



REPUBLIC OF KENYA



**Al Ariba Limited v Mbaabu & 6 others (Environment & Land Case
153 of 2017) [2023] KEELC 21199 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 153 OF 2017
MAO ODENY, J
NOVEMBER 1, 2023**

BETWEEN

AL Ariba Limited PLAINTIFF

AND

SAMMY MURITHI MBAABU 1ST DEFENDANT

SOYONIN FARM COMPANY LIMITED 2ND DEFENDANT

DYNASTY INTERNATIONAL LIMITED 3RD DEFENDANT

CEM-BERG INTERNATIONAL LIMITED 4TH DEFENDANT

KENYA COMMERCIAL BANK 5TH DEFENDANT

SUSAN M. NABULINDO 6TH DEFENDANT

DISTRICT LAND REGISTRAR NAKURU 7TH DEFENDANT

RULING

1. This ruling is in respect of a notice of motion dated June 22, 2023 by the plaintiff/applicant seeking the following orders:
 - a. Spent
 - b. That orders do issue against the District Land Registrar Nakuru and by extension the Director of Land Administration, by reason of their disobedience of the order of court given in the Ruling delivered on 26th April 2018 by the Hon. Justice Munyao Sila. They have purported to register separately the land parcel Nakuru Municipality/Block 20/43 to Chemutai Mercy (I.D. No.20XXXX), Sammy Kimutai Cheruiyot (I.D. No.11XXXX) Ben Kemboi (I.D. No.21XXXX) of P.O. Box XXXX Nairobi on 13th July



2022 and to John Kibii Arap Koskei (I.D.No. 073XXXX) of P.O. Box XX Nakuru purportedly on the April 11, 2001. Their actions amount to contempt of court orders and therefore they should be committed to civil jail for six months.

- c. That the actions of the District Land Registrar and by extension the Director of Land Administration made on 13th July 2022 and 11th April 2001 be cancelled and rendered null and void.
 - d. That the costs of this application be provided for.
 - e. That any other order the court may deem fit and just to grant.
2. The application was supported by the annexed affidavit of Paschal Peter Oyuko Mbeche sworn on 22nd June 2023 where he deponed that he is one of the directors of the plaintiff Company. He further deponed that on 26th April 2016 the court issued orders restraining the defendants from interfering with the plaintiff's possession of land parcel No. Nakuru Municipality/Block 20/43 and an order of inhibition, inhibiting the registration of any transaction or dealings on the said property.
 3. Mr. Mbeche also stated that the defendants in defiance of the said court order registered a lease in favour of Chemutai Mercy, Sammy Kimutai Cheruiyot and Ben Kemboi on October 31, 2022. It was his evidence that the actions of the two defendants commenced on May 23, 2022 when the Director of Surveys through Paskaria Tongoi wrote a letter purporting to create parcel No. 43 measuring 1.247 hectares.
 4. The Applicant further deponed that the orders of the court were served on the defendants and that sometime in July 2020, the Land Registrar issued a certificate of official search dated 3rd September 2019 confirming that John Kirui Arap Koskei was the owner of the suit property which search was meant to assist him sell the property to Stanley Ngethe Chege.
 5. The 6th and 7th defendants filed grounds of opposition on July 12, 2023 where counsel stated:
 - a. That the documents the Plaintiff/ Applicant is relying on were filed by the Hon. Attorney General on 17 May, 2023 upon the AG's request for leave to file a Supplementary List of Documents after discovery of new information not within the Land Registrar's knowledge during the pre-trial period;
 - b. That no action has been undertaken by the Land Registrar, Nakuru to warrant the filling of this contempt application.
 - c. Further that the Land Registrar only registers leases not issuing them, which in this case, the applicant has failed to demonstrate that registration has been done by the 7th defendant/respondent.
 - d. That the Land Registrar was served with the said order as claimed by the Plaintiff/Applicant and complied with it as clearly visible in the Copy of White Card filed on 23rd November 2022 by the 6th and 7th Defendants (List of Documents)
 - e. That there are no additional details in the White Card and the Applicants herein have not produced any evidence to show that any entry has been made by the Land Registrar, Nakuru after the Order was registered.



- f. That the Director, Land Administration is not a Party to this suit to defend itself and neither has evidence been adduced by the Applicants to prove that they served the Order to the Director, Land Administration whose office is responsible for issuing Lease.
 - g. That it is the Land Registrar who flagged the new Lease forwarded to Nakuru based on an existing Lease and the Court Order barring any further action pending the hearing and determination of this suit thus failing to register the New Lease and going ahead to disclose the same to the Court on 10th May 2023.
6. The matter was canvassed by way of written submissions, which were duly filed.

Plaintiff's Submissions

- 7. Counsel listed 3 issues for determination which can be condensed into one issue namely whether the 6th and 7th defendants are in contempt of the court order dated 26th April 2018.
- 8. Counsel submitted that the actions of the Director of Land Administration and Land Registrar amounted to interference of the Plaintiff/ Applicants possession and the two officers from the same office, the former being the Superior Officer to the latter. Further, the actions of the Director of Land Administration and the Land Registrar dealt with the suit property when they purported to register new owners the suit land and thereby creating new entries on the Plaintiff/Applicant's suit land while the orders subsisted.
- 9. Counsel relied on the cases of *Cecil Miler v Jackson Njeru* [2017] eKLR, *Teachers Service Commission v Kenya National Union of Teachers & 2 others* [2013] eKLR and submitted that the 6th and 7th defendants had deliberately violated the orders of the court issued on 26th April 2018 by issuing a certificate of search dated 29th January 2020 that indicated that John Kibii Arap Koskei was the owner of the suit property who then changed ownership to Stephen Ngethe Chege.
- 10. It was counsel's further submission that the respondents violated the court orders on 13th July 2022 when the Director of Land Administration prepared a lease of the suit property and issued it to the Land Registrar who received it with the anticipation to register it and issue title to the new owners.
- 11. Counsel submitted that the actions of the 6th and 7th defendants were in breach of article 40 of the *Constitution* and relied on the cases of *Richard Otieno & 9 others v Michael Otieno Wagunda & another* [2022] eKLR and urged the court to allow the plaintiff's application.

6th and 7th Defendants'submissions

- 12. Counsel for the 6th and 7th defendants submitted on whether the contempt application was rightfully before the court and whether the applicant was entitled to the orders sought.
- 13. On whether the contempt application was rightfully before this court, counsel submitted that the plaintiff brought the application for contempt under section 30 of the *Contempt of Court Act* and yet it was declared unconstitutional in *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR.
- 14. Counsel for the 6th and 7th defendants submitted that the procedure for applying for contempt of court was stated in the case of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014].



15. It was counsel's further submission that the plaintiff failed to serve the application on the Director Land Administration who was cited in the application and yet he was not a party to the proceedings. Counsel also stated that in addition to lack of personal service, the plaintiff did not disclose the person being cited for contempt and cannot therefore seek contempt of court orders on an office.
16. Counsel relied on the case of *Mwangi H.C. Wangonde v Nairobi City Commission* (Civil Appeal No. 95 of 1998) in support of her arguments and stated that in order for the plaintiff to succeed in its application for contempt, it has to prove the terms of the order, knowledge of the said terms by the respondent and failure by the respondent to comply with the terms of the order.
17. Counsel relied on the book *Contempt in Modern New Zealand* and submitted that the plaintiff did not produce any evidence to show that an entry had been made by the Land Registrar, Nakuru after the order was registered and urged the court to dismiss the application.

Analysis and Determination

18. The issue for determination is whether the 6th and 7th Defendants are in contempt of an order issued by the court on April 26, 2018. The orders which is the subject of the contempt application were as follows:
 - a. That pending the hearing and determination of this case, the defendants and/or their servants/agents are hereby restrained by an order of injunction, from interfering with the plaintiff's possession of the land parcel Nakuru Municipality/ Block 20/43, and are further restrained from offering for sale, selling, leasing, charging, or enter into any other disposition.
 - b. That pending the hearing and determination of this case, there is hereby issued an order of inhibition, inhibiting the registration of any transaction and/or dealings in the register/s of the land parcel Nakuru Municipality/Block 20/43.
 - c. That the plaintiff shall have the costs of this application.
19. In a Scottish case of *Stewart Robertson v Her Majesty's Advocate* 2007, Hcac 63, Where Lord Justice Clerk stated that:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willful challenges or affronts the authority of the court of the supremacy of the law, whether in civil or criminal proceedings”, The learned Judge further stated that:

" The power of the court to punish for contempt is inherent in a system of administration of Justice and that power is held by every Judge."
20. Similarly, in the case of *Board Of Governors Moi High School Kabarak v Malcolm Bell and another* (Supreme Court Petition No. 6 & 7 of 2013, the Supreme Court of Kenya described the power to punish contempt as follows:

“the power to punish for contempt is a power of the court to safeguard itself against contemptuous or descriptive intrusion from elsewhere”.
21. Section 5 of the *Judicature Act* confers jurisdiction on Superior courts to punish for contempt of court. Courts punish for contempt of court to preserve the dignity and authority of the court.



22. In the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828 the court 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.”

23. It is not in dispute that the court issued an order of injunction prohibiting interference with the plaintiff’s possession and further issued an order of inhibition inhibiting the registration of any transaction and or dealings in the register of land parcel No. Nakuru Municipality/ Block 20/43.

24. It is further not in dispute that the order was duly served on the 6th and 7th Defendants as admitted by counsel. It is also admitted that the terms of the order were clear and unambiguous and that the 7th and 8th defendants had proper notice of the terms of the order. What the plaintiff must prove is that the 6th and 7th defendants deliberately acted in breach of the orders.

25. In the Court of Appeal case of *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR the court held as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has wilfully and deliberately disobeyed a court order that he was aware of...secondly, as this Court emphasized in *Jihan Freighters Ltd v Hardware & General Stores Ltd* and in *AB & 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)*.”

26. The 6th and 7th defendants admit that the order was served upon them and they effected the necessary changes on the white card but it was their case that when the matter came up for further hearing on 10th May 2023, their counsel informed the court that they had just discovered that there were two parcel files with regard to the suit property and they sought leave to file additional documents.

27. Counsel for the 6th and 7th defendants submitted that the plaintiff used the additional documents that they filed to file the contempt of court application which documents included a copy of a Certificate of Lease for land parcel No. Nakuru Municipality/Block 20/43 dated 13th July 2022 signed by a Land Administration Officer.

28. I have perused the documents annexed to the plaintiff’s application for contempt and I notice that the documents the plaintiff is relying on were issued by the Land Administration Officer and the other documents were addressed to the Director of Land Administration. None of the documents was issued by the 6th and 7th defendants.

29. The Plaintiff/Applicant seeks an order that both the District Land Registrar Nakuru and Director of Land Administration to be held in contempt of the court orders issued on 26th April 2018. It is clear



that the 7th defendant who is the District Land Registrar did not issue the Certificate of Lease issued on July 13, 2022 and that the same was issued by a Land Administration Officer.

30. It is on record that the Land Registrar is the one who flagged the new Lease forwarded to Nakuru based on an existing Lease and the court order barring any further action pending the hearing and determination of this suit thus failing to register the New Lease and going ahead to disclose the same to the Court on May 10, 2023. The Land Registrar therefore should not be punished for alerting the court that the Land Administration Officer had forwarded a lease for registration
31. The Director of Land Administration would have been in a better position to explain the issuance of the certificate of lease on 13th July 2022 which was contrary to the orders issued on 26th April 2018. A perusal of the court record indicates that the Director of Land Administration is not a party to this suit and was not served with the application for contempt. A party cannot be punished if such party has not been accorded a fair hearing.
32. Someone is in breach of the order dated 26th April 2018 but that person is not a party to the proceedings. Counsel attempted to blame the Land Registrar and by extension the land administration officer whose mandates are very different. The best that the plaintiff can do is to fast-track the hearing of this suit so that all the issues of illegal registration can be heard and determined.
33. The upshot is that, the application is dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 1ST DAY OF NOVEMBER 2023.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules

