



Suleiman Enterprises Limited v Kensalt Limited & 3 others (Environment & Land Case 90 of 2018) [2024] KEELC 4123 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4123 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 90 OF 2018**

EK MAKORI, J

MAY 9, 2024

BETWEEN

SULEIMAN ENTERPRISES LIMITED PLAINTIFF

AND

KENSALT LIMITED 1ST DEFENDANT

KEMU SALT PACKERS PRODUCTION LIMITED (UNDER RECEIVERSHIP) 2ND DEFENDANT

HANSHEWER TRANSPORTERS LIMITED 3RD DEFENDANT

SHEEREJI EXPRESS 4TH DEFENDANT

RULING

1. On the crucial date of 14th December 2018, Olola J. issued significant orders. These orders were aimed at restraining the defendants from carting away salt harvested from the plaintiff's properties, known as Land Reference No. 21918 (Grant Number CR 28301 and Land Reference No. 21983(Grant Number CR 28443), stored on the 2nd defendant's property known as Land Reference No.222138. This injunction was also directed to prevent the defendants from entering, trespassing onto, harvesting, transporting, or carting away salt from the plaintiff's aforesaid properties. Furthermore, an order was issued to restrain the defendants from using the pump station refinery, crystallizers, machinery equipment, or any other facility erected on or within the plaintiff's properties and from interfering with or in any manner whatsoever dealing with the plaintiff's properties until the determination of this suit.
2. The case, which is still very much ongoing, has seen the defendants allegedly disregard the orders. In response, an application was initiated on 24th October 2023 to reaffirm those injunctive orders. The application also seeks to summon the Directors of the first defendant and shareholders to show cause for their disobedience. According to the applicant, this seeks to highlight the continued importance and relevance of the court's orders and the need for obedience.



3. On 31st October 2023, this Court directed that the orders remain in force and that the OCS Marereni, as the designated enforcement officer, ensure compliance with these orders.
4. In response, and after the service of the orders, the first defendant promptly filed an application on 14th November 2023. This application sought to vacate the orders issued by this Court on 31st October 2023. In its application, the first defendant argues that the suit properties have changed ownership, as the first defendant purchased them in an auction conducted by Dubai Bank (in liquidation) as chargees in the exercise of its Statutory Powers of Sale. This argument presents the first defendant's perspective on the case and its reasons for seeking to vacate the orders, providing a comprehensive view of the situation.
5. Reckoning the tenor of the two applications and for expeditious disposal of the business of the Court, it was directed that the two motions be heard simultaneously. The parties' counsels argued the applications before me orally on 7th February 2024. They supplied authorities to persuade the Court on their line of arguments.
6. The issues for this Court's determination are of significant importance. The Court must decide whether to strike out the suit herein with costs or reaffirm the perpetuity of the injunctive orders issued by Olola J. ((sic) as reinvigorated by this Court). The Court is also asked to decide whether the Directors of the first defendants are cited for contempt and who will bear the attendant costs of the two applications.
7. On the two applications, Mr. Oluga, for the plaintiff, submits that the orders issued by Olola J. restraining the defendants from carting away salt, trespassing on the suit properties, or using machinery on the ground remain intact. These orders, crucial to the resolution of this case, have never been offset or set aside. They were to remain in force until the suit could have been heard and determined. Pictures were annexed to show carting away the salt, an act which the orders forbid.
8. Regarding the allegations that the first defendant had purchased the suit property, if that is true, which is denied, the first defendant should have moved the Court to have those orders vacated.
9. Whether one of the Directors, Sucheta Patel, is dead, the orders sought are not against the said individual but one Peri Kansangra.
10. On striking out the plaintiff's suit, Mr Oluga submits that the ownership issue is in contention and should be heard on merit. Each party has to testify to prove ownership. The issue of the public auction is under challenge at the Milimani Commercial Court Nairobi in E597 of 2023 – Suleiman Enterprises Limited & Kemu Salt Packers Production Limited v Dubai Bank Limited (in Liquidation) and 3 others. This cannot be a basis to strike out the entire suit. The issue of trespass still stands. At the time, the issue of trespass was in issue, and the defense that the first defendant was a licensee of the second defendant was pleaded. These are issues that must go through a full trial.
11. Mr. Noorani, for the first defendant, submitted that on the issue of contempt, one of the Directors sought to be cited for contempt Mansukh Kansangra, is dead and cannot possibly be summoned by this Court to be cited for contempt. There is no evidence to disapprove of this assertion since a death certificate has been provided.
12. Mr. Noorani avers that the standard of proof in contempt matters has not been achieved as enunciated in the case of *R v Director of Immigration Service and another Ex parte Planet Motors Company Limited* [2016] eKLR.



