



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO. 6 OF 2020 (OS)

JAMES GACHIRI MWANGI.....PLAINTIFF/ APPLICANT DANIEL

VERSUS

JOHN WAWERU MURIUKI.....1st DEFENDANT/RESPONDENT

SARAH WAITHERA WAWERU.....2nd DEFENDANT/RESPONDENT

SAMWEL WAWERU NDUNGU.....3rd DEFENDANT/RESPONDENT

MARTIN MACHARIA WAMBUI.....4th.DEFENDANT/RESPONDENT

RULING

1. On the 25th February 2020, this Court vide an application dated the 25th February 2020 issued an order for parties to maintain status quo in regard to land registration No. Laikipia/Marmanet/ 55 (Extension) pending the hearing and determination of the Application inter parties.
2. While the matter was pending hearing, Counsel for the Plaintiff filed another application under certificate of urgency dated the 7th April 2020, wherein he sought for orders that the 3rd and 4th Defendants/Respondents be summoned to Court to show cause why they should not be committed to civil jail for blatantly failing to comply with the orders of status quo issued by the Court and in default they be committed to jail for a maximum of 6 months for contempt of the said Court order.
3. The Applicant s also sought that the summons be enforced by the Officer Commanding Nyahururu Police Station.
4. The said application was supported by the grounds set on the face of it as well as on the supporting affidavit of James Gachiri Mwangi the Plaintiff/ Applicant herein.
5. The said Application was opposed through the Replying Affidavit by the 4th Defendant/Respondent Martin Macharia Wambui dated the 16th April 2020 in which he had deponed that they were not in contempt of the Court orders because by the time the order of status quo was issued by the Court, they had already taken possession of the suit land where they had already deposited building materials and that pursuant to issuance of the orders, they had not set foot on the suit land.
6. The matter had been placed before the Deputy Registrar for mention who then directed that the application be disposed of by way of written submissions to which parties filed their respective submissions as herein under.

Applicant 's submission.

7. The Applicant s submission was that at the time the Court issued the orders of status quo, the status on the ground had been such that there was a maize plantation as well as some building materials already deposited therein as evidenced by the photographs therein attached to their Application. There had been no construction commenced.
8. That it had been only upon service that the 3rd and 4th Respondents continued to deposit construction material, dug a pit as well as trenches on the said suit land. That they also hired goons who sprayed chemicals on the remaining maize growing thereon as evidenced in their annexure marked as JGM 5, which was in total disregard of the Court orders.

9. That the acts of the 3rd and 4th Respondents, despite there being very clear orders, was reckless, and an act of commission in disregard to matters bordering on Courts' integrity and reputation. That they had a duty to obey the Court's orders until they are discharged.

10. That in an application for contempt of Court orders an Applicant has to meet the following requirements;

- i. Whether an order was granted
- ii. Whether service was effected
- iii. Whether the order was clear, unambiguous and unequivocal
- iv. Whether there was disobedience of the said Court order

11.. The Applicant relied on the decided case in **Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR** to submit that in the instant case an order had been issued on 25th February 2020 which order was served upon the Respondents as evidenced by the Affidavit of Service filed in Court on 7th April 2020. The order was clear unambiguous and unequivocal.

12. That the 3rd Respondent was served yet he chose not to file any response to the Application and therefore did not oppose the same. That it was evident that the order was served upon the Respondents wherein vide the photographs annexed in the Applicants affidavit, the said orders had been disobeyed.

13. That pursuant to the provisions of Order 40 Rule 3, a party is in disobedience and/or breach of any terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months.

14. That the Respondents, having failed to purge themselves had in addition having gone further to destroy the maize plantation even after being served with the instant application, ought to be detained in prison for a term not exceeding six months or as the Court may deem fit. The Applicant relied on the case in **William Gatheca Nguyo v Francis Kariuki Muthee & Another [2019] eKLR** and the case in **Kiiru Tea Factory Company Limited vs Stephen Maina Githiga & 14 Others [2019] eKLR** to buttress their submission and to seek that the Court allows their application with costs.

3rd and 4th Respondent's Submission.

15. Both the 3rd and 4th Respondents opposed the said application for reasons and upon purchase of ¼ acre of land that was to be excised from the original parcel No. Laikipia/Marmanet/ 55 (Extension) the land had been subsequently subdivided resulting into parcels No. Laikipia/Marmanet/ 2294 wherein the 4th Respondent jointly with one Mary Wangechi Wambugu were registered as joint owners to parcel No. Laikipia/Marmanet/ 2294 (Extension) on 13th March 2019.

