



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE No. 74 OF 2014

(As consolidated with Petition No. 10 of 2018)

JULIUS MUTIE MUTUA.....1ST PLAINTIFF

ALEX KYALO MUTEMI.....2ND PLAINTIFF

PASCAL KISELI BASILIO MUNGUI (*Suing as the official of*

AIMI MA LUKENYA SOCIETY).....3RD PLAINTIFF

VERSUS

EAST AFRICA PORTLAND CEMENT CO. LTD.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

KENYA RAILWAYS CORPORATION.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. This Ruling is in respect to the Application dated 5th March, 2019 and filed on even date by the Plaintiffs seeking for the following orders:

a) That Stephen Nthei Kyalo (Acting Managing Director of the 1st Respondent), Philip Maingi (Acting Managing Director of the 3rd Respondent), Wario Sharma (Officer commanding Athi River Police Division (4th Respondent) , William Matu (Officer in charge of station Athi River Police station) (4th Respondent) to be committed to civil jail for a period not exceeding 2 years and or a fine not exceeding Kshs 1 million for deliberately disobeying orders of this court issued on 13th May 2016 and 15th February 2019.

b) That the costs of this Application be provided for.

2. The Application is supported by an Affidavit deponed by Julius Mutie Mutua, the 1st Plaintiff, who deponed that despite the court issuing orders on 13th May, 2016 and 15th February, 2019, and despite the said orders being served on the 1st and 3rd Defendants, the Plaintiffs' structures were demolished by the said Defendants with the abetment of the 4th Respondent.

3. The 1st Plaintiff deponed that on 28th February, 2019, the 1st and 3rd Defendants, with the assistance of the OCPD and the OCS of Athi River Police Division and station respectively, excised a portion of the suit property by digging trenches using heavy machinery and that the excised portion has been leased to a private entity, M/s Grain Bulk Handlers Limited.

4. The 1st Plaintiff deponed that the Defendants have continued to disobey the orders of the court with the connivance of the 4th Defendant. The copies of the orders, the Affidavit of Service, pictures of the demolished buildings and heavy earth moving equipment were annexed to the Application.

5. In reply to the Application, William Matu, the officer in charge of Athi River Police Station, deponed that on 28th February, 2019, he went to the 1st Defendant's land to restore peace after a report was made that a fight had broken out on the land; that the ringleaders of the fighting

were arrested for incitement and that although the order being referred to was served on him, the order did not direct the police to ensure compliance.

6. The 1st Defendant's Company Secretary deponed that she is aware of the existence of the orders of this court restraining parties against any dealings with the subject land; that the 1st Defendant and its officers are law abiding citizens and that as the proprietor of the suit property, they are the ones in occupation of the same.

7. The 1st Defendant's Company Secretary deponed that their officers have not undertaken any activity on the suit parcel of land as alleged; that the 1st Defendant is on record seeking the court's intervention to compel the Plaintiffs and other rival illegal occupants of the suit property to cease from dealing with the suit property pending the hearing and determination of the suit and that the 1st Defendant is aware that there are other rival and illegal groups who have invaded the suit property and have been defying the orders of the court.

8. The 1st Defendant's Company Secretary finally deponed that the 1st Defendant did not and has not instructed any one to demarcate, beacon, sub divide or in any manner deal with the suit property as alleged and that the photographs attached on the Applicant's Affidavit are unknown to the 1st Defendant.

9. The 3rd Defendant's Replying Affidavit is not on record. The 3rd Defendant filed Grounds of Opposition in which it averred that the Application is misconceived and incompetent; that the orders sought in the Application cannot be granted as against the 3rd Defendant because the Application does not provide the particulars of the alleged contempt by the 3rd Defendant and that in any event, the 3rd Defendant did not participate in the proceedings in ELC No. 74 of 2014.

10. The court gave directions that the matter be canvassed by way of written submissions. The Plaintiffs' advocate submitted that the Defendants, together with the Athi River's OCPD and OCS, have all deliberately disobeyed the orders of this court; that the Defendants were aware of the orders of the court by virtue of having been served with the same and that the Defendants' advocates were in court when the said orders were granted. Counsel relied on several authorities which I have considered.

11. In his submissions, counsel for the 1st Defendant admitted that service of the court order was effected on his client; that the terms of the said order were clear, unambiguous and binding on all the parties and that the 1st Defendant's officers did not disobey the said orders.

12. Counsel submitted that the 1st Defendant has not dealt with the suit property in any manner whatsoever; that in contempt proceedings, the decree of proof is higher than on a balance of probability and that the only evidence that the Plaintiffs have produced are a bundle of photographs showing an excavator, a trench and a feeder road.

13. It was submitted by the 1st Defendant's advocate that there is no proof to show that the excavator was on the suit property on the instructions of the 1st Defendant and that the Plaintiffs have not discharged the burden of proof. Counsel relied on the case of **Cecil Miller vs Jackson Njeru & Another (2017) eKLR**.

14. Contempt of court has been defined as conduct which interferes with the administration of justice or impedes or perverts the course of justice. Civil contempt consists of a failure to comply with a judgment or order of a court or breach of an undertaking of court. (See *Osborne's Concise Law Dictionary, P. 102*).

15. In the case of **Sam Nyamweya & Others vs. Kenya Premier League Ltd and Others [2015] eKLR** Aburili J stated as follows:

"Contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings."

16. *Halsbury's Laws of England, Vol.9 (1) 4th Edition* provides as follows:

"Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to Judgment, Orders or other process of Court and involving in private injury."

17. From the above definition of what contempt of court means, the issues for determination are:

a) Were the alleged contemnors aware of the orders that were issued on 13th May, 2016 and 15th February, 2019?

b) Are the alleged contemnors guilty of contempt of the above stated orders?

18. The elements of civil contempt were laid out by the Law Commission of New Zealand in '*Contempt in Modern New Zealand*' that was cited in **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR** as follows:

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil 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.”

19. The record shows that on 13th May, 2016, this court issued an order ELC No. 74 of 2014 prohibiting the 1st Defendant or its agents from erecting, building, occupying or in any other way interfering with Land Reference number 10424 until the hearing and determination of the suit.

20. When the 2nd and 3rd Defendants were joined in this suit vide Petition Number 10 of 2018, this court issued an injunction barring them from interfering with suit property in any manner whatsoever. The said order was issued on 16th July, 2018 on the interim basis. On 15th February, 2019, the court confirmed the interim orders which read as follows:

“2. THAT conservatory orders be issued restraining the Respondents herein by themselves, their agents or servants from continuing the process of compulsorily acquiring and from making any payments to the 2nd Respondent or any other person or in any other manner dealing with the Land Reference No. 10424 (I.R. No. 17951) pending the hearing of the Notice of Motion dated 14th June, 2018.”

21. These are orders that were allegedly disobeyed by the contemnors.

22. In the Application, the contemnors are stated to be Stephen Nthei Kyalo (*Acting Managing Director of the 1st Defendant*), Philip Maingi (*Acting Managing Director of the 3rd Defendant*), Wario Sharma (*Officer Commanding Athi River Police Division and William Matu (Officer in charge of station Athi River Police station)*).

23. Order 40 rule 8 of the Civil Procedure Rules provides that an injunction directed to a corporation is binding not only on the corporation itself but also on all members and officers of the corporation whose personal action it seeks to restrain. This means that Stephen Nthei Kyalo (*Acting Managing Director of the 1st Defendant*) and Philip Maingi (*Acting Managing Director of the 3rd Defendant*) are bound by the orders that are the subject of the instant application.

24. The burden of proof in contempt proceedings is higher than on a balance of probability. In the case of ***Re Bramblevale Ltd (1970) Ch 128 at page 137***, Lord Denning stated that contempt of court is an offence of a criminal character where a man (*or woman*) may be sent to prison for it. That is the reason why one has to prove that the alleged contemnors indeed knowingly disobeyed the orders of the court on a balance that is higher than in other civil cases.

25. Although the conduct complained of by the Plaintiffs amounts to contempt of the Court's orders cited above, I find that the Plaintiffs have not discharged their legal duty of proving that it is the Defendants who demolished the structures shown in the annexed photographs and had the trenches dug on their instructions.

26. I say so because the only evidence that the Plaintiffs produced in support of the Application are photographs of an excavator whose ownership they did not establish. The question of who owns the excavator, and on whose instructions the excavator was on the suit property was paramount in the Plaintiffs' efforts to show that indeed the complained actions were perpetrated by the alleged contemnors' agents. The date when the said photographs were taken are also important in a serious Application of this nature.

27. The person who took the photographs having not sworn an Affidavit to state the date the photographs were taken, and the circumstances under which those photographs were taken, and in the absence of any evidence linking the demolition of the houses on the suit property to the Defendants, I am unable to hold that it is the Defendants or their agents who committed the alleged acts of contempt.

28. For those reasons, I dismiss the Notice of Motion dated 5th March, 2019. The costs of the Application will be in the cause.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE