



REPUBLIC OF KENYA



**Tapoyo v Tapoyo & another (Environment & Land Case 36 (E032) of 2021)
[2022] KEELC 14859 (KLR) (16 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14859 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 36 (E032) OF 2021
FO NYAGAKA, J
NOVEMBER 16, 2022**

BETWEEN

JAMES MUSA TAPOYO PLAINTIFF

AND

SAMSON TAPOYO 1ST DEFENDANT

FREDRICK PKEMOI ANDIEMA 2ND DEFENDANT

RULING

The Application

1. The Plaintiff's Application dated 06/07/2022 and filed on 07/07/2022 was anchored on the provisions of Section 5 (1) of the *Judicature Act*, Section 1A, 1B and 3A of the *Civil Procedure Act*, and Order 51 of the *Civil Procedure Rules*. It sought the following prayers:
 - a. ... spent.
 - b. ... spent.
 - c. That upon hearing of this Application, the Honorable Court be pleased to order that the 2nd Defendant/Respondent be committed to civil jail for a period of six (6) months for contempt and disobedience of this Court's orders dated 23/07/2021 and 25/01/2022.
 - d. That costs of this Application be provided for.
2. The Application is supported by the grounds on its face and Affidavit. The Applicant cited that an antecedent similar Application as the present one had been determined by this court that granted the orders sought in its Ruling of 03/03/2022 as against the 2nd Respondent. On that day, that is 03/03/2022, the 2nd Respondent admitted on oath that he was served with the Court Orders of



23/07/2022 who defended that he proceeded to the court's registry to establish the veracity of those orders.

3. The Court sentenced the 2nd Respondent to a fine of Kshs. 70,000.00. He was also ordered to demolish the temporary structure. The Applicant, however, lamented that the 2nd Respondent has continued to be in defiance of the Court's Orders as he has continually trespassed onto the suit land to graze his cattle. He has further threatened and hurled insults at the Applicant and his family. He annexed several photographs in support of this assertions marked JMT2, JMT3, JMT4 (a) and (b), JMT5 (a), (b) and (c) and JMT6 (a), (b) and (c).
4. The Applicant added that the 2nd Respondent had threatened to erect a church previously demolished on account of the Court's Orders. The Applicant lamented that the 2nd Respondent's actions had caused him mental anguish. He urged that Court Orders are not issued in vain. In that regard, the 2nd Respondent is not above the law. Finally, the Applicant asserted that it was in the interest of justice that the orders sought be granted.

The Response

5. The Application was opposed. The 2nd Respondent filed a Replying Affidavit on 18/07/2022. He denied all the contents in the Application further adding that if they were indeed true, the Applicant ought to have lodged a complaint at the police station to pave way for investigations. He urged this court to dismiss the Application will costs.

Submissions

6. The Application was disposed of by way of written submissions. The Applicant's submissions filed on 06/10/2022 urged this Court to consider his Supplementary Affidavit filed on 11/10/2022 irrespective of the fact that the Affidavit was marked as abandoned by the court on 18/10/2022. Both this submission and request are strange prayers and I will not accede to them. Thus, I will not consider the same since those orders have never been varied or set aside.
7. Turning to the Applicant's substantive arguments, the Applicant submitted that the contemnor, that is the 2nd Respondent, has acted in breach of the court's orders. He relied on several authorities to justify the grant of the orders sought. He prayed that the 2nd Respondent be incarcerated for six (6) months.
8. The 2nd Respondent's submission were filed on 11/10/2022. He submitted that a contempt Application will be successful if the Applicant satisfies that the order alleged to have been breached was indubitable, the party alleged to have breached had actual knowledge of the order and actually breached it intentionally by conducting himself in a manner that defeated the orders complained to have been breached. He relied on the case of Peter K. Yego and another v Pauline Wekesa Kode (sic) which he summed up that the Court had stated in it that it must be proved that the alleged contemnor actually disobeyed the Court order. He urged that the Applicant failed to meet this threshold.
9. The 2nd Respondent added further that the Applicant was in breach of Section 78A and 106B of the Evidence Act. He prayed that the Application be dismissed with costs.

