



Redeemed Gospel Church (Suing Through) Kitonga v Nairobi County & another; M/S Rosko Company Limited (Interested Party) (Environment & Land Case E016 of 2023) [2023] KEELC 21434 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21434 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E016 OF 2023**

**JO MBOYA, J
NOVEMBER 2, 2023**

BETWEEN

**REDEEMED GOSPEL CHURCH (SUING THROUGH) REV. JOHN BANKOSKY
KITONGA PLAINTIFF**

AND

THE NAIROBI COUNTY 1ST DEFENDANT

HON. SUSAN MAKUNGU 2ND DEFENDANT

AND

M/S ROSKO COMPANY LIMITED INTERESTED PARTY

RULING

Introduction And Background

1. The instant Ruling relates to and concerns three (3) separate Applications, albeit filed by the Plaintiff/Applicant herein; and which Applications were ordered to be heard and disposed of simultaneously.
2. Given the diverse orders sought at the foot of the various Applications, it is appropriate and expedient to reproduce the reliefs sought at the foot of each and every Application.
3. In respect of the Application dated the 15th July 2023; the Plaintiff/Applicant has sought for the following reliefs;
 - i.Spent.
 - ii.Spent.



- iii. Pending the hearing and determination of this suit, this Honorable Court be pleased to issue a Temporary Injunction restraining the Defendant whether by themselves, their employees, workmen, servants and/or licensees, infringing upon, erecting structures and/or in any other way interfering with L.R No. 209/11373/209; Eastleigh.
 - iv. This Honorable Court be pleased to issue a Mandatory order directed to and compelling the Defendant/Respondent to demolish and/or remove the illegally erected and/or constructed Structures on L.R No. 209/11373/209; Eastleigh.
 - v. The officer in charge of Police station, Pangani Police Station be directed to ensure compliance and/or enforcement of the order by the Honourable Court.
 - vi. Costs of the Application be provided for.
4. Suffice it to point out that the Application is premised on the various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of one, namely, Rev. John Bankosky Kitonga sworn on even date.
 5. The Second Application is dated the 27th July 2023; and in respect of which the Plaintiff has sought for the following reliefs;
 - i.Spent.
 - ii. The Honorable Court be pleased to find that both the 1st and 2nd Defendant/Respondents are in contempt of the orders of the Honorable court issued on the 17th July 2023.
 - iii. Thee Officer in Charge of Police station, Pangani Police Station be directed to stop the Interested Party and or in other way assist in ensuring compliance and enforcement of the orders granted by this Honorable court.
 - iv. In view of the urgency of this matter, both the CEO to the 1st and 2nd Defendant/Respondent be arrested and committed to Civil Jail for a term of 6 months and be appropriately punished for blatantly refusing and/or failing to comply with the orders of the Honourable court issued on the 17th July 2023.
 - v. Costs of the Application to be borne by the Respondents.
 6. Instructively, the subject Application is premised on the various grounds which have been enumerated in the body thereof. Further and in addition, the Application is supported by the affidavit of Rev. John Bankosky Kitonga sworn on even date.
 7. The Third Application is the one dated the 18th August 2023; and in respect of which the Plaintiff/Applicant sought for the following reliefs;
 - i.Spent.
 - ii. This Honorable Court be pleased to issue an order directing the Officer in Charge of Police Station, Pangani Police Station to ensure that the Defendants/Respondents, their agents, employees, servants and/or any persons acting under their directions be restrained; and/or to assist in the enforcement of the Honourable court orders issued on the 17th July 2023, and extended on the 25th July 2023.
 - iii. Costs of this Application be borne by the Respondents.



8. For coherence, the instant Application is premised on a plethora of grounds which have been enumerated in the body of the said Application. Furthermore, the Application is supported by the affidavit of Rev. John Bankosky Kitonga, sworn on even date, namely the 18th August 2023.
9. It is important to state that the three (3) sets of Applications, (whose details have been alluded to herein before) were responded to by the 2nd Defendant/Respondent in terms of the Replying affidavit sworn on the 22nd September 2023.
10. Moreover, the three sets of Applications came up for hearing on the 18th September 2023; whereupon the court issued directions pertaining to and/or concerning the manner of disposal of the named Applications. For good measure, it was directed that the Applications beforehand be canvassed and disposed of by way of written submissions.
11. Pursuant to and in compliance with the directions of the Honourable court, the Plaintiff/Applicant filed written submissions dated the 4th October 2023, whereas the 2nd Defendant filed written submissions dated the 27th October 2023. Both submissions are on record.

The Parties' Submissions:

a. Plaintiff's/applicant's Submissions:

12. The Plaintiff/Applicant herein filed written submissions dated the 4th October 2023; and in respect of which same has raised, highlighted and amplified two (2) salient issues for consideration by the Honourable court.
13. Firstly, Learned counsel for the Applicant has submitted that this court granted and issued an order for the maintainance of Status quo on the 17th July 2023, which orders were clear and explicit as pertains to their import and tenor.
14. Furthermore, Learned counsel for the Applicant has submitted that upon the issuance of the orders on the 17th July 2023, same proceeded to and extracted the orders and thereafter the said orders were duly served upon the Defendants/Respondents.
15. Nevertheless, Learned counsel has contended that despite having been served with the court orders, the Defendants/Respondents proceeded to and acted in disobedience thereof. Consequently, counsel has contended that the Respondents are guilty of willful disobedience of lawful court orders.
16. Secondly, Learned counsel for the Plaintiff/Applicant has submitted that the Respondents herein entered upon and erected illegal structures on the suit property which lawfully belongs to the Plaintiff/Applicants, albeit without the consent and permission of the Plaintiff/Applicants.
17. Additionally, Learned counsel for the Applicant has contended that to the extent that the suit property lawfully belongs to and is registered in the name of the Plaintiff/Applicant, it is therefore imperative that the Defendants/Respondents be ordered and or directed to demolish the offensive structures which have been build on the suit property within 24 hours from the orders of this Honourable court.
18. Based on the foregoing submissions, Learned counsel for the Plaintiff/Applicants has therefore invited the court to find and hold that the three sets of Applications, whose details were highlighted hereinbefore, have been duly proved and are thus meritorious.



b.defendants'/respondents' Submissions:

19. The Respondents herein filed written submissions dated the 27th October 2023; and in respect of which same have raised, highlighted and canvassed two (2) salient issues for consideration by the court.
20. First and foremost, Learned counsel for the Respondents has submitted that the orders of status quo which were granted by the court on the 17th July 2023; were clear and explicit and in any event, same made provision for the constructions and/or structures which had already been undertaken on the suit property.
21. Additionally, Learned counsel for the Respondents has submitted that at the time when the orders were issued, the Defendants were the ones in occupation of the suit property and same was similarly developed.
22. Arising from the foregoing, Learned counsel for the Respondents has therefore contended that the Status quo to be maintained relates to what was actually obtaining on the suit property and not otherwise.
23. Secondly, Learned counsel for the Respondents has submitted that the Applicant herein has neither established nor demonstrated any act of disobedience by and on behalf of the Respondents and in particular, the 2nd Respondent or at all.
24. Furthermore, counsel has submitted that even though the Applicant has purported that there have been constructions undertaken subsequent to the issuance of the court order, same has however, submitted that the Applicant has failed to tender and/or placed before the Honourable court any credible evidence to prove such allegations.
25. In the absence of credible evidence to prove the allegations of willful disobedience, Learned counsel for the Respondents has submitted that the claim that the Respondents are in contempt of lawful court orders of the court has been laid in vacuum.
26. On the other hand, Learned counsel has submitted that before a court of law can proceed to cite and punish anyone for contempt, it behooves the Applicant to place before the court plausible and cogent evidence and to prove the allegations of contempt to the requisite standard.
27. In support of the foregoing submissions, Learned counsel for the Respondents has cited and relied on, inter-alia, the case of Sylvia Mary versus James Mwangi Gakuya & 2 Others (2022)eKLR; Mututika versus Baharini Firm Ltd (1985)eKLR; and Re- Bramblevale Ltd (1969) ALL ER 1062, respectively.
28. Lastly, Learned counsel for the Respondents has submitted that even though the Plaintiff herein has sought for orders of temporary injunction to restrain the Respondents from entering upon, taking possession of and/or remaining on the suit property, it is evident that the Respondents are already in possession of the suit property and hence the orders of temporary injunction, which are being sought cannot legally issue to prevent an act which has already occurred.
29. At any rate, Learned counsel for the Respondents has also submitted that the orders of demolition which have also been sought by the Plaintiff/Applicant herein, are substantive orders, which cannot be issued on the basis of an interlocutory Application.
30. In view of the foregoing, Learned counsel for the Respondents has therefore invited the court to find and hold that the various Applications, which have been filed by and on behalf of the Plaintiff/Applicant, are clearly misconceived and devoid of merits.



31. In a nutshell, Learned counsel for the Respondents has thus impressed upon the Honourable court to dismiss the Application(s) with costs to the Respondents.

Issues For Determination:

32. Having reviewed the three Applications, (whose details were highlighted elsewhere herein before); and upon taking into consideration the Responses thereto and upon taking into account the written submissions filed by and on behalf of the Parties, the following issues do emerge and are thus worthy of determination.
- i. Whether the Applicant has established and demonstrated a basis to warrant the grant of orders of Temporary Injunction.
 - ii. Whether the Defendants/Respondents are guilty of Contempt and thus ought to be cited and Punished.
 - iii. What reliefs, if any; ought to be granted.

Analysis And Determination

Issue Number 1

Whether the Applicant has established and demonstrated a basis to warrant the grant of orders of Temporary Injunction.

33. The Plaintiff/Applicant herein filed the instant suit vide Plaintiff dated the 15th July 2023; and in respect of which she contends that the suit property lawfully belongs to and is registered in her name.
34. Nevertheless, the Plaintiff proceeded to and contended that despite the fact that the suit property belongs to the Plaintiff/Applicant, the Respondents entered upon and constructed illegal structures therein, albeit without the permission and/or the consent of the Plaintiffs/Applicants.
35. Arising from the foregoing, the Plaintiff/Applicant has thus sought for various reliefs at the foot of the Plaintiff. For good measure, one of the reliefs which has been sought by the Plaintiff/Applicant is as hereunder;
- “This Honorable Court be pleased to issue a Mandatory order directed and compelling the Defendant to demolish and/or remove the illegally erected and/or constructed structures erected on L.R No 209/11373/209; Eastleigh within 24 hours from the Judgment hereon”
36. From the foregoing excerpt, it is evident and apparent that the acts complained of by and on behalf of the Plaintiff/Applicant herein, have indeed occurred. Instructively, the constructions that are complained of have already been undertaken on the suit property.
37. To the extent that the activities complained of had already occurred and/or arisen, the question that the court needs to grapple with is whether an order of Temporary Injunction, which is prohibitory in nature, can legally issue as against an act that has already accrued.
38. In my humble albeit considered view, a temporary order of injunction is ineffective and ineffectual; and thus cannot be able to remedy an act that has already occurred. Put differently, the issuance of an order of temporary injunction, in the manner sought by the Plaintiff/Applicant herein, shall be an act in futility and/or vanity. Clearly, it is not the business of the court to grant orders, which are cosmetic in nature but devoid of any substance.



39. Consequently, I come to the conclusion that the temporary injunction which has been sought for by and at the instance of the Plaintiff/Applicant, is neither available nor worthy of being issued, taking into account the obtaining circumstances, which are clearly known to and within the knowledge of the Applicant herein.
40. To anchor the foregoing exposition of the law, it suffices to adopt and reiterate the holding of the Court (Per Maraga, J, as he then was) in the case of Headmaster Kiembeni Baptist Primary School & Another Versus Pastor Of Kiembeni Baptist Church [2005] eKLR, where the court held and observed as hereunder;

“I have also seen in other cases in which parties make applications for interlocutory injunctive order similar to the one made in this matter which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders. Such practice is to be highly discouraged. Courts on their part should be wary of such applications bearing in mind the fact that Order 39 does not provide for grant of permanent injunctions at interlocutory stage. See also Shah _v – Shah (1981) KLR 374”.
41. Other than the prayer for Temporary injunction, it is also not lost on this court that the Applicant has also sought for an order to compel the Defendant/Respondent to demolish the structures which have since been built and/or constructed on the suit property.
42. Be that as it may, it is also important to recall that the same order for demolition has also been sought for at the foot of the Plaint. Consequently and in this regard, what becomes apparent is that the Plaintiff/Applicant is seeking a similar relief both in the body of the interlocutory Application as well as the Plaint.
43. To my mind, the Order for demolition and removal of the structures, (read, Eviction) which are complained of by the Plaintiff/Applicant, is a substantive and precipitate order. For coherence, what the Plaintiff/Applicant herein is seeking is an order of eviction and demolition.
44. To the extent that what is being sought for is an order of Eviction and demolition, it suffices to point out and reiterate that such an order cannot issue at an Interlocutory stage. For clarity, such an Order must await the Plenary hearing and proof by the Plaintiff, before same can issue.
45. For the avoidance of doubt and barring repetition, the orders that the Plaintiff/Applicant has sought and essentially the one for demolition and removal of (sic) the illegal structures can only be granted, if at all upon a plenary hearing and once the Plaintiff/Applicant has proved his claim of ownership to and in respect of the suit property.
46. Consequently and in view of the foregoing, my answer to issue Number one [1] is to the effect that the Plaintiff herein is neither entitled to an order of temporary injunction; nor an order for demolition of (sic) the offensive structures, which are complained against.

Issue Number 2

Whether the Defendants/Respondents are guilty of Contempt and thus ought to be cited and Punished.

47. Other than the Application wherein the Plaintiff/Applicant had sought for the orders of temporary injunction and demolition, which has been discussed in the preceding paragraphs, the Applicant herein has also contended that the Defendants/Respondents are guilty of contempt and thus same ought to be cited and punished, for disobeying lawful court orders.



48. Further and in addition, the Applicant herein has submitted that it behooves all and sundry, the Defendants/Respondents not excepted, to comply with, abide by, obey and respect court orders.
49. Arising from the foregoing, the Plaintiff/Applicant has thus invited the Honourable court to find and hold that the Defendants herein deserve to be punished by the court for willful disobedience.
50. To start with, there is no gainsaying that this court issued and granted orders for the maintenance of status quo over and in respect of the suit property.
51. Furthermore, it is worth repeating that even though the court granted an order for the maintenance of status quo, the court proceeded and qualified the order by underlining that the buildings and/or constructions that had already been undertaken on the suit property shall remain thereon and shall be used by the Defendants pending hearing and determination of the Application.
52. Other than the foregoing, the Honourable court also ventured forward and directed that there shall be no further construction to be undertaken on the suit property or otherwise.
53. Nevertheless, the Plaintiff has since returned to court and is now contending that the Defendants/Respondents have continued to construct and erect structures on the suit property, despite having been duly served with the lawful court orders issued on the 17th July 2023.
54. To the extent that it is the Plaintiff/Applicant who contends that the Defendants/Respondents have constructed and/or erected further buildings on the suit property despite the court order, it was thus incumbent upon the plaintiff/Applicant to place before the Honorable court cogent, plausible and credible evidence to demonstrate such disobedience and/or contempt.
55. However, it is worthy to note that though the plaintiff has made various allegations of disobedience of the court order, there is no scintilla of evidence whether photographic or otherwise to show any construction which was being undertaken well after the issuance of the court order.
56. Suffice it to point out that at the foot of the supporting affidavit sworn on the 27th July 2023; the Deponent has exhibited three [3] annexures, namely, a copy of the order, affidavit of service made on 18th July 2023; and yet another affidavit of service made on the same date.
57. In my humble view, any Applicant, the current applicant not excepted, who is desirous to procure an order of contempt, must not only demonstrate that the adverse Party was knowledgeable of the court order, but same must venture forward and establish that the court order has been disobeyed.
58. In this respect, it was incumbent upon the Plaintiff/Applicant to demonstrate that there have been constructions being carried out and undertaken by the Defendant/Respondents, despite the existence of lawful court orders. However, no such evidence has been availed and it is therefore difficult to discern the legal basis and/or foundation upon which the contention of willful disobedience is premised.
59. Additionally, it is important to underscore that the burden of proof, namely, proving that the adverse Party is guilty of contempt, lies on the Applicant. Furthermore, it is imperative to emphasize that the claim that the adverse Party is guilty of contempt must be proved beyond the balance of probabilities. Simply, the Standard of proof is the Intermediate one.



60. Without belaboring the point, it is appropriate at this juncture to cite and reiterate the dictum of the Court of Appeal in the case of *Mutitika versus Baharini Farm Ltd* (1985) KLR 227, where the court held thus;

“In England matters relating to contempt are now governed by the *Contempt of Court Act*, 1981. The courts, nevertheless take the view that where the liberty of the subject is, or might be, involved, the breach for which the alleged contemnor is cited must be precisely defined – see for instance *Chiltern Districts Council v Keane*, [1985] Law Society’s Gazette, 29th May page 1567.

In, *Re Breamblevale Ltd* [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063, had this to say,

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt”.

With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined.

61. Other than the foregoing decision, the necessity to implead the acts constituting contempt with the precision and to prove same to the requisite standard, was re-visited and similarly highlighted in the case of *Sheila Cassatt Issenberg & another versus Antony Machatha Kinyanjui* [2021] eKLR, where the court stated thus;

“51. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed.”

62. Having reviewed the contents of the supporting affidavits which anchors the allegations of contempt and upon taking into consideration the case law concerning the necessity to implead the acts constituting contempt with necessary precision and sufficient clarity, I come to the conclusion that the Plaintiff/Applicant herein has neither established nor demonstrated any act of willful disobedience on the part of the Defendants/Respondents.

63. Before departing from the issue herein, it is appropriate to underscore that it is not enough for an Applicant who has raised an application for contempt, like the instant Applicant, to through omnibus allegation on the face of the court and thereafter believe that because the name of contempt has been invoked, the court will no doubt, side with such an Applicant.

64. Simply put, whereas everyone is obligated to comply with and/or adhere to orders of the court, whenever issues of disobedience are raised and/or ventilated, same need to be established and proved to the intermediate standard, before a court of law can cite for contempt and thereafter mete out the requisite punishment.



Issue Number 3

What Reliefs, if any; ought to be granted.

65. The Plaintiff/Applicant contends that same is the lawful and registered owner of the suit property and thus same is entitled to partake of and/or benefit from the privileges attendant to such ownership. [See the provisions of Section 24 and 25 of the [Land Registration Act, 2012](#)]
66. Despite the claim that the suit property belongs to the Plaintiff/Applicant, same has ventured forward and contended that the Defendants/Respondents have since entered upon, constructed and/or built structures thereon; albeit without the consent and/or permission of the Plaintiff/Applicant.
67. I am aware that the allegations and/or averments by the Plaintiff herein have not been canvassed and/or interrogated. Further and in any event, the said averments can only be vouched for during the plenary hearing.
68. However, whilst awaiting the hearing and determination of this suit, there is need and necessity to ensure that the status of the suit property is preserved and/or conserved, to avert alienation and/or wastage of the suit property.
69. Arising from the foregoing observation, it is therefore appropriate to fashion and thereafter grant such an order that would protect and preserve the rights of both Parties, in equal measure. Simply put, this is the import of the Doctrine of Equality of arms.
70. Consequently, despite the fact that this court has found and held that the orders of temporary injunction are neither suitable nor expedient, it is still within the mandate of this court to ensure that the suit property is duly preserved and conserved.
71. Flowing from the foregoing position, I am thus minded to invoke and apply the provisions of Section 13 (7) of the [Environment and Land Court Act, 2011](#); which confers Jurisdiction on the court to grant inter-alia orders of status quo.
72. For ease of reference, the provisions of Section 13(7) [Supra] are reproduced as hereunder;
 - (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including——
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs.



Final Disposition:

73. Upon evaluation and due analysis of the issues that were itemized in the body of the Ruling, this Honourable court has come to various conclusions, as pertains to and in respect of the Applications that were filed on behalf of the Plaintiff/Applicant.
74. Nevertheless, there is no gainsaying that the court has found that the various Applications were devoid and/or bereft of merits. Consequently and in this regard, the court is minded to and Does hereby make the following orders;
- i. The Application dated the 15th July 2023; be and is hereby Dismissed.
 - ii. The Application dated the 27th July 2023; be and is hereby Dismissed.
 - iii. The Application dated the 18th August 2023; be and is hereby Dismissed.
 - iv. Costs of the Applications shall be borne by the Plaintiff/Applicant.
 - v. Nevertheless and for purposes of preservation of the suit property, there be and is hereby granted an order of Status Quo, pertaining to and concerning the suit property, namely, L.R No. 209/11373/209; Eastleigh, and in particular, as pertains to current occupation, possession and use thereof.
 - vi. For the avoidance of doubt, there shall be no further construction and/or development of any new buildings or otherwise on the suit property; save for the buildings which have since been constructed thereon, which shall remain under the occupation and possession of the persons responsible thereto.
75. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Nyakeriga for the Plaintiff/Applicant.*

Mr. Ngome h/b for Mr. Cheronon for the 1st Defendant/Respondent.

Mr. Mbanda for the 2nd Defendant/Respondent.

N/A for the Interested Party.

