



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND

AT KERICHO

CONSTITUTIONAL PETITION NO. 1 OF 2013

DAVE KIPKORIR LANGAT.....PETITIONER/APPLICANT

VERSUS

DISTRICT PHYSICAL PLANNING OFFICER.....1ST RESPONDENT

DISTRICT SURVEYOR, KERICHO COUNTY.....2ND RESPONDENT

DISTRICT LANDS OFFICER, KERICHO COUNTY....3RD RESPONDENT

DIRECTOR OF PHYSICAL PLANNING.....4TH RESPONDENT

DIRECTOR OF SURVEY.....5th RESPONDENT

RULING

1. Pursuant to the delivery of a Judgment in this matter on the 5th May 2015 wherein a decree was issued on the 16th July 2015, the Petitioner/Applicant filed two applications for determination, the first one being via a Notice of Motion application dated the 13th July 2018 filed pursuant to the provisions of Section 27, 28 and 30 of the Contempt of Court Act, Order 51 Rule 1 of the Civil Procedure Rules and the second application also by a Notice of Motion dated the 12th February 2021 filed pursuant to the provisions of Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act, all applications pegged on all enabling provisions of the law.

2. Both the applications were supported by the grounds therein as well as the sworn affidavits of Dave Kipkorir Langat the Applicant herein. The applications were disposed of by way of written submissions.

3. I shall thus summaries each of the applications one after the other.

4. In regard to the application dated the 13th July 2018, the Applicant's case while placing their reliance to the decided case in **Kenya Human Rights Commission vs Attorney General & Another (2018) eKLR**, is that pursuant to the delivery of the judgment on 5th May 2015 and despite the court orders having been served upon the Respondents herein, they had neglected and/or refused to implement the same thus remaining in violation of the said court orders to date.

5. That the 4th Respondent, the Director of Physical Planning, the District Planning Officer Kericho, Mr Keitany, the District Surveyor Mr. Kibowen, the District Land Officer Mr. Patroba Omollo and the Kericho Land Registrar, were in violation of the Court orders when they went ahead and resurveyed his land, re-amended the PDP which gave rise to PDP No. R22/84/4 and PDP No R22/2011/01 wherein the latter overlapped the former, his property and which resulted in the sub-division of his property into several small plots measuring 40 by 80 Sq. feet, wherein after they allocated the resultant parcels to the beneficiaries of the illegality who had then settled and constructed on the suit property, thus obstructing him from enjoying the fruits of his litigation. That their action thus undermined the authority and dignity of the court.

6. The Applicant therefore sought that the Respondents herein above mentioned, having been in contempt of the court orders, must be dealt with in accordance with the law. That the court should not condone any disobedience of its orders. Reliance was placed on the decided case in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828**. The Applicant sought that all the acts of illegality and/or disobedience of the court orders should be reversed and the documents of plots measuring 40 by 80 sq. feet which had been issued to the beneficiaries be revoked, vacated and canceled because the fruits of defiance were not any better than the disobedience which produced it. That the allocation of the land was tainted with illegalities.

7. The Respondents on the other hand have denied being in contempt of court orders stating that the Applicant's application was incompetent, an abuse of the process of courts and lacked merit. That they had not committed any acts of omission or omission that where in any way, contemptuous and in breach to the court orders and Decree of 12th March 2016 and delivered on 5th May 2015 and 16th July 2015. That the subject property had been surveyed as LR 631/1191 as found on Fr No. 190/106 which was authenticated by the Director of Survey in or about 1980's and was later converted to Kericho Municipality Block 5/159. That the Original PDP No. R22/84/4 which was assigned Approved Development Plan No. 113 had never been re-named or amended as alleged. That they were not aware of any cancellation of the existing survey plans Fr No. 190/106 and other survey plans affected by the said PDP No. R22/2011/01 as alleged.

8. That the site for resettlement of the Talai community covered by PDP No. R22/2011/01 and assigned Approved Development Plan No. 224 was on a different site and did not in any way affect PDP No. R22/84/4. That the two parcels of land were separated by a 20m road reserve.

9. That there has been no subdivision registered on the subject property by the Director of Survey. That they had not been personally served with the orders and/or Decree signed on 12th March 2015 and delivered on 5th May 2015 and on the 16th July 2015. That the Applicant had not come to court with clean hands as he had not given full disclosure of material information which would have been of assistance to the court.

Determination.

10. I have considered the submissions by both Counsel for the Applicant and the Respondent. That the Applicant premised his application on the provisions of Section 27, 28 and 30 of the Contempt of Court Act which Act was nullified and the 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.”

11. That disobedience of an impugned order could only be lawfully instituted by dint of the express provisions of Section 5 of the Judicature Act which provides the window by which cases of contempt could be dealt with.

12. 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.”

13. 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.

14. The Application was premised on the grounds that pursuant to the delivery of the judgment on 5th May 2015 and despite the court orders having been served upon the Respondents herein, they had neglected and/or refused to implement the same thus remaining in violation of the said court orders to date. That the 4th Respondent, the Director of Physical Planning, the District Planning Officer Kericho, Mr Keitany, the District Surveyor Mr. Kibowen, the District Land Officer Mr. Patroba Omollo and the Kericho Land Registrar, were in violation of the Court orders when they went ahead and resurveyed his land, re-amended the PDP which gave rise to PDP No. R22/84/4 and PDP No R22/2011/01 wherein the latter overlapped the former, his property and which resulted in the sub-division of his property into several small plots measuring 40 by 80 Sq. feet, wherein after they allocated the resultant parcels to the beneficiaries of the illegality who had then settled and constructed on the suit property, thus obstructing him from enjoying the fruits of his litigation. That their action thus undermined the authority and dignity of the court.

15. 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.”

16. 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.'

17. 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

18. 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.

19. From the sworn affidavits, annexure's, submissions by the respective parties', the applicable law and the decided case, the following issues stand out for determination:-

i. Whether the 4th Respondent, the Director of Physical Planning, the District Planning Officer Kericho, Mr. Keitany, the District Surveyor Mr. Kibowen, the District Land Officer Mr. Patroba Omollo and the Kericho Land Registrar were served with or were made aware of the orders of the judgment dated the 12th March 2015 and delivered on 5th May 2015.

ii. Whether there was any valid Court orders issued by the Court in its judgment dated the 12th March 2015 and delivered on 5th May 2015.

iii. Whether the above captioned Respondents are guilty of contempt of Court the orders issued in its judgment dated the 12th March 2015 and delivered on 5th May 2015.

20. In order to determine these issues, I have considered the proceedings herein as well as the orders contained in the impugned judgment. Indeed the Court record is clear that on the 5th May 2015 when the judgment was to be delivered, there was no appearance for the parties despite there being evidence that Notices had been issued for delivery of the judgment on that day. The said judgment was however delivered in open court in absence of the parties and their Counsel, wherein an order was directed to the Deputy Registrar to notify them of the said delivery.

21. The jurisprudence now favors knowledge of the existence of Court orders as opposed to strict personal service. In the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** the Court of Appeal posed the question as to whether knowledge of a Court order or judgment by an Advocate of the alleged contemnor would be sufficient for purpose of contempt proceedings and answered the question in the affirmative stating:-

“We hold the view that it does. This is more so in a case as this one where the Advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an Advocate appears in Court on instructions of a party, then it behooves him to report back to the client all that transpired in Court that has a bearing on the clients' case...”(emphasis)

22. Indeed from the Court's record, the same is clear that although the judgment was not delivered in the presence of Respondents or their Counsel, yet they had been served with a copy of the court orders and decree of 16th July 2015 as evidenced in the annexures marked as “DKL 1A”, “DKL 1B” and the Affidavit of Service marked as “DKL 2” annexed to the Notice of motion dated the 15th July 2016 and filed in court on the 28th July 2016. This Court thus finds that the Respondents had knowledge of the Court's orders.

23. Indeed the orders contained in the judgment dated the 12th March 2015 and delivered on 5th May 2015 were as follows:

i. That a declaration be and is hereby issued that the acts of the Respondents arbitrarily interfering, and/or arbitrarily re-amending the original survey plan or re-amending the original PDP, or re-survey and sub dividing the suit land LR No. Kericho Municipality Block 5/159 into small plots 40 x 80 sq feet and/of intention to allocate the same to third parties is contrary to Article 40 and 47(1) of the Constitution of Kenya and is therefore illegal, unconstitutional null and void.

ii. That a declaration be and is hereby issued that the Petitioners' rights under Article 40 and 47(1) of the Constitution were violated by the Respondents' acts aforesaid or were acts of arbitrarily interfering to private land and that such interference including the act of resurveying the original plan, re-amending the PDP, re-surveying and sub dividing the suit land LR No. Kericho Municipality Block

5/159 into small plots 40 x 80 sq. feet and of intended re-allocation to third parties is null and void.

iii. That the said Respondents, the Registrar of Titles the Commissioner of Lands or any other person authorized on their behalf be and are hereby directed to cancel, delete and/or remove any entries or interference with the Petitioner's LR No. Kericho Municipality Block 5/159 and/or from implementing whatsoever the contents of the Respondents illegal and unconstitutional acts aforesaid.

iv. That the Respondents are hereby restrained by themselves, their servants/or agents are whatsoever from re-amending the original survey plan, from the amending the original PDP, from re-surveying and sub dividing the suit land LR No. Kericho Municipality Block 5/159 into small plots 40 x 80 sq. feet and of reallocating the suit land to members of the Talai Community or any other third party and from interfering with the Petitioner's private property LR No. Kericho Municipality Block 5/159.

24. I find that indeed there was a valid Court order issued by this Court whose terms were clear and unambiguous. In essence thereto, the Respondents had been restrained by themselves their servants/or agents or whatsoever from re-amending the original survey plan, from the amending the original PDP, from re-surveying and sub dividing the suit land LR No. Kericho Municipality Block 5/159 into small plots 40 x 80 sq. feet and of reallocating the suit land to members of the Talai community or any other third party and from interfering with the Petitioner's private property LR No. Kericho Municipality Block 5/159. The complaint by the Applicant was to the effect that pursuant to the orders of 5th May 2015, the 4th Respondent, the Director of Physical Planning, the District Planning Officer Kericho, Mr Keitany, the District Surveyor Mr. Kibowen, the District Land Officer Mr. Patroba Omollo and the Kericho Land Registrar, went ahead and resurveyed his land, re-amended the PDP which gave rise to PDP No. R22/84/4 and PDP No R22/2011/01 wherein the latter overlapped the former, which was his property and which resulted in the sub-division of his property into several small plots measuring 40 by 80 Sq. feet wherein after, they had allocated the resultant parcels to the beneficiaries of the illegality who had then settled and constructed on the suit property, thus obstructing him from enjoying the fruits of his litigation.

25. **The court is guided by** the Scottish case in **Stewart Robertson vs. Her Majesty's Advocate, 2007 HCAC63**, where Lord Justice Clerk stated that:

“ contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”

26. Further, **Romer L.J in Hadkinson vs. Hadkinson(1952) ALL ER 567** stated that:

“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 even void”

27. I have also gained sight of the replying affidavit by one Mr. Partoba Omollo sworn and filed in court on the 22nd September 2016 in which he confirmed to having received a copy of the judgment wherein he had sought to follow up with the headquarters on the implementation of the same. This was not to be. I find that the actions of the Respondents herein willfully and intentionally defied orders of the Court despite knowledge of the same. 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.

28. I find that the actions of the 4th Respondent, the Director of Physical Planning, the District Planning Officer Kericho, Mr. Keitany, the District Surveyor Mr. Kibowen, the District Land Officer, Mr. Patroba Omollo and the Kericho Land Registrar of resurveying the suit land, re-amending the PDP which gave rise to PDP No R22/2011/01 which in turn overlapped the Applicant's property with the result that it caused a sub-division of his property into several small plots measuring 40 by 80 Sq. feet wherein after they allocated the resultant parcels to 3rd parties, ran afoul of the terms of the Court orders issued in its judgment of the 5th May 2015 which had constrained them from committing the afore mentioned actions against the Applicant's property.

29. The Court of Appeal cited the decision the case of **Eliud Muturi Mwangi (Practicing in the name and style of Muturi & Co. Advocates) vs LSG Lufthansa Services Europa/Africa GMBH & Another (2015) eKLR** held thus;

“The law is that any person who has committed an act of contempt of court is liable for indictment. Therefore, even third parties who are not parties in a suit may be committed for contempt of court and classic examples are contempt on the face of the court, contempt by officers of a company or corporation, contempt by persons who are claiming under the title of a party in a suit or as assigns or successors in title. I therefore agree with the submissions by Mr. Nderitu that the intended contemnors herein being officers of a corporation may be cited for contempt of court.”

30. I find that when all is said and done, the application, dated the 13th July 2018 succeeds with costs. The contemnors shall be brought before this court for sentencing and in the event that they do not bring themselves, a warrant of arrest shall issue.

31. Turning to the second application dated the 12th February 2021, the Applicant herein has sought that as part of the enforcement of the order of the court of 5th May 2015, and the ensuing decree, that there be eviction orders against the Respondents and the third parties and/or any person or persons who have trespassed on LR No. Kericho Municipality Block 5/159, as a consequential relief.

32. The Applicant has also sought that the County Commander of Police Kericho County do provide security to the court Bailiff while executing the said order, so as to ensure that the law and order prevails.

33. That there was a valid judgment in place which had not been appealed against and therefore he should be able to enjoy the fruits of the

said judgment.

34. The Respondent herein filed their grounds of opposition seeking for the dismissal of the application for being incompetent, bad in law, frivolous and lacking in merit for reason that they did not reside on the suit parcel of land and no cause of action had accrued against them. That further, the persons the Applicant sought to evict from the suit land were third parties who had not been parties to the suit and therefore their eviction would cause injustice and hardship upon them.

35. That the Applicants' allegations to the effect that the Respondents had settled, third parties and the said land was a mere allegation which could not hold any water. That the court did not operate in a vacuum. That it would have been prudent for the Applicant to commence separate eviction proceedings against the third parties since they were not parties to the suit. That the orders sought lacked specificity and would cause an embarrassment to the court. Reliance was placed on the decided case in **Mercy Nduta Mwangi T/A Mwangi Kengára & Co Advocates vs Invesco Assurance Company Limited [2019] eKLR**.

36. The issue for determination herein is whether the application for eviction is tenable

37. It is clear from the pleadings herein that the Respondents of whom the court has found to be in contempt of the court orders, had resurveyed the suit land, re-amended the PDP which in turn resulted in the sub-division of the Applicant's property LR No. Kericho Municipality Block 5/159 into several small plots measuring 40 by 80 Sq. feet which parcels of land had subsequently been allocated to third parties.

38. Clearly from the pleadings, it can be discerned that there was no proof that the Respondents/contemnors herein are in occupation of the suit land, secondly, the subject suit has since changed from its original status and now there are third parties in occupation therein who had not been parties to the suit. Given this scenario, and in the light of the provisions of Article 50(1) of the Constitution on fair hearing, the proper avenue for the Applicant to address the issue on eviction is for him to file a fresh suit for the eviction of the persons who are on land to which he obtained orders because the Applicant can only enforce orders against the persons he had sued. The case will then be decided on merits wherein upon a successful conclusion of the matter, that the Applicant can be entitled to an order of eviction.

39. For the above reasons, I do not find merit in this 2nd application and it is dismissed. I make no orders as to costs.

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

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE