



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC MISCELLANEOUS APPLICATION No. E012 OF 2021

BILHA GAHUYA AKATSA (DECEASED)

(Substituted by DIANA BUKACHI as legal representative).....APPLICANT

VERSUS

NELSON MULANDA (DECEASED)

(Substituted by ANJELINA SHIKOKOTI as legal representative).....RESPONDENT

RULING

1. This ruling is in respect of applicant's Notice of Motion dated 20th April 2021. The following orders are sought in the application:

1. *[Spent]*

2. *Summons and a notice to show cause be issued and served upon the Respondent to appear in court in person and show cause why she should not be cited for contempt of court and breach of the judgement and the decree issued on 16.4.2020 in the Environment and Land Court at Kakamega ELC Case No.273 of 2017.*

3. *This Honourable court be pleased to cite the said Respondent for contempt of court and find her in contempt of the court and breach of the judgement and decree issued in the above suit.*

4. *This Honourable court be pleased to punish the Respondent for contempt of court and order the Respondent to purge the contempt by accounting for and remitting to court the rent illegally collected on the suit premises by the Respondent as from the 16th day of April 2020 to date.*

5. *The Respondent be compelled to give vacant possession of the suit premises.*

6. *The costs of this application be provided for.*

2. The application is supported by an affidavit sworn by Diana Bukachi, the applicant. She deposed that she is the legal representative of the estate of Bilha Gahuya Akatsa (Deceased). That Bilha filed Kakamega ELC Case No. 273 of 2017 against the respondent herein and obtained judgment against the respondent on 16th April 2020. That despite being served with the ensuing decree, the respondent has wilfully failed, refused and ignored to obey the judgment. That the respondent is utilizing a part of the suit property and has erected thereon about 10 temporary iron sheet structures whose occupants pay rent to the respondent. That upon service of the decree and in view of the permanent injunction, the respondent should have vacated and ceased conducting business on the suit property.

3. The respondent, Anjelina Shikokoti, filed a replying affidavit in which she deposed that judgment was indeed delivered and that the suit property was subsequently registered in the applicant's name. She denied the allegation that she is utilizing a part of the suit property and added that following leave granted by the Court of Appeal on 4th June 2021, she has filed a Notice of appeal against the judgment on 17th June 2021.

4. The application was canvassed through written submissions which both parties duly filed. The applicant argued that although the suit property has since been registered in her name, the respondent is in contempt since she has remained in possession of a portion the suit property from which she is deriving a benefit by collecting rent.

5. In response, the respondent argued that following registration of the suit property in the name of the applicant, order number 1 of the judgment had been complied with. Further, that the applicant has not discharged the higher burden of proof required in contempt proceedings and has not demonstrated any interference with the suit property by the respondent. She went on to argue that the application has gone beyond contempt and is seeking reliefs which should be pursued in an ordinary civil suit. She urged the court to dismiss the application.

6. I have carefully considered the application, the affidavits and the submissions.

7. It is a cardinal requirement of the rule of law that every person against whom an order is made by court of competent jurisdiction must obey it unless and until it is discharged. Any other course of conduct would lead to a breakdown of law and order, and result in a way of life which is anything but civilised. Court orders are not issued in vain and are not suggestions or pleas to the persons at whom they are directed. See **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others** [2018] eKLR.

8. It follows therefore that an allegation of contempt of court is a serious matter since if proven, the liberty and or property of the contemnor are at risk. Consequently, the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See **Mutitika vs. Baharini Farm Limited** [1985] KLR 229. Every court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times. See **Woburn Estate Limited v Margaret Bashforth** [2016] eKLR and **Kiru Tea Factory Company Ltd v Stephen Maina Githiga & 14 others** [2019] eKLR.

9. For an application seeking to cite and punish a litigant for contempt to succeed, the applicant must demonstrate wilful disobedience of the subject order. The order itself must be clear enough as to leave no doubt as to what is to be done or refrained from. The Court of Appeal reiterated these requirements in **Michael Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others** [2018] eKLR thus:

*... It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in **Republic v. Ahmad Abolfathi Mohammed & Another ...** Secondly, as this Court emphasized in **Jihan Freighters Ltd v. Hardware & General Stores Ltd** and in **A.B. & Another v. R. B.** [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. ...*

10. Judgment was delivered on 16th April 2020 by N. A. Matheka J in Kakamega ELC Case No. 273 of 2017 in favour of Bilha (the plaintiff) and against Hon. Attorney General (1st defendant) and Nelson Mulanda (2nd defendant) as follows:

1. That the transfer and registration done by the 1st defendant on 9th March 2000 in favour of the 2nd defendant in respect of plot No. Kakamega Block 1/636 giving him the lease hold with effect from 1st April 97 be cancelled and the register be rectified and inserted with the name of the plaintiff.

2. Permanent injunction restraining the 2nd defendant from interfering with the suit land.

3. No orders as to costs.

11. The obligations imposed by the judgment are clear enough. The applicant has confirmed that order number 1 in the judgment has since been complied with. In any case, the said order was to be implemented not by the respondent but by the land registry. I do not see how the respondent could possibly disobey order number 1.

12. Pursuant to order number 2, the respondent was restrained from interfering with the suit land. From a reading of paragraphs 10, 11 and 12 of the supporting affidavit, the applicant's position is that there are tenants on the property who have been paying rent to the respondent. The applicant contends that such conduct amounts to wilful disobedience of the judgment. Although in the body of her supporting affidavit, the applicant deposed that one of the tenants by the name of Margaret Achieng had sworn an affidavit confirming being such tenant, no affidavit by the said person was annexed. Instead, an affidavit sworn by Sarah Lihanda was annexed. The said Sarah deposed that she is a tenant of the applicant and not the respondent.

13. The respondent has denied disobeying the judgment and having tenants as is alleged. No further affidavit was filed by the applicant to counter the respondent's position. The applicant has not offered anything that meets the higher standard of proof required in contempt matters. She has not proven her allegations to the expected standard. In any case, the applicant is now the registered proprietor of the suit property. If indeed there are any tenants on the property, then the applicant should assert the rights of a proprietor as against tenants.

14. I note that through prayers 4 and 5 of the application, the applicant seeks an order of accounts, remittal to court of rent and an order compelling the respondent to give vacant possession. No such reliefs were granted in the judgment. The applicant must not be allowed to relitigate the dispute which has since been determined by the court.

15. In view of the foregoing discourse, I am not persuaded that Notice of Motion dated 20th April 2021 has any merit. I dismiss the application. Each party shall bear own costs.

Dated, signed and delivered at Kakamega this 23rd day of November 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Munyendo holding brief for Mr Amasakha for the Applicant

Ms Kadenyi for the Respondent

Court Assistant: E. Juma