



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KITUI

ELC APPEAL NO. 32 OF 2021

(FORMERLY ELC CIVIL APPEAL NO. 5 OF 2021 AT MACHAKOS)

MUTETHYA ALLI.....APPELLANT

VERSUS

GREGORY MATHEW KYALO.....RESPONDENT

RULING

1. The application subject matter of this ruling is dated 16th August, 2021. It is a notice of motion brought under Section 3A of the Civil Procedure Act and Section 5 of the Judicature Act. The prayers that remain for consideration are;

1. Spent

2. That the court be pleased to cite the Respondent for contempt of court and direct that the Respondent be committed to jail and pay to jail and pay a fine for contempt for disobeying the Honorable Courts orders dated 11/5/2021 and 9/6/2021 respectively.

3. That the respondent be ordered to make good the loss incurred by the Appellant as a result of his contemptuous acts, and which damage is estimated at Kshs. 8,950,000.

4. THAT the court be pleased to issue any further orders as it may deem fit in the circumstances of the case and in the interests of justice.

5. THAT the OCS, Nzambani Police Station be ordered to ensure the orders of the court are complied with to stop further demolitions.

6. THAT the Respondent do meet the costs of this application

2. The applicant relies on the grounds on the face of the application and the supporting affidavit sworn by the applicant on 12th August, 2022 and also filed written submissions. The Applicant states that the court issued an order on 12th May, 2021 staying execution of judgment and/or in ruling in Kitui Chief magistrates Court ELC case number E003 of 2021 on 25th March 2021. The orders were issued on 12th May 2021 and extended on 9th June 2021.

3. The Applicant claims that the Respondent and his agents demolished the construction on the suit property and continued to terrorize her by demolishing her houses and chasing away her tenants and making threats. She claims that the said acts will render her family homeless before the case is heard. Further that the respondent has misled the court to issue orders in the lower court allowing her to revisit the suit properties with his surveyors without disclosing that there is a pending appeal and existing orders of stay of execution.

4. The Applicant claims that the dispute between her and the Respondent is on boundary, but the respondent has encroached, destroying houses valued at Kshs. 8,950,000/= belonging to the appellant while being fully aware of the existing orders. The Appellant and her family have been living in fear and if the orders sought are not granted she will suffer irreparable harm.

5. The respondent filed a replying affidavit sworn on 13th January 2022 in which he states that the applicant has not put any material on record to prove that the orders complained of were extracted and served upon him. It is thus not clear which orders the applicant is talking about or how the said order were to be complied with.

6. The Respondent states that the actions complained of by the Applicant of terrorizing her, demolishing her houses and chasing away her tenants are criminal in nature yet she has not shown that there has been a complaint to the police. In reply to the allegations that the Respondent demolished the applicant's houses and the photographs attached, the Respondent states that the applicant has not shown any connection between the Respondent and the photos or that the proof that the houses belong to her. In short, the allegations of contempt of court orders have not been proved according to the Respondent.

7. The Respondent further states that the power to punish for contempt is a powerful tool and is available for use only sparingly and should only be invoked where these quote incidents and unassailed evidence to convict for contempt.

8. The Respondent filed written submissions in which he states that the application does not meet the threshold for making a finding of conviction for contempt of courts. He relied on the South African High Court case **Kristem Carla Burchel vs. Grant Burchel Eastern cape Division Case No. 364 of 2005** where the court stated;

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent (iii) Failure by their responders to comply with the terms of the order.”

9. The Respondent submitted that the three conditions have not been met. The Respondent further relied on the case of **De large vs. Smuts (1998) ZAAC 785 (CC)**, in pointing out the power to imprison for coercive and no-punitive purposes is an extraordinary one.

Determination

10. I have considered the application herein dated 16th August, 2021, the supporting affidavit, replying affidavit and the submissions by Counsel and the authorities relied on and make my determination as hereunder.

11. As submitted by Counsel for the Respondent the essential elements of civil contempt are as outlined in the quoted case of **Kristen Carla Burchel vs. Grant Burchel Eastern cape Division Case No. 364 of 2005**. The same essential elements are espoused in many Kenyan cases, the same were set out in the case **Katsuri Ltd. –vs- Kapurchand Depar Shah (2016) eKLR** where Mativo J. stated

“Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand^[22] have authoritatively stated as follows:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.

12. It is the Courts finding that the Applicant has not shown the terms of the Court orders that are relied on for the contempt proceedings. The said orders are not attached to the application and the Applicant has not shown that the Respondent had knowledge of or proper notice of the terms of the orders. I am further not satisfied that proof has been shown that Respondent acted in breach of the said orders. The Applicant has merely stated that the Respondent terrorized her family, demolished her houses and chased away tenants. The only evidence relied on are photographs whose origin has not been provided.

13. It has been held by courts that contempt of court is an offence of a criminal character and proof of such contempt *must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. This was stated in Mutitika –vs- Bahanini Farm Ltd. (1985) KLR 229*. This is because the charge of contempt is akin to a Criminal Offence. A party may lose his liberty. The court held as follows;

“The Courts 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. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

14. From the foregoing I find that the threshold for proving that the Respondent is in contempt of the Court orders dated 11th May 2021 and extended on 9th June 2021 has not been met and thus the application to cite the Respondent for contempt of court has no merit and the same fails. I further find that grant of prayer 3, 4 and 5 are dependent on the court granting prayer number 1 for contempt. Having found that the said prayer has no merit the subsequent prayers must also fail.

The final order is that the application dated 16th August 2021 is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 9TH DAY OF MARCH, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

RULING READ IN OPEN COURT AND ONLINE IN THE PRESENCE OF-

C. NZIOKA.....COURT ASSISTANT

KARIUKI ADVOCATE.....FOR THE APPELLANT/APPLICANT

MUSYOKI ADVOCATE.....FOR THE RESPONDENT

THE APPELLANT/APPLICANT MUTETHYA ALI PRESENT