



**Kamau v Wachira & 2 others (Environment and Land Case Civil
Suit 642 of 2011) [2022] KEELC 3586 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 642 OF 2011**

SO OKONG'O, J

JULY 7, 2022

BETWEEN

JOSEPH NGATA KAMAU PLAINTIFF

AND

BERNARD MAINA WACHIRA 1ST DEFENDANT

RACHEL NJERI KIBE 2ND DEFENDANT

COUNTY GOVERNMENT OF NAIROBI 3RD DEFENDANT

RULING

1. The full facts of this case are set out in the judgment of this court delivered on May 3, 2018. It is not necessary to reproduce the entire judgment here. I will give a summary of the dispute to the extent relevant to the application before the court. The Plaintiff and the 1st and 2nd Defendants are neighbours. They own and occupy four (4) maisonettes situated on all that parcel of land known as L.R No. 209/8737/1 (hereinafter referred to only as “the suit property”). The Plaintiff owns maisonette 3. The 1st defendant owns maisonettes 1 and 2 while the 2nd defendant owns maisonette 4. The four maisonettes are on the same compound. The suit property is owned by Upper Hill Properties Limited (hereinafter referred to as “the head lessor”). The Plaintiff and the 1st and 2nd Defendants are the directors and shareholders of the head lessor. The Plaintiff and the 1st and 2nd Defendants own their respective maisonettes on separate leases from the head lessor for the unexpired term of 99 years with effect from March 1, 1976 (less the last 10 days thereof). The dispute before the court concerns the use and enjoyment of the common areas on the suit property.
2. In his amended plaint dated August 13, 2013, the plaintiff averred that in breach of the terms and conditions regarding the use of common areas contained in the leases that were issued in respect of maisonettes 1, 2 and 4 by the headlessor to the 1st and 2nd defendants, the 1st and 2nd defendants had illegally blocked for their exclusive use the common areas of the suit property thereby denying the



plaintiff the right to use and enjoy the said areas. The Plaintiff averred that the 1st and 2nd defendants had blocked for their exclusive use, the open grounds on all sides of the four maisonettes, the frontage of the maisonettes, the garden adjacent to maisonette 1 and the servant quarters situated next to maisonette 4. The plaintiff averred that the 1st defendant had erected a perimeter wall alienating the common area next to maisonette 1 and constructed a bungalow on the said common area that he uses for his personal benefit for various business activities. The Plaintiff averred that the said bungalow had blocked the common parking area for the owners of the other maisonettes as well as their visitors and customers. The plaintiff averred that the said bungalow had also interfered with the general serenity and the greenery provided by the garden in the common area. The plaintiff averred that the 1st defendant alienated the said common area without the consent of the owners of the other maisonettes and the mandatory licenses from the 3rd defendant. The plaintiff averred further that around the month of September, 2012, the 2nd defendant also fenced off the common area adjacent to maisonette 4 which was next to the common servant quarters thereby blocking the plaintiff from accessing the area. The plaintiff averred that the said blockage was illegal and unjustifiable.

3. The 1st defendant filed a statement of defence on April 8, 2016 in which he denied all the averments contained in the amended plaint. The 1st defendant denied that he had blocked, obstructed or denied the plaintiff access to the common areas on the suit property. The 1st defendant denied also that he had constructed a bungalow on the common area next to maisonette 1 and that he was using the same for business. The 1st defendant denied that he had breached the terms of the lease under which maisonettes 1 and 2 were let to him by the head lessor. The plaintiff's alleged loss and damage were also denied.
4. In her statement of defence dated April 13, 2016, the 2nd Defendant denied the plaintiff's claim in its entirety. The 2nd defendant denied blocking or denying the plaintiff access to the common areas on the suit property. The 2nd defendant also denied having erected an illegal fence adjacent to maisonette 4 or having placed a blockage to prevent the plaintiff from accessing common areas on the suit property next to the said maisonette or servant quarters. The 2nd defendant denied also that the plaintiff had suffered any damage or loss. The 3rd defendant filed its statement of defence on August 29, 2013. The 3rd defendant denied the entire claim by the plaintiff and contended that the claim was misconceived.
5. The plaintiff's suit was heard and the parties tendered evidence in support of their respective cases and thereafter made closing submissions in writing. After considering the pleadings, the court framed the following as the issues that arose for determination in the suit;
 1. Whether the 1 and 2nd defendants unlawfully erected structures and barriers on the common areas of the suit property thereby denying the plaintiff the right to access, use and enjoy the same.
 2. Whether the 3rd defendant was negligent in the performance of its statutory duties owed to the plaintiff in relation to the said acts by the 1st and 2nd defendants.
 3. Whether the plaintiff suffered loss and damage as a result of the said acts by the defendants.
 4. Whether the plaintiff was entitled to the reliefs sought in the amended plaint.
6. On the first issue which is the only issue relevant to the application before the court, the court stated as follows:

“From the totality of the evidence before me, I am satisfied that the walls that the 1st defendant had erected on the parking area on the lower side of the suit property next to the gate were unlawful and amounted to an infringement on the plaintiff's right to enjoy the use of that



common area. Since the wall was also put up without approval from the 3rd defendant, the construction thereof was illegal. I will comment later on the wall that was put up by the 1st defendant on the drive way of the suit property.

With regard to the fence and the gate that was constructed by the 2nd defendant, I am satisfied that the gate was put up illegally. I have not however found the fence illegal for reasons that I will give later....I have also looked at the site plan for the suit property that was produced in evidence as P.Exh. 9. I am in agreement with the Plaintiff and the 1st and 2nd defendants that they each had a right to exclusive use of the gardens in front of their respective maisonettes. It also appears from clause (xvii) at page 9 of the lease aforesaid that the owners of the maisonettes had a right to fence the said gardens. What I noted when I visited the suit property were however extensions beyond the gardens to the drive way by all the parties. Since all the parties were in agreement that they had a right to the exclusive use of the gardens in front of their maisonettes and had all fenced the same, in the absence of clear evidence as to dimensions of each maisonette's garden, I am unable to say that the perimeter wall and the other fences around maisonettes 2, 3 and 4 are illegal.

What I have found to be illegal is the wall that the 1st defendant had put up at the entrance of the suit property in front of maisonette 1 in the common area that was to be used for parking. I also find the 2nd defendant's gate next to the servant's quarters illegal. The area where the gate has been erected should be open. I am in agreement with the Plaintiff that the area does not form part of the 2nd defendant's garden.”

7. In the judgment delivered on May 3, 2018, the court found that the plaintiff had proved part of his case on a balance of probabilities against the defendants and entered judgment for the plaintiff against the defendants on the following terms:
 1. “I declare that the 1st defendant's acts of fencing and annexing the common area/parking that was meant to be used by all the owners of the four (4) maisonettes on the suit property, L.R No. 209/8737/1 were illegal.
 2. I declare that the metal gate that has been erected by the 2nd Defendant on the suit property next to the servant quarters adjacent to maisonette 4 is illegal.
 3. A permanent injunction is issued restraining the 1st and 2nd Defendants from interfering with the Plaintiff's access and use of the common areas on the suit property.
 4. A mandatory injunction is issued compelling the 1st Defendant to pull down and demolish within 60 days from the date hereof the wall that he has erected on the common area/parking of the suit property, L.R No. 209/8737/1 next to the main gate opposite maisonette 1.
 5. A mandatory injunction is issued compelling the 2nd Defendant to remove within 60 days from the date hereof the metal gate that she has erected on the space between maisonette 4 and the servant quarters.
 6. The orders issued herein shall not prevent the plaintiff and the 1st and 2nd Defendants from agreeing on how to manage the common areas/parking and other activities on the suit property in future.
 7. Each party shall bear its own costs of the suit.”
8. What is before the court is an application brought by the plaintiff by way of notice of motion dated March 15, 2019 in which the Plaintiff has sought the following orders;



1. That the court does find and hold that the 1st and 2nd Defendants are in contempt for disobeying the orders made by the court on 3rd May 2018 and does proceed to punish them.
 2. That the 1st and 2nd defendants be ordered to purge the contempt by pulling down all the illegal structures that they have put up in the common areas.
 3. That the court does order the OCS Capitol Hill Police Station and/or the Director of Criminal Investigations to provide security and assistance to the Plaintiff in the execution of the said orders of 3rd May 2018 and any further orders granted herein.
 4. That the court does issue such further directions and/or orders in connection with the application in the interest of justice as it deems fit.
 5. That the costs of the application be in the cause.
9. The application that was supported by the affidavit of the Plaintiff sworn on March 15, 2019 was brought on the grounds that it its judgment delivered on May 3, 2018, the court had directed the 1st and 2nd defendants to take down the illegal structures that they had put up in the common areas of the suit property and that they were given 60 days to do so. The Plaintiff averred that the 1st and 2nd Defendants were also prohibited from putting up any further structures within the said common areas. The plaintiff averred that the 1st and 2nd defendant had refused to pull down the said structures as ordered by the court and that the 1st defendant had gone ahead to construct more illegal structures within the common area of the suit property.
 10. The Plaintiff annexed to his affidavit several black and white photographs to prove his claim that the illegal structures that the court had ordered the 1st and 2nd defendants to demolish were still in place and that the 1st defendant had put up more of such structures. The Plaintiff also annexed to his affidavit some of the correspondence that his advocates exchanged with the 1st defendant's advocates on the issue.
 11. The 1st defendant opposed the plaintiff's application through a replying affidavit sworn on May 24, 2019. The 1st defendant denied that he had refused to comply with the orders of the court made on May 3, 2018 and that he had gone ahead and put up new illegal structures on the common areas of the suit property. The 1st defendant contended that he had complied with the court order by demolishing all the structures that he had put up on the common areas. The 1st defendant denied that he had put up any new structure on the common areas as claimed by the plaintiff. The 1st defendant annexed to his affidavit several photographs that he claimed to show the latest status of the suit property to prove that he had complied with the court order. The 1st defendant filed a further affidavit in which he claimed that the plaintiff refused to cooperate with him to resolve the matter amicably and that he had instead resorted to harassing him by making malicious and unfounded allegations against him.
 12. The 2nd defendant opposed the application through a replying affidavit sworn on August 17, 2021. The 2nd defendant averred that she complied fully with the court order by pulling down the small metal gate complained of by the plaintiff immediately she became aware of the court judgment. The 2nd defendant annexed to her affidavit a photograph showing that the said gate had been pulled down in compliance with the court order aforesaid. The 2nd defendant averred that prior to filing the present application, the plaintiff did not seek compliance with the said order from her since she had already complied. The 2nd defendant urged the court to dismiss the plaintiff's application with costs.
 13. The application was heard on October 7, 2021. In his submission, the plaintiff's advocate reiterated the contents of the plaintiff's affidavit in support of the application. The Plaintiff's advocate submitted that



the plaintiff had proved the acts of contempt alleged against the 1st defendant. The plaintiff submitted that neither the terms of the order nor knowledge of the same was disputed. As concerns the 2nd defendant, the plaintiff submitted that she had pulled down the offending metal gate and as such the plaintiff did not wish to pursue the application as against her.

14. In her submissions in reply, the 1st defendant's advocate reiterated the contents of the 1st defendant's affidavit and further affidavit filed in opposition to the application. The 1st defendant's advocate submitted that in compliance with the order of the court, the 1st defendant had pulled down the wall that was standing on the common area and had not put up any new structures in the common areas as claimed by the plaintiff. The 1st defendant's advocate submitted that the application was an attempt by the plaintiff to stop the 1st defendant from using the garden area in front of his property. In conclusion, the 1st defendant's advocate submitted that the plaintiff had failed to establish the contempt alleged against the 1st defendant.
15. On her part, the advocate for the 2nd defendant urged the court to dismiss the application as against the 2nd defendant since the 2nd defendant had complied with the court order and the same had been confirmed by the plaintiff.
16. In a rejoinder, the plaintiff's advocate submitted that the structures that the 1st defendant had put up extended to the common area. with regard to the 2nd defendant, the plaintiff's advocate submitted that the 2nd defendant brought down her gate after the filing of the contempt application. The plaintiff submitted that in the circumstances, the 2nd defendant was not entitled to the costs of the application.

Determination:

17. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the affidavits filed by the defendants in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The main issues for determination in the application before me is whether the plaintiff has established that the defendants breached the orders issued herein on May 3, 2018 and whether the plaintiff is entitled to the reliefs sought in the application.
18. 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."
19. In *Mutitika v Baharini Farm Ltd* [1985] KLR 227 it was held that:
 - i. "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.
 - ii. 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.
 - iii. 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."



20. In the Court of Appeal case of *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).”

21. It is on the foregoing principles that the plaintiff’s application falls for consideration. As rightly submitted by the plaintiff, there is no dispute that the court gave certain orders to be complied with by the 1st and 2nd defendants. The terms of the said orders and knowledge of their existence by the 1st and 2nd defendants are also not in dispute. What is in dispute is whether or not the said orders have been disobeyed. Whereas the Plaintiff has contended that the 1st and 2nd defendants have breached the said orders, the 1st and 2nd defendants have denied the alleged breach. The burden of proving the alleged disobedience of the said orders was upon the Plaintiff. As set out in the cases that I have cited above, the standard of proof of contempt is higher than proof on a balance of probabilities.
22. I am not satisfied from the evidence placed before the court that the plaintiff has discharged this burden of proof. The Plaintiff has claimed that the 1st defendant has refused to pull down a wall that he had constructed in the common area on the suit property and has also constructed new structures in the said common area contrary to the orders that were given by the court. In proof of these allegations, the plaintiff placed before the court blurred black and white photographs which he claimed to be showing the wall that the 1st defendant was to bring down and the new structures that the 1st defendant has constructed in defiance of the said court orders. On his part, the 1st defendant also placed before the court photographs which he claimed to have been taken on the suit property and which he claimed to be showing that he has brought down the wall complained of by the plaintiff and that he has not put up any new structure on the suit property. On her part the 2nd defendant claimed that she complied with the said court orders by pulling down a metal gate that the plaintiff was complaining about. She also produced a photograph showing that the said gate has been removed. The plaintiff conceded that the 2nd defendant has complied with the court orders. He contended however that the compliance took place after he had filed the present application.
23. The photographs placed before the court by the plaintiff in proof of his contempt application have no probative value. The court is unable to clearly see the wall that the plaintiff is complaining about or the new structures said to have been put up by the 1st defendant after the said orders by the court. The plaintiff has therefore not met the standard of proof of contempt.
24. For that reason, I find no merit in the plaintiff’s application dated March 15, 2019. The application is dismissed with costs to the defendants.

DELIVERED AND DATED AT NAIROBI THIS 7TH DAY OF JULY 2022

S. OKONG’O



JUDGE

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

Ms. Muthama b/b for Ms.Mbanya for the Plaintiff/Applicant

Ms. Ndirangu h/b for Mr. Nderitu for the 1st Defendant

N/A for the 2nd and 3rd Defendants

Ms. C. Nyokabi-Court Assistant