Analysis and Disposition

10. A brief background abridgment is necessitated as the same lays a foundation on the kernel of the Application. On 06/07/2021, this Court issued an order of temporary injunction restraining the Respondents whether by themselves, their agents, servants, employees and/or any other persons acting on their behalf from selling, leasing, transferring, constructing, trespassing, occupying, cultivating,



rearing animals and/or in any other way dealing or doing any other acts inconsistent with the Plaintiff's proprietary rights over the suit land.

11. Thereafter, the Applicant filed an Application on 27/10/2021 alleging that the 2nd Respondent was in breach of the orders espoused in the Court decision made on 23/07/2021. The 2nd Respondent filed a robust Replying Affidavit on 05/11/2021. In particular, he denied service of the orders. He further challenged the photographs annexed therein as having been taken prior to the proceedings and were therefore aimed at misleading the court.
12. Thereafter, on 14/01/2022, the Plaintiff sought to have an order dated 23/07/2021 to be varied to the extent that the OCS Kapenguria Police Station be directed to enforce those earlier orders. When the matter was mentioned for directions on 17/01/2022, the Court noted that parties were absent. It directed that parties be notified that the Application would be heard on 25/01/2022.
13. The matter was listed on 25/01/2022, when the Applicant satisfied the Court that the 2nd Respondent had been served with the Application. The Court, thus, ordered that the orders issued on 06/07/2021 be enforced by the OCS Kapenguria. Subsequently, the Court issued warrants of arrest on 24/02/2022 against the 2nd Respondent for failing to heed to its orders.
14. On 03/03/2022, the 2nd Respondent admitted that he was in receipt of Court orders in July, 2021. He further admitted that he continued with construction on the suit land. The Court found him in contempt of its orders. Consequently, he was remanded in G.K. Prison Kitale for a period of two (2) days pending a report from the ground about the status thereon, and especially that all activity by the contemnor then had ceased within that period of two days. Thereafter, he would be sentenced.
15. The court further delivered an extensive Ruling on the above issues. It is not my intention to belabor on the same since the Ruling is available in the Court file for the parties' perusal, and the public. Ultimately, the Court convicted the 2nd Respondent for the offence of contempt but released.
16. On 15/03/2022, the court was informed that the contemnor remained uncooperative and disobedient with its orders. Consequently, a warrant of arrested was issued against him to be summoned in court to show cause why he ought not to be imprisoned. The warrants of arrest were subsequently lifted after it was confirmed that he had complied with the orders of the court subsequent to the conviction. That is the snapshot history of this matter.
17. The basis of contempt of court proceedings is to be found in Section 5 (1) of the *Judicature Act* and Section 63 of the *Civil Procedure Act*. They grant this court, as a superior court, the discretionary power to punish for contempt of court. the Court in *Worburn Estate Limited v Margaret Bashford* [2016] eKLR formulated the guiding principles for contempt proceedings that were summarized as follows:

“This Court in two recent successive decisions in *Christine Wangari Wachege* (supra) and *Shimmers Plaza Limited* (supra) explained in extenso the procedure in commencing and prosecuting an application for contempt of court under the English Civil Procedure Rules, 1999. Part 81.9(1) of those rules, in particular, a judgment or an order to do or not to do an act may not be enforced unless the copy of the judgment or order was previously displayed and served; that the person required to do or not to do the act in question is warned that disobedience of the judgment or order would be a contempt of court, punishable by imprisonment, a fine or sequestration of assets, but the court can dispense with service. Otherwise a judgment or order may not be enforced unless a copy of it has been served on the person required to do or not to do the act in question. Under Rule 81.6, and as a general rule, service of the judgment or order must be personal on the contemnor unless the court dispenses with that requirement. Exceptions to that rule are found in Rule 81.8 to the effect



that personal service will be dispensed with if the court is satisfied that the contemnor was present when the judgment or order was given or made, if the contemnor was notified of its terms by telephone, email or otherwise or if the court thinks it is just to dispense with service. There has been little change in this requirement since the decision of this Court in *Ochino & Another v Okombo & others* [1989] KLR 165. The court may also make an order in respect of service by alternative method or at an alternative place....

We reiterate that contempt proceedings being of quasi-criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed.”

18. It must be borne in mind that the relevance of contempt of court proceedings is to preserve the dignity of court orders that are not made in vain. The Court of Appeal in the case of *Gulabchand Popatlal Shah & Another* Civil Application No. 39 of 1990 indeed held thus:

“...It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors...”

19. Guided by the above authorities, the following four (4) crucial elements must be established to succeed in an application for contempt:

- a. That the order was clear, unambiguous and binding on the defendant.
- b. That the defendant had knowledge of or proper service of the terms of the order.
- c. That the defendant acted in breach of the terms of the order.
- d. That the defendant’s conduct was deliberate. [See *Pinnacle (K) Travel and Safaris Limited v Omar Faruk Osman & 5 others* [2017] eKLR.

20. Now I turn to the current application before me. The question I begin with to answer is: was the order clear, unambiguous and binding on the Defendant? A cursory perusal of the orders dated 23/07/2021 that were regurgitated and supplemented on 25/01/2022 reveals that the orders were captured in an unequivocal language. In particular, the orders restrained the Defendants from “... rearing animals and/or in any other way dealing or doing any other acts inconsistent with the Plaintiff’s/Applicant’s proprietary rights...”. In fact, so clear were the orders that the 2nd Respondent herein participated in defending his position substantively when the initial contempt proceedings were initiated by the Applicant on 27/10/2021.

21. The next conjunctive element for determination was whether the Defendant was aware of the orders or in the alternative had been properly served. The answer lies in the 2nd Respondent’s testimony on oath on 03/03/2022. He stated that he was not only aware of the court orders but was also served in July, 2021. He admitted further that he was then constructing a church on the suit land. Subsequent to that he was found guilty of contempt of the same.

22. Did the Defendant act in breach of the terms of the order, this time round? In the instant Notice of Motion, the Applicant deposed that the 2nd Respondent had continually trespassed on the suit land to graze his cattle. He annexed several photographs in support of this assertions. To the Affidavit in support of the Application he annexed as JMT2 evidence of a photo of the Respondent taken on 04/05/2022 while on the suit land. Further, he annexed as JMT3, JMT4(a) and (b) photographs of the Respondent tending cattle on the suit land on 21/05/2022, 09/06/2022 and 10/06/2022. Lastly,



he annexed as JMT5 (a), (b) and (c) photographs of people on the suit land on 02/07/2022, whom he alleged were agents of the Respondent who allegedly hurled insults on and threatened him.

23. In his defence, the 2nd Respondent raised mere denials. He denied trespassing, threatening or hurling insults to the Applicant or planning to reconstruct the church. He also denied that grazing cattle on the suit land and that the photos of him tending cattle and people standing somewhere were taken on it. Absent of police reports about threats or insults to the Applicant the Court cannot base on mere allegations to find the breach of its orders herein. However, of importance are the photos, annexures JMT2, 3, 4(a)-(c) that show the Respondent tending cattle. This is what the Court should interrogate keenly to confirm whether or not that was a breach.
24. The Respondent does not deny that it is he who appears on the photos. What he says is that the photos are false, they were taken at other places other than the suit land. Particularly, the Respondent states at paragraph 5 and 9 respectively of the Replying Affidavit sworn on 18/07/2022 as follows, “I have never grazed cows on the suit land and the cows in the photographs attached do not belong to me,” and “the photographs are false and do not refer to the suit land.”
25. I have carefully analyzed the totality of the denials especially in the two paragraphs. The Respondent does not deny it is him who appears in the photographs. He does not also deny the allegation which is also clear from the photographs that the photos show him grazing or tending cows. My findings are that, first, the 2nd Respondent was untruthful in regard to the aspect of grazing cows on the suit land. He denied that the cows were his yet he did not give an explanation as to whose cows they were and under what terms he was grazing that other person’s cows. Secondly, the 2nd Respondent alleged that the photographs were false. He did not in any way point out the falsehood they contained. Having not denied that his image was in the photographs or failure to show that his appearance was ‘imported’ into the photographs, it is hardly believable that the Court can agree with him that the photos were false. On the contention of falsehood, the 2nd Respondent raised in his submissions an argument that the Applicant’s photographs were in breach of the provisions of the *Evidence Act* on digital evidence. A plain reading of the Sections of the Act cited and submitted renders itself to me as follows: that Section 78A (1) is that electronic messages and digital material is admissible in evidence, 78A (2) admissibility thereof should not be denied solely for reason that it is not in the original form, and 78A (3) that what matters is the weight the Court shall place on that evidence, and that is based on proof of certain facts guided by the four-prong criteria the Sub-Section sets out. I have considered the photographs presented to me as annexures to the supporting affidavit in the instant application and I am satisfied that they meet the criteria of generation, storage and communication required, and apart from a mere allegation that they were false the integrity thereof was not shown to have been interfered with, the identity of the originator was clear that it was the Applicant who took them. Thus, apart from submitting that the photographs did not comply with the provisions of law cited, the Respondent fell short of demonstrating how they did not meet the specifications set out in the provisions. Section 106B of the Act too was submitted on. Section 106B (1) is on admission of digital information contained in electronic record which is printed as a document, without the need to have the original being presented to Court. Sub-Section 2 thereof explains the conditions to be taken care of in respect of a digital document produced by way of a computer output. The Respondent did not demonstrate that the photographs did not fall within the specifications given.
26. Thirdly, the issue of whether or not the photographs were taken on someone else’s land different from the suit land, my view is that the Respondent only posed a mere denial of the fact. Having found that the Respondent lied on the ownership of the cattle shown on the photographs, I find also that the denial he gave of the latter fact too is a lie. In short, I find that the Applicant’s evidence on the issue



of cattle and on which parcel of land they were remains unshaken and therefore I make a finding on the issue above in the affirmative.

27. Was the Defendant's conduct deliberate? The Applicant stated that the 2nd Respondent's actions were maligned to threaten him and his family. He further threatened to erect a church previously demolished. The analysis of the posture and manifest actions of the Respondent in the photographs shows a person sitted in one photograph while cows graze and in others, leisurely standing beside gazing animals. That is not conduct of a person in a hurry to leave the grazing point of who can argue that the cows strayed to the suit land and he was then driving them away. His actions show a person deliberately relaxed and keen on tending the animals as they graze.
28. In any event, the 2nd Respondent has always been aware of the nature of the orders granted on 06/07/2021 and entrenched in the other order dated 23/07/2021. He has always been aware of the consequences for breach as well as captured in the penal notice of those orders. In fact, by virtue of this fact, he had been previously convicted for the offence of contempt and fined as a result. He has always participated in several Applications touching on those orders. He is certainly not only aware of those orders but damningly and glaringly appears to be quite intentional towards blatant disregard of those orders to date. Thus, his actions herein are intentional.
29. In conclusion, it is unfortunate that the 2nd Respondent continues to conduct himself in a manner that disrespects the orders issues by this Court. He appears to have the "utado?" attitude which is had by people who are bent on impunity, scorn and haughtiness, presuming that he is above the law. As long as the orders of this court remain in force, the 2nd Respondent must be reminded that he has no recourse but to strictly abide by them and that dire consequences ensue for breach thereof.
30. Consequently, I find that the notice of Motion Application dated 06/07/2022 is merited in terms of findings I have made above and the 2nd Respondent is guilty of the offence of contempt and I convict him accordingly. I further order that the contemnor, that is to say the 2nd Respondent, shall personally attend court on 21/11/2022 for sentencing. Finally, the Applicant shall also have costs of the Application.
31. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
16TH DAY OF NOVEMBER, 2022**

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE

