REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT ELDORET

ELC CASE NO. 82 OF 2016

TITO TIROP (Suing as the Legal Representative of PHILIP

CHEPKWONY.....PLAINTIFF/ APPLICANT

VERSUS

BENJAMIN TARUS.....1ST DEFENDANT/ RESPONDENT

ISAAC CHEPKWONY.....2ND DEFENDANT/ RESPONDENT

DORCAS JEMELI.....3RD DEFENDANT/ RESPONDENT

BOAZ KOSACHTAI.....4TH DEFENDANT/ RESPONDENT

DAVID NGETICH.....5TH DEFENDANT/ RESPONDENT

RULING

This ruling is in respect of an application dated 8th September, 2020 by the Plaintiff/Applicant seeking the following orders;

a) Spent

b) That the Respondents be and are hereby committed to civil jail for a period not exceeding two (2) years or pay a fine of Kenya Shillings Twenty Million or both for being in contempt of court orders issued on the 5th April, 2017.

c) Costs of this application be provided for.

Counsel agreed to canvas the application vide written submissions. The application is premised on the grounds on the face of the application as well as supporting affidavit deponed by Tito Tirop on 8th September, 2020.

The background of this application is that on 5th April 2017 this court issued orders of temporary injunction restraining the defendants jointly and severally, their servants, agents and/or assigns from in any way dealing with and/or planting, spraying, leasing out and/or trespassing, encroaching, transferring and/or interfering with the parcel of land known as **MOI'S BRIDGE/MOI'S BRIDGE BLOCK 3 (MOGOON) PLOT 2** until the suit is heard and determined. It was the applicant's case that the Respondents have failed to comply with the Court orders since they had commenced leasing the suit land to other third parties and ploughing the suit land.

APPLICANT'S SUBMISSIONS

It was the applicant's case that the respondent has disobeyed the court order hence should be cited for contempt of court.

Counsel for the applicant identified the issues for determination as whether the defendant/respondents are in contempt of court and whether there was personal service upon the respondents.

On the first issue as to whether the defendant/respondents are in contempt of court, the counsel relied on the case of **Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another (2005)KLR 828** where Ibrahim J (as then was) stated:-

"It is essential for the maintenance of the rule of law and order that the authority and dignity of our Courts are upheld at all times. The Court WI/ 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, 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".

Mr. Mengich counsel for the applicant further cited the cases of **Refrigerator and Kichen Utensils Ltd —vs- Gulabchand Popatlal Shah & Others Civil Application No. 39 of 1990, Heelmore —vs- Smith, (2) (1886) L.R 35 C.D 455** as well as **Johnson —vs- Grant 1923 Sc 789.** In the said authorities the Courts held that Court orders must be obeyed and failure to do so amounts to offending the dignity of the Court and the fundamental supremacy of the law.

It was counsel's further submission that Court orders must be complied with as they are not mere suggestions which a party can choose to obey or not and relied on the provisions of Section 29 of the Environment and Land Act which provides 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."

Counsel also relied on the case of **Jane Chemweno vs Paul K, Chemweno case no 411 of [2016]eKLR** as well as that of **Philemon Sonqok v Pauline Keberei Alias Pauline Jebet Rotich and 2 others [2018]eKLR** wherein the Courts imposed penalties by way of jail or fines on contemnors by virtue of the provisions of Section 29 of the environment and land court Act.

On the second issue on whether personal service is mandatory for one to be in contempt of Court counsel cited the case of **Ochino & Another —vs- Okombo & 4 Others (1989)eKLR** wherein the Court of Appeal held that as a general Rule, no order of Court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

Further that the Court of Appeal in the case of **Shimmer's Plaza ltd —Vs- NKB [2015] eKLR** Karanja, Mwera Mwilu JJA approved the jurisprudence from the High Court that restated that knowledge of a court order suffices to prove service and dispenses with personal service for the purpose of contempt proceedings. The Court of Appeal in the above Shimmers Plaza cited with approval Lenaola J. (as he then was) **Basil Criticos —Vs- Attorney General and 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." The CA in shimmers Plaza Ltd also affirmed the position in the Martin Wambora case and emphasized that:-

"It is important however that the court satisfied itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with the full knowledge or notice of the existence of the orders of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty".

Finally, Mr. Mengich submitted that the Respondents were aware of the valid clear and unambiguous orders of the Court but they willfully chose to disobey them and hence they should be punished for being in contempt of Court orders.

RESPONDENT'S SUBMISSIONS

The respondent filed a replying affidavit sworn by the 1st Respondent on 8th January, 2021 on behalf of all the Respondents that the late Phillip Chepkwony is the one who filed this suit and the application leading to the grant of the impugned orders in his capacity as the representative of the late MALAKWEN TARUS alias MALAKWEN KIMUGUNG TARUS via Grant Ad Litem issued in Eldoret CM Ad Litem No. 83 of 2016.

The respondents further averred that upon the demise of Phillip Chepkwony who was a legal representative of their late father MALAKWEN TARUS alias MALAKWEN KIMUGUNG TARUS, the 1st Defendant and one Mr. Noah Kibet were granted letters of administration with Will annexed on 29th March, 2020 in Eldoret HCP&A No. 29 of 2016.

He further deponed that it is only the 1st defendant and his co-executor Mr. Noah Kiptoo who have the locus standi to institute and defend claims against the estate of MALAKWEN TARUS alias MALAKWEN KIMUGUNG TARUS whose name is in the title as registered proprietor of the land known as **MOI'S BRIDGE/MOI'S BRIDGE BLOCK 3 (MOGOON) PLOT 2.**

Ms. Cheso counsel for the Respondents submitted that in contempt proceedings, the party seeking such orders must extract the order in question and the same must be served personally on the person alleged contemnor with a clear explanation as to what the alleged contemnor has done or omitted to do. It was the respondent's case that the 2nd, 3rd, 4th and 5th defendants were never served with the court order granted on 5th April, 2016 and that no affidavit of service was filed.

Counsel also submitted that the import of the order dated 11th April, 2016 was issued at an interlocutory stage and lapsed on 19th May, 2016. As regards the ruling of 5th April, 2017, the respondents averred that they were not served with the ruling and the order extracted on 11th March, 2020 as provided for under Order 5 of the Civil Procedure Rules, 2010.

It was counsel's submission that the photographs in support of the application do not meet the threshold set out under section 78 of the Evidence Act, Cap 80 Laws of Kenya and none of the respondents have been captured in the photographs which are undated and thus impossible to ascertain the reference number of the land being ploughed.

It was further submitted that the Deceased Plaintiff (Philip Chepkwony) died on 21st September 2019 and the Grant Ad Litem issued in ELDORET CM AD LITEM NO.83 OF 2016 automatically lapsed and ceased having legal effect. That the same was not transferable to the current Plaintiff and that the application offends Section 82 (a) of the Succession Act which states that:

> "Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—
>
> (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

Counsel relied on the case of **Joseph Oginga Onyoni and 2 Others v Attorney General and 2 others [2016] eKLR** citing with approval the case of **Troustik Union International & Another —vs- Mbeyu & Another [1993]eKLR** the Court held that the estate of a deceased person is vested in the legal representative and it is only the legal representative who has capacity to represent the estate. Further in the case of **Omari Kaburi -vs- ICDC [2007] eKLR** where the Court held that;

> *"The law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased..."*

Counsel further submitted that the injunction orders issued herein on 5th April 2017 lapsed on 5th April 2018 by operation of law by virtue of the provisions of Order 40 Rule 6 of the Civil Procedure 2010 which states that

> *"where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."*

That the use of the word "shall" connotes it is mandatory for the claim to be heard and determined within 1 year and in the alternative, the Plaintiff ought to have moved the Court from 5th April 2018 to have the orders extended, this having not been done, the injunctive orders lapsed.

It was Ms. Cheso's submission that the order was ambiguous and placed reliance on the case of **Josephine Muthinja —VS- Lilian Muthamia and 2 others** while referring to the case of **Mwangi Mangondu -VS- Nairobi City Commission Civil Appeal No. 95 of 1998** where it was held as follows:-

> *"This requirement is important because the court will only punish as contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of injunction has been proved beyond reasonable doubt".*

That the Respondents had no knowledge of the orders since the same was never served upon them and there is no affidavit of service to establish proper service pursuant to Order 5 of the Civil Procedure Rules 2010. According to the Respondents, it behooved the Applicant to prove that the Defendants were aware of the orders issued on 5th April 2017 as held by the Court of Appeal in **Nairobi Misc.Civi1 Application No. 316 Of 2010 Basil Criticos -Vs- Attoney General & 4 Others.**

Counsel therefore urged the court to dismiss the application with costs to the respondents.

ANALYSIS AND DETERMINATION.

This is an application for seeking for the committal of the respondents to civil jail for contempt of court for a period of 2 years. I have considered the submissions by counsel and the pleadings therein and come to the conclusion that the court must address the following issues:

a) Whether the applicant has locus standi to institute the current proceedings.

b) Whether the orders issued on 5th April, 2017 have lapsed.

c) Whether the Respondents are guilty of contempt of court orders.

This issue of locus standi has been raised in two previous applications and the court has made determination on it. The respondent had raised the same issue vide a preliminary on the jurisdiction of the court to hear and determine this matter and that the applicant has no locus standi to institute this suit.

Justice Ombwayo in his ruling 8th June 2016 held that the plaintiff having obtained limited grant ad litem had capacity to institute this suit. That ruling has not been appealed against therefore it still subsists.

Further this court also dealt with the issue of locus standi vide a ruling dated 5th April 2017 at page 3, paragraph 8 wherein the Court said;

> *"The Plaintiff got letters of Administration Ad litem for purposes of filing this suit. The defendant claimed that the plaintiff lacked the locus to bring this suit as he is not one of the executors of the deceased estate. On the issue of locus, and whether the plaintiff concealed material facts to the magistrate who granted the limited grant, I find that those issues should have been raised in that court. As of now the plaintiff has authority to bring the suit before this court."*
>
> *I will not therefore deal with an issue that has been determined by the court.*

On the second issue as to whether the orders granted on 5th April 2017 lapsed after one year as the provisions of Order 40 Rule 6 is a matter that a Court has discretion over. Order 40 Rule 6 provides that:

> *"where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."*

In the case of **Maxam Limited & 2 others v Heineken East Africa Import Co. Ltd & 2 others [2017] eKLR,** the Court held as follows;

> ***"****I must however also appreciate that Order 40 Rule 6 of the Civil Procedure Rules anticipates that where an interlocutory injunction has been issued on merit then the suit is to be determined and the parties respective rights asserted within one year of the interlocutory order being made. The Rule appreciates and seeks to ensure that neither party is placed at an indefinite hardship through an intermediary order. The mischief was to guard against sluggish and dawdling litigants who seek to delay the prosecution of their claims."*

This was also the holding by the Court in ***Nguruman Ltd v Jan Bonde Neilsen & 2 Others [2014]eKLR*** where the Court held that the object of introducing **rule 6** aforesaid in the 2010 **Rules** was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various machinations to delay the disposal of the suit. Order 40 Rule 6 was intended to ensure that indolent and static litigants are kept in check.

The order granted was until the suit is heard and determined but the court has discretion in deciding whether the order should continue subsisting after the lapse of one year. In determining whether or not to have the interim orders to continue to last beyond twelve months, the court has, *firstly*, to interrogate why trial was not commenced and finalized within twelve months. *Secondly*, there ought to exist special circumstances to warrant the extension.

Our courts have challenges with backlog, limited infrastructure and inadequate numbers of judicial officers to clear such backlog. The courts have also put in place strategies to clear backlogs including listing matters for dismissal for want of prosecution. This matter has been active and not one that should be dismissed for want of prosecution. These are the special circumstances that the court will look at where a matter has not been finalized within one year. There has been no evidence of indolence and any hardship that has been suffered by the existence of the injunction.

This does not mean that the court will entertain cases where parties obtain injunctions and go to sleep to the detriment of the opposing party. The court is vigilant of such parties and will not hesitate to apply the provisions of Order 40 Rule 6 of the Civil Procedure Rules. Having said that I find that the order did not lapse

On the last issue as to whether the respondents are guilty of contempt, in an application for contempt, an applicant must prove that the terms of the order were clear and unambiguous and that the same were binding on the defendant. The orders must be clear and directed to the defendant to do or not to do a certain act with a penal notice on the consequences for disobedience of the order.

The 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- ATTONEY 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*"

If there is proof that the respondent had knowledge of the order, then the issue of personal service is superseded by the knowledge of the order. Courts have held that where a party is represented by an advocate who has authority to act on his or her behalf and the said Counsel was present during the pronouncement of the ruling that gave the order, then it should be assumed that the Counsel communicated the contents of the order to his client and the repercussions of the disobedience.

It is trite that litigants are under an obligation to obey Court orders whether they are in agreement with the contents or not. In the case of **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

> *"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 until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it 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. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid — whether it was regular or irregular.... In cases of alleged contempt, the breach for which the*

alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt……'

The orders in the application were to restrain the respondents from interfering with the suit land until this case is heard and determined. Contempt of court applications are meant to safeguard the integrity of the court and upholding of rule of law to avoid anarchy when court orders are not respected. The applicant has not proved that there was personal service on each of respondents as required by law and also that the applicant failed to file any affidavit of service to demonstrate service.

Accordingly, I find that the applicant has not met the threshold required in contempt of court proceedings. The issue of service, clarity, inambiguity of the order and knowledge are still not clearly addressed.

It should also be noted that p roof in contempt proceedings is higher than in normal Civil cases as it involves the curtailment of freedom of the contemnor if the same is proved. It borders on criminality and the proof is beyond reasonable doubt. Courts must therefore be keen to ensure that a person's freedom is not curtailed wrongfully, which might lead to other violations of rights.

The application is therefore dismissed with costs to the respondents.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF MARCH, 2021

M. A. ODENY

JUDGE