



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 13 OF 2020

IN THE MATTER OF L.R. NUMBER KABARE/ GACHIGI/ 2380

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP. 22 OF THE LAWS OF KENYA

MARY WANGUI NJAGI.....PLANTIFF/APPLICANT

VERSES

NANCY WANJIRA NJAGI.....1ST DEFENDANT/RESPONDENT

JANE WANJIRU NJAGI.....2ND DEFENDANT/RESPONDENT

JOSEPH MWANIKI KARIUKI.....3RD DEFENDANT/RESPONDENT

RULING

Introduction

The Applicant vide a Notice of Motion dated 29th October 2020 sought the following orders:

- (1) That the 2nd defendant /respondent be detained in prison for a term not exceeding six (6) months for disobeying this Honourable Court's order granted the 18th day of September of 2020.*
- (2) That the costs of the application be provided for.*

The application is supported by the following grounds:

- (a) That this Honourable court granted orders on 18th day of September 2020 restraining the Respondent from evicting the Applicant or interfering with the land parcel KABARE/GACHUGI/238.
- (b) That they were in court when the court pronounced the said orders.
- (c) That the 3rd Respondent has barred the applicant from picking her tea bushes and has threatened to use force.
- (d) That the Respondent does not respect the court orders.
- (e) That it is only fair that the 3rd Respondent be detained in prison for a term of six months

Applicant's summary of Facts

The application is supported by the affidavit of the applicant sworn on the same date in which she contends that this Honourable Court issued orders on the 18th September of 2020 restraining the Respondents from interfering with the Land parcel KABARE/GACHIGI/2380.

Thereafter, she sent people to go and pick tea from her land which is the suit property herein but were chased by the 3rd defendant/respondent.

She stated that the Respondents who were present in court when the said orders were pronounced and are also represented by an advocate and that they should have been warned the repercussions of their actions. She argued that it is clear that the 3rd Respondent does not intend to obey the court orders herein.

In reply to the said application, the 3rd Respondent filed a replying affidavit sworn on 27th November 2020.

3rd Respondents summary of Facts

The 3rd Respondent stated that he is the registered proprietor of the suit land parcel No. KABARE/GACHIGI/2380 and has been in vacant peaceful and exclusive possession of the land since 1/03/2020 when he constructed his homestead and have been living together with his family ever since. He stated that a court of competent jurisdiction vide ELC case No. 23 of 2020 (Kerugoya) decreed that he was the rightful owner of the suit land and an injunction order was duly issued in his favor which has not been appealed against, renewed and/or set aside. He attached a copy of the order as “**JMK 1**”. The 3rd Respondent further stated that all the houses on the suit land belong to him and that the applicant does not have a single structure on the suit land as she lives on an adjacent land parcel no KABARE/GACHIGI/2381 with his son one Douglas Muriuki Njagi. He annexed a copy of photos marked “**J.M.K 2**”. The 3rd Respondent also contends that he is aware this Honourable Court delivered a ruling on 18/09/2020 pursuant to an application by the applicant dated 27/04/2020 but the Honourable Court never issued any orders evicting him from his land where he has lived with his family long before the suit was filed. He contends that he has never been served with any formal orders and Notice of Penal consequence with the alleged orders of court issued on 18/09/2020 and hence he cannot be cited for contempt of court orders which has never been served on him in accordance with the relevant law and hence he is not in breach of the same. The 3rd Respondent further stated that his advocate has advised him which advice he verily believes to be true that the law requires proper and personal service of all court orders and the notice of penal consequences upon a respondent before such a party may be cited for contempt and he honestly believes that the application herein lacks merits and a legal muddle. He also contends that the people allegedly sent by the Applicant to pick tea bushes from his land parcel No. KABARE/GACHIGI/ 2380 who were allegedly chased away have not been disclosed or identified and the date and the time in which they were sent to pick the tea bushes. He stated that those particulars which have been left out are crucial and that the alleged people should also have sworn affidavits to verify such allegations and to grant him an opportunity to cross-examine them.

The 3rd Respondent also stated that an application to cite him for Contempt of Court has serious consequences of taking away his Constitutional rights and freedom enshrined in the Constitution and the burden of proof is heavy yet the Applicant herein has approached the issue casually without providing hard evidence that is admissible.

Submissions by the Applicant

The Applicant through the firm of J. Ndana & Company Advocates submitted that this Honourable Court issued temporary injunctions restraining the Respondents from evicting the Plaintiff/Applicant from Land Parcel No. KABARE/GACHIGI/2380 or damaging, cultivating and interfering with the said Land. He argued that the defendants/Respondents were in court when the said orders were issued together with their Advocates. He argued that the Applicant sent her workers to the said farm to pick tea but were chased away by the 3rd Respondent.

3rd Respondent's Submissions

The 3rd Respondent through the firm of Kiguru Kahigah & Co. Advocates submitted on the following three issues:

- (1) What is the nature of the Court orders issued vide the Ruling dated 18/09/2020?*
- (2) Were the said orders formerly extracted and served upon the 3rd Defendant/Respondent together with a Notice of Penal Consequences?*
- (3) Has the orders of this Honourable Court been breached to enable the 3rd Respondent be cited for Contempt of Court?*

The 3rd Respondent admitted that this Honourable Court delivered a ruling on 18/09/2020 temporarily restraining the Respondents by way of an injunction for a period of 90 days from evicting the Plaintiff/Applicant from the suit Land Parcel KABARE/GACHIGI/2380 or damaging or cultivating and/or interfering from the said land and further ordered costs be in the cause.

According to him, the Applicant has not annexed a copy of the order emanating from the ruling including its notice of Penal Consequences as required by the Law. He submitted that failure to do so render the entire application as a nullity. The 3rd Respondent further submitted that the Applicant has demonstrated whether she even attempted to serve the alleged Orders and Notice of Penal Consequences if any to the 3rd Respondent who denies knowledge of such orders or service thereof.

The 3rd Respondent also submitted that the Applicant very casually approached the issue of breach which is a serious matter that should be taken with the seriousness it deserves by producing evidence of the alleged breach as required by Law. He argued that the Applicant has failed to disclose the date and time the Applicant allegedly sent people to pick tea and also failed to disclose the identity of the alleged people she sent to the suit land to pick the tea and that such wild allegations should have been substantiated by way of affidavits sworn by the alleged people who were chased by the 3rd Respondent.

In conclusion, the 3rd Respondent submitted that the burden of proof as required in section 107 of the Evidence Act Cap 80 Laws of Kenya does not shift to the 3rd Respondent but the Applicant has the responsibility to prove her allegations beyond reasonable doubt and not on a balance of probability because the issue of Contempt of Court Orders is a very serious criminal offence as it goes to the roof of the Integrity and Assertiveness of the Judicial and Constitutional authority of our Judicial Institution.

Legal Analysis

I have considered the affidavit evidence both in support and in opposition to the application. I have also considered the submissions by counsels for the Applicant and the third Respondent. The applicable Law, as regards contempt of Court was restated by the Court of Appeal in the Case of **Christine Wangari Gachege –VS- Elizabeth Wanjiru Evans & 11 others (2014) e KLR**. In that case, the Court found that the English Law on Committal for Contempt of Court under **Rule 81.4 of the English Civil Procedure Rules** which deals with breach of judgment, order, or undertakings, was applied by virtue of **Section 5(1) of the Judicature Act** which provided as follows:

“The High court and the Court of Appeal 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.

This section was repealed by section 38 of the Contempt of Court Act of 2016, and as the said Act has since been declared invalid, the Consequential effect in Law is that it had no Legal effect on, and therefore did not repeal section 5 of the Judicature Act, which therefore continues to apply. In addition, the substance of the Common Law is still applicable under section 3 of the Judicature Act. This Court is in this regard guided by the applicable English Law which is part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement of personal service of Court Orders in Contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules”.

I totally agree with the above decision by the Superior Court that since the Contempt of Court Act that had repealed section 5 of the Judicature Act has since been declared unconstitutional, the effect is that section 5 of the Judicature Act still stands.

Having said that, it is imperative to look at the provisions of **Section 5 of the Judicature Act** which states as follows:

(i) *“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”*

The procedure for instituting contempt of court proceedings is the English Law applicable in England at the time the alleged contempt is committed. **Section 5 of the Judicature Act** imposes a duty on the High Court, the Court of Appeal and Law practitioners to ascertain the applicable Law of Contempt in the High Court of Justice in England, at the time the application is brought, the Jurisdiction relating to Contempt of Court proceedings as can be discerned from decided cases appears that the Kenyan Courts have to perpetually and continuously check upon the current Law in force in England in order to apply in its exercise of jurisdiction. That in my respective view is problematic and it is high time the Kenyan parliament rises to the occasion and enacts a comprehensive substantive and procedural law governing Contempt proceedings.

Having said that, it is essential for the maintenance of the Rule of Law and order that the authority and the dignity of the Court are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly and decisively with any proved condemners.

A court order is binding on the party against whom it is addressed and until set aside, shall remain valid and should be complied with. It is a crime to unlawfully and intentionally disobey a Court Order. The essence of Contempt of Court Proceedings is to maintain the authority and dignity of the Court and the capacity to carry out its functions.

In the Case of **Patrick Wanyonyi Munialo –VS- County Executive Committee (CEC) member for Water & National Resources Bungoma County & 3 others; Nzoia Water Services Co. Ltd (interested party); Kennedy Kilali Wekesa & 2 others (contemnor) (2019) e KLR**, the court held as follows:

“The rationale for contempt of Court proceedings is ground on the need to protect the authority and dignity of our courts which is essential for the maintenance of Rule of Law and order in the society. Its objective is to uphold the dignity and authority of the Court, ensure compliance with orders of the Court, ensure observation and respect the due process of Law and multiply public confidence in the administration of justice”.