16. That in January 2019 the 4th Respondent and Mary Wangechi Wambugu took possession of their piece of land wherein they started to deposit building materials and in mid February 2020, they erected a fence and also dug a pit latrine therein.

17. That when the orders of the Court were issued on the 27th February 2020, the said building materials and pit latrine were already in place and upon service of the orders, the Respondents together with Mary Wangechi Wambugu never stepped, entered or carried out any further activities on parcel No. Laikipia/Marmanet/ 2294 (Extension).

18. The 3rd Respondent equally denied being in contempt of the Court orders. His submission was that having purchased his piece of land No. Laikipia/Marmanet/ 2295 (Extension), from the 1st and 2nd Respondents, he had been registered as its proprietor on the 29th April 2019. That he had then taken possession of the same wherein in April 2019 and May 2019 he had deposited building materials and in mid February 2020 jointly with the 4th Respondent, they had put up a fence on their common boundary.

19. That he had not been served with the orders of the 27th February 2020 and requested that one Joshua Muturi Ndiritu who had alleged to have effected service upon him should swear an oath to that effect. That when he became aware of the said orders on the 15th April 2020, he had stopped all activities on Laikipia/Marmanet/ 2295 (Extension). That the trenches complained about had been dug prior to the issuance of the order and in preparation to construct his house.

20. The Respondents submitted that prayer 2 of the Applicant's application was sub judice in the sense that on the 25th February 2020 the Applicant had filed another application seeking the same prayers which application, seeking injunctive orders against the Respondents, was yet to be determined and as such the Applicant was barred by the provisions of Section 6 of the Civil Procedure Act from litigating a similar prayer that was pending determination. That prayer No 2 therefore ought to be struck out.

21. They framed their issues for determination as follows:

- i. Whether there was a valid Court Orders issued on 27th February 2020
- ii. Whether the said orders were served upon the Respondents

iii. Whether the Respondents are in contempt of the said Court orders

22. The Respondents did not dispute the fact that on 27th February 2020, the Court issued orders that the status quo on Parcel No. Laikipia/Marmanet/ 55 (Extension) be maintained, there were further orders that the Application be served within seven days for inter parties hearing on 28th April 2020.

23. That by the time these orders were being issued, Laikipia/Marmanet/ 55 (Extension) had ceased to exist having been subdivided and which sub division had resulted into Laikipia/Marmanet/ 2290-2295 (Extension) and therefore the said order was not binding against the parties as they had no interest in Laikipia/Marmanet/ 55 (Extension) which was the subject matter in the order.

24. That further, the Applicant sought to assert his interest in land measuring 1.25 acres out of Laikipia/Marmanet/ 55 (Extension) yet the Respondents' parcels of land No. Laikipia/Marmanet/ 2294 measured 0.203 hectares while Laikipia/Marmanet/ 2295 (Extension) measured 0.345 hectares giving them a total acreage of 1.35 acres which was beyond what the Applicant had sought in his claim.

25. That the orders issued on the 27th February 2020 did not state that it was to exclusively bind the Respondents in their usage of parcel No. Laikipia/Marmanet/ 2294 and 2295 to the exclusion of persons in possession of parcels No. Laikipia/Marmanet/ 2290-2293 (Extension) which was a bigger parcel of Laikipia/Marmanet/ 55 (Extension) taking into account that there had been 6 sub-divisions from the said suit land.

26. That by the time the order of status quo had been issued, there had already been building materials deposited on the suit land and the order did not specify what the 3rd and 4th Respondents had been refrained from doing in as far as their respective parcels of land were concerned. The Respondents relied on the decided cases in **Michael Sistu Mwaura Kamau vs Director of Public Prosecution and 4 Others [2018] eKLR**, **Richard Lanet Koonyo vs Seleone Koonyo & 3 Others [2017] eKLR** and **Mary Wanja Karobia vs Nairobi City Council [2017] eKLR** to submit that the Court's order of status quo was therefore not clear and precise.

27. The Respondents further submitted that there had been no dispute that the Order of 27th February 2020 had been served upon the 4th Respondent on the 2nd March 2020, however there had been a dispute as to the service in regard to the 3rd Respondent in that according to para 2 of the Affidavit of service, it was clear that the 3rd Respondent had only been served with the pleadings of the suit and not the Court order.

28. That further the 3rd Respondent in his Replying affidavit had deponed that he did not know where either Co-site estate or Plot 78 were located and that on the day it was alleged that he had been served, which was on the 2nd March 2020, he was not in that location. That he, being a school teacher and a resident of Tandare (near Kinamba/Ngarua) he had been in school the whole day up to 5:30 pm (as per the annexed school register) wherein after he had gone to his house and at no time had he travelled to Nyahururu on that particular day. That he had become aware of the Court Orders on the 15th April 2020 when he had been served with the current application. He could therefore not be held to have been in contempt of the Court orders of 27th February 2020 prior to 17th April 2020. Reference was made to the case of **Mary Wanja Kobia and Michael Sistu Mwaura (supra)**

29. The Respondents submitted that Parcel of land No. Laikipia/Marmanet/ 2294 (Extension) was jointly owned by the 4th Respondent one Mary Wangechi Wambugu who was neither a party to the suit nor had she been served with any pleadings and/or order and who could therefore not be held in contempt of the Court orders of 27th February 2020.

30. That the photographs that had been annexed by the Applicant to prove the activities complained of, were photographs depicting trenches, building materials and a pit latrine which was not sufficient evidence to prove the allegations leveled against them for it was not clear whether the photographs were in relation to parcel No. Laikipia/Marmanet/ 55 (extension) or not.

31. That further the photographs did not depict whether there had been any further developments of the suit land after the photographs in the application dated the 25th February 2020 had been taken. The Respondents relied on the decided case in **Robinson Kiano Wangenye vs Stanley Kamau Chege & 2 Others [2018] eKLR** to submit that the said photographs did not connect the 3rd and 4th Respondents to the activities complained of in regard to parcel No. Laikipia/Marmanet/ 55 (extension). The Respondents thus prayed for the Applicant's Application to be dismissed with costs as it had been brought in bad faith, and was an abuse of the Court process.

Determination.

32. I have considered the submissions by both Counsel for the Applicant and the Respondents. **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.”

33. The law guiding the present Application is Order 40 Rule 3(1) of the Civil Procedure Rules which stipulates as follows:-

In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.

34. In the case of **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** the Court of Appeal held as follows:

For many years in the history of the Judiciary of Kenya the Courts have, pursuant to **section 5 (1)** of the Judicature Act, resorted to the prevailing law of England in the exercise of the power to punish for contempt of Court.....

Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when section 5 of the Judicature Act was enacted. By Act No.7 of 2011, **Article 163 (9)** of the Constitution was operationalized by the enactment of the Supreme Court Act (CAP 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt.

Under **section 29** of the Environment and Land Court Act, it is an offence punishable, upon conviction to a fine of not exceeding Kshs.20,000,000 or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the Court given under the Act.

We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of Court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of Court has been expressly clothed with jurisdiction to punish for contempt of Court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of Court Applications

35. The Contempt of Court Act commenced on the 13th January, 2017 but had been declared invalid by the High Court in the case of **Kenya Human Rights Commission vs Attorney General & Another [2018] eKLR**. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court Act, to avoid a lacuna in the enforcement of Court's orders.

36. It was in this respect as observed in the case of **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008**, that the High Court (read Environment and Land Court) has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the Application of the rule of law.

37. In addition, in the case of **Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR**, it was held that where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

38. 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.”

39. 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

40. 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.’

41. 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, an 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.

42. From the sworn affidavits, annexure's, submissions by the respective parties' Counsels on record, the applicable law and the decided cases, the following issues stand out for determination:-

- i. Whether there was a valid Court order issued by this Court on the 25th February 2020.
- ii. Whether the Respondents herein were served with or were made aware of the order of 25th February 2020.
- iii. Whether the order as sought and extracted was clear and unambiguous
- iv. Whether the Respondents are guilty of contempt of Court order herein issued.

43. In the instant case, the Applicant's case is that the 3rd and 4th Respondents were served with the Court order of the 25th February 2020 but disobeyed and disregarded the same willfully and deliberately. On the contrary, the 3rd Respondent denies service or even knowledge thereof and contends that he was not in contempt of Court. The Respondents further submit that the application before Court is incompetent and therefore not capable of effecting the orders of Court sought because the said orders were not clear and precise.

44. On the 1st issue for determination, there is no doubt that on the 25th February 2020, the Court sat for purposes of giving directions on an application dated the 25th February 2020 under Certificate of Urgency wherein the Applicant had sought for interim injunctive orders against the Respondents in respect to parcel No. Laikipia/Marmanet/ 2294 and 2295 which were a subdivision of parcel No. Laikipia/Marmanet/ 55 (extension).

45. Indeed the Court had issued an *ex parte* interim orders in terms of prayer No. 1 of the Applicant's Application that in order to preserve the said subject suit that the parties herein do maintain the status quo as at the moment the Application was filed, pending the hearing of the application inter-parties. To this end, I find that indeed there was a valid Court order issued by this Court upon which a complaint of disobedience has been raised by the Applicant.

46. On the second issue as to whether the Respondents herein were served with or were made aware of the order issued in Court on the 25th February 2020, I find that as a general rule, no order of Court requiring a person to do or to abstain from doing any act may be enforced (by committing him/her for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question, or that the person had the knowledge of an order which supersedes personal service.

47. On this line of argument, it was not denied that the 4th Respondent herein had been made aware of the said orders on the 2nd March 2020. The matter rests at that as pertaining the 4th Respondent.

48. There were submissions however on the service upon the 3rd Respondent who raised an alibi to the effect that at the time of the purported service, he was not at the place and time where the service is alleged to have taken place. That he, being a teacher and a resident of Tandare (near Kinamba/Ngarua) had been at his place of work up to 5:30 pm (as per the annexed school register) wherein he had left for his residence and had not gone to Nyahururu town on that day. That further, he neither knew of a place called Co-site estate nor Plot 78 from where it was alleged that he had been served. His submission was that he was never served with the Court order of the 25th February 2020.

49. The 3rd Respondent further deponed that he had only received the present application alongside the pleadings to the suit land on the 15th April 2020, and therefore he had not known of the existence of any Court order or suit prior to the said service.

50. In the old celebrated case of **EX PARTE LANGELY 1879, 13 Ch D/10 (CA)** Thesiger L.J stated at P. 119 as follows:-

“...the question in each case, and depending upon the particular circumstances of each case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made” And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.”

51. To this end, I am not convinced that the 3rd Respondent was either served or had the knowledge of the existence of the Court order of the 25th February 2020.

52. On the 3rd issue for determination as to whether the order as sought and extracted was clear and unambiguous, I find that pursuant to the issuance of the order for parties to maintain the status quo as herein above captioned, the said order, was extracted and couched in the following terms:

- i. *That the status quo in Land Registration No. Laikipia/Marmanet/ 55 (extension) be maintained.*
- ii. *That the Application be served within seven (7) days*
- iii. *That the Application be served for inter parties hearing on the 28th day of April 2020.*

53. The Respondents have urged that the said order was neither clear nor precise for reason that the Court's orders were that parties maintain the status quo on Parcel No. Laikipia/Marmanet/ 55 (Extension) which land the parties had no interest in the same having ceased to exist

upon its subdivision which had resulted into Laikipia/Marmanet/ 2290-2295 (Extension)

54. That secondly the said orders did not state that it exclusively bound the Respondents in their usage of parcel No. Laikipia/Marmanet/2294 and 2295 to the exclusion of persons in possession of parcels No. Laikipia/Marmanet/ 2290-2293 (Extension) which was a bigger parcel of Laikipia/Marmanet/ 55 (Extension) taking into account that there had been 6 sub-divisions from the said suit land.

55. I find that the terms of the extracted order were not clear in the terms of the identity of parcel of land to which the parties had to maintain the status quo keeping in mind that parcel No. Laikipia/Marmanet/ 55 (Extension) had ceased to exist. The Court will only punish as contempt, a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous.

56. The Respondents also took issue with the fact that by the time the order of status quo had been issued, there had already been building materials deposited on the suit land and the order did not specify what the 3rd and 4th Respondents had been refrained from doing in as far as their respective parcels of land were concerned. That further Parcel of land No. Laikipia/Marmanet/ 2294 (Extension) was jointly owned by the 4th Respondent one Mary Wangechi Wambugu who was neither a party to the suit nor had she been served with any pleadings and/or order and who could therefore not be held in contempt of the Court orders.

57. The Respondents also attacked the photographs that had been annexed by the Applicant to prove the activities complained of to the effect the photographs depicted trenches, building materials and a pit latrine which they stated was not sufficient evidence to prove that these activities were in relation to parcel No. Laikipia/Marmanet/ 55 (extension) or not. Further they did not connect the 3rd and 4th Respondents to the impugned activities.

58. The Court of Appeal in **Shimmers Plaza Ltd Shimmers Plaza Ltd (Supra)** emphasized that.

“It is important however, that the Court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.

59. Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like in the case of any other ordinary matter like service of summons to enter appearance or hearing notice upon a party, where, even if service was regular, Courts have found that ex parte proceedings or judgment made in default could still be set aside on terms in the discretion of the Court.

60. In the end, find that the Applicant has not proved to the required standard that the Respondents as cited were in brazen disobedience of the Court order issued by this Court on 25th February 2020 and I decline to grant the order sought by the Applicant. The notice of Motion dated the 7th April 2020 is herein dismissed, with costs. The Respondents are acquitted of the charge of being in contempt of Court.

Dated and delivered at Nyahururu this 25th day of June 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE