



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. E251 OF 2021

GOOLBANU SHAHNAWAZ WISSANJI

**SHAHID WISSANJI (Suing as administrators of the estate of
the late SHAHNAWAZ M W MURJI).....PLAINTIFFS**

VERSUS

**ABDI GODANA DIDA & DAVID M NYAGA (Sued as officials of
KIBARAGE SLUMS ASSOCIATION).....1ST DEFENDANT**

ORESTUS NIWE CHWEYA.....2ND DEFENDANT

RULING

The plaintiffs brought this suit against the defendants on 9th July 2021. Together with the plaint, the plaintiffs filed a Notice of Motion application dated 8th July 2021 seeking among others a temporary injunction restraining the defendants from entering, encroaching on, selling, transferring, alienating, developing or whatsoever dealing with all that property known as L.R No. 209/8998 (hereinafter referred to as “the suit property”) pending the hearing and determination of the suit. On 22nd July 2021, the court made the following orders after satisfying itself that the defendants had been served with the application:

“1. THAT the application shall be heard inter partes on 8th February 2022.

2. THAT until 8th February 2022 on a temporary basis, an order of injunction is issued restraining the defendants whether by themselves, their members, beneficiaries, employees, servants and/or agents and anyone from entering, encroaching on, selling, transferring, alienating, developing or whatsoever dealing with the suit property being L.R No. 209/8998.

3. THAT the OCPD Gigiri Police Station shall ensure compliance with the order.

4. THAT the defendants be served.”

What is now before the court is the plaintiffs’ application brought by way of Notice of Motion dated 26th August 2021 seeking the following orders;

1. That Mr. John Mwangi, Chairperson, Alice Wangari, Vice Chairperson and Francis Wambua, Secretary being officials of Kibarage Slums Association be committed to prison for a term of six months for disobedience of the order made on 22nd July 2021.

2. That the property of the said Mr. John Mwangi, Alice Wangari, Francis Wambua and Kibarage Slums Association be attached and sold.

3. That the Officer Commanding Spring Valley Police Station or any other station the court may order be directed to enforce the warrants of arrest to be issued by this court.

The application is brought on the grounds that; on 22nd July 2021 the court issued an order restraining the defendants whether by themselves, their members, beneficiaries, employees, servants and/or agents and anyone from entering, encroaching on, selling, transferring, alienating,

developing or whatsoever dealing with the suit property; the order had a penal notice indicating that any disobedience of the same will result in penal consequences for the person disobeying it; on 30th July 2021, the Chairman and a member of the 1st defendant, Kibarage Slums Association were made aware of the said order; on the same day, the order was served upon the 1st defendant's advocates; on 3rd August 2021, the order was served upon the 1st defendant and despite service of the order, the members of the 1st defendant continued to carry out construction activities on the suit property in defiance of the order.

The application is supported by the affidavit of Shahid Wissanji sworn on 27th August 2021 in which he has stated that the order made by the court on 22nd July 2021 was handed over by the plaintiff's advocates on record to a process server by the name Isaac Miano to effect service of the same upon the 1st defendant herein through its officials. He has stated that the said process server went to the 1st defendant's office on 30th July 2021 where he met the 1st defendant's chairman, Mr. John Mwangi and a member one, Mr. Kamau. He has stated that the two read the order and took a photograph of the same but refused to receive the same on the ground that they were not named in the order. He has stated that on 3rd August 2021, the said process server proceeded to affix a copy of the order on the structure that the 1st defendant is putting up on the suit property. He has stated further that the 1st defendant's advocates on record were served with a copy of the order on 30th July 2021 together with a letter calling upon them to impress upon their clients to obey the order. He annexed to his affidavit the affidavit of service sworn by the said process server on how he effected service. He has stated that the photographs that were taken by the said process server on the suit property which are annexed to his affidavit of service show that the construction work was still going on. He has stated that in disobedience of the said order members of the 1st defendant were continuing with construction on the suit property. He annexed to his affidavit a copy of a letter showing that Mr. John Mwangi, Alice Wangari and Francis Wambua are the officials of the 1st defendant, Kibarage Slums Association. He has stated that as the current officials of the 1st defendant, they bear responsibility on behalf of the 1st defendant and have an obligation to obey the court order once the same was brought to their attention even if they are not the officials who were sued.

