



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 157 OF 2017**

**HARUN OSORO NYAMBOKI.....PLAINTIFF**

**VERSUS**

**KENELEC SUPPLIES LIMITED.....1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR, NAIROBI.....4<sup>TH</sup> DEFENDANT**

**DIRECTOR OF SURVEY.....5<sup>TH</sup> DEFENDANT**

**PERMANENT SECRETARY,**

**MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT.....6<sup>TH</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....7<sup>TH</sup> DEFENDANT**

**RULING**

The Plaintiff brought the application dated 9/5/2019 seeking to cite the 1<sup>st</sup> Defendant's director, Joseph K. Claudio for contempt of court and his detention in prison for a term not exceeding six months on the grounds that he disobeyed the court order which was issued on 4/4/2019 in the presence of the 1<sup>st</sup> Defendant's advocate. The Plaintiff stated that Joseph K. Claudio was served with the order on 15/4/2019 and that the 1<sup>st</sup> Defendant was also served with the order on 16/4/2019. The Plaintiff contended that the 1<sup>st</sup> Defendant and its director Joseph K. Claudio had defied and breached the terms of that order. The Plaintiff contended that after the order was served, the 1<sup>st</sup> Defendant and its director had deposited waste material on the public service lane contrary to the order denying access to the Plaintiff and other members of the public. The Plaintiff contended that the 1<sup>st</sup> Defendant's action had undermined the due process of the court and brought into public ridicule the rule of law.

The Plaintiff swore the affidavit in support of that application. He deponed that the public service lane which the 1<sup>st</sup> Defendant was ordered to unblock remained obstructed to date and that huge containers were still on site. He conceded that the sewer and water lines had been restored by the 2<sup>nd</sup> Defendant in February 2019 and that it had placed guards to protect the area from interference or possible destruction. He attached photographs showing the containers on the suit land and some debris deposited on the land. He also annexed a copy of the order made by Obaga J. restraining the 1<sup>st</sup> Defendant from encroaching, fencing, blocking, obstructing, preventing, using, constructing any building or structures, storing any material of any kind, interfering with the water and sewer line or dealing in any manner with the service lane measuring 6 meters serving the Plaintiff's premises being land reference number (L.R No.) 209/13557 situated along Langata Road – Nairobi West within Nairobi County, pending hearing and determination of the suit. The court went further to issue a mandatory injunction compelling the 1<sup>st</sup> Defendant to remove all obstructions or containers blocking the sewerage lines and storm water drains and compelled it to correct, repair and or restore the sewerage lines and storm water drains to their working condition.

Joseph K. Claudio swore the affidavit opposing the application to cite him for contempt of court orders. He deponed that He deponed that although he was aggrieved by the ruling of the court, he was intent on appealing against it but maintained that he had not disobeyed the orders issued by the court. He averred that they had not received any complaint from the Plaintiff that they had committed any acts or omission that would constitute breach of the court order. He averred that before the court issued the orders on 4/4/2019, the Nairobi City

Water and Sewerage Company with the security of uniformed police officers proceeded to excavate and place materials on the ground on 15/3/2019. He made reference to the orders made in Judicial Review Application No. 10 of 2019 and Criminal Case No. 48 of 2019 in the City Court touching on this dispute. He denied that the 1<sup>st</sup> Defendant had interfered with the sewer lines installed by the Nairobi City Water and Sewerage Company. He maintained that the instant application was filed as a personal vendetta. He also annexed photographs showing a police officer guarding a parcel of land which has some debris and excavation on it.

Parties filed submissions which the court considered. The Plaintiff submitted that four elements have to be established to demonstrate the guilt of a contemnor. These are that the terms of the order were clear and unambiguous, they were binding on the Defendant, he had knowledge or proper notice of that order and that he acted in breach of the terms of that order in a deliberate manner. The Plaintiff submitted that there was no ambiguity in the orders issued by the court on 4/4/2019 and that the 1<sup>st</sup> Defendant had proper notice of those orders and full knowledge. He submitted that the 1<sup>st</sup> Defendant had deposited debris on top of the water and sewer lines thereby interfering with water and sewer lines by blocking, obstructing and storing materials on the suit land. He reiterated that the mandatory injunction which the court issued enjoined the 1<sup>st</sup> Defendant to remove all obstruction and containers blocking the sewerage lines and storm water drains which had not been done.

