



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC No. 37 OF 2014

CHARLES LANGAT.....PLAINTIFF

VERSUS

MUKESH KUMAR KANTHILAL PATEL.....DEFENDANT /RESPONDENT

RULING

1. Through an application by way of a Notices of Motion dated 17th June 2021 brought under the provisions of Order 40 rule 3(1) of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law, the Applicant herein seeks to have the Respondent committed to civil jail for contempt of the Court of Appeal orders issued on the 7th November 2019.
2. The application, which was disposed through written submissions is premised on the grounds listed on its face, the annexed affidavit of Charles Langat the Applicant, as well as the submissions herein filed. The core grounds are that the Court of Appeal delivered its judgment on the 3rd October 2019 wherein an order was issued on the 7th November 2019 granting the Applicant vacant possession of the suit property. That the Respondent herein has remained in occupation of the suit property that has refused to vacate from thereon despite being aware of the existence of valid court orders. Instead he has continued to file numerous applications after the delivery of the judgment with a view to frustrating the Applicant and denying him justice.
3. That the Respondent moved to the Court of Appeal in Civil Appeal No. 105 of 2018 via an application dated 11th January 2021 seeking for orders of Review and stay of execution of its judgment. The application was dismissed vide the court's ruling delivered on 19th March 2021.
4. That the Respondent had also filed Petition No. 2 of 2020 before the Environment and Land Court at Kericho seeking restraining orders against the Applicant to restrain from dealing with the suit property. The Petition was also dismissed by the court's ruling of 22nd April 2021 on the basis that the same was res judicata.
5. The Applicant then filed an application dated 16th January 2021 seeking orders to have the Officer Commanding Sotik station to give effect to the Court of Appeal's orders of 3rd October 2019. The Applicant is aggrieved that through the actions of the Respondent of mobilizing rowdy youth of Sotik, who were armed, to block the police from evicting the Respondent from the suit property, it was not possible for the police to effect the court orders. That the Respondent's actions were scandalous on the administration of justice and dignity of the honorable court.
6. The Applicant submitted that there being a valid and lawful court order, these proceedings were therefore lawful, regular and not defective. That courts had been clothed with jurisdiction to entertain contempt of court proceedings for various reasons so as to facilitate the administration of justice, as was held in the case in **Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 Others [2017] eKLR**.
7. The Applicant further submitted that the Respondent had been served with the Court of Appeal order of 3rd October 2019 issued in Civil Appeal No. 105 of 2018, he had been aware of the proceedings as he had participated therein and was represented by Counsel. That he had even attempted to review the court's orders vide an application dated 11th January 2021 but the application had been dismissed through the court's ruling of 19th March 2021. That the mere knowledge of the court order superseded personal service.
8. The Applicant's case is to the effect that the Respondent had breached the terms of the order of the court by wilfully and deliberately failing to comply with them That the said terms were specific to the effect that the his Appeal had succeeded and the judgment of the High Court had been set aside in its entirety, that the Applicant had been granted vacant possession of the suit premises and was further entitled to mesne the profits from the Respondent as well as unpaid rent for 36 months with effect from July 2011 at the rate of Ksh 50,000/= per month and interest thereon.

9. That the Respondent has refused to vacate the suit premises and remains in possession to date and any attempts to evict him has been frustrated by the Respondent's actions herein above stated. The Applicant relied on the decided case in **Tito Tirop (Suing as the Legal Representative of Philip Chepkwony) v Benjamin Tarus & 4 others [2021] eKLR**, amongst others, to submit that disobedience of court orders was being in contempt and was punishable with committal or attachment until the contempt was purged.

10. In response to the Applicant's application, the Respondent sought that the same be dismissed for being incurably defective, premature, bad in law and an abuse of the court process. That from all the proceedings herein filed, there had been no court order whether in the Court of Appeal in Civil Appeal No. 105 of 2018 or from this court, expressly directed at him, orders which he had disobeyed. That the various proceedings he had taken subsequent to the judgment could not possibly amount to disobedience of the court order, capable of being sanctioned and punished in a manner and style as contemplated and understood by the Applicant. That the Applicant ought to have sought leave before filing a substantive application of this nature and therefore the present Application was out rightly defective, premature and completely bad in law.

11. The Respondent denied having mobilized irate Sotik residents to block the police from executing the court orders stating that he had no capacity or authority to do so. That the court, pursuant to the judgment of the Court of Appeal had made several orders that were yet to be enforced and therefore the Applicant could not proceed to flip flop so late in the day to allege that the Respondent was in contempt of the court orders and seek that he appears before the court to show cause why he should not be cited for contempt and be committed to prison for a period of six months or a period of such time as the court may deem fit and just.

12. The Respondent submitted that by the court granting an order for vacant possession, it did not give express orders of eviction against the Respondent as these orders had not been sought by the Applicant.

13. That the judgment from the Court of Appeal could only be enforced and or executed in the suit from which the Appeal was preferred. That if the orders of the Court of Appeal were self-propelling and the judgment obligated the Respondent to vacate the suit premises, the Applicant needed not make an application for eviction to enforce the judgment. That the judgment and order by the Court of Appeal was not expressly directed at the Respondent to vacate the suit premises but it merely granted the Applicant vacant possession of the same and therefore it was incumbent upon the Applicant to enforce and/or execute the judgment and/or extract the order in the usual manner which he did not. That there had been no order that had been directed to the Respondent to obey which he had disobeyed and therefore it cannot be said that he disobeyed any court order.

14. That the Applicant premised his application on the provisions of Order 40 of the Civil Procedure Rules which provision of the law did not relate to disobedience of court orders and therefore the proceedings herein were beyond the provisions of Order 40 rule 3 of the Rules. That disobedience of an impugned order could only be lawfully instituted by dint of the express provisions of Section 5 of the Judicata Act which provides the window by which cases of contempt could be dealt with.

15. The Respondent's submission was that since contempt proceedings were quasi criminal in nature, the Applicant ought to have first sought leave of the court to institute such drastic proceedings. There was no such leave sought and obtained and in the absence of the same, the application was premature and ought to be dismissed with costs. That the avenue by which the Applicant opted for was completely alien and tailored to unnecessarily embarrass, punish and frustrate the Respondent as the same was based on unsustainable allegations. In supporting his case, the Respondent relied on the decided cases in **Katsuri limited vs Papurchand Depar Shah [2016] eKLR**, **Eliud Muturi Mwangi (Practising in the name and style of Muturi & Company Advocates) v LSG Lufthansa Services Europa/Africa GMBH & Another [2015] eKLR**, cases which opined that the standard of proof in Contempt proceedings, being *quasi-criminal in nature, ought to be higher than that in civil cases*.

Determination.

16. I have considered the Affidavits on record, the annexures, the submissions of Counsel and authorities relied on. The Applicant's application by way of a Notice of Motion dated 17th June 2021 and brought under the provisions of Order 40 rule 3 of the Civil Procedure Rules and all other enabling provisions of the law seeks to have the Respondent herein committed to civil jail for contempt of the Court of Appeal orders issued on the 7th November 2019. The Applicant also seeks for costs of the application.

17. I have also noted that the Applicant herein has invoked the jurisdiction of the court under Order 40 of the Civil Procedure Rules and not Section 5 of the Judicature Act. The proper position is that contempt of court proceedings emanating under Order 40 of the Civil Procedure Rules do not need the leave of court to commence. They commence by virtue of Order 40 Rule 3 that is, upon breach of the injunctive or the interlocutory order issued. In this case however, the contempt of court proceedings did not arise from injunctive or the interlocutory order and therefore the proper provision the Applicant ought to have brought the same was under the provisions of Section 5 of the Judicature Act as was held in the case of **Republic vs County Council of Nakuru Ex-Parte Edward Alera t/a Genesis Reliable Equipment [2011] eKLR**.

18. I however find that to dismiss an application for want of form would be against the principles of administration of justice set out under Article 159 of the Constitution and also the policy set out under Order 51 rule 10 of the Civil Procedure Rules. Rule 10 provides that:

“(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2). No application shall be defeated on technicality or for want of form that does not affect the substance of the application.”

19. In the instant case the applicant filed a notice of motion seeking an order inter alia that the Respondent be committed to jail for contempt of court. The Application sets the grounds on which it is premised and the action of the contempt as committed. The motion is supported by an affidavit which contains all the evidence concerning the acts of contempt of court committed by the respondent. Consequently, I see no

offence to the law, no deficiency in the content or any prejudice occasioned to the Respondent by the use of notice of motion as opposed to application notice. It has further not been demonstrated that the use of notice of motion as opposed to application notice as the form of bringing the application affects the substance of the application. The objection on the grounds that this application is brought under the wrong provision of the law, is hereby overruled.

20. The Application was premised on the grounds that judgment had been delivered by the Court of Appeal on the 7th November 2019 when the Respondent had been ordered to give vacate possession of the suit land registered as Sotik Township/667 amongst other orders, to which to date he had failed to comply and continues to be in actual possession of the suit land whilst engaging the Applicant in a myriad of applications so as to buy time and deny him the fruits of his judgment. His actions has thus lowered the authority and dignity of this honorable court, and as such he is in contempt.

21. The Applicant's further grievance is that after his application dated the 16th January 2021 seeking orders to have the Officer Commanding Sotik Station to give effect to the Court of Appeal orders of 3rd October 2019 was allowed, the said officer has not affected the orders of the court for reasons that the Respondent has been mobilizing the rowdy youth of Sotik to block the police from evicting him from the suit property, thus making it impossible for the police to effect the court orders. His assertion was supported by an affidavit dated the 29th June 2021 sworn by No. 234749 Chief Inspector Mary Akoth the Officer Commanding Sotik station as well as annexed photographs depicting the Respondent addressing the youth to that effect.

22. The Respondent on the other hand has denied ever having obstructed the police from evicting him from the suit premises and confirmed that indeed he was still in occupation of the same. His reason being that the judgment and order by the Court of Appeal was not expressly directed at him to vacate the suit premises but it merely granted the Applicant vacant possession of the same and therefore it was incumbent upon the Applicant to enforce and/or execute the judgment and/or extract the order in the usual manner, which he did not. That by the court granting an order for vacant possession, it did not give express orders of eviction against him because orders of eviction had not been sought by the Applicant. His further argument was that the judgment from the Court of Appeal could only be enforced and/or executed in the suit from which the appeal was preferred.

23. *This matter stemmed from the Judgment by this court dated 6th July, 2018 wherein upon Appeal, the Court of Appeal overturned the court's decision and in its impugned Judgment of 7th November 2019 in Court of Appeal Civil Appeal No. 105 of 2018, confirmed the orders that had been sought by the Applicant in the High court to wit, that the Respondent herein;*

a) gives vacant possession

b) pays mesne profits and the

c) unpaid rent for 36 months from July, 2011 at the rate of Kshs. 50,000/- per month

24. After the nullification of our Contempt of Court Act, Courts have now reverted to Section 5 of the Judicature Act as the law under which to punish for contempt of court. **The power to deal with contempt of court as is provided for under Section 5(1) of the Judicature Act is 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.”

25. From the foregoing, it is clear that this provision gives a general power to punish for contempt of court. It is a power that extend to upholding the authority of subordinate courts. To my mind, it is a provision that is general and not specific in its tenure as to particular contempt. It applies to all forms of contempt of court.

26. In the case in **Christine Wangari Gacheche vs Elizabeth Wanjiru Evans & Others [2014] eKLR**, the Court of Appeal correctly pointed out that leave, now called "permission" is not required where committal proceedings relate to a breach of a judgment, order, or undertaking as in the instant case where the alleged contempt was in relation to orders of the Court of Appeal and therefore leave was not required in the circumstances.

27. Having discharged the preliminary issues herein, I now turn to the merit of the application, and I find that what the court is called upon to determine is whether or not there was a valid orders issued by the Court of Appeal to which the Respondent has not complied with and therefore is in contempt of the same.

28. The **Black's Law Dictionary (Ninth Edition)** defines contempt of court as:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

29. In the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR** the Court held that

A Court without contempt power is not a Court. [30] The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a Court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of Court; even obvious, I would say. In the common lawyer's eye, the power of contempt “is inherent in Courts, and automatically exists by its very

nature.....

A Court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. Article 159(1) of the Constitution provides that judicial authority is derived from the people and vests in, and shall be exercised by, the Courts and tribunals established by or under the Constitution. Under Article 10(1) of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2) (a) of the same Article the national values and principles of governance include the Rule of Law.

It is a crime unlawfully and intentionally to disobey a Court order.

This type of contempt of Court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the Court. [36] The offence has in general terms received a constitutional 'stamp of approval,' since the Rule of Law – a founding value of the Constitution – 'requires that the dignity and authority of the Courts, as well as their capacity to carry out their functions, should always be maintained.'

30. Section 29 of the Environment and Land Court is clear to the effect that;

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

31. It is an established principle of law as was held in the case of **Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005** in order to succeed in civil contempt proceedings, the Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.

32. From the sworn affidavits, annexure's, submissions by the respective parties', the applicable law and the decided cases, it is not in dispute that the Respondent herein was aware of the orders issued by the Court of Appeal in its judgment of 7th November 2019, which orders were valid.

33. The point of departure comes into light when the Respondent has raised an argument to the effect that he was still in possession of the suit land because by the court granting the Applicant vacant possession, it did not give express orders of eviction against him. I find this line of argument preposterous to say the least more so because the Respondent is represented.

34. **Vacant possession** in the present situation meant that the suit land was to be made available for the Applicant to move in and /or take possession. It therefore required the Respondent to remove all his goods and/or asserts from the property to enable the Applicant possess it. The consequences of failure to give the said vacant possession would therefore only lead to one thing and that would be the eviction of the Respondent from the suit premises. Vacant possession in the current scenario therefore meant that the suit land be returned to the Applicant. There is no any other way to define vacant possession. So where does that leave us?

35. Indeed the one of the orders issued by the Court of Appeal was for the Respondent herein to give vacant possession to the Applicant. These terms I find were clear and unambiguous. To date, the Respondent is still in possession of the suit premises and has been, regrettably employing despicable tactful means, as above stated, to deny the Applicant of his fruit of judgment.

36. I find that the Respondent herein willfully and intentionally defied orders of the Court despite knowledge of the same. His action of remaining on the suit premises and carrying out the heinous acts of using rowdy youths to stop the law enforcers from carrying out legal orders of the court, in a **deliberate attempt to subvert the Rule of Law**, ran afoul of the terms of the Court orders issued on the 7th November 2019 ordering him to give vacant possession of the suit land to the Applicant.

37. The Applicant has in his replying affidavit demonstrated a clear picture of the Respondent's high-handedness in complying with the Court of Appeal orders, *where he has engaged in tactics that were meant to frustrate the Applicant by ensuring that he is unfairly and without justification denied his fruits of his judgment.*

38. To protect the dignity and authority of the Court of law, this Court, shall be firm on any person who deliberately disobeys Court orders or attempts to scuttle the Court process. I therefore find the Respondent herein Mukesh Kumar Kanthilal Patel in contempt of Court orders. He shall be brought before this court for sentencing. In the event that he does not bring himself, a warrant of arrest shall issue.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 2ND DAY OF DECEMBER 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE