



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 44. of 2017

NASON MWEMA NZIMBI.....PLAINTIFF/RESPONDENT

VERSUS

KIIO NDETEI.....1ST DEFENDANT/APPLICANT

KINGOLA NDETEI.....2ND DEFENDANT/APPLICANT

KYENGO MUINDI NDETEI.....3RD DEFENDANT/APPLICANT

RULING

1. Before this court for determination is a Notice of Motion Application dated 13th July, 2020 and an Amended Notice of Motion Application dated 29th October, 2020 filed by the applicants' and respondent respectively. The first application is brought under **Article 159 (2) and 47 of the Constitution, Section 1A,1B and 3A of the Civil Procedure Act, Order 42 Rule 6, Order 36 Rule 10 and Order 51 Rule 1 of the Civil Procedure Rules**. The applicants seek the following prayers: -

1. Spent

2. Spent

3. That the Summary Judgment and Order dated 12th October, 2017 and all subsequent proceedings thereto be set aside and the main suit herein reinstated for hearing on merits.

4. That the costs of this application be in the cause.

2. The application is premised on the grounds on the face of it and on the annexed affidavit of Kiiio Ndetei, the 1st Applicant herein sworn on 13th July, 2020. The Applicants contend that the honourable court allowed the Respondent's Application dated 2nd September, 2016 which issued summary judgment and orders against the Applicants herein and directed that they be permanently evicted from Land Reference Number Makueni/Kivani/1082.

3. It is the Applicants contention that they are the beneficial owners of land reference number Makueni/Kivani 1082 and were issued with warrants for vacant possession which was executed by the court bailiff and the OCS Kola Police station on 23rd January, 2020. It is the Applicants contention that they were not served with notice of the proceedings leading to the issuance of summary judgment and subsequent execution proceedings and were ambushed by the execution of warrants of vacant possession dated 19th December, 2019.

4. That the proceedings leading to summary judgement were conducted ex-parte and judgment issued on account of failure to respond to the application dated 12th September, 2016. They contend that they were not served and if at all they were served, the service was improper, defective or concealed as it was not brought to their attention.

5. It is the applicants' contention that they stand to suffer irreparably amounting to denial of their constitutional right to property under Article 40 of the Constitution if the judgment and subsequent proceedings remain executed. That the proceedings leading to judgment were a nullity for want of disclosure on account that the same was previously determined in Machakos High Court Civil suit number 225 of 2008-**Muema Mbwi & 4 others versus Joseph Muasa Mbwi & another** on 25th November, 2009 and that the decision binds all parties as well as their successors and representatives in title as there was no appeal thereon.

6. It is also the applicants' contention that their previous advocate did not inform them of the proceedings and the eviction notices and as such they should not bear the consequences of their previous advocate's default or failure to inform them. That this application has merit and there is need for timely reinstatement of the main suit herein in line with the principles of natural justice.
7. The Respondent herein filed his replying affidavit sworn on 3rd August, 2020 in which he deposed that the application does not reflect the true position of the court process in the suit herein. That the Applicants were served with a Plaint and the firm of Kisongoa & Company Advocates filed a memorandum of appearance on 21st December, 2015, they were also served with an application for summary judgment which was received on 15th September, 2016. The Applicants filed a replying affidavit in response thereto dated 22nd May, 2017 and served upon the Respondent's counsel on 25th May, 2017 and, therefore, it was well within their knowledge and was not conducted ex-parte as is alleged by the Applicants.
8. It is the Respondent's contention that the suit land belongs to him after subdivision of Kivani adjudication section in 1986 in which the father to the Applicants never appealed the decision of the Minister. That arising from the decision and ruling delivered by Justice Lenaola on 25th November, 2009 the Applicants were not parties and therefore not bound by the said decision. It is also his understanding that as per the decision of Justice Lenaola, the court declined execution for the reason that the main suit was pending hearing.
9. The Respondent further contends that the suit is different as it refers to land parcel Makueni/Kivani/1082 whereas in Makueni civil case 205 of 2008 the suit was in respect to plot 1082 Kivani adjudication section. That the ruling was also disclosed to the court inferring that the matter is res judicata as this court already determined the same in the hearing of the application for summary judgment. In addition, the applicants never sought leave to file defence out of time bearing in mind that they were involved in the proceedings leading to the orders granted therein and as such there is no valid reason for this court to set aside the ruling.
10. Finally, that the suit land is not ancestral land and the applicants have no beneficial interest on the land, in any case, he has been denied the right to use his property and has suffered prejudice. Despite the warrants of eviction being executed, the applicant went back to the suit land and constructed temporary structures to his detriment.
11. The applicant filed a supplementary affidavit sworn on 24th September, 2020 in which he buttresses the issues contained in the supporting affidavit and further deposed that despite the firm of Kisongoa & Company Advocates having entered appearance, they were never updated on the progress of the matter even after making verbal enquiries and visits. Also, that the Respondent has not attached any hearing notice to the application for summary judgment.
12. Further, that the 1st Applicant's true signature is the one appearing in the supporting affidavit and the supplementary affidavit herein which is different from that appearing in the annexed affidavit. That the notice of appeal is indeed true but as it stands no appeal has been lodged at all. It is also their contention that their defense is meritorious and ought to be allowed.
13. As concerns the Minister's decision, it is the Applicant's contention that the same was contained in the ruling delivered by Justice Lenaola which constitutes their defence of res judicata which bound their late father, with all his legal representatives' heirs and assigns.
14. It is also the applicant's contention that the decision and orders issued in Machakos High Court Civil Case number 225 of 2008 involved their late father and the respondent as parties whose subject matter involves the suit land being Makueni/Kivani/1082 which is similar to plot number 1082 Kivani. That the suit land is ancestral land which their late father acquired and the respondent only acquired title to the land through unprocedural and fraudulent means.
15. It is their position that they continue to suffer bodily injuries as a result of injury inflicted upon them and loss of livelihood despite stay orders being granted by this court on 24th July, 2020.
16. The applicants filed written submissions dated 4th November, 2020. That the issue for determination is whether there is sufficient cause to set aside the summary judgment and hear both parties on the merits of the case. It is the applicants' submission that besides their constitutional rights as enshrined under Article 25, 28, 40 and 51 of the Constitution, the matter involves pertinent issues. That the right to a fair hearing involves substantive and procedural technicalities and ought to be treated with care for long lasting justice to be attained for both parties. They cited the case of **Patriotic Guards Limited versus James Kipchirir Sambu [2018] eKLR** on the principles of natural justice.
17. It is also the applicants' submission that res judicata and sub judice are not just matters of law but also constitute a triable defence which the applicants ought to be permitted to ventilate before a decision as to the question of right to the ownership of the suit land may be determined on merits. The applicants submit that the mistake of their previous counsel in failing to raise the issue of res judicata should not cost them injustice and their land. They rely on the case of **Bank of Africa Kenya limited versus Put Sarajevo General Engineering Company Limited & 2 others [2018] eKLR**.
18. On whether the applicants' have sufficient cause to warrant grant of the orders, it is their submission that this court ought to serve the wider benefits of justice to both parties which in light of the reasons submitted above inclines to meritorious hearing for the court to judiciously serve the interest of both parties in perpetuity. They rely on the case of **Wachira Karani versus Bildad Wachira [2016] eKLR**.
19. The respondents filed their written submissions dated 12th October, 2020. The respondent submits that, the court in exercising its discretionary power to set aside summary should consider the reasons adduced such as failure to file defence, the length of time between the entry of judgment and when the application to set aside was brought, whether the intended defence raises triable issues and the prejudice each party is likely to suffer as it was held in **Africa Management Communications Limited versus Airtel Kenya Limited (2020) eKLR**.
20. On whether service was effected upon the applicants', the respondent submits that indeed service was effected to the extent that the previous counsel filed a Notice of Appeal to the Court of Appeal. They rely on the case **James Kanyuka Nderitu & another versus Marios**

Philotas Ghiaks & another (2016) eKLR and Abok James Odera T/A A.J & Associates versus John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR.

21. The respondent also submits that the firm of Kilonzo & Company Advocates are incompetent to appear on record as in the manner fashioned as they have not complied with **Order 9 Rule 9 of the Civil Procedure Rules**. They rely on the case of **Florence Hare Mkaha versus Pwani Tawakal Mini Coach & Another (2014) eKLR** and **S.K Tarwadi versus Veronica Muelhemann (2019) eKLR**.

22. I have considered the application, relevant replies thereof and the submissions. There are two issues for determination.

a) Whether the firm of Kilonzo & Company Advocates are properly on record.

b) Whether there is sufficient cause to warrant stay of the summary judgment.

23. Order 9 rule 9 of the civil procedure rules provides that:-

‘When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court— (a) upon an application with notice to all the parties; or (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be’.

In the case of **Protein & Fruits Processors Limited & another v Diamond Trust Bank Kenya Limited [2015] eKLR**, the court observed as follows: - **‘My understanding is that the Rule envisages two scenarios,**

1) where there is change of advocate

2) where a party decides to act in person.

The commonality in the two scenarios is that there is previous advocate and the change is happening after judgment has been passed. In the first scenario the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. Under the second scenario a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court’.

24. In this case, the firm of Kisongoa & Company Advocates was previously on record for the applicants, after delivery of the judgment, the applicants appointed the firm of Kilonzo and Company to act for them. Both firms entered into a consent dated 4th May, 2020 addressed to the Deputy Registrar in which the firm of Kilonzo and Company Advocates ought to have made a formal application to come on record pursuant to Order 9 Rule 10 of the Civil Procedure Rules. In my view and in order to cure this error the respondent ought to have filed a preliminary objection challenging the same. However, this was not done. What then is left of this application filed by the firm of Kilonzo & Company Advocates?

25. In the case **John Langat –v- Kipkemoi Terer & 2 others (2013) eKLR** where Justice A. O. Muchelule when faced with similar circumstances stated thus:

“There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates “without an order of the court.”

26. I do agree with counsel for the respondent that no such order was sought or obtained. It follows, that Kilonzo & Company Advocates are not properly on record for the applicants, and therefore the application is incompetent.

27. Having rendered myself on the first issue, I will not delve any further into the substance of the application as it is incompetent.

28. The second application is an amended Notice of Motion application dated 29th October, 2020 brought pursuant to **Order 40 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A,1B, & 3A of the Civil Procedure Act and Section 5** of the Judicature Act which seeks the following prayers: -

1. Spent.

2. Spent.

3. That Kiio Ndeti, Kingola Ndeti and Kyengo Muindi Ndeti, the Respondents herein be punished by the court for contempt of court orders made by this court in the instant suit under the ruling and decree dated 12th October, 2017 and the eviction orders dated 11th January, 2018.

4. That the court directs court bailiff Machakos, Daniel Juma Aliwa to demolish, destroy and remove the new buildings by the Respondents in the property known as Makueni/Kivani 1082 and the OCS Kola police station and DCIO Kilungu do jointly provide security to the court bailiff and maintain law and order during such demolition, destruction and removal.

5. That the OCS Kola police station and DCIO Kilungu do jointly provide adequate security to the Plaintiff/Applicant to enable Plaintiff/Applicant take vacant possession of the suit land being land title number Makueni/Kivani 1082.

6. That the orders herein be served upon the OCS Kola Police station and DCIO Kilungu for compliance.

7. That this honourable court do make any other or further orders that the court may deem necessary to give effect to the ruling and decree dated 12th October, 2017 and the eviction orders dated 11th January, 2018.

8. That the cost of this application be paid by the Defendants/Respondents.

29. The application is premised on the grounds that an order of eviction was granted on 11th January, 2018 and warrants of eviction were issued on 19th December, 2019. The respondents were evicted on 23rd January, 2020 but returned on 24th January, 2020 and have constructed and cultivated on the suit land in total disregard of the court order. That such disobedience is in contempt and they ought to be punished. That although the respondents were served with the present application, they had not purged the contempt and orders have now been sought to guarantee compliance in the court orders in the discharge of duties.

30. The application is supported by the affidavit of the applicant herein, Nason Mwema Nzimbi sworn on 29th October, 2020. He deposed that by an application dated 11th January, 2018, a permanent order of injunction and eviction was granted by this honourable court on 12th October, 2017 and a decree was issued on 11th January, 2018. Thereafter, warrants of eviction were issued to the court bailiff Machakos and was received on 20th December, 2019. The applicant deposed that the Defendants/Respondents were evicted on 23rd January, 2020 in which during this exercise, security was provided by OCS Kola police station and DCIO Kilungu.

31. That on the 24th January, 2020, the respondents returned to the suit land being land parcel number Makueni/Kivani/1082 and constructed iron sheet structure on the land, the same being prejudicial and in violation of the court orders. It is the applicant's contention that he reported the matter to the OCS Kola police station on 24th January, 2020 and thereafter reported to the DCIO Kilungu.

32. The applicant's further contend that he stands to suffer irreparably as the actions of the respondents are occasioning wanton waste, existence of peace and expenses. Also, that orders of this court need to be respected as they are not made in vain. That the illegal structures built on the suit land should be pulled down under the supervision of the OCS Kola Police station.

33. The 1st respondent filed a replying affidavit sworn on 21st January, 2021 in which he deposed that they are not in contempt as they are awaiting court's determination of their application dated 13th July, 2020. The 1st Respondent's also disputes claims of construction on the suit and avers that the same are unauthentic for want of certification.

34. It is his assertion that the claims of contempt are vain since they have been evicted from the suit land and that the allegations raised in the application are bad in law as they are merely wishful and fail the test higher than preponderance or probabilities to prove contempt of court. Finally, that the move by the applicant to file contempt of court is a threat and affront to their constitutional right to liberty.

35. The respondents also filed grounds of opposition dated 18th January, 2021 which raises 8 grounds namely: -

1. That the application is engineered to circumvent the defendant's application dated 13th July, 2020 as to render it nugatory and is as such in bad faith and against good and well settled practice and procedure.

2. That the application is mala fides and purports to deny the defendants the right to be heard by rendering their application dated 23rd July, 2020 nugatory and academic.

3. That the application is squarely an abuse of the due process of law and therefore court process.

4. That the defendants have already been evicted from the premises and the contempt orders are sought in vain aimed at defeating the defendants' substantive application dated 23rd July, 2020.

5. That the Defendants' application questions whether the completed forced eviction would have been justified in the first place and ought to be heard first to clear the path for justice.

6. That the allegations in the application are bad in law for want of authentic substantiation as they are merely wishful.

7. That the allegations in the amended application fail the test higher than preponderance of probabilities required to prove contempt of court.

8. That the application is in vain and an afterthought filed on 4th February, 2020 and only sought to be amended and prosecuted after the defendants filed and served their application dated 23rd July, 2020.

36. The applicant filed a further affidavit sworn on 23rd April, 2021 in which he buttressed the issues raised in his supporting affidavit and further deposed that after eviction, the respondents went back to the suit land and constructed new structures and he relied on the photograph attached to his affidavit. It is his assertion that in fact, the respondents were convicted and sentenced to three years' probation for returning back to his land after eviction. As such he prays that the respondents be convicted for contempt of court as they are still on his land.

37. The applicant filed written submissions dated 23rd April, 2020. I believe and for the avoidance of doubt, the applicant intended to mean 23rd April, 2021. It is the applicant's submission that despite proper service of the warrants of eviction, the respondents continue to disobey lawful court orders and that it is paramount that the orders of the court need to be respected and obeyed. He relies on the case of **Ali Soitara Korir & other versus Josephine Nyambura Koiga Macharia & others [2007] eKLR** and **Mathitu Nderitu & another versus Settlement fund trustees & 2 Others, Fredrick Wang'ombe Nderitu & Another proposed interested parties [2017] eKLR** and **Masaba Farmers Co-operative Union Limited versus Getembe Hospital Limited [2013]eKLR**.

38. The respondents filed their written submissions dated 11th June, 2021. It is their submission that the applicant has not proved contempt of court to the required standard above the preponderance of probabilities. They rely on the case of **Ann Wangu Njeri versus John Murage Muriuki[2020]eKLR**.

39. I have considered the application and the submissions filed by the applicant. Before I delve any further, I wish to refer to the decision of this court as regards representation of the Respondents by the firm of Kilonzo & company advocates in their application dated 13th July, 2020. This court will not depart from that decision and as such I find the replying affidavit dated 21st January, 2021, the grounds of opposition dated 18th January, 2021 as well as the written submissions dated 11th June, 2021 as incompetent and the same is hereby struck out.

40. **The Black's Law Dictionary (Ninth Edition)** defines contempt of Court as:-

“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

41. The law guiding the present Application is Order 40 Rule 3(1) of the Civil Procedure Rules which stipulates as follows:-

In cases of disobedience, or of breach of any such terms, the Court granting an injunction 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.

42. In the case of **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** the Court of Appeal held as follows:

For many years in the history of the Judiciary of Kenya the Courts have, pursuant to Section 5 (1) of the Judicature Act, resorted to the prevailing law of England in the exercise of the power to punish for contempt of Court

Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when Section 5 of the Judicature Act was enacted. By Act No.7 of 2011, Article 163 (9) of the Constitution was operationalized by the enactment of the Supreme Court Act (CAP 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt.

Under Section 29 of the Environment and Land Court Act, it is an offence punishable, upon conviction to a fine of not exceeding Kshs.20,000,000 or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the Court given under the Act.

We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of Court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of Court has been expressly clothed with jurisdiction to punish for contempt of Court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of Court Applications'

43. Section 5(1) of the Judicature Act which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate Courts.”

44. Section 29 of the Environment and Land Court is clear to the effect that;

'Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both'.

45. The applicant herein has annexed pictures showing the structures erected on the suit land. In his supporting affidavit, the applicant stated that the respondents were evicted from the suit land on 23rd January, 2020 and on 24th January, 2020 the respondents went back and erected structures thereon. The pictures annexed herein appear to have been taken on 3rd October, 2020. It is not clear to me who exactly constructed

the structures. The court has not had an opportunity to see any evidence showing actual construction of the structures by the respondents. The pictures only show just that-the structures.

46. The Supreme Court of Kenya in **Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR** held that;

The power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the Respondent s to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order 9 (emphasis mine).

47. I find that the applicant has not proved to the required standard that the respondents as cited were in brazen disobedience of the Court Order dated 11th January, 2018. and I decline to grant the orders sought in the application.

48. The upshot of the foregoing is that the notice of motion Application dated 13th July, 2020 is struck out with costs and the amended notice of motion application dated 29th October, 2020 is dismissed with no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 8TH DAY OF FEBRUARY, 2022

Mbogo C.G

Judge

8/2/2022

In the presence of: -

CA: T.Chuma