



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC PETITION NO.6 OF 2019

JAMES KIMWETICH KULEI.....PETITIONER

-VERSUS-

THE UASIN GISHU COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

REUBEN KIPKORIR SEREM.....2ND RESPONDENT

ISAACK A. ROP KIRISWA.....3RD RESPONDENT

RULING

This ruling is in respect of an application dated 1st October 2020 by the plaintiff/applicant seeking that Isaac A Rop Kisirwa and Kipkoech Chepsaigut be committed to civil jail for disobeying court orders.

Counsel agreed to canvas the application vide written submissions of which the respondent obliged but the applicant opted to rely on the affidavits filed.

APPLICANT'S SUBMISSIONS

The applicant relied on the grounds on the face of the application and the supporting affidavit of the applicant where he deponed that he obtained orders of status quo to be maintained pending the hearing of the petition but the respondents disobeyed the order.

Applicant further deponed that the respondents were served with the order but disobeyed the said order therefore amounting to contempt of court. The applicant therefore urged the court to find that the respondents are in contempt of court.

RESPONDENTS' SUBMISSIONS

Counsel for the respondents relied on a replying affidavit sworn on 4th November, 2020 whereby the respondent denied that the order was issued in the presence of his counsel and that counsel did not undertake to impress him to obey court orders as alleged by the applicant in his affidavit. That the respondent was not aware of any order issued as they were never served.

The respondent further deponed that he has no agent and has never instructed Kipkoech Chepsaigut to act on his behalf and has no interest in the suit property as alleged by the Applicant and has never constructed any fence or any structure over the said parcel of land.

On the issue whether the respondent was served with a court order issued on 29th April 2019, counsel submitted that the respondents were never served with any order. That the respondents were not present in court when the said orders were made and the applicant has not filed an affidavit of service to show that the respondents were duly served.

Counsel further submitted that the photographs depicting a fence is not sufficient evidence to prove the allegation against the respondent as they do not show when the alleged contemptuous acts were carried out.

Ms Tum also stated that the court has not been told what the status quo was at the time when the orders were issued, the status quo was not defined. That as a general rule, no order of court requiring a person to do or to abstain from doing any act may be enforced (by committing him/her 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, or that the person had the knowledge of an order which supersedes personal service.

On the second issue as to whether the respondent is in contempt of a court order, counsel submitted that the respondent had no knowledge of existence of such order in that on 29th April, 2019 he had not entered appearance as shown in the Memorandum of Appearance marked I.K.I in the Replied Affidavit which was filed on 13th May, 2019 thus the Applicant is misleading this Honourable Court by alleging that the order was issued in presence of counsel of all the parties.

Counsel cited the case of **Mary Wania Karobia v Nairobi City County [2017] eKLR**, where Obaga J. stated that:-

"To succeed in an Application for contempt, the Applicant must demonstrate the following:-

(i) That there was court order which was issued.

(ii) That the court order was clear and unambiguous

(iii) That the court order was served upon the contemnor or that the contemnor was aware of the order

(iv) That the court order contained a penal clause warning of the consequences of disobedience of the order.

(v) That the contemnor breached that order."

Further in the case of **Richard Lanet Koonyo v Seleone Koonyo & 3 others [2017] eKLR** Ndungu J. stated that:-

"Certainly orders of court must be in existence and duly served on the alleged contemnor. Knowledge of the existence of the orders is paramount.

There must then be disobedience of the orders for sanctions to apply. The court has the residue power to punish for contempt. "

Ms Tum therefore urged the court to dismiss the application with costs as the applicant has not met the threshold and that the respondent was never served with any court order.

ANALYSIS AND DETERMINATION

The issues for determination are whether there was contempt of court and whether the applicant has proved such contempt.

In the case of **TEACHERS SERVICE COMMISSION v KENYA NATIONAL UNION OF TEACHERS & 2 others [2013] eKLR** Ndolo J observed that:-

"38. The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law."

Contempt of court punishment is to safeguard the rule of law and the administration of justice. If such powers were not vested in the courts, then courts would give orders in vain which can be disobeyed with impunity at will as the court stares with no power to act. That is why the court has been granted the authority to grant orders and when they are disobeyed a recourse for punishment is available.

For a court to punish contempt, it must be established that there was a valid order, proof of personal service of the valid order or proof that the respondent had knowledge of the order, that the respondent deliberately disobeyed the valid order.

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

Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand^l who succinctly stated:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.

From the court order, it is evident that the applicant filed an application for conservatory orders vide an application 11th April 2019 under certificate of urgency. The court ordered the applicant to serve the application within seven days for inter partes hearing on 29th April 2019.

On 29th April 2019 counsel for the applicant informed the court that he had served the application but the respondents had not filed any responses to the application. The court granted orders of status quo to be maintained pending the hearing and determination of the petition. It should be noted that no other party was present apart from counsel for the applicant. It would therefore be erroneous for counsel to state that the respondents 'counsel was present and yet counsel submitted that he had served the respondents and they had not filed any papers.

It is further on record that the respondents filed a Memorandum of appearance of 13th May 2019 after the orders had been granted. This alone casts doubt on whether the order was served on the respondents.

There is a requirement that contempt of court must be proved beyond reasonable doubt as it borders of criminality where a person's freedom is at stake as was held in the case of **Duncan Manuel Murigi Vs Kenya Railways Corporation (2008) eKLR** where the court, in emphasizing the need for personal service of such order, cited with approval the **case of Bramblevale Ltd [1970] CH 128 at P. 137 where Lord Denning Master of Rolls** stated:-

“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”

I have considered the application, the submissions by counsel and find that the application lacks merit and is therefore dismissed with costs to the respondents.

DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF MARCH, 2021

M. A. ODENY

JUDGE