



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 386 OF 2014

(Formerly Nyeri HCC NO. 137 OF 2010 (OS))

AGNES MUTHONI MWANGI.....1ST PLAINTIFF/APPLICANT

PETER NDEGWA MWANGI.....2ND PLAINTIFF/APPLICANT

-VERSUS-

PRISCILLA WANJERI GATHONI.....1ST DEFENDANT/RESPONDENT

PRIMO THUKU.....2ND DEFENDANT/RESPONDENT

SERAH WANGARI MBUGUA.....3RD DEFENDANT/RESPONDENT

RULING

1. This Ruling is the product of a lay man's Application by way of Notice of Motion dated 5th December, 2019 and filed in Court on the 6th December, 2019 by the 2nd Applicant on his behalf and on the behalf of the 1st Applicant herein. The Application is brought under the provisions of Section 5 of the Judicature Act where the Applicants seek that the 3rd Respondent Serah Wangari Mbugua be committed to civil jail for a term of six months for contempt of Court orders having deliberately disobeyed orders of the Court issued on 2nd February, 2018.

2. The Application is premised on the grounds on the face of it as well as on the supporting Affidavit of Peter Ndegwa Mwangi the 2nd Respondent herein dated the 5th December 2019.

3. The Application was opposed through the Replying Affidavit by the 3rd Respondent Serah Wangari Mbugua dated the 24th February 2020 in which she deponed that it was misconceived, incompetent bad in law, and untenable as she had not disobeyed any Court orders since both the Applicants were still on the suit premises.

4. The matter proceeded for inter-parties hearing wherein the 2nd Applicant submitted to the effect that they had sought for the committal to civil jail of the contemnor Serah Wangari Mbugua for having violated Court orders issued by the Court on 2nd August, 2018.

5. That on the day in question the Coram is clear that when the Court delivered its ruling, Serah Wangari had been represented by Mr. Kimunya Advocate who had held brief for her Advocate Mr. Wahome Advocate .

6. That the orders issued thereto were very clear to the effect that;

(i) Leave is granted to the Plaintiffs to amend the Originating Summons herein to include Serah Wangari Mbugua as the defendant.

(ii) An injunction is hereby issued restraining Serah Wangari Mbugua or anybody acting on her behalf from evicting the Plaintiffs from the suit land Thegenge/Karia/1682 until this case is heard and determined.

(iii) Cost of the Application shall abide the outcome of the suit.

7. That despite the orders being in place, the 3rd Respondent had gone ahead and mounted a metallic gate on the suit land and as if that was

not enough on the 17th January, 2020, she in the company of about 20 men had descended onto the suit land wherein they had proceeded to remove the roof to the houses on the suit land and to cause other damage that had been captured at paragraph 15 of his supplementary supporting affidavit to wit;

- i. Removing and ferrying the whole roofing materials that covered four(4) rooms from the Applicants/Plaintiffs' dwelling houses.
- ii. Removing and ferrying doors from the 2nd Applicant's dwelling house
- iii. Vandalizing the Kenya Power and Lighting Company meter box
- iv. Pulling down the walls from a semi-permanent dwelling house occupied by the 2nd Applicant
- v. Logging of two avocado trees that were in their fruiting stage
- vi. That in the said process important documents like school academic certificates, birth certificates and medical records went missing during the melee.

8. The Applicant further submitted that pursuant to the 3rd Respondents' invasion, the matter had been reported to the police wherein the vandalized items had been ferried as exhibits to Nyeri Police Station where the 3rd Respondent in the company of around 7 men had been booked at the police station wherein parties had recorded statements through an occurrence book (O.B) 73/1/20 of 17th January 2020. The contemnor was thereafter released on cash bail

9. It was his submission that since the date of the removal of the roof, from their houses that they had been waiting for the contemnor to purge the contempt but to date nothing had been done thus forcing them to live in a tent.

10. That it was not true as deponed in the 3rd Respondent's Replying Affidavit that the dilapidated roofs had been removed from the building and a gate put on the suit land pursuant to an agreement with her as there had been no such agreement.

11. That the contents of the 3rd Respondent's Replying Affidavits were indeed an admission that they had removed the items from the suit land purporting that there had been an agreement which agreement had not been produced as proof.

12. That the photographs annexed in the 3rd Respondent's Replying Affidavit as well as those annexed to one Francis Cere Wakani's further Affidavit were one and the same photographs.

13. The Applicant attacked Francis Cere Wakani's affidavit to which he had deponed that the iron sheets had been removed on 17th July, 2020 with a view of replacing the same with new ones submitting that the iron sheets had been removed from the suit land on 17th January, 2020 and that the purported photographs of the roof therein annexed had been taken at Nyeri Police station on 12th March, 2020 but that the same had not come from the suit land.

14. That since he had captured at paragraph 22 of his Supporting Affidavit the running costs they had been incurring since 17th January, 2020 when the roof was removed, that the Court do exercise its authority under Section 1A, 1B of Civil Procedure Act, Article 159 of the Constitution and Section 29 of Environment and Land Court Act to hold the 3rd Respondent in contempt of Court orders. The Applicants relied on the decided cases in **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR** and **Republic vs Principal Secretary Ministry of Defence Exparte George Kariuki Waithaka [2019] eKLR** in support of his submissions.

15. In response and in objection of the Application, Counsel for the 3rd Respondent submitted that it would be imperative to look at the history of the case to wit that it had been filed in the year 2010 as High Court Civil case No. 127 of 2010 (OS). Thereafter, the Applicants before Court sought to enjoin the 3rd Respondent in an Application dated 10th January, 2012. That instead of having the matter set down for hearing, the present Application was filed. That as parties were before Court, The Applicants were enjoying injunctive orders pursuant to the Order dated 2nd August, 2018.

16. That although the Court was being asked to cite the 3rd Respondent for contempt of Court, yet the Order that was purportedly contravened by the 3rd Respondent read as follows:

“an injunction is issued restraining Serah Wangari Mbugua or anybody acting on her behalf from evicting the Plaintiffs from the suit land Thegene/Karia/1682 until this case is heard and determined.

17. It was Counsels' submission that the words to be emphasized in this order were **“from evicting”**. That in essence thereto, the 3rd Respondent was restrained by the Judge from physical expulsion of the Applicants from the land.

18. That there had been no evidence tendered of any physical expulsion of the Applicants from the suit land and that erecting of a gate and removal of the roofs and doors did not amount to an eviction.

19. That the Supporting Affidavit talked of issues in the future after the Application had been filed and could not be used to support the same. That the Court had not been provided with the O.B. extract and neither had it been informed as to whether the people arrested had been

charged before a competent Court.

20. That although the Court had been informed that doors to the houses on the suit land had been removed, that Kenya Power and Lighting Company meter was vandalized yet pursuant to Section 64 of the Energy Act 2016 (now repealed), the Court had not been told that the people who vandalized the meter had been charged under the Energy Act.

21. That pursuant to the decided case in **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** it was held that each alleged act of contempt must be identified separately and numerically. The Application before Court had not done so.

22. That in the case of **Katsuri Limited vs Kapurchand Depar Shah [2016] eKLR** it was held that the standard of proof in contempt of Court matters is higher than in civil cases and that in this case, the Applicant had not discharged that burden. That the burden was for him to prove beyond balance of probabilities that contrary to the Court order where the 3rd Respondent had been ordered not to evict the Applicants from the suit land, that they had been evicted therefrom. That instead the evidence adduced in Court was that the Applicants were still on the suit land.

23. Counsel submitted that indeed on the 12th October 2019 the 3rd Respondent had bought iron sheets to go and replace the old and dilapidated iron sheets in her house wherein she and her carpenter had gone to the suit land to replace the same.

24. He relied on the annexed receipts of the purchase of the iron sheets and doors as proof and submitted that the typographical errors on the dates deponed in their affidavits could be corrected so as to determine the real issue because there was consensus that the roof was removed on 17th January, 2020 and not in July 2020.

25. He further submitted that the 3rd Respondent held the Court in high esteem and was not bent to disobey its orders. That the photographs annexed at paragraph 15 of the Applicants' supporting affidavit were inadmissible because they are electronically generated.

26. He submitted that the Applicants' had not met the very strict requirements for an Application for contempt of Court and therefore their Application should be dismissed.

Determination.

27. 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.”

28. 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.

29. 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

30. 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.

31. 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.

32. 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.”

33. 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

34. 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.’

35. 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.

36. 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 3rd Respondent herein was served with or was made aware of the order of 2nd August 2018
- ii. Whether there was any valid Court order issued by the Court on the 2nd August 2018.
- iii. Whether the 3rd Respondent is guilty of contempt of Court order issued on 2nd August 2018.

37. On the first issue for determination herein, the Applicant maintains and indeed the Court record shows that on the 2nd August 2018 when the ruling was delivered, Mr. Kimunya Advocate had held brief for the 3rd Respondents Counsel Mr. Wahome Advocate.

38. The jurisprudence now favors knowledge of the existence of Court orders as opposed to strict personal service. In the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** the Court of Appeal posed the question as to 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...”(emphasis)

39. Indeed from the Court’s record, the same is clear that the ruling was delivered in the presence of Counsel for the 3rd Respondent. This Court thus finds that the 3rd Respondent had knowledge of the Court’s orders.

