



REPUBLIC OF KENYA



**Okumu v Nchoe (Environment & Land Case E014 of 2023)
[2024] KEELC 5195 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5195 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E014 OF 2023**

**CG MBOGO, J
JULY 11, 2024**

BETWEEN

MARK ADEMBA OKUMU PLAINTIFF

AND

KAEKO NCHOE DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion dated 22nd May, 2024, filed by the defendant/applicant and it is expressed to be brought under Article 159 of the Constitution, Sections 1A and 1B, 3, 3A and 63 (c) & (e), Order 40 (1) Rule 3 and Rule 4 (1), Order 40 Rule 7, Order 51 Rule 1, 3 and 13 (2) of the Civil Procedure Rules, Sections 1, 13 (7) and 19 of the Environment & Land Court Act seeking the following orders:-
 1. Spent.
 2. Spent.
 3. That this honourable court do vacate or set aside both the ex parte injunction order of 16th June, 2023 and the contempt proceedings and does fix the injunction application for hearing interpartes or alternatively the court allows the defendant to mitigate before committing the defendant to prison or otherwise penalized for contempt of court.
 4. This honourable court be pleased to review and/or set aside its ruling and the consequential orders delivered on 21st May, 2024.
 5. Costs of this application be provided for.
2. The application is premised on the grounds on its face and further in the affidavit annexed therein. The application is supported by the affidavit of the defendant/ applicant sworn on even date. The defendant/ applicant deposed that he ought to be granted audience before the court to prove that



he respects the dignity, and authority of the court unless it can be established otherwise. He further deposed that on 21st May, 2024 this court pronounced itself that he is in contempt of the injunctive orders issued on 16th June, 2023, and that the court noted that he did not file a response to the said application, which was also unopposed.

3. The defendant/applicant deposed that on 8th April, 2024, he filed a replying affidavit in response to the application for contempt which he knew it had been uploaded to the e-filing system, and that on 22nd May, 2024 his advocates were shocked to learn that the same had not been downloaded due to a technical hitch. He deposed that the failure to place the replying affidavit in the court file was not deliberate but an excusable technological hitch occasioned by the e-filing system.
4. He deposed that he has been convicted for contempt yet there was no deliberate disobedience of the court orders, and unless the order/ruling is stayed, the police could execute the arrest warrants rendering the instant application nugatory.
5. The application was opposed vide the replying affidavit of the plaintiff/ respondent sworn on 4th June, 2024. The plaintiff/ respondent deposed that this court exercising discretion granted injunctive reliefs pending the hearing and determination of the main suit, and if the defendant/ applicant was of the view that the orders should not be granted, he was free to file a rebuttal to the application but he failed to do so.
6. The plaintiff/ respondent deposed that the defendant/ applicant's claim are complete falsehoods for the reason that from 20th March, 2024 to 21st May, 2024, the defendant/ applicant never reached out to the plaintiff/ respondent to explain why they had not served their response to their application. He went on to depose that a perusal of the e-filing portal reveals that there is no replying affidavit that was filed on 8th April, 2024 which is blatantly lying on oath.
7. The plaintiff/respondent deposed that no CTS print out has been annexed to show that they filed the document on 8th April, 2024, and even served it upon him if at all it was filed. He deposed that the application has no basis and is anchored on material misrepresentation, and the affidavit in support of the same is an act of perjury. Further, it was deposed that one cannot prevent the court from passing a sentence following a contempt ruling because a substantive finding of guilt was already made by the court and any attempt to challenge the same is a reserve of an appellate process.
8. The application was canvassed by way of written submissions. The defendant/ applicant filed his written submissions dated 8th June, 2024 where he raised one issue for determination which is whether this court should vacate, review or set aside the injunction and contempt orders.
9. On this issue, the defendant/ applicant submitted that the plaintiff/respondent concealed material information in his application dated 15th June, 2023, and that the court did not have an opportunity to get a rebuttal from him on the factual dispute between the parties. Further, he submitted that if the court had an opportunity to peruse the replying affidavit sworn on 8th April, 2024, it would not have cited the contemnor for contempt.
10. The defendant/ applicant while relying on the cases of *Hadkinson v Hadkinson* (1952) 2 ALL ER 567 at page 575 and *Patrice Thlopane Mosepe v Francis Gaitbo* Civil Case E0196 of 2021 submitted that no willful disregard of the court order has been established, and that is a fact he wants to demonstrate given a chance. That in his application, the contemnor wants a chance to demonstrate there was no deliberate disobedience of the court order, and that he respects the judicial authority of this court and he should not be condemned unheard.



11. He further submitted that he prays for an opportunity to demonstrate he did not deliberately disobey the court orders. He further submitted that his replying affidavit sworn on 8th April, 2024 was inadvertently not placed in the court file. He relied on the cases of *Sam Nyamweya & 3 Others v Kenya Premier League Limited & 2 Others* [2015] eKLR, *Philip Chemwolo & Another v Augustine Kubende* (1986) eKLR and *De Lange v Smuts* [1998] ZACC 6; 1998 (3) SA 785 (CC) para 147.
12. The plaintiff/ respondent did not file his written submissions. Be that as it may, I have considered the application, the replying affidavit of the defendant/ applicant as well as his written submissions. In my view, the issue for determination is whether the defendant/ applicant is entitled to the orders sought.
13. Section 80 of the *Civil Procedure Act* provides: -
 - “any person who considers himself aggrieved:-
 - a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to court which passed the decree or made the order and the court may make such order thereto.”
14. Order 45 (1) of the *Civil Procedure Rules* states as follows: -
 - “Any person considering himself aggrieved: -
 - a) By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b) By a decree or order from which no appeal is allowed by this Act, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”
15. From the above provisions of the law, it is quite clear that the decision to set aside, review or vacate the orders of the court are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and unreasonably. As I have understood the defendant/ applicant, he contends that if the court had a look at the replying affidavit said to have been sworn on 8th April, 2024, it would not have found him in contempt.
16. It will be noted that vide the ruling of this court delivered on 21st May, 2024, this court found the defendant/ applicant in contempt and he was required to be arraigned in court on 5th June, 2024, to show cause why he should not be committed to prison or otherwise penalized for contempt of court. He argued that he filed his replying affidavit to the contempt application through the e-filing portal but due to a technical hitch, the same was inadvertently not placed in the court file.
17. Even as the court is called to exercise its discretion in such an instance, I am mindful of the duty of this court which is to uphold substantive justice. The reasons advanced by the defendant/ applicant are not persuasive to enable this court consider otherwise. I do agree with the plaintiff/ respondent that the



defendant/ applicant had almost two months from the date of the issuance of the directions to comply. If at all the defendant/ respondent filed the said replying affidavit, I am certain that an invoice would have been issued to him prompting the payment of the same. Having not received any invoice, it was not possible to assume that the replying affidavit was properly filed if at all there was any.

18. Whereas I see no merit in the application, I would reiterate the duty of the court as it was observed in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR,

“34. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors. The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

19. Having said, the above, it is my finding that the Notice of Motion dated 22nd May, 2024 lacks merit and it is hereby dismissed with costs to the plaintiff/ respondent. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL this 11TH day of JULY, 2024.

HON. MBOGO C.G.

JUDGE

11/07/2024.

In the presence of: -

Mr. Meyoki Pere – C. A