On the importance of obeying court orders, it was held in the Case of **Shimmers Plaza Limited V National Bank of Kenya Ltd (2015) e KLR** as follows:

“The court should not fold their hands in helplessness and watch as their orders are disobeyed with impunity, left, right and center. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity and authority of the court must be protected and that is why those who flagrantly disobey them must be punished, lest they lead us to a state of Anarchy. We think we have said enough to send this message across.”

In the same decision, the court dealt with the issue of service of a court order and held as follows:

“The dispensation of service under Rule 81.8 of the Civil Procedure (Amendment no. 2) Rule 201 (1) is subject to whether the

person can be said to have had notice of the terms of the judgment or order. The Notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone Email or otherwise.

In our view, otherwise would mean any other action that can be proved to have facilitated the person having come into knowledge of the judgment and/or order. This would definitely include a situation where a person is represented in court by Counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience. This Court in the **Wambora case** (supra) affirmed in the application of these requirements “we will revisit the issue of service. Was there service of the order said to have been disobeyed on the Respondent” there is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect.

“In that respect, this case can be distinguished from Justus Kariuki Mate and another -VS- Hon. Martin Wambora (Wambora Case) supra cited by the learned Counsel for the Applicant. On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before Contempt can be proved. This is line with the disposition covered under 81.8(1)(supra) Kenya’s growing Jurisprudence right from the High Court has registered that knowledge of a court order suffices to prove service and dispense with personal service for the purpose of contempt proceedings for instance, Lenaola J. in the case of Basil Criticos vs Attorney General and 8 others(2012) e KLR pronounced himself as follows:

“The law has changed and as it stands today, knowledge supersedes personal service Where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary.”

This position has been affirmed by this court in several other cases indulging the Wambora Case (Supra).

It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be contempt committed the act complained of with full knowledge or notice of the existence of the order forbidding it. The threshold is quite high as it involves possibly deprivation of a person’s liberty. This standard has not changed since the old celebrated case of *ex parte Langley* 1879 13 CHD 110(C.A), where Thesinger L.J stated as follows at p.119:

“ - - - The question in each case, and depending upon the particular circumstance of the case must be, was there or was there no such notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made. And in a matter of this kind, bearing in mind that the Liberty of the Subject is to be affected, to think that those who assert that there was no such a notice ought to prove beyond reasonable doubt.”

What then amounts to notice, Black’s Law Dictionary 9th edition defines notice as follows:

“A person has notice of a fact or condition if that person has actual knowledge of it; has received information about it; has reason to know about a related fact is considered as having been able to ascertain it by checking an official filing or recording with the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that is does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrejutable to the effect that when an advocate appears in Court on instructions of a party, then it behoves him/her to report back to the client all that transpired in Court that has a bearing on the client case. This is the position in other jurisdiction within and outside the common wealth. In addressing the issue whether service of a judgment or order on the solicitor for the Minister is sufficient knowledge of the order on their part to found liability on contempt; the Supreme Court of Canada in *Bhatanger Vs Canada (Minister of Employment and Immigration)*, (1990) 2 S.C.R. 217 at page 226, L.J. Sopinka held that:-

“In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a part is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Ministers of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in such a case there must be circumstances which reveal a specific reason for bringing the order to the attention of the Minister.”(Emphasis added)

The Court went further and stated thus:-

“On the cases, there can be no doubt that the common law has always required personal suffice or actual personal knowledge of a Court order as a pre-condition to liability in contempt..... Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference proved. (See *Avery Vs Andrews* (1882) 5 1 L.J Ch 414.)“(Emphasis added.)

Now turning to the application before me, the alleged contemnor at paragraph 7 of his replying affidavit affirmed being aware that this Honourable Court delivered a ruling on 18th September 2020 pursuant to an application dated 27th April 2020 but that the Court never issued orders evicting him from his land which is the suit property herein. From the Court record, the orders issued by this Honourable Court on 18th September 2020 are as follows:-

(1) That a temporary injunction be and is hereby granted for 90 days from 18th September 2020 to stop the eviction of the plaintiff/applicant from the land parcel No. KABARE/GACHIGI/2380 or the damaging/cultivating and interfering with the said land.

(2) That the costs of the application shall be in the cause.

According to the applicant, she sent people to go and pick tea from the suit land parcel No. KABARE/GACHIGI/2380 but they were chased by the contemnor. The names of the persons sent by the applicant to pick tea from the suit land have not been disclosed. The alleged persons have not also sworn an affidavit(s) indicating the date, time and place and by whom they were chased. The responsibility of proving that the 3rd respondent disobeyed the orders of this Court by chasing her servants from picking her tea lies with the applicant.

Conclusion

From the foregoing, I find that the applicant has not proved that the 3rd respondent chased her servants from the suit property in disobedience of the orders of this Court issued on 18th September 2020. In result therefore, I find the Notice of Motion dated 29th October 2020 lacking merit and the same is hereby dismissed with costs.

Ruling READ, SIGNED and DELIVERED physically at Kerugoya this 11th day of June, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of :-

- 1. Ms Ndorongo holding brief for Ndana for Plaintiff/Applicant*
- 2. Mr. Wanyinge holding brief for Kahigah for Respondent*
- 3. Kabuta – Court clerk.*