



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 33 OF 2019**

**ASHOCK LABSHANKER DOSHI & ANOTHER.....PLAINTIFFS**

**-VERSUS-**

**COUNTY GOVERNMENT OF MOMBASA & 2 OTHERS.....DEFENDANTS**

**AND**

**BENARD OCHIENG OGUTU..... 1<sup>ST</sup> RESPONDENT**

**ALI HASSAN JOHO ..... 2<sup>ND</sup> RESPONDENT**

**RULING ON SENTENCING**

(Respondents having been found guilty of disobedience of an order of injunction; legal principles applicable; Section 63 (c) of the Civil Procedure Act; Order 40 Rule 3; Section 29 Environment and Land Court Act; whether only sentence would be a prison sentence; principles in sentencing in criminal matters capable of being considered; not in all instances that a prison sentence would be applicable; respondents sentenced to a fine and in default a jail term)

1. The brief background of this case is that through a plaint filed on 28 February 2019, the plaintiffs averred to be the owners of the leasehold title comprised in the land parcel L.R. No. MN/VI/3458 situated in Changamwe, Mombasa County. They claimed that the 2<sup>nd</sup> defendant, a Member of County Assembly (MCA) in the County Government of Mombasa, accompanied by some employees of the County Government of Mombasa (sued as 1<sup>st</sup> defendant) had invaded the suit land, vandalized the gate and destroyed property. Together with the plaint, the plaintiffs filed an application for injunction. Interim orders were issued on 6 March 2019 and extended on 9 April 2019 to 27 June 2019. Pursuant to an application filed on 17 May 2019, the plaintiffs claimed a violation of the interim orders and they sought orders to have Mr. Ali Hassan Joho, the Governor of the County Government of Mombasa, Mr. Jaffer Suleiman Moshesh, the Chief Officer in the Department of Lands, Planning and Housing, and Mr. Benard Ochieng Ogutu, the 2<sup>nd</sup> defendant, found guilty of violation of the order of injunction. They stated that the three visited the land in violation of the order, which inter alia stopped any visitation of the land, and/or led a crowd to further destroy the wall, gate, and other property in the suit land.

2. I heard that application and delivered ruling on 12 February 2020. I was persuaded that the plaintiffs had demonstrated that Mr. Ogutu and Mr. Joho were indeed in violation of the order of injunction but I did not find Mr. Moshesh to be culpable. I then gave directions on mitigation before proceeding to sentence.

3. In his mitigation statement Mr. Ogutu (I will also refer to him as 1<sup>st</sup> respondent), avers that being the MCA of Changamwe Ward, his mandate is to represent the interests of the constituents, and to defend them by advancing the objects and purpose of devolution through legal means. He further states that he has always been a law-abiding citizen, and at the same time, a great champion of adherence to the rule of law. Mr. Ogutu adds that he is a husband, a father to two children with another one on the way, and outside his immediate family, he has dependants, and constituents who rely on him. He further states that he appreciates the ruling of the court, and it should not be imputed that he is an anarchist who is hell bent on trampling upon the rights of the weak by not obeying court orders, because on the sole occasion that he visited the suit land, his intentions were purely on maintaining the law. He asserts that he deeply regrets visiting the suit land in the heat of the moment. He stated that he neither incited anyone nor participated in any demolition of the structures in the suit land, and that the only misdeed was visiting the suit land against the court order. Mr. Ogutu further avers that he is remorseful for the disobedience of the court order. He prays for the court to extend mercy and forgive his disobedience as he is a first time offender with no antecedents of previous crimes. For the reasons above, Mr. Ogutu has sought the leniency of the court and has beseeched the court to issue him with a non-custodial sentence.

4. Mr. Joho (whom I will also refer to as the 2<sup>nd</sup> respondent) also filed his mitigation statement. He stated that he has never disobeyed a court

order and he fully respects the sanctity of the rule of law. He states that on 13 February 2020, he was shocked to read in the newspaper, and on social media, that he had been found in contempt for disobeying the court order herein. He states that he had no knowledge of the existence of the order over the suit property and that if the same were served upon him, he would have obeyed it immediately. He states further that he is informed by his advocates on record, and by some of his advisors, that the suit property subject to the order may not be the property disputed by the 1<sup>st</sup> defendant. He avers that “the confusion as to which property is the suit property has also contributed to the confusion as regards court orders.” He states that it is still not clear that the suit property at the center of the dispute is the same property subject to the contempt proceedings. He states further that after learning of the order for contempt from the press and social media, he left strict instructions to all parties to refrain from trespassing or interfering with the suit property pending hearing and determination of the suit. He states that as it stands no interference of any sorts has been reported to him since he learned of the orders of the court.

5. Mr. Oluga, learned counsel for the plaintiffs, in his submissions, opined strongly that what was stated by the respondents is no mitigation. He submitted that the respondents, despite having been found in contempt, have the audacity to tell the court that the court was wrong. He asked me to be guided by Order 40 Rule 3, and submitted that under that rule, the only sentence this court can be allowed to mete is imprisonment for 6 months and no fine. He urged the court to mete out the highest possible sentence given that the respondents are senior ranking Government officers.

6. Mr. Kariuki, learned counsel for Mr. Ogutu, submitted that his client has appreciated the finding of the court and has even asked for leniency. He did not think that imprisoning the parties will help and asked for a non-custodial sentence for his client.

7. Mr. Saeed, learned counsel for Mr. Joho, had nothing to add and left it to court.

8. I have considered all the above. I agree with Mr. Oluga, that in so far as Mr. Joho’s statement is concerned, one can hardly refer to it as a mitigation statement. In it, he alleges that he was not aware of the court order and that he only came to learn of it in social media and the press. That is an absurd and spurious statement, as all along, Mr. Joho was represented by counsel who was present at the hearing of the application for contempt and also present during the delivery of the ruling that found him in contempt. Within the hearing of the application for contempt, I also found that he could not claim or feign ignorance of the order of injunction. It was certainly the finding of this court that he was in clear disobedience of the order of injunction. I am not sure if Mr. Joho is in denial of that finding, but I am not aware of any appeal filed, or if there is any, that there has been a reversal of the finding that he was in contempt. Chest thumping in a situation such as this does not help.

9. What was disobeyed was an Order 40 order of injunction. In my view, the sentencing regime would comprise of the provisions of Section 63 (c) of the Civil Procedure Act, Cap 21, Laws of Kenya; Order 40 Rule 3; and Section 29 of the Environment and Land Court Act, Act No 19 of 2011. They provide as follows :-

Section 63(c) of the Civil Procedure Act, 2010 :-

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold”.

Order 40 Rule 3(1) of the Civil Procedure Rules, 2010 :-

“3(1) In case of disobedience, or 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”

Section 29 Environment and Land Court Act

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.

10. It will be seen from the above, that under Section 63 (c) of the Civil Procedure Act, in case of disobedience of an order of injunction, the court is at liberty to commit the person to prison and also order that his property be attached and sold. It will be observed that there is no pronouncement in Section 63 (c) of the term of sentence. Order 40 Rule 3 (1) is what provides the actual term of imprisonment which is prescribed as a term not exceeding six months. The order that was disobeyed was issued by the Environment and Land Court, and that being the case, there would be no bar, in my view, if the court, if so moved or in its discretion, utilizes the provisions of Section 29 of the Environment and Land Court Act. The effect of using Section 29 is to increase the term of imprisonment to 2 years and there is a hefty fine of up to Kshs. 20 million or both. I think by providing for a heavy penalty in Section 29 of the Environment and Land Court Act, Kenyans were making it clear that they detest and abhor a violation of an order that touches on property rights, and were making a huge pronouncement that any person who contravenes an order of the court in relation to proprietary rights ought to be made to suffer a very heavy penalty for the same. I am not surprised by the seriousness in which Kenyans take the protection of proprietary rights given the difficult history over land, and the struggle that ordinary Kenyans go through every day, in order to protect their proprietary rights. Land has a special place for Kenyans and it is imperative that any order issued in relation to land be obeyed. I cannot overemphasize that need for we have seen lives being lost because people do not wish to obey court orders over land. A failure to obey an order of court in relation to property only goes to compound the problem and we have enough problems as matters stand when it comes to land in Kenya and we do not need to make matters any more complicated than they already are.

11. Leaders have a special place in Kenya. A Governor controls a whole county and the denizens and multitude look up to such a person to provide leadership. Leadership is not only confined to the political space. A Governor, and a Member of County Assembly, being in strong positions of leadership, can also lead people towards respecting the rule of law. It is trite that people copy their leaders, thus a leader has a

duty and responsibility to obey the law, and guide the citizenry in doing the same. It is therefore painful and disappointing when you see persons holding such positions of leadership being at the forefront in violating the rule of law. It is time that leaders in this country had a serious introspection and changed their ways. This country is not going to be peaceful or held together by a violation of the rule of law and/or disobedience of court orders. That can only lead to a situation of anarchy which is the last thing that Kenyans want. The fabric that holds this country together would be shattered if we all disobeyed court orders. Indeed we would be living in a country of chaos if the law was not being followed. Kenyans want to live in a country of peace and would be proud if their leaders led from the front in respecting and obeying court orders. As I have said, let us introspect and ask ourselves if we want to live in a country that follows the rule of law or whether we want to live in a country that applies the law of the jungle. There is no heroism, absolutely no heroism, in violating a court order. In fact anybody in disobedience of an order of court should be deeply ashamed. This country will be a country that will continue being guided by the rule of law. As courts, we have a duty to safeguard that rule of law. Nobody should imagine that they can get away with violating a court order. Sooner, rather than later, such person will regret his actions. It is time that we all learnt to follow the dictates of the law and respect orders issued by courts for they are issued for the public purpose of maintaining law and order in this country.

12. Before pronouncing sentence, I have not forgotten that Mr. Oluga in his submissions argued that no fine is applicable and that the sole sentence applicable is imprisonment. I do not agree. Although no fine is provided for under Section 63 (e) of Order 40 Rule 3 (1), I am of the opinion that the court has discretion to also mete out other forms of punishment including fines.

13. It is now more or less settled, that a court is not bound to impose the mandatory sentence provided in statute, following the Supreme Court decision in the case of *Francis Karioko Muruatetu & Another vs Republic (2017) eKLR*. The court, while dealing with the mandatory sentence for the offence of Murder under Section 204 of the Penal Code, stated as follows :-

59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.

14. I have also sought guidance from Section 26 of the Penal Code which provides as follows for situations where a person is liable to imprisonment ;\_

26 (3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment.

15. I am aware that the above relate to sentencing for criminal offences but I think the principles therein are general principles which are also applicable to sentencing in a matter touching on disobedience of an order given in civil litigation. The court thus has wide discretion when it comes to sentencing. In the case of *Benard Kimani Gacheru vs Republic (2002) eKLR*, the Court of Appeal indeed stated as follows :-

It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court.

16. I observe that in the case of *Miguna Miguna vs Fred Matiang'i & 8 Others (2018)eKLR*, the court found the respondents to have been guilty of violating an order of the court. One of the respondents in that case was the Cabinet Secretary Ministry of Interior and Co-Ordination of National Government. The court (Odunga J) in that case sentenced the respondents to a fine in the sum of Kshs. 200,000/=.

17. Having all the above in mind, and having considered the mitigation statements, I am of the view that the following sentences are appropriate in the circumstances.

i. For Mr. Benard Ochieng' Ogutu - I can see that he is remorseful and I trust that he has learnt from his mistake. I am of the view that a fine of Kshs. 20,000/= and in default a sentence of 14 days would be appropriate. I so order.

ii. For Mr. Ali Hassan Joho - There is not much remorse in his mitigation statement. It is also important that a person holding the office that he holds, that of Governor, leads from the front in affirming the rule of law. Much is expected from a holder of such office especially in adherence to orders of the court. His apparent lack of remorse is deeply disturbing to this court. Taking all factors into consideration, I commit Mr. Joho to a fine of Kshs. 250,000/= and in default, imprisonment to jail for 60 days. Apart from the above, I believe that the plaintiffs are entitled to restitution. The acts of violation did lead to some damage to property on the land. In addition, Mr. Joho will personally pay any damage and loss that the plaintiffs may have incurred as a result of destruction of the suit property.

18. I further issue warrants of arrest to be executed by the County Police Commander, Mombasa County. He is hereby ordered to proceed to execute the said warrants and arrest and commit the above respondents to Shimo La Tewa Prison, unless they can demonstrate that they have paid the above fines.

19. Orders accordingly.

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF MAY, 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT OF KENYA**

AT MOMBASA