



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO 225 OF 2016 (O.S)

IN THE MATTER OF LANDLOCKED PARCEL PLOT TITLE NO. MOMBASA/BLOCK/XVII/108

AND

IN THE MATTER OF APPLICATION FOR AN ACCESS ORDER UNDER ORDER 140 OF THE LAND ACR NO. 6 OF 2012

AND

IN THE MATTER OF AN APPLICATION BY ABDULLA ALI ABDULREHMAN FOR COARTS INTERVENTION TO PROVIDE A ROAD ACCESS TO HIS LANDLOCKED LAND PLOT TITLE NO. MOMBASA/BLOCK/XVII/108

BETWEEN

ABDALA ALI ABDULRAHAM.....APPLICANT

VERSUS

THE MINISTRY OF LANDS, PLANNING, HOUSING,

MOMBASA COUNTY.....1ST RESPONDENT

THE CHIEF OFFICER, MINISTRY OF PLANNING.....2ND RESPONDENT

THE COUNTY SURVEYOR, MOMBASA COUNTY.....3RD RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA.....4TH RESPONDENT

THE REGISTRAR MOMBASA DISTRICT.....5TH RESPONDENT

THE HONOURABLE ATTONEY GENERAL.....6TH RESPONDENT

AND

MAHMOOD HAIDERLU KHIMJI.....1ST INTERESTED PARTY/APPLICANT

SAKAI MAHMOOD KHIMJI.....2ND INTERESTED PARTY/APPLICANT

RULING

The application

1. The interested parties' application is dated 19th April 2018, and is brought under Order 51, Order 40 Rule 3 (1) of the Civil Procedure Rules, Section 1A, 1B, and 3A of the Civil Procedure Rules, Section 13 (7) of the Environment and Land Act, Section 4,5, and 28 of the Contempt of Court Act No. 46 of 2016 and seeks the following orders;

a) Spent

b) That the Honourable court be pleased to order that (i) Abdalla Ali Abdurahman, the respondent herein (ii) Khalef Khalifa of MUHURI a NGO and (iii) James Kinara, a Commandant of Mombasa County Government Traffic Marshalls attached to the County Inspectorate Unit be cited and punished by committal to civil jail for a period of six months for contempt of Court Orders by this court made and given on 17th February 2017, 3rd March 2017 and 15th June 2017 which orders have been willfully defied and disobeyed by (1) Abdalla Ali Abdurahman, (2) Khalef Khalifa, and (3) James Kinara as aforesaid.

c) That a mandatory and permanent order of injunction be issued restraining (1) Abdalla Ali Abdurahman, (2) Khalef Khalifa, and (3) James Kinara by and/or through their agents, servants, nominees, subordinates or otherwise whatsoever, severally or jointly from entering and or trespassing upon the applicants premises being Land Title Plot No. Mombasa/Block XVII/107 by using and or accessing Land Title Plot No. Mombasa/Block XVII/108 through an unlawful gate, passage or road created over the applicants Land Title Plot No. Mombasa/Block XVII/107.

d) That (1) Abdalla Ali Abdurahman, (2) Khalef Khalifa, and (3) James Kinara jointly and severally be ordered to rebuild, restore, replace and reconstruct at their expense within 14 days the iron gate and perimeter stone wall uprooted, broken, damaged, seized and confiscated on 20th February 2018 from the applicants Land Title Plot No. Mombasa/Block XVII/107.

e) That (1) Abdalla Ali Abdurahman, (2) Khalef Khalifa, and (3) James Kinara be ordered to pay damages to compensate the applicants for the loss and injury suffered due to the destruction and unlawful seizure and confiscation of the applications building materials and properties on 20th February 2018 in defiance of the orders of this court.

f) That the respondent to be compelled and ordered to use the designated road of access to his land Title Plot No. Mombasa/Block XVII/108 as contained in the order of the court given on 14th May 2014 in Mombasa HCCC No. 206 of 2002 (Abdalla A. Abdulrahman V Aliya Apartment, Mohamed Khalif and another)

g) That the costs of this application be provided for.

2. The application is premised on the grounds on the face of the application and further supported by the affidavit of Mahamud Haiderali Khimji. That the court dismissed the respondent's application dated 15th August 2016 on 17th February 2017 thereby vacating the temporary access road granted to the respondent. That the court on 3rd March 2017 and 15th June 2017, granted further orders restraining the respondent from trespassing upon the applicants' Plot No. Mombasa/Block XVII/107 and authorized the applicants to restore and rebuild their gate and perimeter wall.

3. The applicants stated that the respondents have defied the orders of the court and have continuously harassed them with violence and trespass. The applicants have also contended that their family home has been exposed to insecurity due to the actions of the respondents. The applicants pleaded with court to allow the application and save Mombasa/Block XVII/107 from being wasted and damaged from the continuous trespass.

4. The affidavit in support of the application was sworn by one Mahmoud Haidrali Khimji, the 1st applicant. He averred that he and the 2nd applicant are the registered owners of Mombasa/Block XVII/107. He affirmed that the orders that allowed the respondent to use a temporary road of access going through Mombasa/Block XVII/106 joining Tom Mboya Avenue were vacated by the court on 17th February 2017. He further averred that the respondent was duly served in person with the said orders on 24th February 2017 and annexed an affidavit of service filed on 27th March 2017.

5. The deponent stated that on 3rd March 2017 the court issued orders pursuant to the applicants' application dated 1st March 2017. The court restrained the respondent from trespassing upon Mombasa/Block XVII/107 and the respondent was duly served in person with the said orders on 3rd March 2017 and annexed an affidavit of service filed on 15th March 2017. That the court ruled on the application dated 1st March 2017 on 15th June 2017 in the presence of the counsel for the respondent. That the orders were duly served on the respondent in person on 23rd June 2017 and an affidavit of service was duly filed.

6. The deponent averred that on 24th June 2017, with the assistance of Police officers from Central Police station Mombasa he proceeded to rebuild the wall and restore the gate on Plot No. Mombasa/Block XVII/107. That on the same day, the respondent, together with Khalef Khalifa and James Kinara and others demolished the wall and the gate. The deponent claimed that Khalef Khalifa and James Kinara had read the orders when he personally showed the orders to them.

7. The deponent further stated that on 16th February 2018, he resumed construction of the wall in the presence of security from Central police station. That the respondent and Khalef Khalifa and James Kinara incited people to break and demolish the construction but were restrained by the police. He also stated that on 20th February 2018, James Kinara and other employees of County Government of Mombasa descended on the constructed gate and perimeter wall with the county Bulldozer and annexed pictures of the demolition that took place.

8. The 1st applicant stated that the willful and continuous acts of the respondent, Khalef Khalifa and James Kinara of defying the orders of this court should be punished. He argued that those actions were interfering with the due process of the administration of justice and lowering the authority of the court. He pleaded with court to order the respondent, Khalef Khalifa and James Kinara to jointly and severally to restore the uprooted gate and broken perimeter wall and return all the seized building tools as well as compensate the applicant for the loss and injury suffered of Kshs 575,000/=.

The responses

9. The 1st, 2nd, 3rd, and 4th respondents filed Grounds of Opposition on 15th May 2018. The counsel for the 1st to 4th respondents' opposed the application on the grounds inter alia that the applicants have failed to demonstrate how the orders were breached. That the introduced individuals who are not parties to this suit and the remedies sought by the applicants as interested parties do not lie in this suit. Counsel argued that the application is unmerited and ought to be dismissed with costs.

10. Abdalla Ali Abdulrahman, the respondent filed a replying affidavit on 28th June 2018 in opposition of the application. He averred that the application is bad in law, fatally defective, an abuse of the court process and ought to be struck out with costs. He acknowledged having been served with the court orders but denied contravening the said orders or trespassing on the applicants' property. He refuted claims that there exists an access road to his property and further denied conspiring with Khalef Khalifa and James Kinara to frustrate the erection of the perimeter wall and gate. He stated that the applicants were attempting to erect a metal gate on the 4th respondent's property and, who had a right to take action deemed appropriate. He also stated that the pictures annexed by the applicant were inconclusive and fatally defective that and he does not appear in any of the photographs and that they contravene Section 78, 78A and 106B of Evidence Act.

11. The respondent also filed a Notice of Preliminary Objection on 28th June 2018. He raised a preliminary objection to the application for it being fatally defective as the CCTV photographs annexed to the application failed to comply with Section 78, 78A and 106B of the Evidence Act.

12. Khelef Khalifa filed a replying affidavit on 21st June 2018 opposing the application. He averred that he is not party to the suit and has no beneficial interest to this instant proceedings. He denied being aware of the orders of the court issued on 17th February 2017, 3rd March 2017 or 15th June 2017 since no service was effected upon him. He argued that he could not be held in contempt of court orders which he had no knowledge of, served with or aware of the proceedings pursuant to the orders. He urged court to dismiss the application with costs for lacking merit.

The submissions

13. The court directed parties to canvass the application by way of written submissions.

14. Khelef Khalifa filed his submissions on 29th June 2018. Counsel submitted that contempt of court orders requires willful disobedience of court orders; which Counsel stated that Khalef, never willfully took any action that would jeopardize the authority of the court. Counsel submitted that the applicants had not fulfilled the key elements that must be satisfied by the applicant as it was well stated by the **Court of Appeal in Ochino and another V Okombo and 4 others (1989) KLR**.

15. Counsel further submitted that personal service of the court orders was not effected to Khelef Khalifa and therefore he had no personal knowledge of the orders. Counsel argued that he cannot be held in contempt and the applicants have failed to demonstrate that service was effected on him. Counsel also argued that the applicants have failed to demonstrate that the contemnor had any knowledge of the court order. That the court order were directed to Mr. Abdalla Ali Abdulrahman who is a party to the suit unlike Mr. Khalef who was neither a party to the suit nor present when the orders were issued and has no interest in the suit premises. Counsel reiterated that Mr. Khalef was not aware of the court orders he is alleged to have willfully disobeyed.

16. Counsel submitted that the loss of the right to liberty must be considered very gravely and each step leading to the loss must be followed and observed. Counsel contended that contempt of court being of criminal character, the guilt must be satisfactorily proven. Counsel urged that when a party being accused of being in contempt of court orders is not party to a suit, the requirement of service is greater and the applicants have not met that requirement. He relied on the case of Mutitika V Baharini Farm Ltd Civil Appeal No. 24 of 1985 where the court held that:-

“It is evident that the contemnor herein was not a party to this suit. How was he to know of the court order? The plaintiffs/applicants were the ones mandated to initiate a claim. The contemnor ought to have known of the court order herein by being served personally. (emphasis added)”

Counsel urged court to dismiss the application with costs since the applicant have not discharged the burden of proof in contempt proceedings which is high.

17. The 1st and 2nd interested parties filed their submissions in support of the application on 26th February 2021. Counsel submitted that the interested parties/applicants have satisfied the threshold established by law to warrant this court to cite and punish the said contemnors for contempt of court orders that were issued by this court on diverse dates; on 17th February 2017, 3rd March 2017 and 15th June 2017. Counsel submitted that the most comprehensive of the elements for civil contempt were stated in the book **Contempt in Modern New Zealand**. It was stated;

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

a) The terms of the order (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 (see page 6 of Cecil Miller V Jackson Njeru & another (2017) eKLR)"**

18. Counsel submitted that the applicants have met the above threshold and have demonstrated to court that the contemnors acted in willful and continuous defiance and disobedience of the said court orders. Counsel further submitted that the terms of the orders were all binding to the respondent as he was a party to the suit. Counsel contended that the terms of the orders were clear and unambiguous as he never sought interpretation or clarification from the court.

19. Counsel further submitted that the respondent was aware of the said orders that were personally served on him and he does not dispute the receipt of service of the said orders. Counsel submitted that the respondent and James Kinara had knowledge of the court orders as they were personally served upon them. Counsel also submitted that Khalef Khalifa and James Kinara had knowledge of the court orders, which the 1st applicant had personally shown them, in addition a notice of the said orders were placed at the gate which were visibly seen and understood. Counsel submitted that Section 7 and 19 of the Environment and Land Court Act read together with Section 27 of the Civil Procedure Act, empowers court to make an award of costs that follow the event. Counsel urged court to find the contemnors actions led to loss and damage on part of the applicants and award them with damages.

20. The plaintiff/respondent filed submissions on 25th March 2021. Counsel for the plaintiff submitted that the respondent have not committed any act of contempt of court. Counsel submitted that the applicant was stopped from constructing by the county personnel and not the respondent. Counsel submitted that the applicant was required by Section 57 and 58 of the Physical and Land Use Planning Act to obtain requisite approvals and permits for any development within the county. That the applicants failed to demonstrate that they had applied for and paid for the approval permits before construction. Counsel argued that the county government through its officials was right to stop the construction.

21. Counsel contended that the essential elements for proof of contempt of court have not been met to warrant court to issue the orders sought. That the orders of 17th February 2017 that dismissed the respondent's application were negative orders, with no basis or obligation imposed on the respondent that would warrant disobedience. The orders of 3rd March 2017 were restraining the respondents from trespassing through or accessing their property through Mombasa/Block XVII/107. That the applicants did not indicate where the respondent accessed the property through the access denied by court. The orders of 15th June 2017 were directed to the OCS Central Police Station to provide security to the applicants as they restored the gate. That the orders could only be disobeyed by the OCS, and since the applicants have admitted to being provided with security there was no order that was breached.

22. Counsel urged court to dismiss the prayer of mandatory and permanent injunction at the interim stage before parties could be heard on merit. Counsel contended that the applicants had not met requirements for granting injunctive orders as they were stated by the **Court of Appeal in Nguruman Limited V Jan Bonde Nielsen & 2 others CA No. 77 OF 2012**. Further counsel submitted that the applicants failed to comply with the statutory requirements stipulated and do not have clean hands as they have not complied with the Physical and land use Planning Act before purporting to put up the wall and gate, hence the officers from the County Government of Mombasa Inspectorate Unit demolished the unapproved constructions. Counsel urged court to dismiss the application with costs since the applicants had not proved beyond reasonable doubt how the said orders were disobeyed by the respondents.

Analysis and determination

23. I have considered the application, its responses as well as the submissions herein.

24. The applicants herein contends that the orders of the court that were issued on 17th February 2017, 3rd March 2017 and 15th June 2017 were breached by Abdalla Ali Abulrahman, Khalef Khalifa and James Kinara. The court will examine each of the three orders to ascertain whether they were disobeyed as stated by the applicants.

25. The respondent (Abdalla Ali Abdulraham) made an application dated 15th August 2016 for the court to maintain the status quo that the applicant be allowed to continue using the temporary road that goes through Plots Nos. Mombasa/Block XVII/107 and Mombasa/Block XVII/106 in order to access Mombasa/Block XVII 108. The application was however dismissed by this court on 17th February 2017 with costs. The applicants aver that they effected service of the order on to the respondent on 24th February 2017 and filed an affidavit on service on the 27th March 2017 to that effect. I am not persuaded that the orders made by this court on 17th February 2017 are capable of being breached, for the reason that the court merely dismissed the application with costs. The court did not order any of the parties to do anything or to refrain from doing anything. There is nothing arising from that order of this court capable of being willfully disobeyed. It was a negative order as submitted by the respondent.

26. The second order for consideration was granted by this court on 3rd March 2017. From perusing the orders, I do note that the orders were made ex parte in chambers under a certificate of urgency pending the hearing of the application inter parties. On further perusal of the proceedings before this court, I do note that when the application came up for inter parties hearing on 16th March 2017, the court did not extend the interim orders. In my view, the orders that were issued by this court ex parte on 2nd March 2017 were vacated on 16th March 2017 since they were not extended by this court.

