



REPUBLIC OF KENYA



**Mbogo & another v Society & 6 others (Environment & Land Case E068 of 2022) [2023] KEELC 16134 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16134 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E068 OF 2022**

**JA MOGENI, J**

**MARCH 8, 2023**

**BETWEEN**

**RAPHAEL MBUGUA MBOGO ..... 1<sup>ST</sup> PLAINTIFF**

**ESTHER NYAGUTHII NDIRANGU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ZIMMAN SETTLEMENT SCHEME SOCIETY ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS KIRIMA ..... 2<sup>ND</sup> DEFENDANT**

**MARGARET NJERI WANYOIKE ..... 3<sup>RD</sup> DEFENDANT**

**CHARLES MWANGI NGUMI ..... 4<sup>TH</sup> DEFENDANT**

**CHARLES NYAMWENGE ..... 5<sup>TH</sup> DEFENDANT**

**PETER NDUNGU MUTHIKA ..... 6<sup>TH</sup> DEFENDANT**

**BERNARD MUNYUIRA ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated December 1, 2022, the Plaintiff brought this application pursuant to Order 40 Rule 3(1) of the *Civil Procedure Rules*, Section 3A and 63(c) of the *Civil Procedure Act* seeking the following orders:
  1. An order of committal to be made against the 7<sup>th</sup> Defendant to prison for such period and time as this Honourable Court may deem fit and just in that the said 7<sup>th</sup> Defendant has disobeyed the Orders made herein on March 3, 2022 and September 29, 2022, inter alia, :-



- i. Order Compelling the 7<sup>th</sup> defendant to remove and or demolish the structures constructed by him on the parcel of land known ground no 151 of the Zimman Settlement Scheme Society at Zimmermann Estate, Kasarani within Nairobi County along Thika Super highway, Nairobi and the Plaintiff/Applicant be compensated for the losses he has suffered as a result of the disobedience of the orders of this court by the contemnors.
  - ii. Ordering the Respondent to comply with the said Order within thirty (30) days from the date of the Ruling.
  - iii. Ordering the Respondent to pay the costs of the said Application.
2. The application is premised on the grounds stated on the face of the application, the unsigned Supporting Affidavit of Raphael Mbugua Mbogo the 1<sup>st</sup> Applicant herein sworn on the December 2, 2022 and the supplementary Affidavit of Raphael Mbugua Mbogo sworn on the January 19, 2023.
3. The application is opposed. There is a Replying Affidavit sworn by Bernard Munyuiru, the 7<sup>th</sup> Defendant herein, on December 15, 2022.
4. On December 5, 2022, the Court gave directions on filing of written submissions and a Ruling reserved. Both the Plaintiff and the 7<sup>th</sup> Defendant filed their written submissions which I have considered. The Plaintiff/Applicant filed his submissions dated January 24, 2023 on the even date and the 7<sup>th</sup> Defendant/Respondent filed his submissions dated January 10, 2023 of January 17, 2023.

#### **The Plaintiff/Applicant's contention**

5. The long and short of it is that on March 3, 2022, this Honourable Court granted an Order in the virtual presence of counsel for plaintiffs/applicants and absence of defendants and later on September 29, 2022, this Honourable Court granted an Order in the virtual presence of the counsel for the Plaintiffs/applicants, 3<sup>rd</sup> to 7<sup>th</sup> Defendants and non-appearance of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
6. It is their contention that on February 6, 2022, his wife, the 2<sup>nd</sup> defendant and himself visited the suit properties only to realize that plot no 151 was under construction and upon inquires they were informed that the 7<sup>th</sup> defendant herein was the one erecting the construction in Plot no 151. That he accordingly moved to court immediately to protect his ownership interest on the said property. That this Court issued a temporary order on March 3, 2022 and on September 29, 2022.
7. The Order given on March 3, 2022 provided, inter alia that a temporary injunction is hereby issued restraining the 7<sup>th</sup> defendant/ respondent whether by himself, his legal representatives, agents and or servants howsoever from trespassing, wasting, constructing on, further construction, or otherwise interfering or dealing or in any manner interfering with the parcel of land ground no 151 of the Zimman Settlement Scheme Society at Zimmerman Estate, Kasarani within Nairobi County along Thika Super Highway pending the hearing and determination of this application.
8. It is the Plaintiffs/Applicants' contention that the 7<sup>th</sup> Defendant /Respondent has blatantly flouted and continues to flout and disobey the Order of this Honourable Court granted on November 29, 2022 by continued trespass and constructions of the permanent structure on the suit property at night.
9. He deponed that the 7<sup>th</sup> Defendant/Respondent's continued construction on the suit property at night is blatant contempt of the court order issued by this Court on March 3, 2022 and issued on



- September 29, 2022 (hereinafter referred to as the 'court order') amount to contempt of court and ought to be punished accordingly.
10. The Plaintiffs/Applicants contends that the 7<sup>th</sup> Defendant and all other defendants were duly served with the said court order of March 3, 2022 and that upon hearing of the Application this court on September 29, 2022 ordered that the parties to maintain status quo.
  11. The Order given on September 29, 2022 provided, inter alia that the parties maintain the status quo whereby there will be no dealings with the suit property relating to either subdivision, sale and/or transfer and/or charging of the properties, trespassing, wasting, constructing on, further construction, or otherwise interfering or dealing or in any manner interfering with the parcel of land ground No 151 of the Zimman Settlement Scheme Society at Zimmermann Estate, Kasarani within Nairobi County along Thika Super Highway pending the hearing and final determination of the suit.
  12. The Plaintiff/Applicant depones that the 7<sup>th</sup> Defendant and all other defendants were duly served with the said order.
  13. The Plaintiff stated that the grounds on which committal to prison is sought is that 7<sup>th</sup> defendant has willingly and knowingly disobeyed the Orders made herein by this Honourable Court on March 3, 2022 and issued on March 9, 2022 and the court order made on September 29, 2022 and issued on October 11, 2022 as he has continued to trespass on the suit property and has continued to construct on the suit property contrary to the court order.
  14. The Plaintiff depones that the 7<sup>th</sup> Defendant/Respondent have continued with the construction on the suit property at night in blatant contempt of the court order issued by this Court on September 29, 2022 and issued on October 11, 2022. That he has personally reached out to the 7<sup>th</sup> defendant and urged him to obey the court order but has refused, ignored and or neglected to stop any further trespass and construction stating that he will be protected by the President Ruto directives and that the house should not be demolished and or police used to oversee the demolition of the house in Nairobi.
  15. He avers that it is without a doubt that the 7<sup>th</sup> defendant willingly continues to disobey the court order when the orders were being issued the building was still at the laying of the basement as evidenced by picture at page 1,2, and 3 of the annexure 'RMM1' while the current picture the house is at the second floor of the building. That annexed hereto and marked 'RMM1' are copies of supporting documents numbered in pages and in support of the averments made herein.
  16. The Plaintiff/Applicant stated that this application has been made timely and without unreasonable delay.
  17. The Plaintiff/ Applicant depones that if the respondents are not restrained by this Honourable court, he is bound to suffer irreparable damage should the 7<sup>th</sup> defendant be left to continue erecting permanent structures on the plot no 151 of Zimmerman Settlement Scheme society situated along at Zimmermann Estate, Kasarani within Nairobi County along Thika Super Highway.
  18. In response of the 7<sup>th</sup> Defendant's replying affidavit, the Plaintiff contended that the 7<sup>th</sup> Defendant has resulted to building at night while evading arrest by the officers from Kasarani police Station. That indeed the construction is going on as evidenced by the photos attached to his replying affidavit compared with the photos the plaintiff had filed in court while filing this suit.
  19. He states as follows:
    - a. He personally took the photos on March 2022 and the current photos;



- b. The dispute property in dispute is the same, i.e same plot, same area and location and the only changes is that the 7<sup>th</sup> respondent continues to violate the orders of this court by continuing to construct.
  - c. The photos indeed confirm that there is ongoing construction on the dispute property.
  - d. He has on several occasions visited the suit property during the day where he normally finds no construction is ongoing but when he goes back the following day, he realizes there was ongoing construction at night. Thus, confirming the construction is being done at night.
  - e. By the virtue that there has been ongoing construction it indeed confirms the 7<sup>th</sup> defendant who is laying claim over the suit property and had commenced erecting permanent structure there in is indeed the person who continued with the constructions therein.
20. The Plaintiff confirms that the photos annexed therein are for dispute property herein and the application should be allowed as prayed and if the photos annexed on the suit property are not for dispute property, the easiest thing for the respondent to do was to avail the current photos.
21. He depones that the contents of the replying affidavit are just a mere allegation as the respondent intentionally and deliberately ignores the court order restraining him from any further development.
22. It is his case that it is in the interest of justice the respondent herein be punished for willful disobedience of the court order as the same cannot be issued in vain. Further, that there is no doubt whatsoever the 7<sup>th</sup> respondent/ defendant was well aware of the court order as his advocate on record was indeed present when the court issued the orders.

#### **The 7<sup>th</sup> Defendant/Respondent's response**

23. Conversely, it is the 7<sup>th</sup> Defendant/Respondent's deposition that from the outset, he stated that the applicant's allegations that he has disobeyed the orders of this court given on September 29, 2022 and issued on October 11, 2022 is false and misleading. That he has never carried out any development on the parcel of land known as Ground No 151 as alleged by the Applicants. They provided no evidence that either the 7<sup>th</sup> Defendant or through any of his known agents, employees or servants have been carrying out any developments on the suit property as alleged or at all.
24. He stated that indeed if it is true that the Applicants have seen or witnessed him developing the suit property nothing would have been easier than to take photographs of the people developing the Suit Property and present it to court.
25. He depones that however, the photographs annexed to the affidavit in support of the Application do not show anybody, leave alone the 7<sup>th</sup> defendant, carrying out any development on the Suit Property as alleged by the Applicants.
26. That in fact there is nothing in the replying affidavit to show or confirm that the photographs were taken on the Suit Property. There is also no clear relationship between the photographs allegedly taken on 'March 2022' and those allegedly taken 'on early November 2022.'
27. It is the 7<sup>th</sup> Defendant's contention that in fact apart from the annexed copies of the photographs, the Applicants have not provided any other particulars or details to support their allegation that he developed and/ or carried any construction on the Suit Property in violation of the orders of this court.



28. That the entire Scheme where the Suit Property is located is heavily populated with several ongoing constructions and it would appear to him that the Applicants maliciously took random photographs with the sole intention of using the said photographs to have him jailed for contempt and thereby prejudice the court against him.
29. He avers that it is incredible that the Applicants, who obtained orders that expressly barred him from interfering with the Suit Property and even managed to have the court direct that OCS Kasarani Police Station and the DCIO to ensure the orders are enforced, could see him carrying out developments thereon in disobedience of those same orders and fail to report to the Police.
30. He deposes that that construction, especially the establishment of a floor by the laying of a concrete slab, is a labor-intensive exercise that involves heavy machinery and equipment besides a lot of materials like cement, water, and sand and cannot, therefore, be carried out secretly or at night without anybody noticing.
31. The 7<sup>th</sup> Defendant contends that in fact the laying of a slab would require seven days of uninterrupted labor by not less than fourteen people, a feat that cannot be done or achieved in secret or at night as insinuated by the Applicants.
32. That the Applicants claim that he laid the slab of a whole floor and built a whole wall without providing even one single photograph of him or his alleged servants undertaking this massive exercise.
33. He confirmed that he never noticed any service of the order on the October 19, 2022 via WhatsApp as alleged by the Applicants or at all. That he has never been to the site from the time the first order was issued by the court, and he is equally alarmed that there could be ongoing developments thereon without his knowledge.
34. The 7<sup>th</sup> Defendant contends that it is clear that either the photographs annexed to the Applicant's application are of a different building and have been manipulated to mislead the Court or the building has always been like that. That in any event he had no reason or motivation to disregard the orders as he has confidence that justice shall in the long run prevail in this matter.

## **ISSUES FOR DETERMINATION**

35. The application under consideration was filed on December 2, 2022. The Applicant seeks various substantive orders, namely; that an order of committal to be made against the 7<sup>th</sup> Defendant to prison for such period and time as this Honourable Court may deem fit and just in that the said 7<sup>th</sup> Defendant has disobeyed the Orders made herein on March 3, 2022 and September 29, 2022, inter alia, an Order Compelling the 7<sup>th</sup> defendant to remove and or demolish to the structures constructed by him on the parcel of land known ground no 151 of the Zimman Settlement Scheme society at Zimmermann Estate, Kasarani within Nairobi County along Thika Super highway, Nairobi and the Plaintiff/Applicant be compensated for the losses he has suffered as a result of the disobedience of the orders of this court by the contemnors, Ordering the Respondent to comply with the said Order within thirty (30) days from the date of the Ruling and Ordering the Respondent to pay the costs of the said Application.
36. Having found as herein above, I find that the following issue stand out for determination: Whether the 7<sup>th</sup> Defendant are guilty of contempt of court orders issued on March 3, 2022 and September 29, 2022.



## Analysis And Determination

### Whether the 7<sup>th</sup> Defendant are guilty of contempt of court orders issued on 3/03/2022 and September 29, 2022.

37. Black's Law Dictionary (Ninth Edition) defines contempt of court as follows:

' 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 for imprisonment.'

38. As it were contempt of Court is conduct that defies or disrespects the authority of the Court. Such conduct is frowned upon by the Courts as the same tends to impair the fair and efficient administration of justice.

39. Given its ramifications on the administration of justice, Order 40 Rule 3 of the Civil Procedure Rules empowers the Court in the event of disobedience or breach of any terms of a temporary injunction to order the property of the person guilty of such disobedience or breach to be attached. In addition, the Court may order such person to be detained in prison for a term not exceeding six months. The Court also has power to impose a monetary fine where it deems appropriate.

40. The rationale for contempt orders is set out in the case of *Teachers Service Commission V Kenya National Union of Teachers & 2 others (2013) eKLR* where Ndolo J observed as follows:

' 38. The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.'

41. Speaking on the same issue, in *TN Gadavarma Thiru Mulpad -vs- Ashok Khot & Another (2006) 5 SCC*, the Supreme Court of India underscored the significance of obeying Court orders in the following manner:

' Disobedience of this Court's orders strikes at the very root of the rule of law on which the judicial system rests. The rule of the law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic state. If the Judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court's orders are to be followed and complied with.'

42. In the case of *Kenya Human Rights Commission V Attorney General and Another (supra)*, the Court observed as follows:

' Article 159 of the [Constitution](#) recognizes Judicial Authority of the Courts and Tribunals established under the [Constitution](#). Courts and Tribunals exercise this authority on behalf of the people and for that reason they must not only be respected and obeyed but must



also be complied with in order to enhance public confidence in the Judiciary which is vital for our Constitutional democracy. The Judiciary acts in accordance with the laws (Article 160) and exercises its authority through its judgments, decrees and orders or directions to check Government Power, keep it within the Constitutional stretch, hold the Legislature and Executive to account and thereby secure the rule of law, Administration of Justice and protection of Human Rights. For that reason, the authority of the Courts and dignity of their processes are maintained when Court orders are obeyed and respected thus Courts become effective in the discharge of their Constitutional mandate...

It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the Court to do or refrain from a particular act, he has a duty to carry out that order. The Court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. See *Louis Ezekiel Hart V Chief George1 Ezekiel Hart SC 52/2983 2<sup>nd</sup> February 1990*.'

...The fact that the power to punish for contempt is inherent and not granted by statute follows the recognition by the *Constitution* in Article 159 that Judicial Authority is derived from the people and vests in and is exercised by Courts and Tribunals established by or under the *Constitution*'

43. In order to make a case for civil contempt the Applicant must prove certain elements which were set out in the case of *Cecil Miller V Jackson Njeru (2017)*. The Court cited the book entitled 'Contempt in Modern New Zealand' which sets out the elements of Civil contempt as follows:
- a. That the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant.
  - b. That the Defendant had knowledge of or proper notice of the terms of the order.
  - c. That the Defendant acted in breach of the terms of the order.
  - d. That the Defendant's conduct was deliberate.
44. The Plaintiff/Applicant has alleged that the 7<sup>th</sup> Defendant has continued with the construction on the suit property at night in blatant contempt of the impugned court orders. He alleges that he personally reached out to the 7<sup>th</sup> defendant and urged him to obey the court order, but he refused, ignored and/or neglected to stop any further trespass and construction. A fact which has been denied by the 7<sup>th</sup> Defendant/Respondent.
45. In the Scottish case of *Stewart Robertson vs Her Majesty's Advocate, 2007 HCAC 63*, Lord Justice Clerk stated that:
- ' contempt of Court is constituted by conduct that denotes willful defiance of or disrespect towards the Court or that willfully challenges or affronts the authority of the Court or the supremacy of the law, whether in civil or criminal proceedings'
46. And in the case of *Hadkinson vs Hadkinson(1952) ALL ER 567* Romer LJ stated as follows:
- ' It is the plain and unqualified obligation of every person, against, or in respect of, whom 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.'

47. In numerous decisions, the Courts have held that unless and until a Court order is discharged, it ought to be obeyed. As was held by the Court of Appeal in *Central Bank of Kenya & Another vs Ratalal Automobiles Limited & Others, Civil Application No Nairobi 247 of 2006*, it is a fundamental tenet of the rule of law that Court orders must be obeyed, and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.
48. The court held in the case of *Awadh vs Marumbu (No 2) No 53 of 2001 (2004) KLR 458*, that 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 the approved contemnors.
49. In the instant case, the Court issued an order on March 3, 2022 and a further order on September 29, 2022. The Order given on March 3, 2022 was granted in the virtual presence of counsel for the Plaintiffs. I am not sure whether the same was served as there is no affidavit of service demonstrating that this order was served upon the 7<sup>th</sup> Defendant/respondent, but the 7<sup>th</sup> Defendant contended that he has never been to the site since the time the first order was issued which shows that he was aware that there was a temporary injunction that was issued against him by this court. The second order was given on September 29, 2022 in the virtual presence of the counsel for the Plaintiffs/applicants, 3<sup>rd</sup> to 7<sup>th</sup> Defendants and non-appearance of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the same was served upon the 7<sup>th</sup> Defendant on October 18, 2022 as seen on the court order produced before this court. This order was issued by this Court.
50. I note that the orders issued by this Court are clear and unambiguous and are binding on the 7<sup>th</sup> Defendant/Respondent. The Plaintiff however only adduced photographic evidence in an attempt to demonstrate that the 7<sup>th</sup> Defendant/Respondent has disobeyed the court orders given on 3/03/2022 and September 29, 2022. From a glance, there appears to be some development on the property as seen on the photos taken and marked as 'on March 2022' and photos marked as 'early November' attached in the supporting affidavit. The photographs also show a difference from the ones produced in this Court at the time of filing of this suit. However, I agree with the 7<sup>th</sup> Defendant/Respondent, from the material placed before me, the said photographs attached in the supporting affidavit do not demonstrate/show that it is the 7<sup>th</sup> Defendant who is constructing on the suit property as alleged.
51. I opine that supplied pictures showing the state of the suit premises did not exhibit anything to demonstrate that the 7<sup>th</sup> Defendant was the one carrying out the contemptuous acts and/or if the said acts are still ongoing. The photographs do not show, if at all, that it is the 7<sup>th</sup> Defendant/Respondent who is partaking in an act that does not honor the order of this court.
52. The Plaintiff should have taken photographs of the people carrying out the construction at night as alleged and produced the same in court as evidence. He could have also reported the same to the police and produced the report/OB Number as evidence demonstrating that the 7<sup>th</sup> Defendant was violating the orders of this court.
53. In the absence of any such evidence, it follows that the plaintiff/applicant's application to have the 7<sup>th</sup> Defendant cited for contempt was misconceived and without any basis.
54. The court finds that the Plaintiff/Applicant has failed to prove whether there was disobedience of status quo orders and/or the temporary injunction orders.
55. It is for the foregoing reasons that I therefore find that no sufficient ground has been shown to cite the 7<sup>th</sup> Defendant for contempt or to grant the orders that the Plaintiff/Applicant is seeking.



### **Disposal orders**

56. It follows that I did not find any basis for the Application dated December 1, 2022. The same is dismissed with no orders as to costs.

57 It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF MARCH 2023.**

**MOGENI J**

**JUDGE**

Ruling read in virtual court in the presence of:

Mr.Mugo for the Plaintiff

Mr. Kimathi for 1<sup>st</sup>, and 2<sup>nd</sup> Defendants

Mr Omondi holding brief for Mr. Kenyatta for the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants

Ms. Caroline Sagina: Court Assistant.

