



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYERI

ELC CASE NO 36 OF 2016

FIONA ANSETT.....APPLICANT /INTENDEDE PLAINTIFF

VERSUS

GEORGE ODINGA ORARO.....1ST DEFENDANT/RESPONDENT

DAVID MORTON SILVERTEIN (being executors of the

Estate of LIVIA LE POER TRENCH).....2ND DEFENDANT/RESPONDENT

ANTHONY KIMARU MUTAHI.....3RD DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR.....4TH DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 6th February 2020 brought under *Section 1A, 1B, and 3A of the Civil Procedure Act, Order 1, Order 31, Order 40 Rule 1 and 3 and Order 51 Rule 1 of the Civil Procedure Rules, Section 54 Law of Succession Act and all other enabling provisions of the Law* where the Applicant seeks for two prayers namely that the one Stuart Richard Cunningham be substituted with his wife and Co-executor of his estate Fiona Ansett and secondly the 3rd Defendant/ Respondent Anthony Kimaru Mutahi be held in contempt of Court orders of the 8th November 2017.

2. The Application was premised on the grounds on the face of it as well as the undated supporting Affidavit of Fiona Ansett.

3. The Application was opposed by the 3rd Respondent 's Grounds of Opposition dated the 20th February 2020 to wit that the Applicant had no locus standi in this matter.

4. On the 20th February 2020, when the matter came up for hearing inter parties, the prayer sought to substitute the deceased Plaintiff with the current Plaintiff Fiona Ansett was not opposed and the same was allowed by the Court. What now remained was the Application to hold the 3rd Respondent / Defendant Anthony Kimaru Mutahi in contempt of Court orders, which Application was set for hearing inter-parties on the 2nd April 2020.

5. Due to the Covid-19 pandemic wherein Courts were not sitting, the matter did not proceed for hearing on the day scheduled. The Plaintiff/Applicant then filed yet another Application dated the 6th April 2020 informing the Court that the 3rd Defendant/Respondent Anthony Kimaru Mutahi had been committing acts in contempt of the Court orders issued on the 8th November 2017 and had even threatened the Applicant, her family and workers. The Applicant sought that he be restrained from committing the said acts to ensure maintenance of peace and to guarantee the safety of the Plaintiff.

6. The Court directed for the 3rd Defendant/Respondent to cease committing any acts on the suit property that went against the Court orders issued on 8th November 2017 with immediate effect. The Court further directed that the Application herein be disposed of by way of written submission to which by the time I retire to write is ruling, despite service having been effected, only the Plaintiff/Applicant had filed their written submissions to their Application seeking that the 3rd Respondent be cited for contempt of Court orders.

Plaintiff's submission.

7. The Plaintiff /Applicant submitted to the effect that on the 8th November 2017 the Court had issued the following orders,

- i. That the status quo as earlier agreed and confirmed in the ruling of 31st July 2017 as regards occupation be maintained.
- ii. That the 3rd Defendant be restrained from alienating, charging and/or disposing Nanyuki LR 10422/13 pending the hearing and determination of the suit.
- iii. That the status quo be maintained as obtaining today 8th November 2017.
- iv. Neither the Plaintiff nor the 3rd Defendant will undertake further developments on the suit property. This includes installation of more electricity poles or construction of new structures, pending the hearing and determination of the suit.

8. The order was by the consent of all parties who were present in Court on the day they were issued and where the Plaintiff's advocates took further steps of serving the said orders attached with a Penal Notice upon the various Advocates in the matter.

9. That despite knowledge of the Court order which case was within the personal knowledge and attention of the 3rd Defendant/Contemnor Anthony Kimaru Mutahi, he continues to engage in activities within the suit property that amounts to wanton destruction therein. That in the process, he claimed that the orders did not apply to him as the original Plaintiff had passed away.

10. That the Defendant has continued to engage in construction activities within the suit property where he personally supervises his workers in the process as evidenced in their annexed photographs herein.

11. That despite his advocate being present in Court on 20th February 2020 when he requested to be granted leave to file his response to the Application, by closure of the Courts on 15th March 2020, as a result of the Covid-19 pandemic, no such response has been filed.

12. That the essence of contempt of Court proceedings is to seek to uphold the dignity and authority of the Court, to ensure compliance with the directions of the Court and lastly to preserve an effective and impartial system of justice.

13. The Plaintiff submitted that in contempt proceedings, knowledge of the Court orders superseded personal service. That the Court orders were given by consent of all parties and in the presence of the 3rd Defendant/Respondent who was also physically present in Court and in the presence of his legally and duly appointed Counsel who had been unaware of the position of the Court.

14. That the Court had gone ahead to describe what it had meant by parties maintaining the status quo on the said date and therefore the order could not be said to be ambiguous on the meaning of 'status quo'. Reliance was placed on the decided case in **Abida Werimba Mwaniki & 2 Others vs Samwel Njeru M'ngendo & 2 Others [2017] eKLR**.

15. The Applicant submitted that the prayers to cite and 3rd Respondent for contempt of Court remained undefended that it ought to be granted. They relied on the case in **Africa Management Communication International Limited vs Josph Mathenge Mugo & Another [2013] eKLR**.

16. The Applicant further submitted that there has been continuing, deliberate and intentional non-compliance of the Court order by the 3rd Defendant/Respondent who has refused to purge the contempt.

17. That the suit did not abate with the death of the original Plaintiff as there had been his substitution by consent of parties and therefore the Court order was still in force. That the acts of the 3rd Defendant/Respondent directly challenged the rule of law and order which everyone ascribes to and is required to respect at all times. That the 3rd Respondent/Defendant Anthony Kimaru Mutahi had knowingly and willfully disobeyed and continues disobeying the orders of this honorable Court to which punishment ought to be meted out to him as prescribed.

18. That due to the apprehension of the Plaintiff/Applicant of her safety that of her family, employees and guests, she sought the protection from the police officers in whose jurisdiction the suit property is situated but was asked to seek Court orders.

19. That the Plaintiff/Applicant is entitled to protection of law to be enforced by law enforcement agents, the police in this case, as was stated in the case **Stephen Wanjau Mwangi & 2 Others vs Patrick Tumuti Kimutwe [2019] eKLR**.

20. The Plaintiff/Applicant sought that their Application be allowed and that the police be directed to ensure enforcement of the Court orders.

Determination.

21. I have considered submissions by both Counsel for the Applicant and the Defendants. **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.”

22. 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.

23. 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

24. 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**. In her Application, the Applicant has filed her Application pursuant to various provisions of the law and all other enabling provisions of the law. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court's orders.

25. 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.

26. 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.

27. 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.”

28. 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

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. 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.

31. From the sworn affidavit, annexures, submissions by the Applicant's Counsel, the applicable law and the decided cases, the following issues stand out for determination:-

i. Whether the 3rd Respondent herein was served with or was made aware of the order of 8th November 2017

i. Whether there was any valid Court order issued by this Court on the 8th November 2017.

ii. Whether the 3rd Respondent is guilty of contempt of Court order issued on 8th November 2017.

32. On the first issue as to whether the Respondent herein was served with or was made aware of the order of 8th November 2017, in the case of **Kenya Tourist Development Corporation vs Kenya National Capital Corporation & Another, Nairobi High Court Civil Case No. 6776 of 1992, it was held that** the knowledge of an order supersedes personal service.

33. In the instant case, the proceedings are clear that on 8th November 2017 all Counsel to the parties were present including Counsel for the 3rd Defendant/Respondent, wherein they had by consent agreed on the following:

i. That the status quo as earlier agreed and confirmed in the ruling of 31st July 2017 as regards occupation be maintained.

ii. That the 3rd Defendant be restrained from alienating, charging and/or disposing Nanyuki LR 10422/13 pending the hearing and determination of the suit.

iii. That the status quo be maintained as obtaining today.

iv. Neither the Plaintiff nor the 3rd Defendant will undertake further developments on the suit property. This includes installation of more electricity poles or construction of new structures, pending the hearing and determination of the suit.

34. The Court adopted this consent wherein it had directed the parties to set down the matter for hearing pursuant to the Defendants amending their defences and complying with the provisions of Order 11 of the Civil Procedure Rules.

35. The Court of Appeal in the **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** had posed the question 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...”

36. Indeed from the Court's record, the same is clear that the consent of the 8th November 2017 had been adopted as an order of the Court in the presence of Counsel for the 3rd Defendant/Respondent. This Court thus finds that the 3rd Respondent had knowledge of the Court's orders and therefore personal service was unnecessary

37. On the second issue for determination as to whether there were any valid orders issued by this Court. I find that the Court had adopted a consent to the effect that:

“That the status quo be maintained as obtaining today.

Neither the Plaintiff nor the 3rd Defendant will undertake further developments on the suit property. This includes installation of more electricity poles or construction of new structures, pending the hearing and determination of the suit.’

38. The 3rd Defendant/Applicant by not filing his response has not disputed that indeed there had been a valid order issued by the Court and I therefore find that indeed the said orders of the 8th November 2017 was a valid order.

39. On the last issue as to whether the 3rd Respondent brazenly disobeyed the orders of the Court, I have considered the submission by Counsel as well as looked at the annexures herein annexed to the Application herein. It is not in dispute that the pictures annexed marked as 'H' show activity going on, including construction on the suit land, activities which have not been disputed by the 3rd Respondent.

40. The Applicant has deponed in their affidavit that the contemptuous acts are still ongoing and that the 3rd Respondent has even threatened

her and her household including her guests and workers. A fact which has not been controverted or denied by the 3rd Respondent.

41. The Scottish case of **Stewart Robertson vs. Her Majesty's Advocate, 2007 HCAC 63**, 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”

42. 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”

43. From the foregoing, it is trite that contempt of Court proceedings and Applications are subtle and criminal in nature and would impose criminal sanctions if a conviction followed.

44. I find that the 3rd Respondent / Defendant herein willfully and intentionally defied orders of the Court despite knowledge of the same. His action of engaging in activities within the suit property that amounts to wanton destruction and the construction of the work engaged on the said suit property ran afoul of the terms of the Court orders issued on the 8th November 2017 which had directed that parties to desist from further developments on the suit property, disposing off, transferring and/ or alienating the parcel of land pending the hearing of the suit.

45. It has been held by the Courts that unless and until a Court order is discharged, it ought to be obeyed. As was held by the Court of Appeal in **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others, Civil Application No. Nairobi 247 of 2006**, it is a fundamental tenet of the rule of law that Court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.

46. In the case of **Awadh vs. Marumbu (No. 2) No. 53 of 2001 (2004) KLR 458**, the Court held that it is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.

47. I thus find that the 3rd Respondent/Defendant herein is in blatant contempt of Court orders and proceed to punish him for contempt.

48. Further orders are that the Police officers within the jurisdiction of the suit premises are herein directed ensure that the orders of the Court are enforced.

49. The Plaintiff/Applicant's Application dated the 6th February 2020 is herein allowed with costs.

Dated and delivered at Nyeri this 23rd day of July 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE