



Tapoyo v Tapoyo & another (Environment & Land Case 36 (E032) of 2021) [2024] KEELC 5085 (KLR) (5 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5085 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 36 (E032) OF 2021**

FO NYAGAKA, J

JULY 5, 2024

BETWEEN

JAMES MUSA TAPOYO PLAINTIFF

AND

SAMSON TAPOYO 1ST DEFENDANT

FREDRICK PKEMOI ANDIEMA 2ND DEFENDANT

RULING

1. The Plaintiff filed herein an Application dated 05/04/2024. He did so on 15/04/2022. He sought the prayers that this honorable court be pleased to commit the second defendant to civil jail pending the hearing and determination of the suit. Further, that the Officer Commanding Station (OCS), Kapenguria Police Station be directed to enforce the order of 15/01/2022 by arresting the 2nd Defendant/Respondent and producing him in court with immediate effect. He relied on several grounds. The main one was that the 2nd Defendant had again defied the court's order, having defied it twice before and been convicted of contempt of court. He was hell bent on stalling the hearing and determination of this suit.
2. The order issued on 15/01/2022 was one of a temporary injunction against the Defendants. It prohibited them from trespassing onto, leasing, transferring, selling, occupying, cultivating, varying animals on and all in any other way dealing with land parcel number, L.R. West Pokot/Keringet 'A'/3943 pending the hearing and determination of this suit. Further, the 2nd Defendant had been found guilty of contempt of court twice and fined in default of which payment he would serve an imprisonment for the respective terms.
3. When the application came before the court for consideration under Certificate of Urgency this court issued directions, one of which was that the second respondent was to cease forthwith any activities on the suit land, including setting his foot there on contrary to the earlier orders of this court and in



- default, the OCS Kapenguria Police Station would arrest and bring him to court within for further orders.
4. The record shows when the Application came for inter partes hearing on the 13/05/2024 learned counsel for the Respondent indicated to the court that he no longer had instructions and would be applying to cease acting for the 2nd Respondent. On his part, learned counsel for the Applicant indicated that the OCS Kapenguria Police Station had not arrested the Respondent even though he continued to plough and cultivate the suit land. This caused learned counsel to pray for summons to issue to the OCS Kapenguria to attend court and show cause why he was not effecting the arrest. The OCS attended court on 12/06/2024 and indicated that prior to the summons, he was not aware that he was supposed to effect the arrest: he only knew of a criminal case in Kapenguria Law Courts and not this one. Further, he was willing to arrest the alleged contemnor.
 5. He agreed to do so in two days. By 14/05/2024, the said Respondent had not been arrested. The Court fixed the matter for mention on the 02/07/2024. The court issued yet another notice to show cause to the OCS Kapenguria to explain the delay. It directed that the matter be mentioned on the 23/07/2024. However, on 04/07/2024 the Police in Kapenguria arrested the alleged contemnor and brought him to Court. It was the presentation of the said Respondent under arrest that prompted the application before me.
 6. With the history of the matter having been lain down, I now proceed to determine the Application. The instant application is an oral one and is interlocutory in nature. It precedes the written one dated 05/04/2024 which has not been fixed for hearing, to date. It could not be fixed for hearing due to the reason that learned counsel who then appeared for the Respondent moved the court, as stated above, before that application could be heard that he be permitted to cease acting for the Respondent since he did not have instructions. This Court permitted him to do so and then followed the instances when attempts to arrest the Respondent were made. In essence the arrest and presentation of the contemnor is an indirect facilitation of him to have an opportunity to oppose the Application dated 05/04/2024: it is for his own good since the application could have proceeded ex parte if it could have been fixed for hearing and an Affidavit of Service confirming service upon him filed, and for one reason or other he failed to attend, perhaps for fearing arrest or attempting to evade Court.
 7. In the instant oral application, on his part, the Applicant prayed for committal of the Respondent to jail for a period of six (6) months on the allegations that he had disobeyed the orders of this Court. However, the Respondent prayed that he be not committed to jail and given opportunity to harvest the crop he planted on the suit land. The Applicant's arguments were that the Respondent was a serial contemnor. Learned counsel for the Applicant articulated the instances the Respondent had allegedly disobeyed the Court orders. He zeroed in on the two occasions this court had found their contemnor guilty of contempt of Court and sentenced him accordingly, which sentences he served. He went on further that the prayer he made was about the enforcement of the directions of this Court issued on 15/04/2024 stopping the Respondent from entering the suit land and using it after the filing and urging of the application dated 05/04/2024.
 8. On his part, the Respondent outlined the history of his previous arrests and convictions on contempt of Court over the matter admitted on oath that, indeed, he had moved on to the disputed parcel of land and cultivated one acre thereof and planted beans thereon, and they were about to be ready for harvest. He stated he did so because he had not received proper advice from learned counsel whom he accused of having been dishonest to the extent that she had since been arrested by the Director of Criminal Investigation (DCI) and her matter was pending processing. Further, he had since realized that it was a mistake for him to have moved onto the land and planted. Again, he wished that he be



- permitted to harvest the beans and after that he does not ever set foot on the disputed parcel of land until the suit is heard and determined.
9. Upon being cross-examined on his statements he stated that he had committed an error; he had been arrested twice before and been found guilty. He undertook not to set foot on the land until the matter was determined. He also offered to let the beans be harvested, under the supervision of the police or authorities and the proceeds be deposited in Court pending the hearing and determination of the suit, and at the end of this suit they be handed over to whoever Court would declare the owner of the suit land. Therefore, he offered to purge the contempt in that manner.
 10. I have considered the Application and the law. Two issues lie before me for determination. The first one is whether this Court should commit the Respondent to jail. The second one is whether to order the release of the Respondent from custody and if so, on what terms.
 11. The legal basis of contempt of court proceedings is found in Section 5 (1) of the *Judicature Act*, and for this Court, Section 29 of the *Environment and Land Court Act*. The provisions grant this court, as a superior one, the discretionary power to punish for acts of alleged disobedience if proven. contempt of court.
 12. Brian A. Garner in Black's Law Dictionary (Eleventh Edition) Thompson Reuters, 2019 defines contempt of court as:-

“Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”
 13. In the case of *Hadkinson -v- Hadkinson* (1952) 2 All ER. 567, it was held that:

“It is plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.” (Also see the case of *Katsuri Limited Vs Paurchand Depar Shah* (2016) eKLR).
 14. It is well settled that every court order ought to be obeyed by the person to whom it is directed, and he should do so regardless of whether it was irregular. Until and unless he challenges it and it is set aside, it has to be obeyed. When it is not obeyed then the process of proceedings for punishment for contempt thereof set in.
 15. Under Section 29 of the *Environment and Land Court Act* it is stipulated:

“....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.”
 16. The Court in *Worburn Estate Limited v Margaret Bashford* [2016] eKLR formulated the guiding principles for contempt proceedings. It stated thus:

“This Court in two recent successive decisions in *Christine Wangari Wachege* (supra) and *Shimmers Plaza Limited* (supra) explained in extenso the procedure in commencing and prosecuting an application for contempt of court under the English Civil Procedure Rules,



1999. Part 81.9(1) of those rules, in particular, a judgment or an order to do or not to do an act may not be enforced unless the copy of the judgment or order was previously displayed and served; that the person required to do or not to do the act in question is warned that disobedience of the judgment or order would be a contempt of court, punishable by imprisonment, a fine or sequestration of assets, but the court can dispense with service. Otherwise a judgment or order may not be enforced unless a copy of it has been served on the person required to do or not to do the act in question. Under Rule 81.6, and as a general rule, service of the judgment or order must be personal on the contemnor unless the court dispenses with that requirement. Exceptions to that rule are found in Rule 81.8 to the effect that personal service will be dispensed with if the court is satisfied that the contemnor was present when the judgment or order was given or made, if the contemnor was notified of its terms by telephone, email or otherwise or if the court thinks it is just to dispense with service. There has been little change in this requirement since the decision of this Court in *Ochino & Another v Okombo & others* [1989] KLR 165. The court may also make an order in respect of service by alternative method or at an alternative place....

We reiterate that contempt proceedings being of quasi -criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed.”

17. It should not be lost sight of the fact that the process and punishment for contempt of court is to preserve the dignity of court. The Court of Appeal in the case of *Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990* indeed held thus:

“...It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors...”

18. The meaning and purpose of punishment for contempt of Court having been made clear, the question that remains unanswered is whether the instant application is merited. For one to be punished for contempt of Court he ought to have been found guilty of the disobedience complained of. In the instant application, the Applicant was only brought before me under a warrant of arrest following my directions that he be arrested if he continued to enter the disputed parcel of land. As is the position, the Applicant’s application dated 05/04/2024 has not been heard. Furthermore, the Respondent has stated on oath that he entered the suit land following improper legal advice. That is a fact that ought to be canvassed at the hearing of the Application dated 05/04/2024, which is pending.
19. For the above reasons, I find that the prayer for committal to jail is premature and improper. I disregard it.
20. The next issue then becomes plain and simple: whether this court should order the release of the Respondent from custody and upon what terms.
21. The Respondent prayed that he be released from custody. He offered to purge the ongoing contempt by letting the beans he planted on the disputed parcel of land to be harvested and sold and the proceeds be deposited in Court. This Court notes that the offer to purge the contempt comes at a time when the Court is set to fix the application dated 05/04/2024 for hearing since the Respondent is now within the reach of the Court.
22. I have considered the issue. I am of the view that in the interest of justice and fairness, and in order to give the Respondent a chance to be heard on the pending Application, and in the interest of quickening



the process towards the hearing of both the Application and the hearing, the Respondent is directed to be released pending the hearing and determination of the application dated 05/04/2024 on the following terms:

- a. The 2nd Respondent, Fredrick Pkemoi Andiema, be and is hereby released on a bond of Kshs. 500, 000/= with a suitable surety of a similar sum.
- b. The 2nd Respondent is directed to keep peace, and he (except as expressly directed in (d) below), his family, relatives, agents, successors and assigns are ordered never to set foot on the disputed portion of land, whether in daylight or at night or indeed on any other part of the day being dawn or dusk, and should observe and obey the orders issued on 25/01/2022 until the suit is heard and determined.
- c. The beans growing on the disputed parcel of land are to be valued, at the expense of the 2nd Respondent, immediately but not later Friday 12/07/2024 by an agricultural officer.
- d. The valuation of the beans be done in the presence of only the Applicant or his duly appointed representative, the 2nd Respondent or his duly appointed representative, the Area Chief and Assistant Chief, and the village elder of the areas where the suit land is situate.
- e. The beans shall be let to grow to harvest time under the constant watch of the Area Chief, Assistant-Chief and Village elder.
- f. At the harvest time the crop shall be harvested, in the presence of the persons stated in paragraph (d) above, and the same shall be sold under the supervision of the Area Chief and/or Assistant chief and the proceeds be deposited in this Court.
- g. The proceeds deposited in Court shall be held as such until the determination of this suit, whereupon the party who shall be found to be the owner of the disputed portion shall be given or paid the same, immediately after judgment.
- h. In order to give the 2nd Respondent a change to be heard on the Application dated 05/04/2024 he is directed to file a Replying Affidavit thereto and serve the Applicant within seven (7) days of this order.
- i. The Applicant shall have 14 days to submit and serve the 2nd Respondent, and the 2nd Respondent shall have 14 days to submit and serve, after being served.
- j. The fulfillment, in good faith, of all the above conditions by the Respondent shall be one of the mitigating factors should the 2nd Respondent be found guilty of contempt of Court at the determination of the Application dated 05/04/2024. To be clear, should any of his family members interfere with the crop and proceeds or set foot on the disputed land, the bond shall be cancelled and the 2nd Respondent be arrested and prosecuted for his opposition to the Application from custody.
- k. To avoid deliberate destruction or devaluation of the crop growing on the disputed parcel of land, the Applicant and his family, agents and or assigns too shall not interfere with the growth and harvest of the crop on the disputed land, and shall not carry out any activity thereon except as outlined in paragraph (d) above, and shall only freely access and set foot on the disputed parcel of land after the harvest of the crop, in default his conduct shall be taken into account in the determination of the Application dated 05/04/2024.
- l. The Application dated 05/04/2024 shall be heard on 19/09/2024.



23. Consequently, I have not granted the prayer of the Applicant for this Court commit to prison the 2nd Respondent. Similarly, I have not granted the initial prayer of the 2nd Respondent to harvest the beans for his own benefit.

24. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 5TH DAY OF JULY, 2024

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

