



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE 377 OF 2013

STEPHEN K SANG1ST PLAINTIFF/ RESPONDENT

REV. LUKA KIPKURGAT SANG 2ND PLAINTIFF/ RESPONDENT

-VERSUS-

CHEBII BOIYO1ST DEFENDANT/ APPLICANT

SAMMY KIPSAT alias REUBEN KIPSAT 2ND DEFENDANT/ APPLICANT

CONSOLIDATED WITH ELC NO. 394 OF 2013

SIMON DAVID KORIR PLAINTIFF/ RESPONDENT

-VERSUS-

CHEBII BOIYO1ST DEFENDANT/ APPLICANT

SAMMY KIPSAT alias REUBEN KIPSAT 2ND DEFENDANT/ APPLICANT

RULING

This ruling is in respect of an application brought by way of Notice of Motion dated 9th November 2020 by the defendant/ applicants seeking for the following orders:

- a) Spent.
- b) That the Plaintiff/Respondents contemnors herein REV. LUKA KIPKURGAT SANG and SIMON DAVID KORIR be committed to civil jail for such a period as this Honourable court may deem fit for disobeying the orders issued by this Honourable Court on 26th June, 2020 which directed that status quo be maintained until the hearing and determination of the 3rd plaintiff's Mr. Simon Korir be heard and determined.
- c) That in the alternative the properties of REV. LUKA KIPKURGAT SANG & SIMON DAVID KORIR be attached or they be fined for disobedience and/or breach of the orders issued on 26th June, 2020.
- d) That this honorable Court direct that the new structures erected by the Contemnors during the subsistence of the court orders be pulled out.
- e) That the OCS Tambach Police Station to ensure compliance of the Orders.
- f) That the Respondents be condemned to pay costs of this application.

Counsel agreed to canvas the application vide written submissions which were duly filed.

DEFENDANT/APPLICANT'S SUBMISSIONS

Counsel relied on the grounds on the face of the application and submitted that the 1st and 2nd Plaintiff/Respondents are in contempt as they

felled down trees, erected new structures and installed a barbed wire fence around the disputed property contrary to this Court's orders.

In support of the application the applicant swore an affidavit where he stated that on 26th June, 2020 Court issued Orders to the effect that Status quo be maintained pending the hearing and determination of the application in effect barring the Plaintiffs/Respondents by themselves, their servants or agents or any other person whatsoever acting on their behalf from entering into, leasing out, selling, construction, demarcating, developing, or in any other way dealing or interfering with the Defendants'/Applicants' ancestral property known as SAKATIA/SEUT at Emsea sub-location pending hearing and determination of the application. It was further stated that the matter was previously heard and determined by elders who awarded the land to the applicants and the plaintiffs went to court and the case was dismissed vide a Judgment delivered on 23rd April, 2020.

He further deponed that the court declined to make a determination on the proprietary rights of parties with respect to the suit property since the matter is pending the adjudication process and therefore this application has been preferred in bad faith as the defendants are attempting to seek a declaration of property rights in the suit property when the court expressly declined to do so and that Emsea/Changach was declared an adjudication area reasons whereof the interests of the said area can only be determined by the adjudication committee. It was deponed that the applicant's motion is bad in law and an abuse of the court process and the applicant ought to file an objection to the adjudication committee and not file the present application.

Counsel urged the court to find that the respondents are in contempt of the court order.

PLAINTIFF/RESPONDENTS' SUBMISSIONS

Counsel for the respondents opposed the application and submitted that orders ought not to issue as the Applicants have not discharged the burden of proving that there was contempt. That the applicants have admitted that the annexed photographs were taken before the issuance of the orders of maintenance of status quo. Further that the said photographs do not indicate when they were taken hence cannot be of probative value to the determination of if the 1st and 2nd Plaintiff/ Respondents acted in contempt after issuance of orders.

Counsel relied on the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** which echoed the book Contempt in Modern New Zealand who succinctly 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 (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.*

Counsel also cited the case of **Cheseret Arap Korir Vs Equitorial Land Holdings Ltd [202] eKLR** where Kibunja J held that a claimant has to prove contempt above the balance of probabilities and below beyond reasonable doubt.

Counsel therefore urged the court to find that the applicants have not discharged the burden hence the application should be dismissed with costs.

ANALYSIS AND DETERMINATION

The issue for determination is whether the respondents are in contempt of court and whether such contempt has been proved to the required standard.