The alleged contemnors have opposed the application through a replying affidavit sworn by them jointly on 16th September 2021. The alleged contemnors have contended that the orders of injunction made on 22nd July 2021 lapsed by effluxion of time since the same was served upon them on 5th August 2021 outside the 3 days' time limit set under Order 40 Rule (4)(3) of the Civil Procedure Rules within which ex parte orders of injunction must be served. The alleged contemnors have contended further that they are not personally liable for the alleged breach of the said order. The alleged contemnors have contended that the 1st defendant has about 3000 members living over a vast area of land which includes the suit property. The alleged contemnors have contended that while they communicate with their members through meetings and other means, they are not capable of being ever-present. The alleged contemnors have averred that they are unable to ensure that each and every member follows their directives.

The alleged contemnors have averred that they have not personally breached the order of 22nd July 2021. They have contended that the plaintiffs have not provided any evidence showing that they breached the said order while the same was in force. The alleged contemnors have averred that due to the 1st defendant's limited resources, they had no capacity of ensuring that the order was complied with. The alleged contemnors have contended that they are law abiding citizens of humble means and that the orders sought against them would cause grave injustice to them as they are likely to be rendered homeless.

The plaintiffs filed a further affidavit sworn by Shahid S Wissanji on 20th September 2021 in response to the alleged contemnors replying affidavit of 16th September, 2021. In this further affidavit, the plaintiffs have reiterated that the order of 22nd July 2021 was made when the plaintiffs' application for injunction was coming up for inter partes hearing and the respondents had been served with a notice. The plaintiffs have averred that the order was in the circumstances not made ex parte and cannot be said to have lapsed as at the time it was served.

Submissions:

The application was argued by way of written submissions. The plaintiffs filed submissions and further submissions dated 23rd September 2021 and 27th September 2021 respectively. The plaintiffs framed four issues for determination by the court namely; whether the order said to have been disobeyed was made, whether the order was served, whether the order was disobeyed and whether the alleged contemnors should be punished for the disobedience of the said order. On the first issue, the plaintiffs have submitted that the fact that the court made an order on 22nd July 2021 restraining the 1st defendant from engaging in certain activities is not disputed the same as the terms of the said order. The plaintiffs have submitted that the said order was made on a date that was fixed for the inter partes hearing of the plaintiffs' application for injunction that had been served upon the 1st defendant and as such the order was not made ex parte as claimed by the alleged contemnors. On whether the order was served, the plaintiffs have submitted that the alleged contemnors have admitted in their replying affidavit that they were served with the order on 5th August 2021. The plaintiffs have submitted that in addition to service of the order upon the alleged contemnors, the order was also served upon the 1st defendant's advocates on record and was also affixed on a building on the suit property. The plaintiffs have averred that John Mwangi who is the 1st defendant's chairman and one of the alleged contemnors and a Mr. Kamau a member of the 1st defendant had also read and taken a photograph of the order on 30th July 2021 when they refused to accept service of the same.

On whether the order was disobeyed, the plaintiffs have submitted that it is not denied by the alleged contemnors that construction was going on, on the suit property when the present application was filed. The plaintiffs have also submitted that they have placed adequate evidence before the court showing the construction works that were being undertaken on the suit property by the 1st defendant's members. The plaintiffs have averred that the alleged contemnors have not denied that the construction complained of by the plaintiffs was on the suit property.

On whether the alleged contemnors should be punished, the plaintiffs have submitted that the 1st defendant is a society registered under the Societies Act, Chapter 108 Laws of Kenya and under section 2 of the Act, the alleged contemnors are officers of the 1st defendant. The plaintiffs have submitted that as top officers of the 1st defendant, the alleged contemnors bore the greatest responsibility over the actions of

the 1st defendant. The plaintiffs have averred that the alleged contemnors had the capacity to stop encroachment on the suit property and construction that was being undertaken by the members of the 1st defendant thereon. The plaintiffs have contended that the alleged contemnors had a responsibility to ensure compliance with the said court order. The plaintiffs have submitted that the fact that the alleged contemnors were not named in the suit and the order as parties was irrelevant. The plaintiffs have submitted that upon being elected as officials of the 1st defendant, the alleged contemnors assumed responsibility for the activities of the 1st defendant.

The 1st defendant and the alleged contemnors (hereinafter referred to as “the respondents” where the context so permits) filed submissions dated 24th September 2021. The respondents framed two issues for determination by the court namely; whether the order made on 22nd July 2021 had lapsed as at the time it was served on the respondents and whether the plaintiffs have proved contempt alleged against the respondents. The respondents have cited Order 40 Rule 4(3) of the Civil Procedure Rules and have submitted that since the order made on 22nd July 2021 was made ex parte, the same had to be served within three days of being made failure to which it would lapse automatically. The respondents have submitted that since the said order made on 22nd July 2021 was not served until 5th August 2021 outside the three days provided for in the aforesaid rule, the order was served after it had lapsed. The respondents have submitted that to argue that the order was not made ex parte because it was made on a date fixed for inter partes hearing of the plaintiffs’ application was to craftily stretch the meaning of the word ex parte.

On whether the plaintiffs have proved contempt against the alleged contemnors, the respondents have submitted that the burden of proof was on the plaintiffs. The respondents have submitted that the plaintiffs placed nothing before the court linking the alleged contemnors to the acts of contempt complained of. The respondents have submitted that the plaintiffs have not explained why they have chosen the alleged contemnors for punishment amongst seven officials of the 1st defendant. The respondents have submitted further that the plaintiffs have not demonstrated that the alleged contemnors directly disobeyed the court order. The respondents have submitted that the 1st defendant has a membership of over 3000 people and that no evidence was placed before the court showing that the house that was being constructed and painted on the disputed land belonged to the alleged contemnors. The respondents have submitted that the officials of the 1st defendant had no way of ensuring that all the members followed their directives. The respondents have submitted that the plaintiffs have failed to establish that the alleged contemnors were personally in contempt of the said court order before the same lapsed. The respondents have submitted that the application is an abuse of the process of the court as it was filed for the sole purpose of forestalling the pending application by the 1st defendant to strike out the suit for being sub judice.

Determination:

I have considered the plaintiffs’ application together with the affidavits filed in support thereof. I have also considered the affidavit filed by the respondents in opposition to the application. Finally, I have considered the submissions by the advocates for both parties and the authorities cited in support thereof. The main issues for determination in the application before me are; whether the plaintiffs have established that the respondents breached the order made herein on 22nd July 2021 and whether the plaintiffs are entitled to the reliefs sought in the application.

In Hardkinson v Hardkinson [1952] ALL ER 567, it was held that:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”

In Mutitika v Baharini Farm Ltd [1985] KLR 227 it was held that:

- 1. “ A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.**
- 2. The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.**
- 3. The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.”**

In Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR the court set out the law on contempt as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another (supra). Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & 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).”

It is on the foregoing principles that the plaintiffs’ application falls for consideration. The plaintiffs have claimed that the respondents

committed acts of contempt by allowing their members to enter the suit property and continue with construction of buildings thereon in breach of the order made herein on 22nd July 2021. In response to the charge, the respondents have contended that as at the time the said order was served upon them, the same had lapsed and as such was not capable of being complied with. The respondents have claimed further that they had no capacity to supervise compliance with the said order and that in their individual capacities, they did not breach the said order.

Order 40 Rule 4 (1), (2) and (3) of the Civil Procedure Rules provides as follows:

“4. (1) Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte.

(2) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.

(3) In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.”

I am in agreement with the respondents that the order of 22nd July 2022 was made ex parte in the sense that it was given in the absence of the respondents. The order does not however fall within the orders given under Order 40 Rule 4(1) of the Civil Procedure Rules. The plaintiffs' application for injunction dated 8th July 2021 first came to court for directions ex parte on 12th July 2021. On that date, the court did not grant any order but directed that the application be served for hearing inter partes on 20th July 2021. On 16th July 2021, 20th July 2021 was declared a public holiday. On application by the Plaintiffs, the court gave their application dated 8th July 2021 a new hearing date. The application was fixed for hearing on 22nd July 2021. The respondents did not deny that their advocates on record were served with notices for the hearings that were to take place on 20th July 2021 which was declared a public holiday and the new date of 22nd July 2021. On 22nd July 2021 neither the respondents nor their advocates turned up for the hearing of the application. The court after hearing submissions by the plaintiffs' advocate granted the order of 22nd July 2021 which is the subject of the present application. I am in agreement with the plaintiffs that failure on the part of the respondents and their advocates to attend court on 22nd July 2021 after being served with a hearing notice does not render the order made on that date an ex parte order made under Order 40 Rule 4(1) of the Civil Procedure Rules. Order 40 Rule 4(1) of the Civil Procedure Rules empowers the court to make orders ex parte without service of an application where delay may defeat the purpose of the order sought. Where the court directs service of an application to be effected, service is effected and an order is given thereafter albeit in the absence of a party, such order is made outside Order 40 Rule 4(1) of the Civil Procedure Rules. Since the order falls outside Order 40 Rule 4(1) of the Civil Procedure Rules, the provisions of Order 40 Rule 4(2) and (3) of the Civil Procedure Rules do not apply to it. That explains why after granting the order, the court listed the application for hearing on 8th February 2022. Due to the foregoing, I am not in agreement with the respondents that the said order had lapsed as at the time the same was served upon them.

Kibarage Slums Association is the 1st defendant in this suit. Abdi Godana Dida and David M. Nyaga who were sued as the officials of the association were removed from office on 28th February 2021 and replaced by the alleged contemnors. This was before the suit herein was filed. As at the time the order of 22nd July 2021 was made, it was the alleged contemnors who were the officials of the 1st defendant association. The said order of the court was served upon them in that capacity. The terms of the order were clear. The alleged contemnors have not contended that they did not understand the order. I am in agreement with the plaintiffs that as officials of the 1st defendant, the alleged contemnors are responsible for the actions that are taken by the 1st defendant through its officials or members. The alleged contemnors cannot run away from this responsibility. The alleged contemnors know all the members of the 1st defendant. In fact, they have claimed that they are over 3000. The alleged contemnors cannot persuade me that they were not aware of the names of the persons who were carrying out construction on the suit property after the order stopping such activity was served upon them if they were not personally involved. The alleged contemnors have not denied that construction activities continued on the suit property even after the court order was served upon them. They did not dispute the evidence of such activities that was placed before the court by the plaintiffs. They have not placed any evidence before the court that they brought the court order to the attention of whoever was carrying out construction assuming that they were not involved. They have not denied that the construction was being undertaken by a member of the 1st defendant. In my view, it is not enough for the alleged contemnors to claim that they are not omnipresent and that they lacked capacity to supervise the activities of the members of the 1st defendant. Having been elected and having accepted the positions given to them which are recognized by law, the alleged contemnors cannot run away from the responsibility given to them. Even if it has not been proved that the alleged contemnors personally breached the said order, the order covered the 1st defendants' officials and members. The alleged contemnors bear responsibility for the contempt of the members of the 1st defendant.

Due to the foregoing, I am satisfied that the plaintiffs have proved the charge of contempt against the alleged contemnors. Consequently, I hereby make the following orders;

1. I find John Mwangi, Alice Wangari and Francis Wambua, the Chairperson, Vice Chairperson and Secretary respectively of the 1st defendant, Kibarage Slums Association in contempt of the order made on 22nd July 2021.
2. The said John Mwangi, Alice Wangari and Francis Wambua shall appear before this court on a date to be fixed to be heard in mitigation before a sentence of passed against them.
3. The plaintiffs shall have the costs of the application.

DELIVERED AND DATED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ochieng for the Plaintiffs

Mr. Karagu h/b for Mr. Waigwa for the 1st defendant and the contemnors

N/A for the 2nd defendant

Ms. C. Nyokabi-Court Assistant