In its submissions, the 1<sup>st</sup> Defendant conceded that the terms of the order issued by Obaga J on 4/4/2019 were clear and unambiguous. That being aggrieved by those orders, the 1<sup>st</sup> Defendant filed **Civil Appeal No. 557 of 2019** challenging the issuance of those orders. It maintained that it had obeyed the court orders. It submitted that it was not within its purview to remove the obstructions, containers, sewerage lines and storm water drains from the suit land. It went further to submit that having knowledge and proper notice of the terms of the order, it had acted obediently in accordance with the terms of the order and that its directors had not breached those orders deliberately. The 1<sup>st</sup> Defendant urged that the Plaintiff had failed to establish or demonstrate any flagrant contempt by the 1<sup>st</sup> Defendant but had instead obfuscated the issues so as to mislead the court.

The Attorney General (AG) submitted that the orders issued by the court were clear and directed the 1<sup>st</sup> Defendant not to engage in certain specified activities. The AG submitted that the 1<sup>st</sup> Defendant's advocate was in court when the orders were issued. It argued that photographs were not sufficient to prove that a party was in violation of court orders. The AG argued that a party seeking to have another committed for contempt of court must prove that there was disobedience which was wilful and deliberate. The AG submitted that where there were alternative measures to remedy the contempt, the court ought to defer to the other measures because orders for committal to civil jail or attachment of property were extreme and touched on the constitutional rights to liberty and property of the person cited for contempt. The AG invited the court to note that the orders in question were interim in nature and the main dispute between the parties was yet to be determined. The AG urged the court not to grant the orders sought by the Plaintiff while contending that there were measures which the court could adopt to secure compliance if it found that the 1<sup>st</sup> Defendant was in contempt. It expressed doubt that there was disobedience of the court orders.

The issue for determination is whether the court should cite Mr. Joseph K. Claudio for contempt of the orders issued on 4/4/2019 and whether he should be committed to jail. It is not in contention that the orders issued by Obaga J. on 4/4/2019 were clear and unambiguous. It is also not in doubt that the 1<sup>st</sup> Defendant and its director were aware of that order. The point of divergence is whether or not the 1<sup>st</sup> Defendant deliberately acted in breach of those orders.

The orders in question restrained the 1<sup>st</sup> Defendant from encroaching, fencing, blocking, obstructing, preventing, using, constructing any building or structures, storing any material of any kind, interfering with the water and sewer line or dealing in any manner with the service lane measuring 6 meters serving the Plaintiff's premises being L.R No. 209/13557 situated along Langata Road – Nairobi West within Nairobi County, pending hearing and determination of the suit. The Plaintiff conceded that the sewer and water lines had been restored by the 2<sup>nd</sup> Defendant in February 2019 and that the 2<sup>nd</sup> Defendant had placed guards to protect the area from interference or possible destruction.

The Plaintiff's complaint against the 1<sup>st</sup> Defendant is that it had deposited debris on top of the water and sewer lines thereby interfering with water and sewer lines and that it had deposited waste material on the public service lane contrary to the court order thereby denying access to the Plaintiff and other members of the public. The Plaintiff relied on the photographs taken of the suit land. Further, the Plaintiff's contention is that the mandatory injunction which the court issued enjoined the 1<sup>st</sup> Defendant to remove all obstruction and containers blocking the sewerage lines and storm water drains which had not been done. If the water and sewer lines were restored by the 2<sup>nd</sup> Defendant in February 2019 then the Plaintiff's claim would only extend to the removal of the containers and the debris which it claims was deposited on the suit land.

The 1<sup>st</sup> Defendant submitted that it was not within its purview to remove the obstructions, containers, sewerage lines and storm water drains from the suit land.

The court agrees with the submission made by the AG that where alternative measures to remedy contempt exist, the court ought to defer to the other measures. The Plaintiff can apply to have the containers removed from the suit land and sold then part of the sale proceeds can be paid towards the removal of the debris and other obstructions from the suit land.

The Plaintiff neither tendered evidence to show that the containers blocking his access belonged to the 1<sup>st</sup> Defendant nor did he prove that the 1<sup>st</sup> Defendant deposited waste material on the public service lane contrary to the court order. The Plaintiff failed to prove that the 1<sup>st</sup> Defendant or its director, Joseph K. Claudio had deliberately disobeyed the court order issued on 4/4/2019.

The court declines to grant the orders sought in the application dated 9/5/2019.

Delivered virtually at Nairobi this 19<sup>th</sup> day of July 2021.

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Michael Manyara for the Plaintiff

Mr. E. Musyoka holding brief H. Kago for the 1<sup>st</sup> Defendant

Mr. V. Owuor- Court Assistant

No appearance for the other Defendants