27. The final court order that the applicants state to be disobeyed were issued on 15th June 2017. The court ordered the OCS Central Police Station to provide Security to the applicants to restore the gate and perimeter wall on Plot No. Mombasa/Block XVII/107. The applicant filed an affidavit of service sworn by Babuji B. Aleli on 19th April 2018. Babuji averred that on 23rd June 2017 he served a copy of the said court order upon the officer in charge of Central Police Station Mr. Chumwa. He further stated that on 24th June 2018 and 16th February 2018, the police provided security to the applicants while they restored the perimeter wall and gate as ordered by the court. Nevertheless the applicants

averred that despite being served with the said orders on two separate instances and acknowledging service, the respondent willingly defied the orders of the court. The 1st applicant further averred in his affidavit that on 16th February 2018, while the construction of the wall and gate was going on, he served the order on Khalef Khalifa and James Kinara with the said orders. That they both read and accepted service of the order but declined to sign on the principal copy of the order.

28. The application has been opposed by the respondents on the ground that the application is against persons who are not party to a suit. Khelef Khalifa refuted claims that he was served with the orders of court that stating he neither had knowledge of the said orders nor was he party to the suit. The respondent admitted being served with the orders of court but denied trespassing onto the applicants' property. He objected to the CCTV pictures that the applicant relied upon to show that he was involved in demolishing the perimeter wall and gate on the ground that they were fatally defective for failing to comply with Section 78, 78A and 106B of the Evidence Act.

29. The basis of contempt of court is Section 5 of the Judicature Act that gives the High Court power to punish for contempt of court as is for the time being possessed by the High Court of justice in England. In the case of **Ochino & another V Okombo & 4 others (1989)eKLR the Court of Appeal held that:-**

“We have to follow the procedure and practice in England. As we read the law, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of section to compel him to obey. As this court pointed out recently in the case of Mwangi Mangondu V Nairobi City Commission (Civil Appeal No. 95 of 1988):

‘This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant had proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.’ ”

30. As a general rule, all service of the orders deemed to be breached should be served personally unless court dispenses with personal service. **The Court of Appeal in Shimmers Plaza Limited V National Bank of Kenya Limited (2015) eKLR stated that:-**

“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 a person to come into knowledge of the terms of the judgement and/or order. This could 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.”

31. The orders given by this court on 15th June 2017 were directed to the OCS Central Police Station to provide security to the applicants. The affidavit of service filed by the applicant established that the OCS Central police station was served with the said orders. The applicants have also acknowledged that the police accepted service and provided security in two separate occasions. There is no dispute that the orders were personally served on the OCS Central police station an affidavit of service filed to that effect. It is not also in dispute that the OCS complied with the said orders by offering security to the applicants.

32. The court will only punish as contempt if satisfied that the terms of the order were clear and unambiguous and the contemnor had proper notice of the terms of the order. In my view, the terms of the order were clear, the OCS central police station was ordered by this court to offer security to the applicants, which was done on two separate occasions. From the evidence before me I have no doubt that the said orders were complied with and consequently there is no basis which the committal of Abdallah Ali Abdulrahman, Khalef Khalifa and James Kinara can be sustained, for the reason that the said orders were not directed to them but to the OCS Central Police station. Only the OCS was capable to breaching the said orders, which in this case he did not.

33. On determination of Prayer 3, 4 and 5 of the application, the applicants have stated that the respondent has continuously harassed the applicants with violence, exposed their family home with insecurity whilst the applicants' suit being wasted and damaged by the continuous trespass. Its trite law that the court cannot issue an order of permanent injunction before hearing all parties on merit. The court will only grant a mandatory injunction if there exists clear facts that infer special circumstances that go over and above those in a prohibitory injunction. In the case of **Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:-**

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

34. Consequently the applicants have not presented before court, the special circumstances that would warrant a grant of mandatory injunction. Moreover the applicant is asking court for damages of Kshs 575,000/=, it has been held by the court time before that once damages can be qualified, then the court cannot issue an injunction. For the reason that, the applicant will be adequately compensated by an award of damages when the matter is heard and determined to his favour. Based on the above findings, prayer 3, 4 and 5 of the application fails. On prayer 6 of the application, the court will not make a determination on a permanent order in an interim application as it goes to the root of the suit and needs to be determined at trial.

35. In light of the above findings, the court finds the Notice of Motion dated 19th April 2018 devoid of merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 29TH DAY OF JULY 2021.

JUSTICE C.K YANO.

ENVIRONMENT AND LAND COURT-

JUDGE