



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. E132 OF 2021

WINGS OF LIFE GOSPEL CHURCH INTERNATIONAL TRUSTEES.....PLAINTIFF

VERSUS

HUSSEIN ADAN SOMO.....1STDEFENDANT

NAIROBI CITY COUNTY.....2NDDEFENDANT

CHIEF LAND REGISTRAR.....3RDDEFENDANT

MINISTRY OF LANDS AND PHYSICAL PLANNING.....4TH DEFENDANT

DIRECTOR OF SURVEYS.....5TH DEFENDANT

ATTORNEY GENERAL.....6TH DEFENDANT

RULING

The plaintiff brought this suit on 19th April, 2021 through a plaint dated 16th April, 2021. In its plaint, the plaintiff claimed that it was the owner of all that parcel of land known as L.R No. 209/16780, I.R 211484 also referred to as Plot “B” Off Racecourse and General Waruinge Road (hereinafter referred to as “the suit property”). The plaintiff contended that the suit property was allocated to it on 3rd April, 1997 by the 2nd Defendant’s predecessor, City Council of Nairobi. The plaintiff contended that it took possession of the suit property and constructed thereon a church building and other structures. The plaintiff contended on 13th and 14th April, 2021, the 1st and 2nd defendants with the aid of Police Officers entered the suit property and demolished the plaintiff’s church building, offices and a nursery school that had been constructed thereon with the intention of evicting the plaintiff from the property. The plaintiff averred that the 1st and 2nd defendants did not have a court order authorizing them to demolish the plaintiff’s structures on the suit property or to evict the plaintiff therefrom.

Together with the plaint, the plaintiff filed an application dated 16th April, 2021 seeking among others the following orders;

1. An urgent temporary injunction do issue restraining the 1st and 2nd defendants, their agents, servants, employees and whomsoever from demolishing, evicting, selling, charging and/or interfering in any manner with the plaintiff’s possession of the suit property known as L.R No. 209/16780(I.R 211484) also referred to as Plot B Off Racecourse and General Waruinge Road, Nairobi pending the hearing and determination of this application inter-partes.
2. That an order be issued to the 3rd and 4th defendants to register a caveat against L.R No. 209/16780(I.R 211484) forthwith.

The plaintiff’s application came up for directions ex-parte on 23rd April, 2021 when the court after considering the application together with the supporting affidavit gave the following temporary orders;

“1. That pending the hearing of the application inter-partes or further orders by the court, the 1st and 2nd defendants are restrained on a temporary basis from demolishing the plaintiff’s structures, evicting the plaintiff, selling, charging and/or interfering in any manner whatsoever with the plaintiff’s possession of all that parcel of land known as L.R No. 209/16780, I.R 211484 also referred to as Plot “B” Off Racecourse and General Waruinge Road(hereinafter referred to as “the suit property”). For the avoidance of doubt, possession of the suit property shall revert to and shall remain what it was prior to the alleged forceful entry into the property and eviction of the plaintiff therefrom on 13th and 14th April, 2021.

2. That until further orders by the court, there shall be a temporary inhibition inhibiting the registration of any other or further dealings with the suit property.

3. That the application shall be served for hearing on inter-partes on 28th April, 2021.”

The said court orders of 23rd April, 2021 were extracted and served upon the 1st defendant on 24th April, 2021. The 1st defendant failed to comply with the same. Instead, the 1st defendant filed an application on 26th April, 2021 seeking a review, variation and/or setting aside of the said orders on among other grounds that the 1st defendant stood the risk of being cited for contempt of court if the said orders were not set aside and that the eviction of the plaintiff and demolition of its structures that were restrained by the court through the said orders had already taken place. The 1st defendant also filed an application in the Court of Appeal in Civil Appeal (Application) No. E241 of 2021, Nairobi seeking to stay the said orders which application was dismissed by the Court of Appeal on 8th June, 2021.

Due to the 1st defendant's continued defiance of this court's orders of 23rd April, 2021, the plaintiff filed an application dated 11th June, 2021 for contempt against the 1st defendant and the court directed that the said application for contempt be heard first. The plaintiff's contempt application was brought on the grounds that the orders made on 23rd April, 2021 and extended on 28th April, 2021 were extracted and served upon the 1st defendant and that the 1st defendant had refused to comply with the same. The plaintiff averred that the 1st defendant was aware of the said orders and even filed an application before this court for the review of the same and in the Court of Appeal for stay of the said orders. The plaintiff averred that the 1st defendant had refused to comply with the said court orders in that the 1st defendant had refused to hand over possession of the suit property to the plaintiff. The plaintiff averred that the 1st defendant had stationed two (2) security guards on the suit property that had prevented the plaintiff from accessing the property.

The 1st defendant opposed the application through a Notice of Preliminary Objection dated 28th June, 2021 and a replying sworn on 14th September, 2021. In his affidavit, the 1st defendant stated that he was given possession of the suit property by the 2nd defendant on 13th March, 2021 and that he thereafter fenced the same and erected a gate thereon. The 1st defendant contended that although the court orders made on 23rd April, 2021 were served upon him, the same had been overtaken by events. The 1st defendant contended that he had not blocked the plaintiff from accessing the suit property.

The plaintiff's contempt application was heard on 29th September, 2021. In a ruling delivered on 21st October, 2021, the court found the 1st defendant in contempt of the court orders made on 23rd April, 2021. The court stated in part as follows in the ruling:

“...I am satisfied that the plaintiff has proved the act of contempt alleged against the 1st defendant. The orders given on 23rd April, 2021 were clear in their terms. The 1st defendant was prevented from interfering with the plaintiff's possession of the suit property. The court made it clear that in the event that possession of the suit property had been taken from the plaintiff through forceful eviction, possession had to revert to what it was prior to the eviction of the plaintiff from the suit property. It is not disputed that the plaintiff was forcefully evicted from the suit property. It is also not disputed that the 1st defendant took possession of the suit property thereafter. It is not disputed that the 1st defendant was served with the court order aforesaid that required that possession be restored to the plaintiff. It is also not disputed that the plaintiff has not got back possession of the suit property. I am persuaded that the 1st defendant in flagrant disobedience of the order issued herein on 23rd April, 2021 has denied the plaintiff access to the suit property by putting up a perimeter wall fence around the suit property, installing a gate and posting guards to keep off the plaintiff from the property.”

The court made the following final orders on the contempt application;

1. I find the 1st defendant, Hussein Adan Somo in contempt of the orders made on 23rd April, 2021 and extended on 28th April, 2021.

2. The 1st defendant is granted seven (7) days from the date hereof within which to purge his contempt by granting the plaintiff access and possession of the suit property on a temporary basis pending the hearing of the plaintiff's and the 1st defendant's applications dated 16th April, 2021 and 26th April, 2021 respectively pending herein.

3. The 1st defendant shall appear before this court on a date to be fixed to address the court in mitigation before a sentence is passed against him.

4. The plaintiff shall have the costs of the application.

This matter is now before me for sentencing of the 1st defendant/contemnor. The 1st defendant filed an affidavit sworn on 29th October, 2021 “as to purging any contempt and as to mitigating the sentence to be made.” In the affidavit, the 1st defendant stated that he had purged his contempt by allowing the plaintiff to access the suit property for the purposes of worship and that he was glad to continue allowing the plaintiff to access the property for the purposes of worship. The 1st defendant stated that the plaintiff had only occupied 15% of the suit property and that 85% of the plaintiff's structures and premises were on the neighbouring parcel of land known as L.R No. 209/16779 which is owned by another church. The 1st defendant averred that both the suit property and L.R No. 209/16779 (hereinafter referred to as “Plot No. 209/16779”) are fenced. The 1st defendant stated that the plaintiff had all along up to 14th April, 2021 occupied only 15% of the suit property measuring approximately 0.001 acres. The 1st defendant stated that 85% of the plaintiff's occupation was of Plot No. 209/16779. The 1st defendant stated that it was not clear whether the plaintiff wanted the entire land comprised in the suit property or only the portion thereof that was occupied by the plaintiff prior to its eviction.

In mitigation, the 1st defendant urged the court to take into consideration the fact that the orders in respect of which he was found in contempt were made ex parte and that the portion of the order for which he is being punished was imported into the dispute by the court itself since the plaintiff never sought the same. The 1st defendant contended that the orders in question were obtained and served long after he had taken possession and fenced the suit property. The 1st defendant stated that the plaintiff was given adequate notice before his eviction from the suit property and that he had ample opportunity to come to court to challenge the 1st defendant's claim over the suit property. The 1st defendant contended that he was being punished for enjoying his lawful property. The 1st defendant contended that if he was to give unrestrained access of the suit property to the plaintiff, that would be a license to other parties to seek access and use of the suit property including a party who has filed another suit against him namely; Nairobi ELC No. 142 of 2021. The 1st defendant contended that he was wrongfully found in contempt of court since the plaintiff's contempt application did not meet the threshold for proof of contempt. The 1st defendant urged the court to find that he should not be punished for contempt and if the court finds that he must be punished the court should consider a fine of Kshs. 15,000/-.

The plaintiff filed affidavit sworn by Gerishon K. Njoroge on 2nd September, 2021 in response to the 1st defendant's affidavit in mitigation. In the affidavit, the plaintiff reiterated that the 1st defendant had not purged his contempt. The plaintiff averred that it made three unsuccessful attempts to gain access to the suit property. The plaintiff averred that the 1st defendant had stationed security guards inside and outside the suit property to keep off the plaintiff. The plaintiff contended that the 1st defendant could not dictate to the court the terms on which he wished to comply with the court order. The plaintiff averred that the 1st defendant was not remorseful and that his affidavit was not in mitigation but was an attempt to set out terms to the court on which he wished to comply with the orders of the court. The plaintiff contended that the 1st defendant had exhibited impunity and arrogance in his attempt to justify his continued acts of contempt. The plaintiff urged the court to impose stiff sentence upon the 1st defendant which should include a 6 months' custodial sentence and attachment of the 1st defendant's properties. The plaintiff contended that the suit property is distinct and separate from the neighbouring properties and that the plaintiff had never encroached on any property.

In addition to his affidavit, the 1st defendant gave oral evidence in mitigation on 9th November, 2021 and was cross-examined by the plaintiff's advocate. The plaintiff's representative Gerrison Kanori Njoroge also testified and was cross-examined by the 1st defendant's advocate. In his evidence in chief, the 1st defendant reiterated that he had complied with the court order. The 1st defendant reiterated that prior to its eviction, the plaintiff was occupying two parcels of land namely; the suit property and Plot No. 209/12779 and that the plaintiff's premises fell more on Plot No. 209/12779. The 1st defendant stated that when the plaintiff's advocate wrote to his advocates requesting to be given possession of the suit property, he instructed his advocates to inform the plaintiff's advocates that the plaintiff was at liberty to enter the suit property for prayers after which it had to leave the premises. The plaintiff told the court that he was still happy and willing to allow the plaintiff's members to enter the suit property for the purposes only of worship pending the hearing of the suit. The 1st defendant stated that he had allowed the plaintiff to enter and occupy the portion of the suit property that was in its possession prior to its eviction. The 1st defendant stated that the plaintiff should only come to the suit property during the day and not at night.

On cross-examination by the plaintiff's advocate, the 1st defendant denied that the plaintiff had occupied the entire land comprised in the title of the suit property. The 1st defendant stated that he demolished all the structures that had been erected on the suit property illegally. The 1st defendant denied that he was dictating to the court the terms on which the plaintiff should be allowed back to the suit property. In examination by the court, the 1st defendant stated that he was not ready to hand over the entire land comprised in the suit property to the plaintiff. He stated that he was willing to give the plaintiff access to the space that the plaintiff occupied prior to 13th April, 2021. He stated that his problem was with the plaintiff total takeover of the entire land including the portion thereof that was not in its occupation as at 13th April, 2021. The 1st defendant asked the court for leniency.

In his evidence, Gerrison Kanori Njoroge, the plaintiff's Arch Bishop stated that the plaintiff entered the suit property in 1991 with the permission of the City Council of Nairobi which subsequently allocated the property to the plaintiff in 1997. He stated that the land in the area was divided into two portions only namely "A" and "B" which were allocated to two churches. He denied that the land was divided into portions B, C, D and E as claimed by the 1st defendant. He admitted that during the demarcation of the two plots, part of the plaintiff's temporary church building fell within portion "A" which was owned by another church. He stated that the plaintiff had commenced construction of a permanent church building on the suit property in respect of which they had obtained all the necessary approvals. He stated that the construction of the permanent church building was almost complete when the 1st defendant descended on the suit property and demolished not only the temporary church but also the new church building and the bible school that was being housed in the premises. He stated that the plaintiff had tried three times to go back to the premises but was denied access by the 1st defendant who chased the plaintiff's members away using goons. He stated that the gate of the suit property has never been opened to allow the plaintiff to access the suit property. He urged the court to stop arrogance and impunity by imposing a custodial sentence against the 1st defendant. He stated that the plaintiff should be reinstated on the suit property without conditions.

In cross-examination, Gerrison Kanori Njoroge stated that the plaintiff should be given access to the whole land comprised in the suit property. He stated that within the land that has been fenced by the 1st defendant, there is an area that does not belong to the plaintiff. He stated that the portion of that area belongs to another church while the other portion was occupied by a garage. He stated that there were also some rental houses on the suit property before the demolition which had been put up with the plaintiff's permission. He stated that once the 1st defendant hands over the suit property to the plaintiff, the plaintiff will adjust its boundary to what belongs to the plaintiff. He denied that the 1st defendant had allowed the plaintiff to access the suit property for worship purposes. He stated that when he went to the suit property to take possession, the occupants refused to open the gate. He stated that the plaintiff was not claiming the land that was owned by the other church or the area where the garage was situated. He stated that the 1st defendant had encroached on other parcels of land that did not belong to the plaintiff. In re-examination, he stated that the plaintiff had no intention of occupying what was not in their occupation prior to their eviction from the suit property. He stated that the land that was occupied by the other church and the area where the garage was situated on which the 1st defendant had also encroached did not belong to the plaintiff and the plaintiff was not interested in the same.

I have considered both written and oral representations by the 1st defendant in mitigation and the response thereto by the plaintiff. The following is my view on the issue at hand. As is often said, court orders are not made in vain. They are meant to be complied with. If for any reason a party is unable to comply with an order of the court what is expected of him is to come back to court and explain the difficulties he has in complying with the order. I do not think that it is open for a party to decide for himself on how to comply with an order more particularly when his interpretation of the order is contrary to the order itself. In Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 the court cited the case of Gulabchand and Popatlal Shah & Another, Civil Application No. 39 of 1990 in which the Court of Appeal stated that:

“...It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are 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...”

In Central Bank of Kenya & Another v Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006, the court stated that:

“Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.”

In Wildlife Lodges Ltd. v County Council of Narok and Another [2005] 2 EA 344 (HCK) the court cited Hadkinson v Hadkinson [1952] 2 All ER 575 in which it was held that:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt...A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...”

The court went further to state that:

“Had there been any misapprehension in the minds of the defendants, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding; this would have been the lawful course of action...Against this background, I would take the position that consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...”

I have to state clearly that an *ex parte* order by the court is a valid order like any other. To obey orders of the court is to obey orders made both *ex parte* and *inter partes*. The court, by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court... Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant”.

In Awadh v Marumbu (No 2) No. 53 of 2004 [2004] KLR 458, it was held that:

“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.”

This court had made a finding that the 1st defendant was guilty of contempt of court. Upon making that finding, the court gave the 1st defendant 7 days within which to purge his contempt before sentencing him. What I am supposed to determine in these proceedings is the sentence that should be imposed against the 1st defendant. In determining the issue, I am supposed to consider among others whether the 1st defendant has purged his contempt and whether there are any other mitigating factors that may lessen the gravity of the sentence to be imposed.

From the material before me, I am in agreement with the plaintiff that the 1st defendant has not purged his contempt. It has never been disputed by any of the parties to this suit that the plaintiff was in occupation of the suit property prior to its forceful eviction therefrom on 13th and 14th April, 2014. The orders made on 23rd April, 2021 were very clear in their terms. In the event that the plaintiff had been evicted from the suit property, the plaintiff's possession had to be restored to the state in which it was prior to its eviction. From the evidence on record, the 1st defendant took possession of the suit property after the plaintiff's forceful eviction. In compliance with the said court orders of 23rd April, 2021, the 1st defendant had an obligation to allow the plaintiff to enter and take possession of the portion thereof that it was

occupying prior to its forceful eviction.

The 1st defendant told the court that prior to its eviction, the plaintiff was only occupying a small portion of the suit property. That may have been the case but the 1st defendant had an obligation to give the plaintiff free and unrestricted access to the said portion of the suit property which they had occupied prior to their eviction. The 1st defendant had no right to dictate to the plaintiff or to the court the terms on which the plaintiff should enter and use the portion of the suit property from which they were evicted. The 1st defendant has no right or authority to set the time when the plaintiff is to enter the suit property and when it should leave. The 1st defendant also has no right to dictate to the plaintiff the activities that the plaintiff should carry out on the said portion of the suit property and what it should not carry out. The 1st defendant must unconditionally grant the plaintiff free and unrestricted access to the portion of the suit property that the plaintiff was occupying prior to its forceful eviction; nothing more nothing less. The plaintiff told the court that it was not interested in any portion of the suit property that it was not occupying prior to its eviction. Since the suit property is not developed, it is not onerous to ask the 1st defendant to do what he has been ordered by the court to do. Even if it was onerous, it is a price the 1st defendant has to pay for the rule of law to prevail.

The 1st defendant told the court that the plaintiff should only enter the suit property during the day and only for the purposes of worship after which they should leave. These are terms which can only be set by the court. As mentioned in the cases that I have cited earlier, in case the 1st defendant had a problem with the orders that were made by the court and wanted them varied or set aside, he was at liberty to make an appropriate application. There is an application by the 1st defendant for the variation and setting aside of the orders of 23rd April, 2021 which is pending. Until the court varies the orders of 23rd April, 2021, the 1st defendant has no alternative but to obey the same as they are. The 1st defendant does not have the luxury of obeying the said orders on his own terms. Due to the foregoing, it is my finding that the 1st defendant has not purged his contempt.

On other mitigating factors, the 1st defendant contended that the order made on 23rd April, 2021 was not clear in that the court did not state whether he should handover the whole of the suit property to the plaintiff or only the portion that was occupied by the plaintiff. The 1st defendant contended that this contributed to his inability to comply with the order. This is an issue that the 1st defendant raised for the first time during these sentencing proceedings. The fact that the plaintiff had occupied only a portion of the suit property should have been brought to the attention of the court during the hearing of the contempt application. Even if that was the case, I am unable to see how that would justify the 1st defendant's failure to comply with the orders of the court. The court orders only required the 1st defendant to restore the plaintiff to the same position on which it was on the suit property prior to its eviction. The 1st defendant was not ordered to surrender to the plaintiff any land that the plaintiff did not occupy. The fact that the plaintiff did not occupy the entire land comprised in the suit property is therefore not an excuse for the 1st defendant's failure to comply with the court order. It is therefore not a mitigating factor.

The 1st defendant asked for leniency. I am however unable to see any remorse in the 1st defendant's affidavit in mitigation or oral evidence tendered in court. What I gathered from the tone of the 1st defendant in his affidavit and evidence is that in his opinion, the court was wrong in making an order for the reinstatement of the plaintiff into the suit property after the plaintiff's forceful eviction because the order was not sought by the plaintiff in its application. The court had powers to make the orders it made on 23rd April, 2021 for the ends of justice to be met. In William Peter Mayaka v Kenya Reinsurance Corporation Ltd. [2021]eKLR, the court stated that:

“22. As regards the order made in part ‘c’ of the judgment, to the effect that the plaintiff gives access to the suit premises, the Court does not see any error thereon. The Court always retains inherent power to make orders that are efficacious for the ends of justice. The defendants may not have prayed for the order of access, but the Court in its view found it necessary to issue that order so that justice is not denied but met by the Court’s judgment.”

I am fully in agreement. The only remedies available to a party who is aggrieved by an order of the court is to seek a review of the order before the same court or to appeal against the same. It is not open to a party to disobey a court order because in his opinion the order was erroneous.

Taking all factors into account, I hereby make the following orders;

1. The 1st defendant shall pay a fine of Kshs. 100,000/- within 14 days from the date hereof in default of which he shall be arrested and committed to prison to serve a civil jail term of sixty (60) days from the date he is handed over to the prison authorities.
2. The 1st defendant is given a further fourteen (14) days from the date hereof within which he shall purge his contempt by granting to the plaintiff unconditional and unrestricted access to and possession of the portion all that parcel of land known as L.R No. 209/16780, I.R 211484 also referred to as Plot “B” Off Racecourse and General Waruinge Road, Nairobi that was occupied by the plaintiff prior to its eviction on 13th and 14th April, 2021.
3. In the event that the 1st defendant fails or refuses to comply with the order referred to in paragraph 2 above, the 1st defendant shall be arrested and committed to prison to serve a civil jail term of sixty (60) days from the date he is handed over to the prison authorities. This shall be without prejudice to the plaintiff's right to move the court for further or other orders.

DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kahuthu for the Plaintiff

Mr. Jaleny h/b for Mr. Katwa for the 1st defendant

N/A for the 2nd defendant

N/A for the 3rd, 4th, 5 and 6th defendants

Ms. Betsy Chelangat-Court Assistant