



**Karumba v Kahungu (Environment & Land Case E051 of 2023)
[2024] KEELC 546 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 546 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E051 OF 2023
AA OMOLLO, J
FEBRUARY 1, 2024**

BETWEEN

NAOMI WANJIKU KARUMBA PLAINTIFF

AND

JOSEPH KAMAU KAHUNGU DEFENDANT

RULING

1. For determination is the Motion dated 8th May, 2023 brought under the provisions of Section 3A of the Civil Procedure Act, Section 5 of the judicature Act and Section 29 of the Environment and Land Court Act. The Plaintiff/Applicant seeks orders;
 1. Spent
 2. Spent
 3. That the Deputy Registrar of this court do visit Title Number Nairobi Block 110/230 (“suit property”) at the Plaintiff/Applicant’s cost for ascertainment purposes with regards to the Defendant/respondent’s occupation, use of and extent of the development on the suit property vis a vis the interim orders issued on 8th March, 2023 and file a report to that effect within 7 days.
 4. That a declaration do issue that the Defendants/Respondent is in contempt for lack of compliance with the court order issued on 8th March, 2023.
 5. That consequent upon No. 4 hereinabove, this Honourable Court be pleased to sentence the Defendant/Respondent to imprisonment in jail for such a term that it may deem fit and to pay such fine as it may deem appropriate.
 6. That an order do issue compelling the Defendant/Respondent to demolish all structures erected on the suit property for purposes of restoration of the status quo.



7. Costs of this application.
 8. That this Honourable Court be further pleased to make such other interlocutory orders as may appear to the Court to be just and convenient.
2. The application is supported by the grounds on its face inter alia;
 - a. The Plaintiff/Applicant filed the present suit and application both dated 14th February, 2023 to assert her proprietary rights with respect to Title Number Nairobi/block 110/230 (“suit property”).
 - b. On the hearing date of the aforementioned application being on 8th March, 2023, in the presence of the counsel of the Defendant/Respondent, the court ordered that “no party shall commence and or undertake any constructions during the pending of the application.”
 - c. On 12th March, 2023, the Plaintiff/Applicant proceeded to the suit property, upon which she witnessed that construction was ongoing both in the daytime and at night despite the existence of a court order barring the same.
 - d. On 13th March, 2023, the Defendant/Respondent’s contemptuous actions were brought to the attention of his Advocates on record to urge compliance lest his client faces the ensuing consequences.
 - e. However, upon returning to the suit property on 20th April, 2023, not only could she not access her property as both a perimeter wall and a gate had been erected, but also construction of a house was ongoing and substantial progress had been made towards its completion; such is the gigantic nature of the house that one could see it without gaining access to the suit property.
 3. The application premised further on the supporting and supplementary affidavits sworn by the plaintiff. She deposed that inspite of the orders of 8th March, 2023, she was baffled when she visited the suit property on 12th March, 2023 to witness ongoing construction on a wall nearing completion. The plaintiff avers that when she returned to the suit property on 20th April, 2023, she could not even access the suit premises because the perimeter wall and gat had been erected. That on 1st May, 2023, the Defendant had constructed a water tower for creating an environment habitable to a human being. She annexed photographs to corroborate her assertions.
 4. The plaintiff further stated that the orders of 8th March, 2023 was clear, concise and simplistic and they were issued in the presence of the Defendant’s advocate. She added that the Deputy Registrar’s report will greatly and the court on the true status of the suit property.
 5. In opposing the application, the Respondent filed a replying affidavit sworn on 21st June, 2023 although headed as responding to the application dated 14th February, 2023. He denied the allegation of being in disobedience of the orders of this court issued on 8th March, 2023. The Defendant denied carrying out any development on the suit property as alleged. It is the Defendant’s contention that the Applicant has not provided any evidence that him or his known agents have carried out developments on the suit property.
 6. It is the Defendant’s deposition that the Applicant ought to have taken a photo of the construction signage to confirm the same were taken on the suit property. The Defendant avers that the suit property is located in a heavily populated area with several constructions going on and it would appear the Applicant maliciously took random photographs or took them before the interim courts orders were issued with the sole intention of deceiving this court to send him to jail.



7. At paragraph 17 of the Replying Affidavit, the Defendant denied any service of the Interim order or its terms. That he had no reason to disregard this court's order. Paragraphs 20 – 23 describes how the Defendant acquired the title to the suit property. He deposed that the Applicant is trying to use these orders to dispossess him of his land. Instead he also accused the plaintiff of sending hooligans on 9th February, 2023 to damage everything erected. He asserted that the application is devoid of merit and ought to be dismissed with costs.
8. The Respondent filed written submissions while the plaintiff filed submissions dated 2nd August, 2023 in regard to the application dated 14th February, 2023. The Respondent reiterated the contents of his replying affidavit. In addition, the Defendant submitted that the standard of proof in contempt proceedings is higher than in civil cases citing the case of *Mutilika v Babarini Farm Ltd.* (1985) eKLR.
9. Further, the Defendant cited *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi* (2016) eKLR where the court set out the essential elements to prove contempt. The Respondent argues that the application fails the threshold because;
 - i. There is no affidavit of service confirming if the order was served
 - ii. The photographs annexed by the applicant has not complied with the mandatory provisions of section 106(b)
 - iii. The time when the offending constructions were undertaken are not specific in the photographs.
10. The Respondent concluded that there was no evidence presented before this court to prove the alleged contempt and he urged the court to dismiss the application for contempt with costs.
11. The law is now settled on the standard of proof in contempt proceedings given that it is quasi-criminal. Mativo J. (as he then was) restated the test for establishing contempt in his decision in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR where he stated thus –

“ 40. It is an established principle of law that 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; and (iii) Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements, the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* 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”

12. The orders which the applicant is alleging disobedience was issued on 8th March 2023 in the presence counsel for the Defendant/Respondent so there was no requirement on the Applicant to serve the order. On whether the terms of the order was clear, paragraph 4 thereof required either party not to commence and or undertake any construction on the suit property during the pendency of the application. Paragraph one of the order required the Respondent to file and serve their response to the application within 14 days from 8th March 2023.
13. When the matter came up next on the 24th April 2024, Counsel for the Respondent stated that they had not filed a replying affidavit because they were looking forward to an amicable settlement of the application. It is inferred that the Respondent was aware of the requirement to file a response within 14 days from 8.3.2023 and it follows that it was aware of the remainder of the orders issued together with the one which granted it permission to file a replying affidavit. The order was very clear in terms of directing the parties not to construct on the land before the application is determined.
14. The Court of Appeal decision in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR where it was held that –

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings” We hold the view that it does. This is more so in a case such 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 behoves him/her to report back to the client all that transpired in court that has a bearing on the client’s case.”
15. The remaining question is whether the Applicant has proved that the Respondent acted in breach of the order. The Applicant put reliance on the photographic evidence annexed to the affidavit in support of the application and marked as NWK. The photos indeed show evidence of some on-going work, however the Respondent pointed out that they have no dates to prove they were taken before or after the issuance of the orders of 8th March 2023. In the supplementary affidavit, the Applicant shared photographs that were annexed to the application where the injunctive relief was sought.
16. By providing a comparison of the two sets of photographs, the Applicant has clearly demonstrated that as at the time she first moved the court, the walls now under construction were almost at the ground level and there was no house standing on the suit property. The burden then shifted on the Defendant not just to say that the photographs in the current application are undated but rather to explain to this court the difference obtaining on the suit property as at the date of the order. I am persuaded to hold that the Respondent deliberately continued with undertaking construction on the suit property despite being aware of the orders of this court.
17. In conclusion, I hold that the application has been proved in terms of prayer 4 of the notice of motion finding the Respondent/Defendant to have acted in breach of this Court’s order. The Defendant shall be sentenced after being given an opportunity to show cause. In reference to prayer 6 of the motion



seeking orders to compel the Defendant to demolish the offensive structures, this court suspends the granting of this relief pending determination of the main suit when it shall take the same into consideration while making final orders. Prayer 3 requesting for site visit by the Deputy Registrar is declined as the said officer's role in the manner sought amounts to assisting a party in prosecuting their application. Costs of the application granted to the Plaintiff/Applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY 2024

A. OMOLLO

JUDGE