In any civil suit, the burden of proof of establishing any fact rests with the party raising the allegations. This is set out under section 107 of the Evidence Act wherein it provides:

"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

The Applicants allege that the 1st and 2nd Defendant/Respondents acted in contempt it follows that they must bear the burden of proving the facts giving rise to the contempt complained of. This burden, in civil cases, is discharged on a balance of probabilities and it is discharged by proving all the essential elements to establish one's claim. Therefore, to prove that indeed the Respondents were in contempt, all essential elements of contempt as provided by statute or as developed by case law have to be established.

Contempt of Court is provided for under Section 5 of the Judicature Act. Section 5 thus provides as follows: -

“(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 that power shall extend to upholding the authority and dignity of the subordinate courts.”

Additionally, section 29 of the Environment and Land Court Act provides as follows;

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

The Court’s attention was drawn to the decision of the High Court sitting at Nairobi in **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR**. In this decision, Mativo J pronounced himself stating: -

“38. **The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’**[40] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.[41] Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).[42]

39. *These requirements – that is the refusal to obey should be both willful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. **They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces.***[43] *Honest belief that non-compliance is justified or proper is incompatible with that intent.”*

A claimant must establish two things: one, knowledge and understanding of the existence and content of orders preventing certain conduct by the alleged contemnors; and two, that such contemnors willfully acted contrary to these express Court instructions.

The first requirement to establish contempt of Court has been satisfactorily established. The 1st and 2nd plaintiff/ Respondents in this case had knowledge of the orders of this Court of 26th June 2020. The Court of Appeal sitting in Nairobi in **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** tracing the procedural rules for punishing contempt of court back to Part 81 of Civil Procedure (Amendment No. 2) Rules, 2012 of England, stated that;

“*The dispensation of service under rule 81.8*

*(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 terms of the judgment and/or order. **This would definitely include a situation where a person is represented in court by counsel.**”*

Clearly the said rules contemplate that notice and by extension knowledge of the orders exists when one is represented. All the parties were present in court and represented when the orders were issued and therefore, the first element is sufficiently established.

The second element to be established is that the 1st and 2nd plaintiff/ Respondents acted in willful and *mala fide* disobedience of the orders. This is a factual issue and it involves considering the evidence attached to the application for a contempt finding. The Applicants have attached photographs to their application which they allege show the Respondents acting in contempt.

However, as has been correctly submitted by the 3rd Plaintiff/ Respondent, what is the probative value of these photos when they do not state or provide information on when they were taken? How would the court determine whether the actions, which indeed if done after the court issued its orders would have been in contempt, occurred after this Court issued its orders.

The photographs which the applicants would heavily rely on are inadequate to aid the application for contempt. The Evidence Act and in particular section 9 which provides: -

“*Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by such a fact, or which establish the identity of anything or person whose identity is relevant, **or fix the time or place at which any fact in issue or relevant fact happened,** or which show the relation of parties by whom any such fact was transacted, **are relevant in so far as they are necessary for that purpose.**”*

The Applicants were under a duty to place the photographs in a periodic context in order for this Court to determine whether the actions captured in the photos occurred as a time when the same would have amounted to acting in contempt of this Court’s orders , therefore the second element of contempt has not been satisfactorily established.

In the case of **Teachers Service Commission Vs Kenya National Union of Teachers & 2 others (2013) eKLR** Ndolo J observed that;

“The reasons why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of Justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguard the rule of law”

The judge went further to state;

“I am of the same persuasion that the reason why power is vested in courts to punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and the respect for law and order. As it was in the time of Chief Justice Mckean in 1786 so it is today that courts have a duty to ensure that Citizens bend to the law and not vice versa./ Indeed, if respect for law and order never existed, life in society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and the rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally, without exception. An order is meant to be obeyed and not otherwise.”

Contempt of court orders are meant to safeguard the dignity of the court and not necessarily to punish the contemnors. If the court finds that a party is in contempt of court, then it would not hesitate to punish the said contemnor. The elements of contempt must be proved above the probabilities as it involves the curtailment of a person’s freedom or imposing a fine on the person. This means that the court must be satisfied that the elements have been proved.

I find that the applicant has not discharged this burden of proving that the respondents were in contempt and the same is dismissed with each party to bear their own costs.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF AUGUST 2021

M. A. ODENY

JUDGE