40. On the second issue for determination as to whether there were any valid orders issued by this Court on the 2nd August 2018, I find that the orders issued then were to the effect that

‘I find that the applicant has made out a case for being granted an order of injunction restraining the third Respondent from evicting him from the suit property pending the hearing and determination of the suit.’

41. To this end, I find that indeed there was a valid Court order issued by this Court whose terms were clear and unambiguous. Although parties to the suit have not disputed that indeed there was a valid order issued by the Court, yet the 3rd Respondent herein has raised the issue that the words to be emphasized in the Court’s order were “**from evicting**”. That in essence thereto, the 3rd Respondent was restrained by the Judge from physical expulsion of the Applicants from the suit land and therefore since no evidence of physical expulsion from the suit land had been tendered, Counsel contended that the 3rd Respondent could not be said to be in contempt of Court orders simply by the fact that she had erected a gate on the suit land, removed the roofs and doors to the Applicants’ buildings with an intent to replace them, since the said acts did not amount to an eviction.

42. The evidence of the Applicants was to the effect that pursuant to the orders of 2nd August 2018, the 3rd Respondent had erected a metallic gate on the suit land, thereafter on the 17th January, 2020, she in the company of about 20 men had descended onto the suit land wherein they had proceeded to remove the roofs and doors to the houses on the suit land, vandalized the Kenya Power and Lighting Company meter box, pulled down the walls from a semi-permanent dwelling house occupied by the 2nd applicant, logged two avocado trees that were in their fruiting stage wherein in the process, important documents like school academic certificates, birth certificates and medical records went missing during the melee, this evidence had remained unchallenged to this point in time.

43. I entertain doubt and I am not persuaded that the 3rd Respondent had removed the doors and roof to the houses, she claimed was hers, so as to replace them. I take notice that the matter before Court is one in which each party claims ownership of the suit property. It therefore behooves the Court as to why the 3rd Respondent claimed ownership to the suit property when she carried out the said impugned acts before determination of the suit as per the Court Orders.

44. I find that the 3rd Respondent was ill motivated as she damaged the Applicants’ properties therein by demolishing the doors, roof and other parts of the premises in what could be termed as constructive eviction since it was done with an intention of forcing the Applicants to abandon the houses which in itself was unlawful attempt of forceful eviction against the Applicants. I pose and ask myself as to who would continue to live in a premises that has no roof, doors, walls and electricity as this would be akin to living on the streets or in the wilderness which state of affairs was what the 3rd Respondent had reduced the Applicants to in the present instance.

45. The US Court of Appeals Eleventh Circuit stated in **Carl Di Missino and Roma M.DiMissino vs City of lear Water, No.85-3654) 805F.2d 1536** that;

“Depriving a tenant of water services amounts to constructive eviction, which under Section 83, 54 of the Florida Statutes, a tenant would be entitled to half in a suit to enjoin the landlord from taking possession by means other than the eviction proceedings required by Section 89.59(3)(a).”

46. On the last issue for determination therefore, I am in agreement and I am clear in my mind that the 3rd Respondent’s actions of erecting a gate on the suit property, demolishing, roofs, doors and walls, which actions have not been denied, were part of an eviction strategy. It did not matter that the Applicants do not hold title to the suit premises but the mere fact that they were in occupation, the 3rd Respondent was duty bound to respect their right to adequate housing as well as their right to dignity.

47. As I conclude, I will observe that the manner in which the 3rd Respondent attempted to evict the Applicants from the suit land was despicable and indeed cruel. I find that the 3rd Respondent herein willfully and intentionally defied orders of the Court despite knowledge of the same. Her action of invading the suit land in the company of others and carrying out the heinous acts which would be termed as constructive eviction, ran afoul of the terms of the Court orders issued on the 2nd August 2018 which had constrained her from evicting the Applicants from the suit property pending the hearing and determination of the suit.

48. To protect the dignity and authority of the Court of law, this Court, shall be firm on any person who deliberately disobeys Court orders or attempts to scuttle the Court process.

49. I find that the 3rd Respondent herein Serah Wangari Mbugua in contempt of Court orders and proceed to punish her for contempt.

i. The 3rd Respondent, Serah Wangari Mbugua is hereby condemned to pay a fine of Ksh. 300,000/- (three hundred thousand shillings) in default to serve a term of 3 months in civil jail effective immediately.

ii. The Applicants’ Application dated the 5th December, 2019 is herein allowed with cost.

It is ordered.

Dated and delivered at Nakuru this 30th day of November 2020

M.C. OUNDO

