



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENTAL AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO. 165 OF 2019**

**ETORE JOHN AKARAN**

**DANIEL ODHIAMBO AMUKA**

**FREDRICK ANYANGO AKEYO**

**JEREMIAH LEWA**

**BIASHA ALI SALIM.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**ELLEN PROPERTIES**

**OCS BAMBURI POLICE STATION**

**DISTRICT COMMISSIONER KISAUNI**

**OCS KIEMBENI POLICE STATION**

**OCPD KISAUNI.....DEFENDANTS/RESPONDENTS**

**RULING**

1. The application herein is dated 26<sup>th</sup> January 2021 and is brought under Order 40 Rule 3 (1), 3 and 4 (1) of the Civil Procedure Rules, Section 1A (3) and 63 of the Civil Procedure Act. The plaintiffs/applicants' herein seeks court to commit the 1<sup>st</sup> defendant's director Margaret Muthoni Ndungu to civil jail for contempt for disobeying the court orders issued on 19<sup>th</sup> January 2021. The plaintiffs avers that the 1<sup>st</sup> defendant disobeyed the orders of court not to demolish structures until the pending case is dispensed with.
2. The application is supported by affidavit of Etoe John Akaran, the 1<sup>st</sup> plaintiff herein. He pleaded that on 19<sup>th</sup> January 2021, the court directed that there should be no demolition of structures on the suit property pending inter parties hearing of the application. That on the night of 23<sup>rd</sup> January 2021, the 1<sup>st</sup> defendant, their servants, and their agents descended upon the said suit property and demolished the plaintiffs' structures without a valid eviction orders. That the 1<sup>st</sup> defendant's actions of demolishing the structures, were to intentionally disobey the court orders.
3. The 1<sup>st</sup> defendant opposed the application vide a replying affidavit sworn by Ms. Margaret Muthoni Ndungu on 22<sup>nd</sup> February 2021. She denied having disobeyed the orders of court issued on 20<sup>th</sup> January 2021. Further to this, she stated that the nine houses that were on the suit property remain untouched. She stated that she cannot tell when and where the applicants' photographs were taken that depict the demolished structures.
4. The court directed that the plaintiffs' application be disposed of by way of written submissions.
5. The 1<sup>st</sup> defendant filed written submissions on 18<sup>th</sup> May 2021. The 1<sup>st</sup> defendant submitted that it has not disobeyed the court orders issued on 20<sup>th</sup> January 2021. That the nine houses that were situated on the suit property prior to court making the orders against demolition still stand undemolished. The 1<sup>st</sup> defendant further submitted that the photographs that were annexed to the application cannot be used to

infer contempt of court orders, for reason that they could have been taken from any location other than the suit property. The 1<sup>st</sup> defendant concluded by stating that the evidence placed before court is not sufficient to hold the 1<sup>st</sup> defendant's director in contempt of court.

6. The plaintiffs submitted in support of their application on 19<sup>th</sup> May 2021 and stated that the 1<sup>st</sup> defendant demolished the plaintiffs' structures on 23<sup>rd</sup> January 2021. More to that, it was stated that pending the determination of this suit, the 1<sup>st</sup> defendant on 3<sup>rd</sup> May 2021 descended again onto the suit property and demolished the plaintiffs structures. The plaintiffs further refuted claims that there are only nine houses on the suit property and averred that there is a Upendo village where the residents live onto the suit property.

7. I have considered the application before me as well as the submissions made by the parties and the issue before me for consideration is whether the 1<sup>st</sup> defendant's director is in contempt of court orders issued on 20<sup>th</sup> January 2021.

8. Where court has issued injunctive orders as it did on 20<sup>th</sup> January 2021, it has subsequent powers to punish those who violate them, as provided by Order 40, Rule 3 (1) of the Civil Procedure Rules:-

**“In cases of disobedience, or of 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.”**

9. Disobedience of court orders amounts to contempt of court. Section 5 of the Judicature Act still applies in determination of contempt of court proceedings in Kenya as it was stated in the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** where it was held:-

**“That since the act that repealed section 5 of the Judicature Act has been declared unconstitutional, the effect is that section 5 of the Judicature Act still stands. Having concluded as aforesaid, I find it fit to examine the procedure for instituting contempt of court proceedings under section 5 of the Judicature Act.”**

10. It is trite law that for a party to succeed in contempt proceedings the applicant has the burden to prove the terms of the order were unambiguous and binding onto the respondent, that there was proper service on the respondent of the order, which the actions of the respondent are in clear violation of the terms of the orders.

11. The applicants herein have proved the clarity of the orders of court issued on 20<sup>th</sup> January 2021. However the applicants have not proved to court that the party they seek to be found in contempt of court was properly served with the orders of court. I have examined the order annexed to the supporting affidavit dated 26<sup>th</sup> January 2021 and marked “B” and I do not see a stamp indicating that Margaret Muthoni Ndungu was personally served with the order. Further to that, there is no affidavit of service on court record to prove proper service effected onto Margaret Muthoni Ndungu. Without evidence of personal service of the orders, the court cannot find the Margaret Muthoni Ndungu in contempt of court. Moreover Margaret Muthoni Ndungu is not a party to the suit and if the plaintiff wanted the directors of the 1<sup>st</sup> defendant to be held in contempt, they should have lifted the corporate veil.

12. Given that contempt of court orders seek the imprisonment of a party and denial of the liberty of a person, the applicants cannot wish away the duty to prove beyond a shadow of doubt the requirements expected of them. The criminality of punishing a party for disobeying a court order, places a greater burden onto the applicant to prove to court that despite the party being fully aware of the orders, he or she chose to disobey and for that reason should be punished.

13. The evidence adduced by the applicant does not lead court to make a finding that Margaret Muthoni Ndungu is in contempt of the orders issued on 20<sup>th</sup> January 2021. In light of the above observations, I find no merit in the plaintiffs' application dated 26<sup>th</sup> January 2021 and the same is dismissed. Each party to bear their own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 9<sup>TH</sup> DAY OF JUNE 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

**Yumna Court Assistant**

**C.K. YANO**

**JUDGE**