



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ELC CASE NO 455 OF 1998

PETER MIGOSI MIGOSI.....PLAINTIFF/APPLICANT

VERSUS

DIOCESE OF KISII.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 16th September 2020, the Plaintiff filed an application seeking that the Respondent's Agent/Servant one Raphael Achira, the pastor in charge of the Parish be cited for contempt and that he be punished by committing him to prison for a period not exceeding 6 (six) months and the property belonging to the Respondent/Defendant be seized for disobeying the lawful order issued on 12th May, 2020. The said order was issued *ex parte* staying the execution of a decree issued by this Court in the Judgment rendered on 13th March, 2015 pending the hearing and determination of the application dated 5th May, 2020 *Inter partes*. In the said application the Applicant particularly sought to stop any development of the disputed portion of Land LR NO. WEST MUGIRANGO/BOMANONO/ 1083.

2. The application is based on the grounds that the said *ex parte* order was duly served on the Respondent but it has blatantly refused to obey the said order. Further the Applicant avers that on the 12th September 2020, one Raphael Achira proceeded to the site with armed Police Officers and started developing the site. In support of his allegations the Applicant annexed photographs marked PMM1 showing the alleged development on the disputed portion of LR NO. WEST MUGIRANGO/BOMONO/1083.

3. In response to the application, the Respondent filed a Replying Affidavit on 19th October, 2020. In the said Affidavit, the Respondent averred that on 12th September 2020, the congregants of Nyaisa Conference and in particular the youth gathered at the church that was stalled due to a court order issued herein, to do some cleanup, clear overgrown grass, sweep and clean up the soil debris that had accumulated on the church floor during the Covid-19 lockdown in readiness of a church service on 13th September, 2020. This happened after the President had up scaled the number of congregants attending churches in Kenya to 200, therefore there was need to prepare for 200 congregants attending church on 13th September, 2020.

4. The Respondent further deponed that there was no evidence of constructing or developing the stalled church as the youth and other congregants had no wheelbarrows, bags of cement, sand, building stones, steel and ballast on the ground and at the disputed portion known as LR NO. MUGIRANGO/BOMANONO/1083. It was the Respondent's desposition that the photographs produced by the Applicant showed photos of youth doing the cleanup as opposed to developing the stalled Nyaisa Catholic 12).

5. The Respondent further alleged that while doing the cleanup, the Applicant's brother, one Wilson Obare accompanied by 3 armed Administrative Police Officers visited the site. One of the Officers approached Raphael Achira and informed him that Mr. Obare had filed a complaint with them that there was construction of the stalled church development going on. The Respondents contend that upon an explanation by Mr. Abira, the said officers were satisfied that there was no construction going on save the cleanup exercise. It was also the Respondent's contention that the photo of the armed officer, was one of the AP Officers with Raphael Achira.

6. The court directed the parties to dispose of the application by written Submissions. Both parties filed their submissions on 23rd February, 2021 which submissions I have considered.

ISSUES FOR DETERMINATION

7. Having considered the Notice of Motion, affidavits and the rival submissions of the parties the sole issue for determination is whether the Respondent's agent should be cited for contempt of court.

ANALYSIS AND DETERMINATION

8. The law that governs contempt of court proceedings in our Jurisdiction is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others (2014) eKLR**. In that case the Court recognized that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the Judicature Act.

9. This calls for examination of Section 5 of the Judicature Act. The said section confers this court with the power to punish for contempt of court. The said section provided that:

1. 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 such power shall extend to upholding the authority and dignity of subordinate courts.

2. An order of the High court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court”.

10. From the above provision of the law, contempt proceedings are **quasi-criminal** in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. This principle was reiterated in the case of **Gatharia K. Mutikika vs Baharini Farm Ltd[1985] eKLR** where it was 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... It 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.”

11. The requirements for what constitutes contempt of court were clearly outlined in the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** where it was established that an application for contempt proceedings 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. As *Mativo J* rightly pointed out in the aforementioned case, it will be impermissible to find an alleged contemnor guilty of contempt in the absence of **conclusive proof** of all the 4 essential elements. The requisite elements must be established **beyond reasonable doubt**.

13. In the matter before me, there is no contention as to whether *the terms of the order dated 12th May, 2020 were clear and unambiguous nor is there a contention as to whether the Defendant had knowledge of or proper notice of the terms of the order or not.*

14. *From my own analysis of the averments of the parties and their written submissions, the bone of contention is whether the Respondent has acted in breach of the terms of the order and if so, whether its conduct was deliberate.*

15. *The terms of the order that is said to have breached were to the effect that a stay of execution order had been granted stopping any developments on the disputed portion of the land pending the hearing and determination of the application dated 5th May, 2020 Inter partes.*

16. The Applicant avers at Paragraph 6 of his Supporting Affidavit that on the 12th September 2020, Raphael Achira together with a group of youth was at the disputed portion known as LR NO. WEST MUGIRANGO/BOMONO/1083 and in company of an armed Officer they were preparing the ground for development. In support of his allegations the Applicant annexed photographs showing the alleged activities.

17. In his response, Mr. Achira averred that on 12th September 2020, the congregants of Nyaisa Conference and in particular the youth were at the disputed portion to do a cleanup, clear overgrown grass, Sweep and clean up the soil debris that had accumulated at the church floor during the Covid-19 lockdown in readiness of a church service on 13th September, 2020. He further averred that the Officer seen with him at

the site was brought by the Applicant's brother who had made a complaint concerning the presence of the youths on the site.

18. From the above analysis it is clear that there is doubt as to whether the actions of Mr. Achira and the youth amounted to development. While the Applicant averred that the Respondent was preparing the ground for development, no evidence has been tendered of the eventual development on the disputed portion of the land. In any event the said actions have been explained by the Respondent to have been merely the preparation of the grounds for a church service. The Applicant was required to prove his case to the required standard and mere suspicion of development does not meet the threshold.

19. In the foregoing, I find no merit in this application and I dismiss it with no orders as to costs.

20. It is so ordered.

Dated, signed and delivered at Kisii this 11th day of June, 2021.

J.M ONYANGO

JUDGE