



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 453 OF 2017

JOHN KYENGOPLAINTIFF/APPLICANT

-VERSUS-

BENJAMIN MUTETI MUTISO CONTEMNOR/RESPONDENT

RULING

1. The application for determination is dated 8th October, 2020 filed by the Plaintiff/Applicant under certificate of urgency of even date. It is brought under Order 40 Rule 3 of the Civil Procedure Rules, 2010 Section 5 of the Judicature Act Cap 8 Laws of Kenya, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and the Contempt of Court Act 1981 and Part 81 of the Civil Procedure (Amendment No. 2) Rules 2012 both Laws of England.

2. The Applicant seeks the following Orders:

i) Spent.

ii) **THAT** BENJAMIN MUTETI MUTISO, the Contemnor/Respondent herein be held in contempt and committed to civil jail for such term as the Honourable Court shall deem fair and just for disobeying the orders of this Honourable Court made on 11th October, 2017 and 6th December, 2017.

iii) **THAT** the Plaintiff/Applicant be and is hereby granted leave to demolish the fence recently erected on the suit property Title No. Sultan Hamud/348 situated in Sultan Hamud town in Makueni County for having been erected by the Contemnor/Respondent in the year 2020 in contempt of the orders of this Honourable Court made on 11th October, 2017 and 6th December, 2017 and so as to maintain the *status quo* as at 6th December, 2017.

iv) **THAT** Order Number 3 above be enforced by the OCS Sultan Hamud Police Station.

v) **THAT** the costs of this application be borne by the Contemnor/Respondent.

3. The application is supported by the affidavit of John Kyengo sworn on 8th October, 2020. The affiant deposed that he is the sole registered owner of Title No. Sultan Hamud/348 having been issued with a 99-year certificate of lease running from 1st June, 1998. That he has had quiet possession of the suit property since then. That after taking possession of the suit property, he erected a *mabati* structure thereon and fenced off the plot with barbed wire. That on 11th June, 2017, the Respondent illegally trespassed into his plot, destroying his fence while also dumping some construction materials with a view to commencing new construction. The Applicant subsequently reported the matter to the police and the Respondent agreed to discontinue with the trespass and to remove the construction materials.

4. The Applicant averred that after the Respondent reneged on his promise to remove the construction materials on the Applicant's plot, he promptly filed this suit and the Court issued interim orders of injunction in his favour dated 11th October, 2017. That on 6th December, 2017 both parties herein reached a consent to the effect that the interlocutory application dated 10th October, 2017 be compromised in the terms that the *status quo* be maintained pending hearing and determination of the main suit. That on 2nd August, 2020 the Respondent went to the suit property, dug holes and erected barbed wire fence using cement poles despite his knowledge of the consent order. That the said acts by the Respondent amount to contempt of court and thus he ought to be punished by this Court.

5. Opposing the application, the Respondent, Benjamin Muteti Mutiso swore his replying affidavit on 14th December, 2020. He deposed that the Applicant is guilty of non-disclosure of material facts to wit; that the Applicant is the registered owner of Title No. Sultan Hamud/348 while the Respondent is the registered owner of Title No. Sultan Hamud/393. That he has fenced off Title No. Sultan Hamud/393 and not the suit property subject of these proceedings. Lastly, the Respondent denied encroaching or interfering with the suit property as alleged by the Applicant urging the Court to dismiss the application with costs.

6. None of the parties herein filed submissions as per the directions issued on 4th November, 2020. To begin with, the essence of contempt of court proceedings was aptly reiterated by Mativo J. in Samuel M. N. Mweru & Others -Vs- National Land Commission & 2 others [2020] eKLR, wherein the Court stated as follows;

“33. It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

7. For an application for contempt of court to be successfully prosecuted, some stringent elements must be proved by the Applicant. These elements were set out in the case hereinabove stated by Mativo J. in the following manner;

“Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of 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.”

8. I have perused the court record and identified the order dated 6th December, 2017. The parties herein consensually agreed to maintain *status quo* in the suit property pending hearing and determination of the main suit. That means that neither party could enter upon Title No. Sultan Hamud/348 for purposes of carrying out any activities on the land until the *status quo* order lapsed or was discharged by this Court or an Appellate Court. Nonetheless, I am concerned as to the efficacy of the *status quo* order vis-à-vis a latter order dated 4th December, 2018 issued at the request of the Plaintiff/Applicant. Briefly, the order dated 4th December, 2018 required that the whereabouts of the suit property in addition to Title No. Sultan Hamud/393 be ascertained by a surveyor at the joint expense of the parties herein. I see no evidence of a survey report having been filed in compliance thereof.

9. That being the case, I am in doubt that the Defendant/Respondent could be in breach of the order dated 6th December, 2017 particularly when one of those properties is registered in his name. There can be absolutely no room for doubt in an application for contempt of court which imperils the alleged contemnor to potential jail time. That survey report could have squarely sealed the Respondent's fate in this application. This Court is minded not to fill in the gaps for a step which the Plaintiff/Applicant himself knows would have allayed suspicion as to the compliance with the order complained to have been breached.

10. In De Lange -Vs- Smuts [1998] ZACC 6; 1998 (3) SA 785, the Court held as follows;

“The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.”

11. Closer home, in Econet Wireless Kenya Ltd -Vs- Minister for Information & Communication of Kenya & Another [2005] eKLR, the learned Mohammed Ibrahim J. (as he then was) opined as follows;

“It is my view that due to the gravity with which the law and the court is deem any contempt of court or allegations thereof, the court usually under an obligation to deal with such contempt of court or investigate allegations that it has taken place. This is in particular where the alleged contemnor is a party in proceedings and is affected by the orders granted by the court. Where an application for committal for contempt of court orders are made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both.”

12. The undoubted conclusion therefore is that this court does not find that the Respondent herein willfully refused to obey the court order dated 6th December, 2017. The Notice of Motion dated 8th October, 2020 does not satisfy the prerequisites for the court to grant the orders sought. Accordingly, I dismiss the application with no orders as to costs. Parties shall endeavor to conclude this suit on priority basis.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 2ND DAY OF SEPTEMBER, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi