



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 22 OF 2020 (O.S.)

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LAND PARCEL NO. KYENI/KATHUNGURI/T43

AND

IN THE MATTER OF ADVERSE POSSESSION OF

LAND PARCEL NO. KYENI/KATHUNGURI/T43

BETWEEN

RACHAEL WAMBURA NGONDI.....PLAINTIFF

VERSUS

JUSTA MUTITU MURIUKI (Sued as the personal representative of the Estate of

Henry Muriuki Kuvuiva.....1ST DEFENDANT

CYPRIAN NDWIGA (Sued as the legal beneficiary of the Estate of

Henry Muriuki Kuvuiva.....2ND DEFENDANT

LUKA MURIUKI

(Sued as the legal beneficiary of the Estate of Henry Muriuki Kuvuiva...3RD DEFENDANT

RULING

INTRODUCTION

1. Before the court is a notice of motion dated 19th April, 2021 filed by the Applicants on 27th April, 2021. The Application is expressed to be brought under Order 40 rule 3 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63 (c) and (e) of Civil Procedure Act, Sections 5(1) of the Judicature Act and all other enabling provisions of the Law.

APPLICATION

2. The Applicant is RACHAEL WAMBURA NGONDI, who is the plaintiff in the suit, while the Respondents are JUSTA MUTITU MURIUKI, CYPRIAN NDWIGA, AMBROSE NDWIGA and LUKA MURIUKI who are the defendants in the suit and all are sued in their capacity as legal representatives of the estate of Henry Muriuki Kuvuiva.

The motion came with three (3) prayers which are as follows:

i) **THAT** this honorable court be pleased to find that the 2nd, 3rd and 4th defendants are in contempt for disobedience of the court orders dated 10.10.2020, issued on 22.10.2020.

ii) **THAT** the 2nd, 3rd and 4th defendants be arrested and be committed to jail for contempt of court for such period as the court may deem fit.

iii) **Costs** of this application be provided for.

3. The application was anchored on grounds inter alia, that the respondents disobeyed the court orders made on 22.10.2020, having been served with the court order on 17.12.2020. It is alleged that they evicted the applicant from the disputed land parcel number Kyeni/Kathunguri T43. It is pleaded that the respondents have constantly issued threats and intimidation to the applicant against enforcing the orders and have mobilized the police and hired criminals against the applicant. It is further pleaded that the respondents, in disregard of the court order, were tilling the land in readiness for planting. According to the applicant, the respondents having disobeyed the court should be cited for contempt of court and punished accordingly.

4. With the application was filed a supporting affidavit dated 19.4.2021, sworn by the applicant. She reiterated the contents in the application and averred that the court allowed her application for injunction and she extracted the court order and served it upon the respondents on 17.12.2020. According to her, immediately service of the order was effected on the respondents they visited the suit premises accompanied by two policemen and hired goons. They evicted her from the land. She further alleged that the respondents demolished her house and took away her household goods.

5. She claimed to have reported the matter at Runyenjes police station but was informed that the officers were acting on their own instructions. She alleged to have been warned by the respondents from re-entering the land. It was her further claim that her trees were cut down and the grave sites for her parents destroyed. She decried the unfairness of her eviction despite the court order. She is seeking that the respondents be cited for contempt of court. To the application is attached the court orders, affidavit of service to prove service upon the respondents and photographs.

RESPONSE

6. The application was responded to by way of replying affidavit filed on 30.6.2021 and dated 25.6.2021. The replying affidavit was sworn by the 4th respondent who brought to the court's attention that the 1st respondent is deceased but confirmed that the rest are co-administrators to their father's estate.

7. He denied that the applicant lives on the land or ever lived on it. He further denied that they hired police men and goons to evict her from the land. He confirmed being informed of the contents of the court order by their advocate and according to him they have never contravened the court order. It is his position that the particulars of the details of the police and their names ought to have been given by the applicant together with particulars of the occurrence book. He reiterated that the applicant does not live on the suit parcel of land and that the applicant's mother lived on it and vacated after a case at the land tribunal which conferred ownership of the land to the respondents' father. The applicant's mother has never appealed the ruling by the tribunal, he deposed.

8. It was alleged that the applicant is known to the respondents and that she lives with her husband and son on a different plot. Further allegations have been made that she resides with her father in law and two sons on land parcel No. Kyeni/Kigumo/1138 owned and registered in the name of her father in law. The respondents averred that the applicant's sole intention is to punish them and they reiterated that they have never disobeyed any court order.

SUBMISSIONS

9. The application was canvassed by way of written submissions. The applicant filed her submissions on 22.9.2021. She relied on the grounds in the application and further submitted that personal service of the court order disobeyed is not mandatory but knowledge of the order suffices to prove service for purposes of contempt proceedings.

10. In support of this they relied on the cases of **Sam Nyamweya & 3 others Vs Kenya Premier League Limited & 2 others (2015) eKLR** which had cited with approval the case of **Issack Ouma Obera Vs County Government of Busia (2020) eKLR** which had cited the court of Appeal case in **Justus Kariuki Mate & Another Vs Martin Nyaga Wambora & Another (CA 24/2014) Nyeri**. Further reliance was made on the cases of **Shimmers Plaza Ltd Vs NBK (2015) eKLR** and the case of **Basil Criticos Vs Attorney General & 8 others (2012) eKLR** where the court stated that knowledge of the court order supersedes personal service.

11. According to the applicant, the respondents had admitted knowledge of the court order and it is her submission that such knowledge superseded personal service. It is her further contention that despite the respondent's awareness of the court order they deliberately disobeyed the orders.

12. The assertion by the respondents that the applicant did not reside on the land was termed as false as, according to her, she had proved to the court such occupation and had been issued with interim orders as a result. It is said that the respondents had not denied utilizing the land and had further failed to explain the persons using the land. It was alleged that they had only claimed they were administrators of their late father's estate.

13. It was emphasized that the dignity of the court and respect of rule of law must be upheld at all times. It was further submitted that the respondents should not be allowed to continue disobeying the court orders. The parties relied on the case of **Issack Ouma Obera Vs County Government of Busia (2020) eKLR** where the court held that obedience of court orders is not optional but compulsory and one does not

choose whether to obey or not. The respondents were said to have had an obligation to obey the court order but had deliberately chosen to disobey it and the court was urged to cite them for contempt and punish them accordingly.

14. The respondent's submissions were filed on 8.11.2021. The respondent too relied on their replying affidavit. They submitted that the allegations by the applicants to the effect that they had evicted her from the land using police officers had not been backed by documentary evidence or entries in the occurrence book. They relied on the case of **Samuel MN Mweru and Other versus the National Commission and two others Misc 442 of 2017** which sets the standards to be proved in a case of contempt and averred that such standards must be proved. In the same case the court observed that the requisite elements must be established beyond reasonable doubt.

15. Reliance was made on the case of **Sheilla Cassatt Issenberg and another versus Antony Macharia Kinyanjui** in Kajiado High Court Number 19 of 2020, where the court held that contempt of court was an offence of criminal character and that it must be proved satisfactorily. The proof must be higher than on balance of probabilities almost but not exactly beyond reasonable doubt. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge.

16. Further reliance was made on the cases of **Peter K Yego & Others Vs Pauline Wekesa Kode (Acc No. 194 of 2014)**, **Katsuri Limited Vs Kapurcahrd Depor Shah (2016) Eklr** citing the case of **Kristen Carla Burchel V Barry Grant Burchell (Eastern Cape Division Case No. 364 of 2005** and the case of **Carey Vs Laiken 2015 SCC 17** in support of the case.

17. It was alleged that the applicant had failed to submit any credible evidence in support of her allegations. It was said that as the allegations involved police officers, then it was possible for the applicant to give details and support her allegations as there were public records and documents. They reiterated that they did not interfere with the suit land. To them, the applicant had a duty to prove beyond reasonable doubt that they had disobeyed the court order, a duty she is alleged not to have discharged. With that, the court was urged to dismiss the application with costs.

ANALYSIS AND DETERMINATION

18. I have considered the application, the response made, and the rival submissions. I have also looked at the court record. The applicant filed the present suit seeking to be recognized as an adverse possessor of land parcel number Kyeni/Kathunguri/T43 registered in the name of Henry Muriuki Kuvuiva. The registered owner is now deceased and his estate is now administered by the 2nd, 3rd and 4th respondents as stated in their pleadings. The 1st Respondent is deceased. With the suit was filed an application for injunction seeking to have the respondents restrained from utilizing or dealing in any manner with the suit parcel of land and orders for inhibition to prevent interference with the register pending determination of the suit.

19. The court issued interim orders and further granted the injunction and inhibition as prayed. It is these orders that the applicant alleges to have been contravened by the respondents and the court has been called upon to cite them for contempt of court. The only issue therefore that commends to me for determination is whether the respondents are in contempt of the court orders issued on 22nd October 2020 as claimed by the applicant?

20. The Black's Law Dictionary 11th Edition, defines contempt as:

The act or state of despising; the quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it punishable by fine or imprisonment.

The legal framework that governed contempt of court was the Contempt of Court Act until its nullification in the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR Constitutional Petition No. 87 of 2017**.

21. The court in the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** while discussing the legal framework on contempt of court stated as follows;

*"The applicable law as regards contempt of court existing before the enactment of the Contempt of Court Act was restated by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR**. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the Judicature Act which provided that:*

"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 subordinate courts."

This section was repealed by section 38 of the Contempt of Court Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the Judicature Act, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the Judicature Act. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules."

22. As restated in the above case law, the law then applicable in contempt of court proceedings is Section 5(1) of the Judicature Act which mandates that the court relies on the applicable law in England at the time the alleged contempt is committed. In the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** the court dealing with an application for contempt of court based on disobeying of a court order stated

“An application under Rule 81.4 “(breach of judgement, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon”.

23. A claim on contempt of court is a grave issue that the court treats with a lot of seriousness as it goes to the core of undermining the authority of the court. It is a fundamental principle of law that court orders are meant to be obeyed to the letter as they are not issued in vain. Failure to obey court orders would then result in contempt of court.

24. The importance of obedience of court orders was restated in the case of **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] eKLR** where the court cited with approval the case of **GULABCHAND POPATLAL SHAH & ANOTHER CIVIL APPLICATION NO. 39 OF 1990**, (unreported). The Court of Appeal held, inter alia,

“..... It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors”

25. The court needs to ascertain whether the applicant herein has met the basic elements set out to prove a case for contempt of court. In the case of **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR** as relied upon by the Respondents, the court stated that

“The applicant must prove to the required standard (in civil contempt cases which is higher than in criminal 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.*

26. I will therefore analyze each element as set out above. I have looked at the court order issued by the court and it is clear that the order issued by the court was clear and unambiguous and was addressed to the respondents, hence binding upon them.

27. On the second issue the alleged contemnor ought to have knowledge of or proper notice of the terms of the order. The respondents by their own admission have confirmed having knowledge of the court order. They have gone ahead to aver that their advocate on record read and explained to them the contents of the court order. The court is satisfied that they had sufficient knowledge of the contents of the court order.

28. The issue of whether the respondents are in breach of the court order is what is strongly disputed. The applicant has alleged that the respondents breached the court order and proceeded to evict her from the land, destroyed her house, cut down her crops and have been constantly intimidating and harassing her. There are photographs attached by the applicant which show crops and the house that have been destroyed. The applicant avers that the acts done by the respondent were done by hired goons in the company of two police officers. She further states that she reported the matter to the police.

29. The respondents on their part have remained firm that they have at all times obeyed the court orders. They have feigned ignorance of the issues raised by the applicant. To them the applicant has merely made allegations without any proof. They aver that the allegation of them evicting the applicant by the help of police officers ought to be strictly proved, considering that such an issue ought to have been captured in the occurrence book at the police station.

30. The nature of a claim of contempt of court though civil in nature has been held to be of a criminal character as it has the potential of limiting one's liberty to freedom when one is committed to civil jail. The standard of proof of such a claim is higher than proof on a balance of probability but not beyond reasonable doubt. This was so held in the case of **Gatharia K. Mutikika v Baharini Farm Limited** [1985] KLR 227, where the court rendered itself thus:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.”

31. I have looked at the claim by the applicant and save for the photos annexed herein the issue of the manner and by whom such eviction was made has not been proved by way of evidence. The applicant states that she enquired from Runyenjes police station on the issue of the two police men who had accompanied the respondents. I note that no O.B number has been annexed to her application. She has not stated whether the police proceeded to investigate the matter or even whether her claim was recorded by the police.

32. Having held that a claim of contempt of court is one that has potential consequences of restricting one's liberty or imposition of a fine and also that the threshold for proof is higher, it was incumbent upon the applicant to establish that the alleged eviction was done by the respondents. It was crucial that details of police records be made available since it's the applicant's position that the matter was reported. Given the seriousness with which the court treats allegations of contempt, I am hesitant to make a finding that contempt is proved.

33. Having stated the above, I find that the applicant has not met the elements for grant of the orders as prayed herein and I dismiss the application with no orders as to costs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **9TH DAY** of **DECEMBER, 2021**.

In the presence of Kimanzi for plaintiff and Njiru Mbogo for the defendants.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

9.12.2021