



Muigai & 2 others v Turbo Munyaka Cooperative Society Limited & another (Environment & Land Case 34 of 2020) [2023] KEELC 18565 (KLR) (3 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 34 OF 2020
FO NYAGAKA, J
JULY 3, 2023**

BETWEEN

**JOHN KAMAU MUIGAI 1ST PLAINTIFF
JOEL NGASHA 2ND PLAINTIFF
DAVID GATIBA KIMANI 3RD PLAINTIFF**

AND

**TURBO MUNYAKA COOPERATIVE SOCIETY LIMITED 1ST DEFENDANT
ONESMUS GICHIRI MBURU 2ND DEFENDANT**

RULING

1. By a Notice of Motion dated February 21, 2023 the Plaintiffs moved this Court for orders that the 1st Defendant and one James Kariuki Gichora be found in Contempt of Court. They brought the Application under Sections 3, 3A, of the [Civil Procedure Act](#), Order 40 Rule 3 of the [Civil Procedure Rules, 2010](#). Specifically, they sought the following orders:-
 - a) ...spent
 - b) ...spent.
 - c) That the said James Kariuki Gichoraherein be committed to civil jail for a period of 6 months or such period to be stated by court or they be punished as the court shall decide for disobeying the court order issued herein on September 25, 2020 by interfering with the subject matter of the suit being 31 leases for parcel Nos Munyaka Trading Centre/13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 88 emanating from the subdivision of land comprised in title number Makutano/Kapsara Block 2/247.



- d) That the Defendant/Respondent be condemned to pay costs of this application.
2. The Application was based on five grounds. The first one was that on September 25, 2020, this honourable court issued an order of injunction (whose terms were reproduced verbatim in this ground); the Defendant/Respondents were aware of the order since they were present in Court and represented by an advocate, and still the order was served upon them and they acknowledged service on the service copy annexed to the Affidavit; the Defendants and one James Kariuki Gichora, who replaced the 2nd Defendant had disobeyed the order and have continued to sell the suit lands, and allowed constructions to go on despite the existence of the order; the actions of the Defendant/Respondents and the said James Kariuki Gichora were unlawful and calculated embarrass the dignity of this honourable court and the interest of justice demanded that the orders sought be granted.
 3. The Application was supported by the affidavit of John Kamau Muigai which he swore on February 21, 2022. He repeated the contents of the grounds in support of the Application in an almost verbatim manner hence I will not repeat them. However, to support the depositions he annexed and marked as JK1 a copy of the Order given by the Court on September 25, 2020. He swore further that the Defendants and one James Kariuki Gichora who replaced the 2nd Defendant had disobeyed the Court order and have continued to sell the suit lands and have allowed constructions to proceed thereon despite the subsistence of the Court order. He annexed and marked as JK2 a bundle of three photographs to show alleged constructions on the suit lands.
 4. The Application was opposed through the Replying Affidavit of one James Kariuki Gichora who deponed it on March 7, 2023. He deponed that he was elected the Vice Chairman of the 1st Defendant in an election held on September 29, 2021. He annexed and marked JKG1 a copy of the Minutes of the meeting of the same date in which the resolution was passed. He swore that the 2nd Defendant died on November 16, 2021. He annexed a copy of the Certificate of Death and marked it as JKG2.
 5. He deponed that by the time the Orders of September 25, 2020 were passed he was not yet authorized to appear and represent the Defendant. He swore further that the letter of authority was filed on October 22, 2020. He stated that there was no evidence of service of the Order in issue and that he had never been served with the same. He denied ever or in any way disobeying the Order of September 25, 2020. He deponed that the Application was made in bad faith and designed to derail and delay the further hearing and finalization of the suit. He denied the deposition that he replaced the 2nd Defendant. He stated that to him only one Defendant was in the suit after the death of the 2nd Defendant.

6. Applicants' further affidavit

- 1) That the Defendants were aware of the court order issued in this matter on September 25, 2020 having been served by the same on September 28, 2020 as per the affidavit of service by the process server filed in this matter and annexed hereto as JK1.
- 2) That since one James Kariuki Gichora is a member of the 1st Defendant and is acting on behalf of the 1st Defendant and also came on record on behalf of the 2nd Defendant, he knows about the said order but he chose to disobey it.
- 3) That the 1st Defendant continued allocating plots on Munyaka Trading center and allowed its members to continue building on the said trading centre despite there being a court order. Annexed hereto and marked JK2 are some Certificates issued in the year 2022.



Submissions

7. The Applicant began his submissions by summarising what the application was about and the prayers sought in it. They submitted that Order 40 Rule 3(1) provides that in cases of disobedience or of breach of an injunction the Court may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release. They admitted that this honourable Court issued an order of injunction on September 25, 2020. They reproduced the specific content of the Order. They summed that although the Defendants were aware of the orders and had been served it subsequent to issuance they had disobeyed it. Moreover, that the Defendants were duly represented when the order was issued by an advocate who actively participated in an application in which the court order was issued. They contended further that the order was clear and had a penal notice. They submitted that one James Kariuki Gichora was a member of the 1st Defendant and was acting on its behalf besides coming on record on behalf of the 2nd Defendant, and that he knew about the said order but chose to disobey it
8. They relied on the cases of *Hon Basil Criticos v The Hon Attorney General & 8 Others* [2012] eKLR, and that *Justus Wanjala Kisiangani and 2 Others v City Council of Nairobi and 3 Others* [2008] eKLR.
9. They then submitted that in the instant case, instead of complying with the court order issued in this matter and served upon them, the Defendants and one James Kariuki Gichora chose to disobey the same and have continued to sell the suit lands and allowed construction to proceed despite there being a court order. They submitted that it was in contravention of the common law doctrine of *lis pendens*, often expressed in the maxim *pendente lite nihil in novature* (during litigation nothing should be changed).
10. They submitted that the 1st Defendant continued allocating plots on Munyaka Trading Center unimpeded and allowed its members to continue building in the said Trading Center. They stated that this was a question of willful disobedience to be frowned upon by the court. They relied on the photographs showing constructions which they alleged were ongoing on the suit properties. They also submitted about a Certificate issued in the year 2022 (although none was exhibited by way of an annexure to any affidavit). They argued that annexure JK2 as well as deposition on the further affidavit demonstrated this. Although on March 27, 2023 the Court gave leave to the Plaintiffs to file a Further Affidavit within three (3) days, none was in the Court file and it was actually not filed although learned counsel purported to sneak into the file a word version of the unfiled document with the word versions of the submissions.
11. At that sharp practice, this Court hereby admonishes the Applicant's learned counsel and repeats the clarion call it has always had on all and sundry that honest is the only key to equity and other reliefs. It is the hallmark of a good lawyer whose practice lives for ages to come and unlocks future jobs. This crooked one of being dishonest, lying and quick to mislead does not and will never lead one far.
12. Their submission was that the construction was being done by members of Turbo Munyaka Cooperative Society Limited, and that the fact was not disputed.
13. The Applicants then gave a strange submission: that it would be unnecessary for the them to obey the Court order and stop constructions on the suit properties while the Defendants continued to construct despite the court order sopping further constructions during the pendency of the case. They stated that the actions of the Defendant/Respondents and James Kariuki Gichora were unlawful and calculated embarrass the dignity of this honourable court. They urged the Court to find the Defendants in contempt of orders of the order issued on September 25, 2020 and convict accordingly.



Respondents' submissions

14. The Respondents submitted that the ruling giving rise to the order(s) alleged to be disobeyed was read via electronic mail on the September 23, 2020. They argued that it was not therefore true that they were present when it was read. Further they contended that the order(s) alleged to be disobeyed were made on September 23, 2020 and not September 25, 2020. Their contention was that the orders were extracted by the plaintiffs' counsel and signed on the September 25, 2020 but the purported service by the said process server is suspect for the following reasons. These were that the process server did not state that he knew the 2nd defendant before the material date of service or state the person the person who showed him the home of the 2nd defendant or the one who identified him. Their further argument was that the 2nd defendant was a literate man and a long standing Chairman of the 1st defendant who always signed the documents but strangely he was alleged to have thumb printed the order. They countered that to state that the process server did not say that he had a stamp pad with him.
15. They submitted that the 2nd defendant died on the November 16, 2021. The death certificate is annexed to the replying affidavit on record. Further, that the orders of the court are clear: a temporary injunction was issued, on the September 23, 2020, and the status quo to be maintained, and the suit was pending.
16. Theirs was that disobedience of a court order is a very serious matter. On the point they relied on the case of Kitale Elc Land Case No 23 of 2018 (*Rachael Wanjiku Tonui v Enes Sitachi And 5 Others*). They stated that first, the Court must be satisfied that a party willfully and deliberately disobeyed its order that he was aware of. They relied on the case of *Shimmers Plaza Ltd v National Bank Of Kenya Ltd*[2015] ECLR, they argued that the threshold is quite high.
17. The Ground No. 3 in support of the application states - that the Defendants/Respondents and James Kariuki Gichora, who replaced the 2nd defendant have since disobeyed the said order, and have continued to sell the suit lands and have allowed constructions to proceed despite their having a court order. The same averment is reiterated in paragraph 7 of the supporting affidavit.
18. It is worth noting that the 2nd Respondent died on the November 16, 2021 and he was not substituted. The suit against him therefore abated on November 16, 2022, well before the application herein got commenced. There is therefore only one Defendant/Respondent and that is Turbo Munyaka FC Society Limited and to which James Kariuki Gichora is a vice chairman. It is therefore not true that James Kariuki Gichora replaced the 2nd defendant.
19. In his replying affidavit James Kariuki Gichora has on oath stated in paragraph 7 of the replying affidavit that he has not in any way whatsoever disobeyed the court order of September 25, 2020.
20. It is therefore imperative on the part of the applicants to avail credible evidence that the society through James Kariuki Gichora its vice Chairman, has sold and continue to sell the land/plot(s) comprised on any one or more of the 31 leases. No evidence of any sale has been availed to court. No plot number has been given for any plot or plots that have been sold. No purchaser has been identified and not a single sale agreement has been availed. If truly any plot has been sold, there would have been no difficulty in obtaining evidence over the sale and present it to the court. The allegation of sale of plots has no supporting evidence whatsoever and the same just remains as an allegation. It cannot be the basis of a conviction for contempt.
21. In paragraph 4 of the further affidavit, the 1st applicant has stated - 1st defendant continued allocating plots on Munyaka Trading Centre and allowed its members to continue building on the said trading center despite there being a court order. But who have been allocated plots in the center? No names are given. No plots numbers are identified as having been allocated by the 1st defendant. If truly plots



have been allocated, to people known to the applicants and who also claim to be having plots in the same center, then the claimants should have identified those allocated plots. Your Lordship is urged to find that the plots allocation allegation have absolutely no supporting evidence.

22. Some two photos were also annexed to the supporting affidavit. The two are photos of buildings under construction. The time the photos were taken is shown as 10.30 pm and 10.29 pm respectively. The 1st applicant does not purport to be the one who took the photos. There is no evidence on who took the photos or where the photos were taken. It is not even suggested that the photos were taken in any of the 31 leasehold plots. The plot numbers where the buildings under construction are standing have not been shown. The persons who are undertaking the constructions have not been identified. The photos have no evidential value and they should just be disregarded. In other words, there is no established link whatsoever, between the photos and the suit plots representing the 31 leases. The court cannot assume that the buildings are standing on any one or more of the 31 suit plots. The applicants have failed to discharge the burden of proof upon them.
23. There are two documents annexed to the further affidavit as annexures JK2. They are referred to as certificates. But looking at the documents, they are not certificates. The said documents were wrongly introduced since they were not a response to the issues raised in the replying affidavit. The respondent has no opportunity to respond to the new documents. The source of the documents remains unknown. Their authenticity is also questionable, since they are not even certified. They are not in any way connected to the 31 plots that are the subject of the suit. Only the persons named in the two documents as owners could have explained them. Unfortunately, that has not happened. But for sure they are not certificates and the court should find and hold that the two documents have no evidential value to the issues in the present application.
24. The applicants have failed to attain the requisite threshold to prove disobedience of the court orders of September 23, 2020 (not September 25, 2020). Consequently, the application should be and is hereby dismissed with costs to the Respondents. The hearing of the suit still remains as September 20, 2023.
25. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 3RD DAY OF JULY, 2023

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