13. He further asserts that on 18th October 2023, when the alleged contempt occurred, the suit properties had changed hands from the plaintiff to the first defendant by public auction. This was supported by the affidavit deponed on 14th November 2023 and annexures provided by one Perry Mansukh Kansangra. The purchase and final transfer process is detailed in paragraphs 11 to 12. After the auction conducted by M/s Baseline Auctioneers on 22nd September 2023 and subsequent transfer, the first defendant became the rightful owner of the suit properties and had a right to enter and use the same.
14. According to Mr. Noorani, injunctive orders expire after one year unless extended by an application. In this case, the orders had been in effect for four years and expired one year after their issuance, and this Court's putative extension needed to be corrected and outside of its jurisdiction. Counsel cited the decision in *Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & others* [2018] eKLR, enunciating the import of the one-year lifetime of an injunction as dictated by Order 40 Rule 6 of the *Civil Procedure Rules*.
15. On striking out the suit, he states that the issue will be ownership. Since the suit properties have changed hands to the first defendant, there will be nothing to try since it is admitted there is a suit pending in the High Court Milimani Commercial Division on the issue of the public auction and the subsequent transfer of the suit properties. Mr. Noorani avers that that will be the proper forum to ventilate the issues raised herein by Mr. Oluga. He further argued that this is a clear case of forum shopping where the plaintiff strives to get the desired outcomes by filling multiple cases in forums of concurrent jurisdictions. The decision in *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR is cited by counsel on the need to check on the abuse of the Court process by filing a plethora of suits in various for judicial forums of concurrent jurisdiction and the need by this Court to discourage the same.
16. The dispute is whether the applicant has proved the elements that can lead to the respondents being cited for contempt. As correctly submitted, for this Court to cite one for contempt as held in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR:

“It is an established principle of law that^[45] 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. 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.^[46] Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*^[47] 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.



41. It is the last test in paragraph (d) above that warrants detailed consideration. Unfortunately, the applicant's counsel never addressed it at all. On the face of our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, a high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature.
42. Two principals emerge. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order if reasonable doubt exists about the essentials. In this regard, I am not satisfied that wilful disregard of the court order has been established.
43. The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.
44. Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.
45. It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt



as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established. And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one': -

'The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly, it will constitute a breach of s 12 of the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.'^[48]

46. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.^[49]
17. The orders issued on 14th December 2018 by Olola J are not in dispute. After the Court issued the same, it will seem that the suit went into a lull. The orders were never extended after a year, as the record shows. This Court extended the same ex parte on 31st October 2023, oblivious of the facts disclosed by the first respondent that the "ground" about the suit properties had significantly shifted and that the properties in contention were sold in a public auction. Now, the suit properties are registered in the first respondent's name. The issue of the sale is in active litigation before the High Court Milimani Commercial Division in Milimani Commercial Court E597 of 2023 – Suleiman Enterprises Limited & Kemu Salt Packers Production Limited v Dubai Bank Limited (in Liquidation) and 3 others, and as it stands, the first respondent is the registered owner of the same. The ownership of the suit properties, therefore, has changed hands. It significantly affects the orders issued by Olola J on 18th December 2018. As affirmed by this Court on 31st October 2023.



18. Order 40 Rule 6 of the *Civil Procedure Rules* 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.”

19. In the case of *Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & another* [2018] eKLR, the Court of Appeal stated thus:

“A plain reading of Order 40 Rule 6 shows that the rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not lapse.”

20. No application was made to extend the orders by Olola J. after a year—the orders lapsed by operation of the law. Meanwhile, the suit properties are now said to be in the hands of the first defendant. There is a suit on the said change in the High Court Milimani Commercial Division. It is active. Scanty information was provided to this Court on its progression and possible direction by the Superior Court. I have also been informed that one of the Directors sought to be cited for contempt long died. This has not been ousted. There is a death certificate provided. I have nothing to the contrary on the averment of the death of one of the Directors. To me, the extension of the orders by this Court then appears to have been devoid of jurisdiction, the bedrock of the suit properties having mutated and changed hands. Therefore, the orders issued by Olola J. and this Court cannot be extended. The first respondent’s Directors cannot be held in contempt – one has already died, and, on the other hand, there are no regular lawful orders in place, the same having lapsed by the operation of the law one year after issuance.

21. This Court and the Superior Courts have held that striking out pleadings is a draconian measure and should be the last resort. Courts should strive to sustain suits. In *Meya Agri Traders Ltd v Elgon House* [2010] Ltd (Civil Appeal 15 of 2020) [2023] KECA 574 (KLR) (26 May 2023) (Judgment), the Court of Appeal held as follows:

“The power of the trial court to strike out pleadings is enshrined under Order 2 Rule 15(1) of the *Civil Procedure Rules* which provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- B. it discloses no reasonable cause of action or defence in law; or
- C. it is scandalous, frivolous or vexatious; or
- D. it may prejudice, embarrass or delay the fair trial of the action; or
- E. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

22. This power is a discretionary power of the trial court. However, as rightly submitted by the appellants, striking out of pleadings is a draconian tool which must only be deployed by courts in the clearest of incidences. In our view, if a pleading raises a triable issue irrespective of whether it will succeed or not, the suit ought to be allowed to proceed to trial. On the contrary, where a pleading is of no substance



or ground, mere denial, fanciful and or is of some ulterior motive the court should not shy away from invoking its powers to strike out such a suit. Invoking the power to strike out pleadings must be in adherence to the well laid down principles requiring that it be exercised sparingly and in clear and obvious cases. A pleading may only be struck out if the elements contained in Order 2 Rule 15(1)(a), (b), (c) and (d) of the *Civil Procedure Rules* are in existence. To buttress our views on this issue, we refer extensively to the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another*[1980] eKLR thus:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it. On the other hand, if there is a point of law which merits a serious discussion the court should be asked to proceed under order XTV" rule 2.”

23. I have said the keystone of the suit properties has mutated over time. Whereas ownership was at the centre of the trial, with the plaintiff alleging ownership of the suit properties, the first defendant alleged license conferred by the second defendant. I will agree with Mr. Oluga then that the issue of trespass and mesne profit before the alleged change of ownership to the first defendant will remain at the epicenter of the trial as the parties battle in the Milimani Commercial Division on the aspect of the auction and ultimate change in the ownership of the suit properties.
24. These, therefore, will be the final orders of this Court:
 - a. Application dated 24th October 2023 be and is hereby dismissed.
 - b. The application dated 14th November 2023 partially succeeds to the extent that the orders issued by this Court dated 31st October 2023 are hereby vacated. The orders issued by Olola J. on 14th December 2018 lapsed by operation of the law.
 - c. The suit herein to proceed to trial on the issues of trespass and mesne profits.
 - d. Each party is to bear own costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 9TH DAY OF MAY 2024.

E. K. MAKORI



JUDGE

In the Presence of:

Ms. Machogu for the Applicant.

Court Assistant: Happy

In the absence of:

Mr. Noorani for the 1st Respondent

