



Mocho (suing as the legal administrator of the estate of Taplule Cherop Saranda) v Chepkengei Posho Mill Group & 3 others (Environment & Land Case 25 of 2019) [2022] KEELC 14999 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14999 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 25 OF 2019
MC OUNDO, J
NOVEMBER 24, 2022**

BETWEEN

**PETER KIBET MOCHO PLAINTIFF
SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF TAPLULE
CHEROP SARANDA**

AND

**CHEPKENGEI POSHO MILL GROUP 1ST DEFENDANT
RICHARD KIPTONUI BETT 2ND DEFENDANT
LAND REGISTRAR BOMET 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. By an application dated the November 18, 2019, brought pursuant to the provisions of section 3A of the *Civil Procedure Act*, the 1st defendant/ applicant herein seeks to cite the plaintiff respondent for contempt of the court orders issued via a ruling delivered on September 27, 2019 where the court had ordered parties to maintain the *status quo* prevailing before the filing of the suit, pending the hearing and determination of the same.
2. The said application was supported by the grounds set on the face of it as well as on the supporting affidavit of one Augustine Kimilgo Sang sworn, on behalf of the 1st applicant, on the November 18, 2019.
3. The application was opposed through the notice of preliminary objection dated then March 6, 2020 for reason that the same was served upon counsel for the plaintiff/respondent instead of being served upon



the plaintiff/respondent personally and secondly that the said application was incompetent having been brought under the wrong provisions of the law.

4. The preliminary objection was disposed of in the first instance wherein *vide* a ruling delivered by the court on February 26, 2021 the court found the same to be unmeritorious and dismissed it with costs. The plaintiff/respondent thereafter filed another set of grounds of opposition dated the June 22, 2022 apparently based on the same grounds of opposition that had been dismissed but using a different terminology to the effect that the order alleged to have been disobeyed ought to have been extracted and brought to the attention of the plaintiff through personal service. That the said application was intended to intimidate the plaintiff not to prosecute the suit and further that the ruling of September 27, 2019 was not injunctive in nature as the plaintiff was not barred from using the suit land.
5. By an order of the court of November 25, 2021, in the presence of counsel for the plaintiff and the 1st and 2nd defendants, the court had directed that the application be disposed of by way of written submissions.
6. The applicant's submissions dated 14th February 2022 were to the effect that pursuant to the delivery of the ruling dated September 27, 2019 where the court had ordered parties to maintain the *status quo* pending hearing and determination of the suit, the plaintiff had forcefully moved into the parcel of land No Kericho/Kapkelelei/1250, displaced the applicant who had been in occupation since 1980 wherein he had then started ploughing it.
7. The applicant framed the issues for determination as follows;
 - i. Whether the application was served on the plaintiff.
 - ii. Whether the plaintiff/respondent has violated the court order dated September 27, 2019 requiring parties to maintain the *status quo* prevailing before the filing of the case.
 - iii. Whether the respondent should be punished.
8. The applicant proceeded to submit that service of the application for contempt had been effected upon Counsel who had received the same without protest and since the suit was ongoing, he was bound to inform his client clearly and timeously of what was going on. That personal service was desirable but was not mandatory in all situations.
9. That the plaintiff had not challenged the application save for filing a preliminary objection which had been dismissed. The plaintiff had violated the order for status quo when he moved onto the land and the court under the provisions of section 29 of the *Environment and Land Court Act* had the authority to punish him for contempt, upon conviction, to a fine not exceeding one million or imprisonment not exceeding two years or both.
10. The plaintiff had not offered any explanation as to why he had not complied with the orders of the court which orders ought to be respected at all times. The contemnor was still in possession of the suit land to date and therefore was guilty of contempt and he ought to be convicted and sentenced accordingly. The applicant sought for costs.
11. The application on the other hand was opposed by the plaintiff's undated submissions filed on June 28, 2022 to the effect that what was not in dispute was that on September 27, 2019, the court had delivered a ruling directing the parties to maintain the *status quo* pending the hearing and determination of the suit. That these orders were not extracted and personally served upon the plaintiff who is alleged to have violated the same.



12. That the law on contempt proceedings, which are quasi criminal in nature, is fairly settled to the effect that when a person is found guilty for civil contempt he or she may be jailed or property sequestered and it is therefore for this reason that the rules of natural justice have to be strictly complied with.
13. That plaintiff/respondent relied on the decided case in *Woburn Estates Limited vs Margaret Bashforth* [2016] eKLR to submit that there was no order directed to the plaintiff which was violated and therefore the application dated November 19, 2012 (sic) did not meet the threshold requirement for contempt of court and thus the same should be dismissed.

Determination.

14. I have considered submissions by both counsel for the applicant and the defendants. The *Black's Law Dictionary (Ninth Edition)* defines contempt of court as:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

15. The law guiding the present application is order 40 rule 3(1) of the *Civil Procedure Rules* which stipulates as follows:-

“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.”

16. In the case of *Woburn Estate Limited v Margaret Bashforth* [2016] eKLR the Court of Appeal held as follows:

“For many years in the history of the Judiciary of Kenya the courts have, pursuant to section 5 (1) of the *Judicature Act*, resorted to the prevailing law of England in the exercise of the power to punish for contempt of court.....

Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when section 5 of the *Judicature Act* was enacted. By Act No 7 of 2011, article 163 (9) of the *Constitution* was operationalized by the enactment of the *Supreme Court Act* (cap 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt.

Under section 29 of the *Environment and Land Court Act*, it is an offence punishable, upon conviction to a fine of not exceeding Kshs 20,000,000 or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the Court given under the Act.

We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this court to punish for contempt of court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of court has been expressly clothed with jurisdiction to punish for contempt of court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of court applications”

17. It was in this respect as observed in the case of *Republic vs Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya* HCMCA No 13 of 2008, that the High Court (read



Environment and Land Court) has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.

18. In addition, in the case of *Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waitbaka* [2019] eKLR, it was held that where there is a lacuna with respect to enforcement of remedies provided under the *Constitution* or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the court, the court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the court by section 3A of the *Civil Procedure Act* to grant such orders that meet the ends of justice and avoid abuse of the process of court.

19. Section 5(1) of the *Judicature Act* which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

20. Section 29 of the *Environment and Land Court* is clear to the effect 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 or to imprisonment for a term not exceeding two years, or to both”

21. In the case of *Samuel M N Mweru & Others v National Land Commission & 2 others* [2020] eKLR the Court held that

“A court without contempt power is not a court. [30] The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgments and orders is a contradiction In Terms, An “oxymoron.” Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in courts, and automatically exists by its very nature.....”

A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. Article 159(1) of the *Constitution* provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the *Constitution*. Under Article 10(1) of the *Constitution* the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the *Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2) (a) of the same article the national values and principles of governance include the rule of Law.

It is a crime unlawfully and intentionally to disobey a court order.

This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. [36] The offence has in general terms received a constitutional ‘stamp of approval,’ since the Rule of Law – a founding value of the *Constitution* – ‘requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.’



22. It is an established principle of law as was held in the case of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No 364 of 2005 in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the respondent, (iii). Failure by the respondent to comply with the terms of the order.
23. From the sworn affidavit, annexures, submissions by the applicant’s counsel, the applicable law and the decided cases, the following issues stand out for determination:-
- i. Whether the plaintiff herein was served with or was made aware of the order of September 27, 2019.
 - i. Whether there was any valid court order issued by this court on the September 27, 2019.
 - ii. Whether the plaintiff is guilty of contempt of court order issued on September 27, 2019.
24. On the first issue as to whether the plaintiff herein was served with or was made aware of the order of September 27, 2019, in the case of *Kenya Tourist Development Corporation vs Kenya National Capital Corporation & Another*, Nairobi High Court Civil Case No 6776 of 1992, it was held that the knowledge of an order supersedes personal service.
25. In the instant case, the proceedings are clear that on September 27, 2019 counsel for the plaintiff and counsel for the 1st and 2nd defendants were present in court when the ruling was delivered in the following terms;
- “The purpose of temporary injunction is to preserve the property in dispute pending the disposal of the suit. It is not in dispute that the 1st respondent has been in occupation of the suit property since 1981 with the full knowledge of the plaintiff and the plaintiff has not demonstrated what prejudice he stands to suffer if the temporary injunction is not granted at this stage. I hold the view that that it would be unfair will issue an injunction against the defendant restraining them from entering the suit property before the case is heard on its merits. What I ought to do is to preserve the subject matter pending the hearing and determination of the main suit. In the circumstance and in applying the balance of convenience test, the order that commends itself to me is that the status quo prevailing before the filing of this case be maintained pending the hearing and determination of the suit herein.”
26. The court then directed the parties to comply with the provisions of order 11 of the *Civil Procedure Rules* within 30 days.
27. The Court of Appeal in the *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR had posed the question whether knowledge of a court order or judgment by an Advocate of the alleged contemnor would be sufficient for purpose of contempt proceedings and answered the question in the affirmative stating:-
- “We hold the view that it does. This is more so in a case 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 behooves him to report back to the client all that transpired in court that has a bearing on the clients’ case...”



28. Indeed from the court's record, the same is clear that the order of the court had been delivered and/or issued in the presence of counsel for the plaintiff /respondent. This court thus finds that the plaintiff/ respondent had knowledge of the court's orders and therefore personal service was unnecessary
29. On the second issue for determination as to whether there were any valid orders issued by this court. I find that the court had directed that that:
- “That the *status quo* prevailing before the filing of this case be maintained pending the hearing and determination of the suit”.
30. The plaintiff/respondent in his response has not disputed that indeed there had been a valid order issued by the court and I therefore find that indeed the said orders of the September 27, 2019 was a valid order.
31. On the last issue as to whether the plaintiff/respondent brazenly disobeyed the orders of the court, I have considered the submission by Counsel as well as looked at the annexures herein annexed to the application herein. it is not in dispute that the pictures annexed marked as ‘AKS’ show an activity of ploughing going on in the suit land, an activity which has not been disputed by the plaintiff/ respondent whose defence (at para 4 of his grounds of opposition dated June 22, 2022) was that the ruling of September 27, 2019 was not injunctive in nature as the plaintiff was not barred from using the suit land. From the date of the said grounds of opposition it is clear that the contemptuous acts which began in 2019 are still ongoing.
32. The Scottish case of *Stewart Robertson vs Her Majesty's Advocate*, 2007 HCAC 63, 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 LJ in *Hadkinson vs 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, it is trite that contempt of court proceedings and applications are subtle and criminal in nature and would impose criminal sanctions if a conviction followed.
35. It has been held by the courts that unless and until a court order is discharged, it ought to be obeyed. Indeed the Court of Appeal in *Central Bank of Kenya & Another vs Ratalil Automobiles Limited & Others*, Civil Application No Nairobi 247 of 2006 held that it was a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a court of law.
36. In the case of *Awadh vs Marumbu* (No 2) No 53 of 2001 (2004) KLR 458, the court held that it is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.



37. I find that the plaintiff/respondent herein willfully and intentionally defied orders of the court despite knowledge of the same. His action of ploughing and/or engaging in activities within the suit property ran afoul of the terms of the court orders issued on the September 27, 2019 which had directed that parties maintain the status quo prevailing before the filing of this case pending the hearing and determination of the suit. I thus find that the plaintiff/respondent herein is in blatant contempt of court orders and will proceed to punish him for contempt.

38. The 1st defendant /applicant's application dated the November 18, 2019 is herein allowed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 24TH DAY OF NOVEMBER 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

