the lower court case culminated in a new number. being allocated to the suit which is the current suit ELC No 2 of 2021 and the plaintiff admitted that the only other suit that she had filed is CMCC No 34 of 2020 which was transferred. I find that the application dated October 14, 2021 lacks merit and is therefore dismissed with costs in the cause.
33. On the third issue as to whether the plaintiff/applicant has met the threshold for grant of injunction stopping the defendants from continuing with construction on the suit land, the plaintiff avers that she is the beneficial owner of a portion of No 8897 whose ownership is captured as Title No CR 25828 and Deed Plan No 183892 pursuant to a sale agreement between the plaintiff and the 3rd defendant *vide* sale agreement made on the July 1, 2011.



34. The principles for grant of injunctions are as set out in *Giella versus Cassman Brown*(1973) EA 358 and as was reiterated in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (2014)eKLR where the Court of Appeal held that; -

“In an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, if any doubts as to b, by showing that the balance of convenience is In his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

35. The purpose of injunction is to preserve the substratum of the case pending the hearing and determination of the suit. The applicant must establish a *prima facie* case against the defendants to benefit from the discretion of the court as orders of injunctions are equitable remedies.

36. Similarly in the case of *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & ano* [2019] eKLR where the court in deciding on an injunction application stated;

“Circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts.....”

37. This has been a protracted dispute with cases which have been determined on the issue of the original ownership of the suit land which the ELC Court and the Court of Appeal declared to belong to the 3rd defendant. The current dispute is whether the plaintiff owns a portion of the land or the defendants herein more specifically the 1st 3rd and 5th defendants.

38. The issue is whether the applicant has established that the property in dispute is in danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property.

39. From the evidence on record and the submissions by counsel, the plaintiff claims a portion of the suit land and not the whole parcel of land. There are survey reports which were ordered by the DCI to be carried by the County Surveyor to ascertain and identify the portion No 8897/2 Malindi which indicated that it could only ascertain and identify plot No 8897 registered in FR No 258/33 and was not confirm the boundaries of potion No 8897/2 which the plaintiff claims.

40. There also allegations that the disputed portion is part of a road reserve which the court will not deal with now as such issues will be handled during the hearing of the main suit.

41. The plaintiff/applicant claims to have purchased a portion No 8897/2 from the 3rd defendant *vide* an agreement dated July 12, 2011 which was after the 5th defendant had purchased Plot No 8897 on February 10, 2006 and got a title in 2020 after the finalization of the case Court of Appeal case that had been filed against the 3rd defendant. There is an issue whether the suit plot 8897 is distinct from



8897/2 or the same. The plaintiff has also filed a restriction on the suit land which is registered in the 5th defendant's name Pamela Auma Ogola.

42. I have also looked at the plaintiff's pleadings and more specifically under paragraph 16 of the further amended plaint dated September 23, 2021 particularized and quantified the damage and financial losses suffered as follows; -
- a. Demolished perimeter wall at the junction property and the resort.
 - b. Rebuilt wall
 - c. Lost structures
 - d. Material lost on the site
 - e. Cost of labour used to rebuild both walls
 - f. Electricity and water connection on the junction premises
 - g. Cost of beefed up security at the junction suit premises and cost of a new security system for the resort.
 - h. Electric fence, CCTV cameras, telephone cables, electric cables and lamp shades for the resort property.
43. Further the plaintiff has quantified damages at paragraph 15 of the further amended plaint dated September 23, 2021 in terms of loss of rental income as follow;
- a. Rental income of Kshs 10,000/- from the month of June 2020 till judgement of this court.
 - b. Reinstatement of the Kshs 20,000/= rental deposit paid by the plaintiff's tenants due as a result of the frustration of the tenancy.
 - c. Reinstatement of Kshs 20,000/= deposit of utility bills paid by the plaintiff's tenants.
 - d. Rental income for prestige resort for the months of July 2020 till judgement of this court
44. As per the principles for grant of injunctions, a party must show that he/she will suffer irreparable harm which is not capable of being compensated by way of damages. If damages are quantifiable then the equitable remedy of injunction is not available. Is the property being wasted, the answer is the negative as there is no proof that the property is either being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property.
45. In *Halsbury's Laws of England* [Halsbury's Laws of England, third edition, Volume 21, paragraph 739, page 352.] it is stated that: -

“It is the very first principle of injunction law that *prima facie* the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of



compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and Specific Performance," [Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Cananda Law Book, 1992), p 2-27] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

46. The applicant has not demonstrated the harm cannot be compensated by way of damages. The suit property is secured by a restriction lodged by the plaintiff/applicant and there is no evidence that the respondents want to part with possession of the suit land or sell the suit land. I therefore find that the applicant cannot benefit from the equitable remedy of injunction.

47. On the issue of balance of convenience, I find that the balance lies in favour of not granting an order of injunction but in the interest of justice the respondents are ordered to maintain the status quo in that they should not part with the possession of the suit property or sell the same while this suit is pending.

48. On the last issue of whether the respondents should be cited for contempt *Black's Law Dictionary* 9th Edition, defines contempt 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 the administration of justice."

49. Order 40 rule (3) of the *Civil Procedure Rules* provides that in 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 not exceeding six months unless in the meantime the court directs his release.

50. In the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* (2005) KLR 828, Ibrahim, J (as he then was), had this to say on the importance of obeying court orders, stating: -

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void."

51. In the Scottish case of *Stewart Robertson-vs- 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 willful challenges or affronts the authority of the court of the supremacy of the law, whether in civil or criminal proceedings", The learned judge further stated that: -



" The power of the court to punish for contempt is inherent in a system of administration of Justice and that power is held by every judge."

And in the case of *Board of Governors Moi High School Kabarak-vs- Malcolm Bell and another* (Supreme Court Petition No 6 & 7 of 2013 the Supreme Court of Kenya described "the power to punish for contempt is a power of the court to safeguard itself against contemptuous or descriptive intrusion from elsewhere".

52. In an application for contempt an applicant must also prove that the order was served on the respondent but knowledge of the order supersedes personal service as was held in Nairobi Misc Civil Application No 316 of 2010 *Basil Criticos -vs- Attorney General & 4 others* where Lenaola J (as he then was) stated; -

"That the law has changed and so as it stands today, knowledge supersedes personal service and for good reason.where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary"

53. It is not disputed that the respondents had knowledge of the order but they claimed that the *status quo* order was to the effect that they were not to dispose the suit land or part with possession as the order was granted when the status quo obtaining in the suit property was that construction was ongoing. The court did not stop the construction but ordered that the *status quo* be maintained. The applicant did also not argue the application to show that the respondents were in breach of the court order.

54. I therefore find that the application for contempt lacks merit and is therefore dismissed with costs in the cause. This does not give the respondents a leeway to disobey court orders.

55. To solve the real issue in contention. The parties should avoid many applications and fast track the hearing of this case on priority basis taking into account the history of this dispute.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF OCTOBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

