



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 258 OF 2013

ANN WANGU NJERU.....APPLICANT/DEFENDANT

-VERSUS-

JOHN MURAGE MURIUKI.....RESPONDENT /PLAINTIFF

RULING

1. The applications before me under certificate of urgency are dated the 26th February 2020 and 2nd April 2020, wherein the Applicant seeks orders that the Respondent be cited for contempt of orders of Court issued on the 23rd May 2018 where the Court, by consent, had issued an order to the effect that parties maintain the status quo in regard to land registration No. Nanyuki South Timau Block 1/600 (MIA MOJA) Laikipia/Marmanet/ 55 (Extension) pending the hearing and determination of the suit.
2. The Applicant brings the present application seeking that the Respondent be committed to civil jail for a maximum of 6 months for blatantly failing to comply with the orders of status quo issued by the Court. That further, the Court do order for the removal of the illegal structure erected on the suit land and that the OCS Umande Police station do confirm compliance with this order and for costs of the Application.
3. The said application was supported by the grounds set on the face of it as well as on the supporting affidavit of the Applicant Ann Wangu dated the 25th February 2020 and 2nd April 2020 respectively.
4. The initial Application 26th February 2020 was opposed through the Replying Affidavit by the Respondent John Murage Muriuki dated the 10th March 2020 in which he deponed that he had not disobeyed any Court orders as there had been no iota of evidence to the Applicant's allegations. That there had been in existence 13 homesteads within the suit land during the pendency of the suit and that he had not been responsible for any structure built therein by the homeowners since they were not his agents.
5. That the Applicant had plucked off some annexures from the application including the Court Order and photographs of the impugned structures so as to throw him off balance in preparation of his defence.
6. That the Court could not be asked to remove structures on the ground without first satisfying itself that they had been erected therein in defiance of Court orders.
7. That the Application was bad in law, untenable and violated all the guidelines of the contempt of Court proceedings.
8. 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.
9. Since the response was served upon the Applicant on the date the matter had been fixed for hearing inter-parties, he sought for leave to read its contents and file a response thereto to which leave was granted to file and serve her supplementary affidavit to the Replying Affidavit within one week and the matter was set for hearing.
10. Instead of filing her supplementary affidavit, the Applicant being a layperson filed a similar application dated the 2nd April, 2020 seeking similar orders and a response Respondent's Replying affidavit to the application dated the 26th February 2020. The Court directed for service. Further orders were to the effect that the applications be disposed of by way of written submissions in light of the Covid-19 Pandemic.

Applicant's submission.

11. The Applicant relied on the provisions of Section 29 of the Environment and Land Court as well as the provisions of Order 40 Rule 3(1) of the Civil Procedure Rules to seek for orders, for the committal of the Respondent to civil jail for a period of 6 months for being in contempt of the Court orders of the 23rd May 2018 where parties by consent had been ordered to maintain the status quo in regard to land registration No. Nanyuki South Timau Block 1/600 (MIA MOJA) pending the hearing and determination of the suit.

12. That the Respondent in defiance of the said order had gone ahead and erected a house on the suit land as evidenced by the photograph annexed in her application, and thereafter feigned ignorance of the existence of the said structure for which she prayed that the Court issues an order for it to be pulled down.

13. That further, while she was contemplating on her next move after the Respondent had put-up the house, and in total disregard of the Court orders, the Respondent had gone and pulled down her pit latrine in total disregard of the health hazards thus causing her psychological torture. That she was now apprehensive of being evicted from her house and had reported the matter to Umande police station.

14. The Applicant further submitted that having complied with all the provisions of the law her application should be allowed.

Respondent s Submission.

15. The Respondent's submission on the other hand was that the Applicant, who was the defendant in this case was determined to frustrate the Plaintiff/Respondent by attempting to have him committed to jail over allegations of contempt of the Court order.

16. That the standard of proof in contempt proceedings was akin to that in criminal proceedings which was 'beyond reasonable doubt'. That other than making allegations, the Applicant had not demonstrated beyond doubt that the said structure belonged to the Respondent. That there were 31 homesteads on the subject land where the Respondent also claimed a stake in the subject suit. That it would therefore be unsafe for the Court to be led to believe that the Respondent was a contemnor against Court orders which he had sought the Court to make in his favour.

17. That the Applicant had also failed to demonstrate when the said structure had been erected therefore making it impossible for the Court to make a finding as to whether or not the same had been constructed before or after the issuance of the Court order.

18. That further the attached photograph of the impugned house showed that it was a large permanent house which had been built on a fenced portion of land. That obviously it must have taken long to build it and therefore the Respondent was left to wonder why it had taken so long for the Applicant to file the present application and not while the house was still at the foundation level.

19. That the house depicted in the photograph was neither familiar nor part of the homes in the suit property and therefore there was a risk of demolishing an innocent person's house if the orders sought were granted. He sought that the Respondent do hold her horses until the finalization of the suit.

Determination

20. I have considered the submissions by both Counsel for the Applicant and the Respondent. **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.”

21. 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.

22. 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

23. 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.

24. 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.

25. 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.”

26. 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

27. 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.’ [

28. 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.

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

i. Whether the Respondent herein was served with or was made aware of the order of 23rd May 2018

ii. Whether there was any valid Court order issued by this Court on the 23rd May 2018.

iii. Whether the Respondent is guilty of contempt of Court order issued on 23rd May 2018.

30. On the first issue for determination herein, 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. On this issue, there was also no contestation and therefore the Court shall take it that indeed the orders of 23rd May 2018 had been served upon him and therefore nothing turns here.

31. On the second issue for determination as to whether there were any valid orders issued by this Court on the 23rd May 2018 wherein the Court had directed that parties by consent do maintain the status quo in regard to land registration No. Nanyuki South Timau Block 1/600 (MIA MOJA) pending the hearing and determination of the suit. To this end, I find that indeed there was a valid Court order issued by this

Court whose terms were clear and unambiguous. There having been no submissions on this point, the same shall rest.

32. On the last issue as to whether the Respondent is guilty of contempt of Court order issued on 23rd May 2018, although the Applicant has deponed that the Respondent built a house and demolished her pit latrine on the suit land, her evidence remained as such. The Respondent has attacked the said allegation and the photograph that had been annexed by the Applicant to prove the activities complained of to the effect that there were about 13 homesteads on the subject suit, that there was lack of evidence to support the fact that the house in the photograph was built on the disputed piece of land and by the Respondent, secondly that the said house was a big permanent house which ordinarily would have taken a long time to finish yet the Applicant had taken no action and had waited until the house was finished to file the present application and lastly that it had not been made clear as to when the said structure had been erected therefore making it impossible for the Court to determine as to whether or not the same had been constructed before or after the issuance of the Court Order.

33. I also find that although the Respondent had not submitted on the allegation that he had demolished the Applicant's pit latrine yet other than a picture of a felled structure out in the field, the Applicant has not proved beyond reasonable doubt that the structure was a pit latrine that had been built on the suit land for which the Respondent had demolished.

34. The standard of proof in cases of contempt of Court is well established. In the case of **Mutitika vs Baharini Farm Limited [1985] KLR 229, 234** the Court of Appeal held that:

*“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which **can be said to be quasi-criminal in nature.**”*

35. Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicant was therefore tasked to endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like any other ordinary matter.

36. The Supreme Court of Kenya in **Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR** held that;

The power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the Respondent s to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.

37. In the end, I find that the Applicant has not proved to the required standard that the Respondent as cited was in brazen disobedience of the Court Order issued by this Court on 23rd May 2018 and I decline to grant the order sought in her Application.

38. The notices of Motion dated the 26th February 2020 and 2nd April 2020 are herein dismissed, with costs. The Respondent is acquitted of the charge of being in contempt of Court.

Dated and delivered at Nyeri this 30th day of September 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE