Patel & 2 others v Kenya Railways Corporation & another (Environment and Land Case Civil Suit 21 of 2023) [2024] KEELC 5155 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5155 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND CASE CIVIL SUIT 21 OF 2023

SO OKONG'O, J

JULY 11, 2024

(FORMERLY HCCC NO. 247 OF 1996)

BETWEEN

GIRISH KESHAVLAL PATEL .... 1ST PLAINTIFF

BABULAL DURLABHJI KOTAK .... 2ND PLAINTIFF

ARVIND CHAGANLAL PATEL T/A TRIO DEVELOPERS .... 3RD PLAINTIFF

AND

KENYA RAILWAYS CORPORATION .... 1ST DEFENDANT

MIDLAND EMPORIUM .... 2ND DEFENDANT

RULING

Background

1. The Plaintiffs brought this suit against the defendants in the High Court on 28th August 1996. The Plaintiffs averred that they were the registered proprietors of all those parcels of land known as Kisumu Municipality/Block 3/167, 168, 169,170, 171, 172, 173, 174, 175 and 176 (hereinafter referred to as “the suit properties”). The Plaintiffs averred that they were allocated the suit properties on or about 1995. The Plaintiffs averred that at the time the suit properties were allocated to them, the 2nd Defendant was in possession thereof having been granted a temporary occupation licence to occupy the same by the 1st Defendant who had earlier claimed ownership of the property. The Plaintiffs averred that upon being allocated the suit properties by the Government of Kenya and issued with titles in respect thereof, any interests that the 1st and 2nd Defendants had in the suit properties became extinguished. The Plaintiffs averred that the 2nd Defendant which was in actual possession of the suit properties had refused and/or ignored to vacate the same. The Plaintiffs averred that the 1st Defendant had also registered cautions against the titles of the suit properties without any right or lawful cause.

The Plaintiffs sought judgment against the Defendants jointly and severally for; an order for the removal of the cautions registered against the titles of the suit properties, an order for the eviction of the Defendants from the suit properties, General damages for trespass, and the costs of the suit.

2. The Defendants were served with Summons to enter appearance. The 2nd Defendant entered appearance but failed to file a defence within the prescribed period as a result of which interlocutory judgment in default of defence was entered against it. The 2nd Defendant's application to set aside the said interlocutory judgment was dismissed on 14th October 1996. On its part, the 1st Defendant failed to enter appearance and like the 2nd Defendant, interlocutory judgment was entered against it. The 1st Defendant's application seeking to set aside the interlocutory judgment was dismissed by the court on 28th October 1996.

3. The court subsequently heard the matter as formal proof and entered judgment for the Plaintiffs against the Defendants on 25th February 1997. In the judgment, the court entered judgment against the 2nd Defendant in the sum of Kshs. 600,000/- being general damages and ordered the Land Registrar to remove the cautions that were registered against the titles of the suit properties in favour of the 1st Defendant. At the time of the judgment, the 2nd Defendant had vacated the suit properties pursuant to the consent order made on 25th November 1996. Because of this development, the court appears not to have made an order for possession or eviction in the judgment.

The application before the court

4. What is now before the court is the Plaintiffs' application brought by way of a Notice of Motion dated 31st October 2023 under Section 3A of the Civil Procedure Rules seeking the following principal orders;

    1. That Patel Jayshree Girishkumar Keshavlal be substituted as the 1st Plaintiff in place of Girish Keshavlal Patel, deceased.

    2. That the court does find that the 1st Defendant is in contempt of the judgment of the court ordering the eviction of the Defendants from the suit properties and determine the appropriate punishment for the management of the 1st Defendant generally and its Chief Executive Officer, Mr. Philip Mainga in particular.

    3. That the court be pleased to make orders to protect the dignity and integrity of the court and ensure respect for the court orders by requiring the 1st Defendant to restrain from committing acts of contempt of court and in particular to restore possession of the suit properties to the Plaintiffs.

    4. That the 1st Defendant be required to account for the rent collected from the suit properties and the said amount be paid to the Plaintiffs as compensation within such duration as the court deems fit.

    5. That all future rents from the suit properties be paid to the Plaintiffs and the tenants put in possession by the 1st Defendant who are not willing to pay rent to the Plaintiff to deliver possession to the Plaintiffs within such duration as may be determined by the court.

    6. That the court makes such orders as are necessary to compensate the plaintiffs for the loss of user since October 2023 and if need be an inquiry into the extent of the losses suffered by the Plaintiffs be made.

    7. That any suitable orders be made.

8. That the costs of the application be borne by the 1st Defendant.

5. The application that was supported by the affidavit sworn by Patel Jayshree Girishkumar Keshavlal sworn on 30th October 2023 was brought on several grounds. The Plaintiffs averred that the 1st Plaintiff was deceased and Patel Jayshree Girishkumar Keshavlal sought to be substituted as the 1st Plaintiff was the administrator of his estate. The Plaintiffs averred that the court file for the suit herein got lost and the 1st Defendant took advantage of the said loss to commit the acts of contempt complained of. The Plaintiffs averred that the 1st Defendant forcefully dispossessed the Plaintiffs of the suit properties and unlawfully put tenants thereon. The Plaintiffs averred that the 1st Defendant had since been collecting rent from the said tenants on the suit property. The Plaintiffs averred that they had suffered substantial loses as a result of the contemptuous acts of the 1st Defendant complained of.

6. The Plaintiffs averred that Patel Jayshree Girishkumar Keshavlal was the widow and the administrator of the estate of the deceased, 1st Plaintiff. The Plaintiffs averred that the suit property was registered in the name of the deceased and the 2nd and 3rd Plaintiffs and that the deceased died in May 2019. The Plaintiffs averred that on 25th February 1997, the court gave judgment in favour of the Plaintiffs for vacant possession and a decree was issued in that regard. The Plaintiffs averred that the 2nd Defendant which was in physical possession of the suit properties vacated the suit properties and handed over possession to the Plaintiffs. The Plaintiffs averred that after taking possession of the premises, the Plaintiffs developed the same by constructing ten (go downs thereon). The Plaintiffs averred that the Plaintiffs enjoyed possession of the premises until October 2019 when the 1st Defendant forcefully took possession of the suit properties. The Plaintiffs averred that upon taking possession of the suit properties, the 1st Defendant rented the same out to third parties.

7. The 1st Defendant opposed the Plaintiffs' application through a Notice of Preliminary Objection dated 4th December 2023 and a replying affidavit sworn by Stanley Gitari on 23rd April 2024. In its Notice of Preliminary Objection, the 1st Defendant contented that the Plaintiffs' advocate lacked capacity to institute the application before the court on behalf of the Plaintiffs and that the application was statutorily time barred by virtue of Sections 4(4), 7 and 17 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The 1st Defendant averred further that the application was incompetent and was filed contrary to the provisions of Order 22 Rule 18 of the Civil Procedure Rules.

8. In its replying affidavit, the 1st Defendant averred that it had not disobeyed any court order. The 1st Defendant denied further that it forcibly took possession of the suit properties from the Plaintiffs. The 1st Defendant averred that the administrator of the estate of the 1st Plaintiff had not demonstrated that she had authority from the 2nd and 3rd Plaintiffs to bring the present application. The 1st Defendant denied unlawfully renting out the suit properties to third parties after forcibly taking possession of the same. The 1st Defendant averred that the Plaintiffs who did not even know the identities of the alleged tenants did not prove the alleged renting out of the suit properties to the said tenants. The 1st Defendant averred that the Plaintiffs did not establish the acts of contempt alleged against the 1st Defendant. The 1st Defendant averred that the Plaintiffs' application was misconceived and amounted to an abuse of the court process.

9. The Plaintiffs' application and the 1st Defendant's preliminary objection were heard together by written submissions. The Plaintiffs filed submissions dated 8th April 2024 while the 1st Defendant filed submissions dated 27th May 2024. I have considered the Plaintiffs' application together with the supporting affidavit. I have also considered the 1st Defendant's Notice of Preliminary Objection and replying affidavit filed in opposition to the application. Finally, I have considered the written submissions by the advocates for the parties and the authorities cited in support thereof. I will consider

the 1st Defendant's preliminary objection to the application before considering the application on merit if necessary.

10. The 1st Defendant's first objection was based on Order 9 Rule 9 of the Civil Procedure Rules which provides that after judgment has been entered in a matter in which a party is represented by an advocate, such a party cannot file a notice to act in person or change advocates without leave of the court. The 1st Defendant contended that the advocates currently on record for the Plaintiffs having come on record after judgment should have either obtained leave of the court before coming on record or obtained consent from the firm of Kahi & Company Advocates.

11. It is common ground that the firm of advocates currently representing the Plaintiffs, Charles BG Ouma & Co. Advocates filed a Notice of Change of Advocates in this matter on 26th October 2023 without leave of the court or consent from the firm of Kahi & Company Advocates. The Plaintiffs stated in their affidavit in support of the application that Amusavi Kahi Advocate who acted for them before their current advocates died. I am satisfied from the material before me that the Plaintiffs have proved on a balance of probability that Amusavi Kahi advocate who acted for the Plaintiffs in this matter when judgment was entered herein on 25th February 1997 had died by 2018. The letterhead of the firm of Kahi & Company Advocates on the court record bears only the name of Amusavi Kahi David. There is no indication that he had a partner or an associate. I agree with the 1st Defendant that Order 9 Rule 9 of the Civil Procedure Rules was intended to protect advocates and that even a deceased advocate is entitled to that protection. However, in this case, judgment was entered on 25th February 1997; 26 years before the filing of the present application. There is also evidence that Amusavi Kahi David advocate had died by 2018. I am of the view that if any fees remained due and payable to Amusavi Kahi David advocate, his estate or he must have recovered the same from the Plaintiffs. In the case before me, the Plaintiffs would not have been able to serve the firm of Kahi & Company Advocates even if they had sought leave of the court to change advocates. Their advocates on record also could not have obtained consent from the said firm. I am of the view that in a situation like the one before me where proceedings are being undertaken over 20 years after judgment and there is evidence that the advocate previously acting for a party is deceased and his law firm has ceased to exist, it would be onerous to insist that leave ought to be obtained before such a party can change advocates or act in person. I am of the view that it is sufficient if the party seeking to change advocates furnishes proof that the firm or the advocate previously acting for him/her has ceased to exist. I will therefore overrule the objection by the 1st Defendant based on Order 9 Rule 9 of the Civil Procedure Rules.

12. The 1st Defendant's next objection was based on the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The 1st Defendant contended that the Plaintiffs' application was an attempt to execute a judgment of the court that was delivered more than 25 years ago contrary to the provisions of Section 4(4) of the *Limitation of Actions Act* which limits any action on a judgment to 12 years from the date of the judgment. In response to this objection, the Plaintiffs contended that they were not seeking to execute the judgment that was entered in their favour but were only before the court to stop acts that came about after the said judgment.

13. I do not agree with the Plaintiffs that they are not seeking to enforce the judgment of the court. In my view, the Plaintiffs are using contempt of court proceedings to enforce the eviction order that was made in their favour on 21st June 1996. I am of the view that the rationale behind Section 4(4) of the *Limitation of Actions Act* is that litigation must come to an end. I am of the view that as far as the dispute between the parties herein is concerned, it came to an end with the judgment that was entered in favour of the Plaintiffs on 25th February 1997 which judgment the Plaintiffs had 12 years to execute. After the expiry of the 12 years, no action could be taken on the judgment. In my view what is before the court is an application for execution veiled as an application for contempt of court. If an order for

possession was made against the 1st Defendant and the 1st Defendant has not or did not comply with the order, the remedy provided for in the Civil Procedure Rules is an application for execution against the 1st Defendant. The Plaintiffs have not followed that route because they are aware that the law does not allow them to apply for execution of such an order after the expiry of 12 years. For the foregoing reasons, I uphold the 1st Defendant's objection to the application on the ground that the application offends Section 4(4) of the *Limitation of Actions Act*.

14. The last objection by the 1st Defendant was based on Order 22 Rule 18 of the Civil Procedure Rules. As I have already mentioned, the Plaintiffs should have filed an application for execution if there was a disobedience of the order for possession and sought warrants of eviction. If they had done that, they would have been required to comply with the provisions of Order 22 Rule 18 of the Civil Procedure Rules. Now that the Plaintiffs decided to hide behind the contempt of court proceedings to beat the objections based on Section 4(4) of the Limitation of Actions, they were not required to comply with Order 22 Rule 18 of the Civil Procedure Rules.

15. My finding on the 1st Defendant's preliminary objection would have been sufficient to dispose of the Plaintiffs' application. I will however consider the merit of the application in case I am wrong on the issue of whether the application is time barred. On the merit of the application, what I need to determine are; whether the 1st Defendant breached the order made by this court on 21st November 1996 by which the Plaintiffs were given vacant possession of the suit properties, and whether the Plaintiffs are entitled to the reliefs sought in the application. The relevant part of the order said to have been disobeyed provided as follows:

> "(b) The Plaintiffs be and are hereby given vacant possession of all those parcels of land in Kisumu Municipality known as Kisumu Municipality/ Block 3/ 167, 3/168, 3/169, 3/170, 3/171, 3/172, 3/173, 3/174, 3/175 and 3/176."

16. This order was made in court in the presence of the advocates for all the parties when the Defendants' separate applications for stay of proceedings came up for hearing before the judge. The applications were dismissed summarily and an order for vacant possession made.

17. In Hardkinson v. Hardkinson [1952] ALL ER 567, the court stated that:

> "It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt."

18. In Mutitika v. Baharini Farm Ltd. [1985] KLR 227 it was held that:

    i. "A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.

    ii. The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.

    iii. The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor."

19. In Micheal Sistu Mwaura Kamau v. Director of Public Prosecutions & 4 others (2018) eKLR the Court of Appeal set out the law on contempt as follows:

> "It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the *Contempt of Court Act* and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another (supra). Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutitika v. Baharini Farm (supra) and Republic v. Ahmad Abolfathi Mohammed & Another (supra)."

20. In Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR, the court stated as follows:

> "We now revisit the issue of service. Was there service of the order said to have been disobeyed on the respondent? There is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect. In that respect, this case can be distinguished from Justus Kariuki Mate & Another vs Hon. Martin Wambora (Wambora case) supra cited by learned counsel for the applicant. On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra). Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of Basil Criticos Vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows:-
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> > "…the law has changed and as it stands today knowledge supersedes personal service.….where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary"

21. This position has been affirmed by this Court in several other cases including the Wambora case (supra). It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty.

> …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."

22. It is on the foregoing principles that the Plaintiffs' contempt of court application falls for consideration. The Plaintiffs have contended that the 1st Defendant breached the said order in October 2019 by forcibly taking possession of the suit properties, renting them out to third parties and collecting rent. I am not satisfied that the Plaintiffs have proved the charge of contempt of court levelled against the 1st Defendant for various. It is common ground that the 1st Defendant was not in actual possession of the suit properties when this suit was brought and the said order of possession made. The physical possession of the suit properties was with the 2nd Defendant. Soon after the order of possession was made on 21st November 1996, the Plaintiffs entered into a consent with the 2nd Defendant by which the 2nd Defendant was allowed to vacate the suit properties by 28th November 1996. There is an order on record made pursuant to a consent between the Plaintiffs and the 2nd Defendant dated 13th November 1997 through which the Plaintiffs' claim against the 2nd Defendant was marked as settled. Since the 1st Defendant was not in possession of the suit properties, it could not have given the Plaintiffs possession of the same. It could not therefore have complied with the said order. In other words, there was nothing the 1st Defendant was required to do or abstain from doing by that order. The order as amended by the consent of the Plaintiffs and the 2nd Defendant was directed at the 2nd Defendant. I am unable to see therefore how the 1st Defendant's alleged forcible takeover of the suit properties 23 years later in 2019 could be said to be in contempt of the said court order.

23. I also agree with the 1st Defendant that the Plaintiffs had the burden of proving the alleged forcible takeover of the suit properties by the 1st Defendant and letting them out to third parties. As correctly submitted by the 1st Defendant, the standard of proof of contempt is higher than proof on a balance of probabilities. The Plaintiffs claimed that the 1st Defendant forcibly took possession of the suit properties from the Plaintiffs in October 2019. The Plaintiffs claimed to have constructed 10 godowns on the suit properties. It is these godowns that the 1st Defendant is said to have forcibly taken possession of. The Plaintiffs placed before the court no evidence of the alleged takeover. The Plaintiffs claimed that the 1st Defendant rented out the said godowns to third parties. The Plaintiffs admitted however that although the alleged takeover took place in 2019, by the time they were coming to court in October 2023, 4 years later, the Plaintiffs did not know any of the alleged tenants. There is no evidence of any letter written by the Plaintiffs to the 1st Defendant about the alleged forcible takeover. There is also no evidence that any report was made to the Police about the illegal action. I am therefore not satisfied that the Plaintiffs have proved that the 1st Defendant breached the order made herein on 21st November 1996.

24. Having held that the Plaintiffs have not proved a breach of the order made on 21st November 1996 and that the Plaintiffs' application offends the provisions of Section 4(4) of the Limitation Actions Act, the Plaintiffs are not entitled to any of the orders sought in their application before the court including that seeking the substitution of Patel Jayshree Girishkumar Keshavlal as the 1st Plaintiff in place of Girish Keshavlal Patel, deceased. Order 24 Rule 3 of the Civil Procedure Rules provides as follows:

    (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

25. In my view, Order 24 Rule 3 of the Civil Procedure Rules comes into play only where there is an existing suit. In this case, the suit was heard and determined with finality over 25 years ago. No purpose in my view would be served by substituting the deceased 1st Plaintiff with Patel Jayshree Girishkumar Keshavlal.

Conclusion

26. For the foregoing reasons, I find no merit in the Plaintiffs' Notice of Motion application dated 31st October 2023. The same is dismissed with costs to the 1st Defendant.

DELIVERED AND SIGNED AT KISUMU ON THIS 11TH DAY OF JULY 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Owalla h/b for Mr. Ouma for the Plaintiffs

Ms. Odhiambo for the 1st Defendant

Mr. Mukoya for the 2nd Defendant

Ms. J. Omondi-Court Assistant