



**Mwangi v Njoroge & 4 others (Environment & Land Case
E011 of 2023) [2023] KEELC 17198 (KLR) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E011 OF 2023**

FM NJOROGE, J

MAY 5, 2023

BETWEEN

SUSAN WANJIRU MWANGI PLAINTIFF

AND

STEPHEN KIMANI NJOROGE 1ST DEFENDANT

JOSEPH WAGEMBA 2ND DEFENDANT

DIRECTOR OF SURVEYS 3RD DEFENDANT

NAIVASHA DISTRICT LAND REGISTRAR 4TH DEFENDANT

**SUB-COUNTY LAND ADJUDICATION AND SETTLEMENT OFFICER,
NAIVASHA 5TH DEFENDANT**

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion application dated March 24, 2023 which is expressed to be brought under Article 2 of the [Constitution of Kenya](#), Order 51 of the [Civil Procedure Rules](#), Sections 3 and 3A of the [Civil Procedure Act](#) which seeks the following orders:
 - a. Spent
 - b. That this honorable court be pleased to punish the 1st and 2nd respondents herein by detaining them in prison for a term not exceeding six months for contempt of court for disobeying orders issued by this honorable court in the ruling dated March 15, 2023.
 - c. That this honorable court be pleased to make such further orders as is just in the circumstances.
 - d. That cost of this application be borne by the Respondents herein.



2. The application is supported by the affidavit of Susan Wanjiru Mwangi sworn on March 24, 2023. The grounds on the face of the application and the supporting affidavit are that on March 15, 2023, the court delivered a ruling issuing an order of temporary injunction restraining the 1st and 2nd defendants from dealing in any manner with land parcel No Naivasha/Kiambogo Scheme/623 pending the hearing and determination of the suit; that the said ruling was delivered electronically to the 1st and 2nd defendants advocates email address and so they were aware of the order; that on March 23, 2023, in disregard to the court orders, the 1st and 2nd defendants entered the suit property, cultivated it and planted maize and beans; that the said food crops are yet to sprout ; that the issue was reported at Elementaita police station and was issued with an OB number; that she reported the matter to her advocates who told her that court orders are not issued in vain; that the defendants actions are undermining the authority of this court; that the 1st and 2nd defendants are in contempt of the orders issued on March 15, 2023 and that it is in the interest of justice that the orders sought are granted.
3. In response to the application, the 1st defendant filed a replying affidavit sworn on April 3, 2023 on April 4, 2023. He deposes that he was never served with a court order arising from the ruling of March 15, 2023; that from the plaintiff's affidavit, no order was extracted from the ruling of March 15, 2023; that the plaintiff ought to have attached to her affidavit a duly extracted order arising from the ruling delivered on March 15, 2023 together with an affidavit of service and evidence of defiance of the served court order; that from the photographs attached to the plaintiff's affidavit, neither the 1st nor the 2nd defendants are captured; that the persons appearing in the said photographs are workers that he hired to plant maize crops on his father's parcel of land known as Naivasha/Kiambogo Settlement Scheme/597 and it had nothing to do with the plaintiff's parcel of land known as Naivasha/Kiambogo Scheme/623; that it is only fair that a surveyor be sent to the two parcels of land and ascertain if the two parcels of land are one and the same or if they are distinct; that the surveyor to file his report in court and the plaintiff's application be dismissed with costs.
4. The plaintiff filed a supplementary affidavit sworn on April 19, 2023 on April 20, 2023 where she deposed that on April 12, 2023, after the 1st and 2nd defendants had been served with the application for contempt, they instructed people to enter the suit property and weed the food crops that had been earlier planted; that she tried to plead with them to stop but they were armed with machetes and clubs and threatened to harm anyone who tried to stop them.
5. No submissions were filed in respect to the said application.

Analysis and determination

6. After considering the application, replying affidavit and the supplementary affidavit, the only issue that arises for determination is whether the 1st and 2nd defendants should be held in contempt of court for disobeying the orders issued by the court on March 15, 2023.
7. The plaintiff's case is that the court in its ruling delivered on March 15, 2023 issued a temporary injunction restraining the 1st and 2nd defendants from dealing in any manner with land parcel No. Naivasha/Kiambogo Scheme 623. Despite the court's ruling, the 1st and 2nd defendants went to the suit property on March 23, 2023 and planted maize and beans. Upon service of the present application for contempt, the 1st and 2nd defendants entered the suit property in order to weed the food crops that they had earlier planted.
8. The 1st defendant's case on the other hand is that the plaintiff did not extract an order from the ruling delivered on March 15, 2023 and further that he instructed his farm workers to plant maize crops on



his father's land parcel No Naivasha/Kiambogo Settlement Scheme/597 which is different from the plaintiff's parcel of land.

9. The *Black's Law Dictionary* 11th Edition defines contempt as follows:

“The act or state of despising. 2. The quality, state, or condition of being despised. 3. Conduct that defies the authority or dignity of a court or legislature...”

10. Section 5 of the *Judicature Act* confers jurisdiction on superior courts to issue punishment for contempt of court. Courts punish for contempt of court to preserve the dignity and authority of the court. The court in the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828 stated as follows on the importance of obedience of court orders:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void.”

11. The standard of proof in contempt of court proceedings is higher than that of a balance of probability because the liberty of a contemnor is at stake and the plaintiff has to prove willful and deliberate disobedience of the court order if it was to succeed. This was held by the court in the case of *Gatbaria K Mutitika v Baharini Farm Limited* [1985] KLR 227 as follows:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

12. As pointed out before, the plaintiff alleged that the ruling delivered on March 15, 2023 was served upon counsel for the 1st and 2nd defendants and so they were aware of the orders of injunction that had been granted. The 1st defendant on the other hand pointed out that he was never served with the



court order arising from the ruling delivered on March 15, 2023 and that no affidavit of service has been annexed to the plaintiff's application to show that he had been served.

13. Given the gravity of the consequences that flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have personal knowledge of the said orders. A perusal of the court record indicates that an order was extracted from the ruling delivered on March 15, 2023 and was issued on March 23, 2023. A further perusal of the court record shows that there is an affidavit of service filed on April 19, 2023 which indicates that the court order issued on March 23, 2023 was served upon the 3rd, 4th and 5th defendants. It is my view that there is no evidence that the 1st and 2nd defendants were served with the court order issued on March 23, 2023 and for them to be held in contempt, the plaintiff has to demonstrate that they had personal knowledge of the said order.

14. The court in the case of *Sheila Cassatt Issenberg & another v Antony Machatba Kinyanjui* [2021] eKLR held as follows:

“ 57. As was again stated by the Supreme Court of India in *Mahinderjit Singh Bitta v Union of India & Others* 1 A No 10 of 2010 (October 13, 2011):

In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is *lis* before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution. (Emphasis).

58. The emphasis as shown in the above cases is that there must be “willful and deliberate disobedience of court orders.” There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and wilfully disobeyed it.

59. In *Peter K Yego & others v Pauline Wekesa Kode*, (Acc No 194 of 2014, the court stated that “it must be proved that one had actually disobeyed the court order before being cited to contempt.”

15. Consequently, the application dated March 24, 2023 lacks merit and it is hereby dismissed. Costs of this application shall be in the cause.

16. This court notes that there is no dispute that both land parcels claimed by the applicant and by the 1st and 2nd respondents exist and that the land parcels, known as No Naivasha/Kiambogo Scheme 623 and Naivasha/Kiambogo Settlement Scheme/597 lie adjacent to one another. The 1st and 2nd defendants have admitted this in their response to the committal application. It is clear that the plaintiff's claim raises a boundary dispute that can be put to rest by the establishment of boundaries by the relevant authority. The court also notes that the 1st and 2nd defendants filed the application dated March 30, 2023 seeking for an order that the Nakuru County Surveyor proceeds to the subject parcels of land to determine their boundaries and file a report in court.

17. In the interest of justice and fairness and to expedite the determination of the present dispute, this court orders that the Nakuru County Surveyor shall visit land parcel No's Naivasha/Kiambogo Scheme 623 and Naivasha/Kiambogo Settlement Scheme/597 to establish the boundary between the two parcels



of land and indicate how much land of the plaintiff the 1st and 2nd defendants have encroached on, if any, and submit a report to this court within thirty (30) days of this order.

18. The expenses of the survey exercise shall be borne equally by the plaintiff on the one hand and the 1st and 2nd defendants on the other. If one party delays or deliberately or otherwise fails to pay their share the opposite party shall pay the whole of the survey expense sum and then lodge a formal demand in writing to the defaulting party who shall remit the sum claimed within 7 days of the demand in default of which the party not in default shall be entitled to execute against the defaulting party for the said sum as though they were costs of a suit.
19. The service of the 1st and 2nd defendants' application dated March 30, 2023 is hereby dispensed with as the said application is now overtaken by events. Following the above orders, this matter will be mentioned on June 6, 2023 to receive the Surveyor's Report and for further directions regarding the main suit.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 5TH DAY OF MAY 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

