



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 76 OF 2017

ONESMAS NTHANGA NGUMA & 77 OTHERS.....PETITIONERS/APPLICANTS

VERSUS

KATELEMBO ATHIANI MUPUTI FARMING &

RANCHING CO-OPERATIVE SOCIETY.....1ST RESPONDENT

THE LAND REGISTRAR, MACHAKOS.....2ND RESPONDENT

THE MINISTRY OF INTERIOR.....3RD RESPONDENT

NATIONAL POLICE SERVICE.....4TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

AND

THE NATIONAL LAND COMMISSION.....INTERESTED PARTY

RULING

1. This Ruling relates to the Application dated 12th November, 2018 in which the Applicants are seeking for the following orders:

a) Spent.

b) That the 1st Respondent herein be cited for contempt of the orders of this Honourable Court issued on 21st June, 2017 and its management committee be subsequently imprisoned for a period not exceeding six (6) months.

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

2. The Application was supported by the Affidavit of the 1st Applicant who deponed that this court issued orders on 21st June, 2017 in favour of the Applicants; that the said orders were served upon all the Respondents and that the said orders required the 1st, 3rd, 4th and 5th Respondents to refrain from summoning, detaining, prosecuting, evicting or in any manner harassing the Applicants over their occupation and use of the land upon which they are settled pending the hearing and determination of the Petition.

3. According to the Applicants, the 1st, 3rd and 4th Respondents have failed to comply with the said orders and have allowed one Caleb Mule, with the escort of police officers from Machakos Police Station, and a Surveyor, one Muema Ndivo, to enter into various plots belonging to the Applicants purporting to resurvey the said land.

4. Other than surveying the suit property, the 1st Applicant deponed that the Respondents attempted to evict the Applicants from the suit land and demolished a structure that was under construction and that on 14th September, 2018, Mutua Kimeu, Makau Kimeu and Joseph Muthoka entered the portion of land belonging to the 21st Petitioner, planted trees and excised one (1) acre of the land which they gave to the 21st Petitioner's neighbour.

5. According to the 1st Applicant, on 12th September, 2018, the Respondents removed the 7th Petitioner's fence; that on the same day, the Respondents uprooted the 33rd Petitioner's avocado trees and that on 14th September, 2018 Mutua Kimeu, Makau Kimeu and Joseph Muthoka Muindi excised ¼ acre belonging to the 78th Petitioner and planted a fresh boundary.
6. The 1st Applicant deponed that on 5th September, 2018 and 13th September, 2018, the Respondents entered the 4th Applicant's portion of land and expanded a road and that on 26th September, 2018, the Respondents entered the 20th and 78th Petitioners' portion of land, cultivated it and hived off a portion of the land which they allocated to Charles Muthoka Kitivi and Joseph Muthoka Muindi.
7. In reply to the Application, the Chairman of the management committee of the 1st Respondent deponed that the 1st Respondent, through its officers and servants, have not disobeyed any court order; that the acts of third parties were being attributed to the 1st Respondent and that the 1st Respondent had no control over the actions of third parties or the 2nd to 6th Respondents.
8. It was deponed that the actions attributed to Caleb Mule, police officers and Muema Ndivo were not actions authorized by the 1st Respondent; that Mutua Kimeu, Makau Kimeu and Joseph Muthoka Muindi were not employees of the 1st Respondent and that their actions cannot be attributed to the 1st Respondent.
9. In his Supplementary Affidavit, the 1st Applicant deponed that on 22nd January, 2019, the 20th Petitioner, the 78th Petitioner and the son to the latter were summoned to appear before the Katelembo Management Committee on 29th January, 2019; that on 7th June, 2019, the 39th, 40th and the 52nd Petitioners were summoned by the Office of the Assistant Chief, Katelembo Sub-location, requesting them to visit the said office on 10th June, 2019 without failure and that the said summons were in clear contempt of the orders issued by the court on 21st June, 2017 in Machakos ELC Petition No. 547 of 2016.
10. It was deponed that on 12th April, 2019, there was a purported agreement drafted by the Assistant Chief, Katelembo Sub-location, stating that various Petitioners therein had agreed to vacate the suit property and that this action amounts to contempt of the orders of the court.
11. In his submissions, learned counsel for the Applicants cited several cases, including the case of *Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828* where Ibrahim, J (*as he then was*) stated as follows:
- “It is essential for the maintenance of the rule of law and order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of contempt 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 void.”*
12. Learned counsel for the Applicants submitted that the Applicants have attached several summons emanating from the 1st Respondent; that the actions of the 1st Respondent were in contempt of the injunctive orders issued by this court on 21st June, 2017 and that the letters that were issued by the Assistant Chief, Katelembo sub-location, shows that the 3rd Respondent is in breach of the court orders issued on 21st June, 2017.
13. It was counsel's further submission that as the demolition was happening, the officers from the 4th Respondent were at all times present to scare away the Applicants.
14. Learned counsel for the 1st Respondent submitted that it was imperative that the court be satisfied, firstly, that the Application meets the conditions set out by law for contempt of court and secondly, that the 1st Respondent indeed disobeyed the court order. With regard to the conditions to be met, the 1st Respondent's counsel invited the court to consider the cases of *Philip Kipsigei Ruto vs. David Tore Pirade & Another (2012) eKLR* and *Nginyo Investments Ltd vs. Mobile Pay Limited (2012) eKLR*.
15. The 1st Respondent's counsel took issue with the service of the court order on the 1st Respondent and argued that the same did not show the name and designation of the person who received it; that the same was not endorsed with the official stamp of the 1st Respondent and that there was no evidence to show that the members of the Management Committee of the 1st Respondent were served personally with the court order.
16. Learned counsel for the 1st Respondent submitted that there was nothing to show that the 1st Respondent disobeyed the court order; that the other five Respondents were not under the control and direction of the 1st Respondent and that annexures ONN1, 2, 5 and 6 related to actions that took place after the instant Application was filed and therefore were extraneous matters that ought to be expunged from the record.
17. Contempt of court consists of 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*).
18. In the case of *Sam Nyamweya & Others vs. Kenya Premier League Ltd and Others [2015] eKLR* Justice Aburili 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.”

19. Halsbury's Law of England, Vol.9(1) 4th Edition states 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.”

20. The Applicants have argued that the Respondents are in contempt of the order of this court dated 16th June, 2017 and issued on 21st June, 2017 which provided as follows:

“1. That a temporary injunction is hereby issued restraining the 1st, 3rd, 4th and 5th Respondents from summoning, arresting, detaining, prosecuting, evicting or in any manner harassing the Petitioners/Applicants over their occupation and use of the land upon which they are settled pending the hearing and determination of the main Petition filed herein.

2. That costs of the application be in the cause.”

21. There are essentially four elements that must be proved to make the case for civil contempt. The Applicants must prove to the required standard that the terms of the order (*or injunction or undertaking*) were clear and unambiguous and were binding on the Respondent; that the Respondent had knowledge of or proper notice of the terms of the order; that the Respondent has acted in breach of the terms of the order; and that the Respondent's conduct was deliberate (*See Contempt in Modern New Zealand*).

22. The Appellants have alleged that the orders which were issued by this court were served upon the Respondents, and that the Respondents disobeyed the said orders by resurveying the suit property and attempting to evict the Appellants from the land. According to the Applicants, the Respondents have been cutting trees on the suit land, uprooting the existing fences and even opening up roads using excavators.

23. The record shows that when the court delivered its Ruling on 16th June, 2017, neither the Respondents nor their advocate were in court. Indeed, although the Respondent extracted the order of 16th June, 2017 on 21st June, 2017, other than the 1st Respondent, there is no evidence on record to show that the said order was served on the rest of the Respondents or their advocate. Having not filed an Affidavit of Service to show the service of the order on the Respondents or their advocates, I find that the Respondents had no proper notice of the orders of the court order.

24. In any event, the Applicants have not stated the person who took the photographs that they are relying on in support of the Application. I say so because most of the photographs do not have a date, and the few photographs that have a date do not indicate the land which was in issue. Indeed, considering the serious nature of the Application that is before the court, the person who took the photographs should have sworn an Affidavit indicating the circumstances under which he was taking the photographs.

25. Furthermore, there is no evidence to show that the 1st Respondent's Management Committee members, who purported to summon some of the Applicants, and the other Respondents were personally served with the order of this court, which renders the Application a non-starter. Consequently, the Application dated 12th November, 2018 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30TH DAY OF JULY, 2020.

O.A. ANGOTE

JUDGE