



**Tonui & another v Koske & 4 others (Environment and Land Case
24 of 2020) [2024] KEELC 3284 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3284 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CASE 24 OF 2020**

MC OUNDO, J

APRIL 4, 2024

BETWEEN

LEAH CHELANGAT TONUUI 1ST PLAINTIFF

PETER MUGUN 2ND PLAINTIFF

AND

KIPSIELE ARAP KOSKE 1ST DEFENDANT

ANNAH KOSKE 2ND DEFENDANT

PETER SIELE 3RD DEFENDANT

DAVID KIPKEMOI KOSKEI 4TH DEFENDANT

ROBERT KIPKORIR KOSKEI 5TH DEFENDANT

RULING

1. The Plaintiffs/Applicants by way of Notice of Motion dated 24th April, 2023 brought under the provisions of Order 40 Rules 3(1), (2) & 3 and Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#); Section 1A, 1B, 3A and Section 63 (c) & (e) of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya and all other enabling provisions of the law seek for contempt proceedings against the 1st and 2nd Defendant/Respondents for blatantly failing to comply with the court's orders issued on 27th October, 2020 and 11th October, 2022. They further seek for orders barring the said Respondents from filing any pleadings, documents and or taking any further/other proceedings in the instant matter until they purge the contempt, for further orders necessary to meet the ends of justice, and for costs of the application.
2. The application was premised on the grounds on the face of it and supported by an affidavit dated 26th April, 2023 sworn by Leah Chelangat Tonui, the 1st Plaintiff/Applicant herein to the effect that on 27th October, 2020 the court had issued interim orders restraining the 1st, 2nd and 3rd Defendants/



Respondents from interfering or dealing in any manner whatsoever with the parcel of land measuring 1.2 acres comprised in a parcel of land known as Kericho/Kapsoit/26 (the suit land).

3. That the order had been served upon the 1st, 2nd and 3rd Defendants/Respondents who had refused, neglected and/or otherwise failed to comply with it. That she and the 2nd Plaintiff/Applicant had filed an application for contempt on 3rd March, 2021 wherein a notice to show cause and the subsequent warrant of arrest had been issued. On the 11th October, 2022 the court upon considering the 1st, 2nd and 3rd Defendants/Respondents' mitigation had lifted the warrants of arrest against them giving them a stern warning to keep off the suit land until the hearing and determination of the instant suit and in default they would face a jail term of six months without the option of a fine.
4. That despite the warning, the said Defendants had forcefully continued to trespass on the suit land by cultivating and planting maize, beans and cassava and also utilizing a portion of the suit land as a grazing field for their cows. That indeed, she had seen the 1st Defendant/Respondent herein grazing his three cows on the suit land on diverse dates being 15th November 2022, 17th November, 2022, 25th December, 2022 and 1st January, 2023. Further, that she had also seen the 2nd Defendant/Respondent cultivating the suit land on several occasions and planting and weeding crops such as sukumawiki, onions, maize, beans and cassava on the suit land.
5. That subsequently, it had become absolutely necessary and urgent to have the 1st and 2nd Defendants/Respondents committed to jail for contempt of court in order to avert further disobedience of valid court's orders and in the interest of justice.
6. In response to and in opposition of the application, the Defendants/Respondents vide their Replying Affidavit dated 23rd June, 2023 sworn by Kipsiele Arap Koske, the 1st Defendant/Respondent herein confirmed that the court had granted orders of temporary injunction restraining 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents from trespassing into and interfering with the Plaintiff/Applicants' quiet possession of the suit land until the inter-parties hearing of the Plaintiffs/Applicants Application. That whereas he and his co-defenders had been arrested on 9th October, 2022 for disobeying the said court's orders, the same was because the Plaintiff's advocate had failed to serve them with the application and/or the court orders hence they had been condemned unheard.
7. He deponed that it had been impractical to obey the said orders because the Plaintiffs had never fenced off any portion of their land to distinguish it from the rest of the Defendants/Respondents land hence they could not discern the exact land which he and his siblings should not trespass, in obedience of the court's order. That he and his siblings had been in continuous occupation of the suit land to the exclusion of the Plaintiffs, during the lifetime and after their father's death. Further, that he and his siblings had not trespassed on any land belonging to the Plaintiffs either before or after the filing of the present suit. That he and his co-defenders were law abiding citizens who had been willing to keep peace until the instant suit was heard and determined.
8. He urged the court to visit the suit land to discern the true position of the land before reaching a determination to avert injustice.
9. In a rejoinder, the Plaintiffs/Applicants vide their Supplementary Affidavit dated 1st November, 2023 sworn by Leah Chelangat Tonui, the 1st Plaintiff/Applicant herein deponed that the Respondents' Replying Affidavit had been replete with deliberate falsehoods, misrepresentations, concealment and non-disclosure of material facts calculated to obviate the court from properly determining the true state of affairs relating to the location and status of the 1.2 acres portion of the land comprised in a parcel of land known as Kericho/Kapsoit/26 (the suit land). She maintained that the 1st, 2nd and 3rd Defendants had been duly served with the application dated 3rd March, 2021 as evidenced by the Affidavit of Service



on record but they had refused to attend court at the hearing of the application necessitating the court to order for their arrest.

10. She deponed that the suit land was located besides the road near the Kapsoit-Kisumu Highway and was clearly distinguishable from the rest of the land which the 1st Defendant and his siblings were in occupation. Further that there had been a clear boundary separating the suit land from the 1st Defendant's land hence the 1st and 2nd Defendants could not purport to feign ignorance of the location and boundaries of the suit land.
11. That she had no objection to the court visiting the suit land in order to ascertain the true factual position regarding its location, boundaries and the trespass that the 1st and 2nd Defendants had continued to commit on the land in flagrant disregard of the Court's orders granted on 27th October, 2020 and 11th October, 2022.
12. On 27th April, 2023 the court directed that the Application dated 24th April, 2023 be canvassed by way of written submissions, parties complied for which I shall summarize their respective submissions as herein under.

Plaintiffs/Applicants' submissions.

13. The Plaintiffs/Applicants summarized the factual background of the matter before framing one issue for determination to wit; whether the 1st and 2nd Defendants/Respondents were in contempt of the Court's orders issued on 27th October, 2020 and 11th October, 2022.
14. They submitted that on 11th October, 2022, the 1st, 2nd and 3rd Defendants had been found in contempt of the said court orders. However, upon considering the 1st, 2nd and 3rd Defendants' mitigation, the court had lifted the warrants against them with a stern warning to keep off the suit land until the hearing and determination of the instant suit. They had further been warned that any attempt to interfere with the suit land would attach a jail term without an option of a fine.
15. The 1st and 2nd Defendants had not denied that they had been cultivating on the suit land by planting maize, beans and cassava and also utilizing a portion of the same as a grazing field for their cows. Indeed the 1st Defendant's contention had been that the Plaintiffs had not fenced her portion of the suit land to distinguish it from the rest of their land hence they could not discern the exact land which they should not trespass on, in obedience of the court's orders.
16. They submitted that since the court's orders of 27th October 2020 and 11th October 2022 had not been set aside, the 1st, 2nd and 3rd Defendants ought to obey them by observance. Reliance was placed on the decided case of *Ramesh Popatlal Shah & 2 others vs. National Industrial Credit Bank Limited* [2005] eKLR where the court had cited the decision in *Hadkinson v Hadkinson* [1952] ALL E.R. 567.
17. That by continuing to utilize the suit land, the 1st Defendant had been acting in clear contempt of the court and his conduct had brought the authority of the court into disrepute. That the said orders had been issued in the presence of the Defendants and their Advocate wherein the order had been read out and explained to them by the court as had been requested by their Advocate, thus the 1st and 2nd Defendants could not feign ignorance as far as the said orders were concerned.
18. That the continued prolonged disobedience of the aforementioned court's orders was likely to embarrass and unnecessarily delay the just and fair hearing and determination of the instant suit thus the necessity to grant the orders sought as the court had unfettered powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.



Defendants/Respondents' Submissions.

19. The Defendants/Respondents similarly framed one issue for determination to wit whether they had willfully disobeyed court's orders issued on 27th July, 2022 for which they should be detained.
20. They relied on the holding in the decided case of *Gacharia K. Mutikika v Baharini Farm Ltd* (1985) KLR 227 which had laid down the guidelines for conducting contempt of court proceedings to submit that there was no service of the application that had given rise to the orders issued on 27th October, 2020. That the Plaintiff/Applicant thus obtained ex-parte injunctive orders against them without giving them a chance to defend themselves. That they had only become aware of the present case and the resultant orders when they were arrested and brought before the court, for contempt of court orders, on 11th October, 2022.
21. Their submission was that they had always been in occupation of the suit land before and after the demise of their late father one Kipkoske Arap Cheruiyot and were not aware of any alleged sale agreement between the Plaintiffs and their late father. That the Plaintiffs/Applicants had never occupied the suit land, fenced it off or in any other way distinguished it from the rest of the land occupied by themselves (Defendants/Respondents) That they had been unable to obey the court's orders because the land claimed by the Plaintiffs/Applicants was not identifiable and/or could not be distinguished from the rest of the land they occupied.
22. It was their submission that the Plaintiffs/Applicants' application had failed to demonstrate to the court how they had willfully disobeyed the court's orders. That their liberty was at stake and their fate ought not to be determined based on baseless allegations contained in sworn affidavits whose correctness or otherwise had not been tested.
23. They urged the court to find that the Plaintiffs/Applicants application lacked merit and have the same dismissed with costs.

Determination

24. 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.”
25. 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.”
26. 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.”



27. 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”
28. 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.
29. The current issue stems from an application dated the 4th August 2020 where the Plaintiffs had sought interim orders against the defendants. On the 24th October 2020 the court having satisfied itself that the Respondents had been served and that there had been an affidavit to that effect filed in court, and further that the Respondents had not filed any response to the application nor appeared in court, the application was allowed in terms of prayer 3 with costs.
30. Prayer 3 of the said application was as follows;
- “That pending the hearing and determination of this suit an interlocutory injunction be and is hereby issued restraining the 1st, 2nd, and 3rd, defendants/ respondents by themselves, their servants, employees and/ or agents from re-entering trespassing into, selling, cultivating, tilling or using the land for any other purposes, cutting down or uprooting tea, demolishing and committing any acts of waste thereon or in any manner whatsoever, interfering or dealing with the parcel of land measuring 1.2 acres comprised in a parcel of land known as Kericho/Kapsoit/26.”
31. Upon obtaining the ex-parte orders, the Plaintiffs herein had filed an application dated 3rd March 2021 seeking contempt proceedings against the 1st, 2nd, and 3rd, Defendants/Respondents who had failed to comply with the ex-parte orders issued on 27th October 2020 despite service. The Applicants were directed to serve the said application upon the Respondents who had then been warned to desist being in contempt of the court orders.
32. On 4th November 2021 the court issued a Notice to show cause to all the three Defendants to appear in court to show cause why they should not be held in contempt of the court orders of the 27th October 2020.
33. On the 25th January 2022, the Defendants/Respondents did not appear in court and warrants of arrest were issued against them. They were subsequently arrested and released on their personal bond wherein they appeared in court on the 11th October 2022. After the court had considered their mitigation, the court informed them of the importance of adhering to court orders wherein the court pardoned them and lifted the warrants of arrest with a stern warning to keep off the 1.2 acres of land comprised in parcel of land known as Kericho/Kapsoit/26, until the hearing and determination of the suit, failure to which they would face a jail term without an option of a fine.
34. As parties were in the process of complying with pre-trial directions the Plaintiffs again filed the current application dated the 24th the April 2023 seeking contempt proceedings against 1st and 2nd Defendants/ Respondents for ignoring the Court’s orders issued on 27th October, 2020 and 11th October, 2022 as they had forcefully trespassed on the suit land and had proceeded to cultivate and plant sukuma wiki (kales) onions, maize, beans and cassava and also utilize a portion of the land as a grazing field for their



cows. The contempt complained of was supported by pictorial evidence annexed as “LCT 1” which photographs had been taken on 24th March 2023.

35. In response to the allegations leveled against them, the 1st Defendant/Respondent herein confirmed that indeed the court had granted orders of temporary injunction restraining them from interfering with the Plaintiff/Applicants’ quiet possession of the suit land. That it had been however impractical to obey the said orders because the Plaintiffs had never fenced off any portion of their land to distinguish it from the rest of the Defendants/Respondents land hence he could not discern the exact land which he and his siblings should not trespass in obedience of the court’s order. That he and his siblings had been in continuous occupation of the suit land to the exclusion of the Plaintiffs, during the lifetime and after their father’s death. He however denied having trespassed on any land belonging to the Plaintiffs either before or after the filing of the present suit. That he and his co-defenders were law abiding citizens who had been willing to keep peace until the instant suit was heard and determined. He urged the court to visit the suit land to discern the true position of the land before reaching a determination to avert injustice.
36. From the sworn affidavit, annexures, submissions by the parties’ Counsel, the applicable law and the decided cases, and having warned myself of the dangers of depriving the Defendants/Respondents their freedom without confirming the true position of the matter in question more so in light of the Defendants/Respondents response that “there were no boundaries to distinguish the two parcels of land thus making it impractical to comply with the orders” and further Keeping in mind that the power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort, in the best interest of justice I find that the logical action to take at the moment would be to allow the court to visit the site to satisfy itself on whether or not the suit land is distinguishable from the Respondents/Defendants’ land before making a final determination on whether or not the Defendants/Respondents were/are in contempt of the court orders of 27th October 2020 and 11th October 2022.

It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 4TH DAY OF APRIL 2024

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

