



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 39 OF 2019**

**U-HAUL VEHICLE LTD.....PLAINTIFF**

**=VERSUS=**

**KIAMBU DANDORA FARMERS CO. LTD.....1<sup>ST</sup> DEFENDANT**

**DANDORA HOUSING SCHEME LIMITED.....2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**INSPECTOR GENERAL OF POLICE.....5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**RULING**

This suit was brought on 12<sup>th</sup> February, 2019 against the 1<sup>st</sup> defendant who was the only defendant in the plaint dated 12<sup>th</sup> February, 2019. Together with the plaint, the plaintiff filed an application by way of Notice of Motion of the same date seeking a temporary injunction restraining the defendant from in any manner interfering with the plaintiff's quiet possession and enjoyment of all those parcels of land known as L.R No. 209/9466 and L.R No. 209/9467 pending the hearing and determination of the suit. On 23<sup>rd</sup> April, 2019, the plaintiff brought another application by way of Notice of Motion dated 23<sup>rd</sup> April, 2019 seeking an order that pending the hearing of the plaintiff's earlier application dated 12<sup>th</sup> April, 2019, the court be pleased to issue orders restraining the defendant from in any manner interfering with the plaintiff's possession and enjoyment of all those parcels of land known as L.R. No. 209/9465, L.R No. 209/9466, L.R No. 209/9467 and L.R No. 209/9468("the suit properties"). On 29<sup>th</sup> April, 2019, the court issued an order restraining the defendant from carrying out further demolition of a perimeter wall that was constructed by the plaintiff around the suit properties.

On 7<sup>th</sup> June, 2019, the plaintiff brought another application by way of Notice of Motion dated 3<sup>rd</sup> June, 2019 seeking a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from encroaching, alienating, dividing, transferring, selling, charging, developing or in whatever manner and whichever manner dealing with or interfering with the plaintiff's right of occupation, possession and/or use of the suit properties pending the hearing and determination of the suit. On 13<sup>th</sup> June, 2019, the plaintiff amended the plaint to add the 2<sup>nd</sup> to 6<sup>th</sup> defendants to the suit. When the matter came up for hearing of the plaintiff's application dated 3<sup>rd</sup> June, 2020 inter-partes on 17<sup>th</sup> June, 2019, the court gave the defendants time to respond to the application and ordered that pending further orders by the court, there was to be no other or further developments or construction works on the suit properties. On 23<sup>rd</sup> September, 2019, the said orders of 17<sup>th</sup> June, 2019 were extended to 18<sup>th</sup> March, 2020 when the matter was to come up for further directions.

On 18<sup>th</sup> December, 2019, the plaintiff filed yet another application by way of Notice of Motion dated 16<sup>th</sup> December, 2019 seeking the following orders;

- a) That the Honourable court be pleased to find and hold that the directors of Kiambu Dandora Farmers Company Limited and the directors of Dandora Housing Scheme Limited were in contempt of the court orders issued on the 17<sup>th</sup> June, 2019.
- b) That this Honourable court be pleased to hold that as consequence of their acts of contempt, the contemnors shall be detained in prison for a period of 6 months or such period that the court may please.
- c) That this Honourable court be pleased to compel the contemnors to obey the said court order.

d) That this court be pleased to issue a mandatory order directing that any and all structures erected after the issuance of the orders of this Honourable court of 17<sup>th</sup> June, 2019 be demolished forthwith.

e) That this court be pleased to order the officers of the 5<sup>th</sup> Respondent to enforce the above orders of the Honourable court.

The application was supported by the affidavit of Francis Kibiru Njenga sworn on 16<sup>th</sup> December, 2019 and a supplementary affidavit sworn on 30<sup>th</sup> April, 2020. In the affidavit of 16<sup>th</sup> December, 2019, the deponent averred that on 17<sup>th</sup> June, 2019 in the presence of the advocates for all the parties, the court made an order that there shall be no further developments on the suit properties. The deponent averred further that on 23<sup>rd</sup> September, 2019 the said order was extended. The deponent averred that the 1<sup>st</sup> and the 2<sup>nd</sup> defendants by themselves and/or agents entered the suit properties and began to excavate and erect structures thereon. The deponent averred that the said activities were being carried out with the blessings of the 5<sup>th</sup> defendant. In his supplementary affidavit, Francis Kibiru Njenga averred that on 20<sup>th</sup> December, 2019 the court issued an order directing the OCS Buruburu Police Station to arrest and bring to court any person contravening the order in question and that the said order was not enforced. He stated that a follow up letter to the OCS Buruburu Police Station on the enforcement of the order elicited no response. He stated that due to the failure, refusal and neglect to enforce the orders issued by this court, the construction was still being undertaken on the suit property in contravention of the orders issued by the court. He contended that the OCS Buruburu Police Station was in contempt of court. He stated that court orders are not issued in vain and the same must be obeyed and enforced by the relevant authorities to preserve the dignity of the court.

The application was opposed by the 1<sup>st</sup> defendant through a replying affidavit sworn by its director Joseph Mwangi Karanja on 12<sup>th</sup> March, 2020. The 1<sup>st</sup> defendant's said director averred that the suit properties were within the larger parcel of land known as L.R 116379/3 which was owned by the 1<sup>st</sup> defendant. He denied that the 1<sup>st</sup> defendant was carrying out any construction on the suit properties as alleged by the plaintiff. He averred that the 1<sup>st</sup> defendant had abided by the orders of the court and that the allegations made against the 1<sup>st</sup> defendant were malicious and were only intended to disparage the reputation of the 1<sup>st</sup> defendant before the eyes of the court. He urged the court to dismiss the application.

#### Submissions.

The application was disposed of by way of written submission. The plaintiff/applicant filed its submissions on 30<sup>th</sup> June, 2020. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants/respondents filed their submissions on 14<sup>th</sup> July, 2020. The 1<sup>st</sup> defendant/respondent filed its submissions on 12<sup>th</sup> November, 2020 while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/respondents did not file submissions.

The plaintiff submitted that it was not in dispute that the developments that were being carried out on the suit properties were open acts of disobedience of the authority of the court which should be punished. The plaintiff cited Econet Wireless Kenya Ltd. v Minister for information & Communication of Kenya & Another [2005]1 KLR 828 in which the court stated that it was essential for the maintenance of the rule of law and order that the authority and dignity of the courts are upheld at all times and that the court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. The applicant also relied on B v Attorney General [2004] 1KLR in which it was held that court orders are not made in vain and that if that were the case, the court would be exposed to ridicule, and no agency of constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of the people.

On whether the 1<sup>st</sup> and the 2<sup>nd</sup> defendants were guilty of disobeying the orders issued by the court, the plaintiff submitted that all parties were represented when the said order was made. The plaintiff cited Basil Criticos v Attorney General & 4 others [2012] eKLR in which it was held that knowledge of an order supersedes personal service. The plaintiff submitted that the 1<sup>st</sup> defendant had through omission or commission allowed its members to defy the said court order. The plaintiff relied on Lakeview Investment Ltd. v John Paul Odera (sued as the chairman, Nairobi Kenya Secondary School Heads Association) where a director of a company was found in contempt when he failed to give an explanation as to who had continued with construction of a building whose construction had been stopped by the court.

The plaintiff submitted further that having proved clear disobedience of the court order, the court had a duty to punish the contemnors by committing them to civil jail and also making an order for the demolition of the structures that they had put up in defiance of the court. The plaintiff submitted that since the plaintiff and the 1<sup>st</sup> defendant who were laying a claim to the suit properties had denounced the constructions which were being carried out on the suit properties, an order for the demolition of the structures that had been put up on the suit properties in defiance of the court order in question would not cause any harm to any party.

In its submissions dated 23<sup>rd</sup> July, 2020, the 1<sup>st</sup> defendant submitted that the standard of proof of contempt was higher than that in civil cases and that the plaintiff had not proved the acts of contempt alleged against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> defendant submitted that the plaintiff had not tendered any evidence showing that it served the 2<sup>nd</sup> defendant with summons to enter appearance and the orders that they had been accused of disobeying. The 1<sup>st</sup> defendant submitted further that there was no evidence placed before the court showing that the directors or members of the 1<sup>st</sup> defendant were involved in the construction complained of by the plaintiff. The 1<sup>st</sup> defendant submitted that the plaintiff had failed to prove contempt against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

In its submissions dated 14<sup>th</sup> July, 2020, the Attorney General who appears for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants cited the Supreme Court decision in The Board of Governors Moi High School, Kabarak v Malcom Bell & another, SC Petition Nos. 6 & 7 of 2013 in which the purpose of the court's power to punish for contempt was spelt out. The Attorney General submitted that the court has a duty to ensure that its orders are complied with to avoid ridicule and to guarantee the rule of law.

The Attorney General submitted that the directors of the 1<sup>st</sup> and 2<sup>nd</sup> defendants had personal knowledge of the order that had been issued by the court which knowledge was admitted by the 1<sup>st</sup> defendant's director. The Attorney General submitted that knowledge of an order

supersedes personal service and that a person is taken to have had knowledge of an order if he or his agent was present when it was given. In support of this submission, the Attorney General relied on Nyamogo & Another v Kenya Posts Telecommunications Corporation [1990-1994] E.A 465.

The Attorney General submitted that since the structures on the suit properties were constructed after the orders that were made by the court on 17<sup>th</sup> June, 2019, the same were put up in disobedience of the said orders and as such the orders sought for their removal were well founded in law. The Attorney General submitted that the plaintiff's application had merit. The Attorney General submitted that court orders must be obeyed and that the court cannot be helpless on the face of disobedience of its orders. The Attorney General supported the grant of an order for the demolition of the structures that were put up on the suit properties after the orders that were made by the court on 17<sup>th</sup> June, 2019 to redeem the already ridiculed image of the court.

#### Determination.

I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the 1<sup>st</sup> defendant in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. In Hadkison v Hadkinson[1952] All ER 567, it was held that:

**“It was plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment...”.**

In Mwangi H.C Wangonde v Nairobi City Commission, Civil Appeal No. 95 of 1998, it was held that:

**“...as a general rule an order of court requiring a person to do or abstain from doing any act may not be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.”**

In Mutitika v Baharini Farm Ltd [1985] KLR 227 it was held among others that;

**(i) The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.**

**(ii) The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.**

I am aware that the courts have since moved away from the position that the order alleged to have been breached must be personally served on a person sought to be punished together with the penal notice before contempt can be proved. Knowledge of a court order has been held to be sufficient thereby dispensing with personal service for the purposes of contempt proceedings. See, Shimmers Plaza Limited v National Bank of Kenya Limited[2015]eKLR and Basil Criticos v Attorney General & 4 others (supra) that were cited by the applicant and the Attorney General in their submissions.

It is on the foregoing principles that the plaintiff's application falls for consideration. It is not disputed that on 17<sup>th</sup> June, 2019, the court made an order on the following terms:

**“THAT pending further orders by the court, there shall be no other or further developments or construction works on the properties in dispute namely, L.R. No. 209/9465, L.R. No. 209/9466, L.R. No. 209/9467 and L.R. No. 209/9468.”**

It is not disputed that the said order was made in the presence of the advocates for the plaintiff, the 1<sup>st</sup> defendant, the 3<sup>rd</sup> defendant and the 5<sup>th</sup> and 6<sup>th</sup> defendants. The 2<sup>nd</sup> defendant has never participated in these proceedings and it is not clear whether it was served with summons to enter appearance and the various applications for injunction that were filed herein by the plaintiff. It is also not disputed that the said order of 17<sup>th</sup> June, 2019 was not obeyed and that the construction works continued on the suit properties despite the existence of the order. It is also not disputed that when it was brought to the attention of the court through an application dated 20<sup>th</sup> December, 2019, that its order was not being obeyed, the court made a further order on the following terms:

**“THAT the court hereby directs the Officer Commanding Buruburu Police Station to arrest and bring before the court as soon as practically possible any person found carrying out any construction or development on L.R. No. 209/9465, L.R. No. 209/9466, L.R. No. 209/9467 and L.R. No. 209/9468 for him or her to show cause why he/she should not be committed to civil jail for disobeying the orders issued by the court herein on 17/6/2019.”**

It is not in dispute that even this order of 20<sup>th</sup> December, 2019 was not obeyed. The construction works on the suit properties continued and no one was arrested as ordered by the court. On 5<sup>th</sup> May, 2020, the counsel appearing for the Attorney General informed the court that the order of the court made on 20<sup>th</sup> December, 2019 was not attended to by the Officer Commanding Buruburu Police Station because the suit properties are situated in Dandora and not Buruburu. He requested that the order be amended and directed at the Officer Commanding Dandora Police Station. Following that request, the court amended the earlier order on 5<sup>th</sup> May, 2020 to read:

**“THAT the Officer Commanding Dandora Police Station to arrest and bring before the court as soon as practically possible any person found carrying out any construction or development on L.R. No. 209/9465, L.R No. 209/9466, L.R No. 209/9467 and L.R No. 209/9468 for him or her to show cause why he/she should not be committed to civil jail for disobeying the orders issued by the court herein on 17<sup>th</sup> June, 2019.”**

The new order was served upon the Officer Commanding Dandora Police Station. I am certain of this fact because from the record, on 18<sup>th</sup> May, 2020, the Officer Commanding Dandora Police Station wrote to this court to confirm the authenticity of the said order. When the matter came up on 8<sup>th</sup> June, 2020 for confirmation whether the Officer Commanding Dandora Police Station had acted on the order, the court was informed that despite service of the order upon the said officer, no action had been taken and that construction was still continuing on the suit properties. It was after all attempts to enforce the orders made herein on 17<sup>th</sup> June, 2017 failed that the court gave directions for the hearing of the plaintiff's contempt of court application dated 16<sup>th</sup> December, 2019. The plaintiff's application was directed against the 1<sup>st</sup> and 2<sup>nd</sup> defendants whose directors the plaintiff wanted held in contempt and punished. As mentioned earlier, the plaintiff also sought an order that the structures that had been put up on the suit properties in disobedience of the said orders of 17<sup>th</sup> June, 2019 be demolished under the supervision of the police.

The 1<sup>st</sup> defendant has all along maintained and still maintains that although the suit properties are within its parcel of land measuring 818 acres, it is a law abiding corporation and was not in any way involved in the construction works which were being undertaken on the said properties. The 1<sup>st</sup> defendant has suggested that since the area where the suit properties are situated is prone to land invasion by squatters, there was a possibility that those carrying out construction on the said properties are squatters. The 1<sup>st</sup> defendant has contended that the plaintiff has failed to prove the acts of contempt alleged against the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has contended that there was no evidence placed before the court showing that the directors or members of the 1<sup>st</sup> defendant were the ones carrying out construction on the suit properties.

As I have mentioned earlier, the 2<sup>nd</sup> defendant has never participated in these proceedings from the inception. There is no evidence on record that it was served with summons to enter appearance, the various applications that have been filed by the plaintiff and the orders issued in relation thereto. There is no evidence that 2<sup>nd</sup> defendant was served with the order that was made by the court on 17<sup>th</sup> June, 2017 or that it was aware of the same.

As was held in the case of Mutitika v Baharini Farm Ltd. (supra), the standard of proof of contempt of court is higher than that required for civil cases. Although I strongly share the view of the plaintiff and the Attorney General that the 1<sup>st</sup> defendant is not candid to the court, I have no basis for finding it in contempt. The 1<sup>st</sup> defendant who claims that the suit properties form part of its parcel of land cannot convince this court that it is not aware of the persons who have invaded the suit properties and are carrying out construction of permanent buildings thereon. I believe that the 1<sup>st</sup> defendant is aware of the trespassers but the disclosure of their identities would not serve its interest in the suit properties. That said, the burden of proof was upon the plaintiff. The 1<sup>st</sup> defendant had no duty to assist the plaintiff to prove the contempt alleged against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. It is my finding that the plaintiff has not proved that the 1<sup>st</sup> defendant by itself, its directors, members or agents are involved in the construction being undertaken on the suit properties in defiance of the orders made by the court on 17<sup>th</sup> June, 2020. A case has therefore not been made out for the punishment of the directors of the 1<sup>st</sup> defendant.

With regard to the 2<sup>nd</sup> defendant, an application for contempt cannot lie against it. As I have mentioned earlier, there is no evidence that it was served with the court order that was made on 17<sup>th</sup> June, 2019 or that it was aware of the same. There is also no evidence that the 2<sup>nd</sup> defendant by itself, its directors, members or agents are involved in the construction being undertaken on the suit properties in defiance of the said orders made by the court on 17<sup>th</sup> June, 2019. Without evidence of service or knowledge of the orders made on 17<sup>th</sup> June, 2019, the plaintiff's application as against the 2<sup>nd</sup> defendant is a nonstarter.

Apart from the orders seeking the punishment of the directors of the 1<sup>st</sup> and 2<sup>nd</sup> defendants for the activities taking place on the suit properties in defiance of the orders made by the court on 17<sup>th</sup> June, 2019, the plaintiff had also sought an order for the demolition of the structures that have been put up on the suit properties in contempt of the said order. I am satisfied from the evidence placed before the court that even after the court stopped any other or further construction on the suit properties, the construction works continued. I am also convinced that those who were carrying out construction on the suit properties were aware of these proceedings and of the fact that the activities they were engaged in were stopped by the court. The activities on the suit properties were in the circumstances being carried out in contempt of court. It is regrettable that even the Police could not bring the contemptuous acts to an end by arresting those found on the suit properties after the court ordered such arrest to be carried out to unmask those behind the construction. I believe that the Police will still have an opportunity to come clean on the matter.

As submitted by the plaintiff and the Attorney General, the court cannot be helpless on the face of deliberate defiance of its orders. I am convinced that demolition of the structures put up on the suit properties after the orders made herein on 17<sup>th</sup> June, 2019 will send a strong message to the contemnors and those who have been protecting them that you defy a court order at your own peril. I am satisfied that in the circumstances of this case, an order for the demolition of the structures put up on the suit properties in defiance of the orders made on 17<sup>th</sup> June, 2019 is necessary to redeem in the words of the Attorney General “the already ridiculed image of the court”.

In conclusion, the plaintiff's application dated 16<sup>th</sup> December, 2019 succeeds in part. I decline to grant prayers 2, 3 and 4 of the application. Prayers 5 and 6 of the application are allowed on the following terms;

1. All the structures and buildings constructed on or put up on L.R. No. 209/9465, L.R No. 209/9466, L.R No. 209/9467 and L.R No. 209/9468 after 17<sup>th</sup> June, 2019 shall be demolished by the owners thereof forthwith.

2. The plaintiff shall pin a copy of this order in a conspicuous place on each of the said structures and shall also publish the order once in the Daily Nation and the Standard newspapers on a week day.

3. In the event that the owners of the said structures fail to demolish the same within 21 days from the date of the publication of the order in the two (2) newspapers as aforesaid, the plaintiff shall be at liberty to carry out the demolition of the same at its own cost which costs shall be recoverable at the conclusion of the suit subject to proof from whichever party the court will find to have been responsible or contributed to the construction of the said structures.

4. In the event that the demolition of the said structures becomes necessary pursuant to order 3 above, the 5<sup>th</sup> respondent through the Officer Commanding Dandora Police Station shall provide the plaintiff with the necessary security to enable it carry out the demolition

5. The costs of the application shall be in the cause.

**Dated and Delivered at Nairobi this 26<sup>th</sup> Day of November, 2020**

**S. OKONG'O**

**JUDGE**

**Ruling read virtually through Microsoft Teams Video Conferencing platform in the presence of;**

Mr. Wakwaya for the Plaintiff

Mr. Murunga for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

Mr. Mbuthia for the 3<sup>rd</sup> Defendant

Mr. Kamau for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants

Ms. C. Nyokabi-Court Assistant