



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 188 OF 2017

FORMERLY MERU ELC. 226 OF 2013

MUTIRIA KARUMBAI MACWA.....PLAINTIFF

VERSUS

JAMES NJAGI MAKEMBO1ST DEFENDANT

THE COUNTY COMMISSIONER

THARAKA SOUTH SUB COUNTY.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. This ruling concerns an application brought to court by the applicant's advocate dated 25th May, 2020.
2. The application was canvassed by way of written submissions.
3. The Applicants' submissions are reproduced in full herebelow without any alterations whatsoever:

APPLICANT'S SUBMISSIONS TO NOTICE OF MOTION DATED 25/5/2020

The applicant herein moved the court to issue the following orders:-

- a) That this application be certified urgent and be heard on priority basis.*
- b) That the Honourable Court be pleased to find all the respondents (1 -12) are in contempt of court for disobedience of the orders of the court contained in the final decree herein which was issued on the 27/2/2019.*
- c) That the Honourable court upon granting prayer (b) above, be pleased to commit all the respondents to imprisonment for a period of 6 months or/and pay each amount of money in fine as the court may deem fit.*
- d) The Honourable Court be pleased to order demolition of all buildings and/or structures owned by the respondents on L.R. NO RUKURINI/133*
- e) That all the respondents do meet the costs of these committal proceedings.*

The application is supported by the affidavit of the applicant. When the matter came up for directions on the 22/9/2020, the 1st respondent appeared with his advocate Miss Matiri, who was holding brief for Mr Gichunge Muthuri. The 2nd respondent appeared in person and was granted an opportunity to address the court. All the other respondents, though duly served with the application did not attend court.

Miss Matiri informed the court that she had instructions to represent all the other respondents. The court directed that he regularizes the appointment in 5 days. It was further directed that the application be disposed off through written submissions, hence these submissions.

The 1st respondent has filed a replying affidavit denying service of the decree and taking the position that he intends to challenge the decision of this court before the Court of Appeal. He admits however that he is aware of the court's judgment and that is the reason he wants to file appeal.

WHAT IS THE LAW ON CONTEMPT OF COURT

The power of the court to punish for contempt is prescribed by Section 5 (1) of the Judicature Act, which states:-

“(1) The High Court and the Court of Appeal shall have the same powers 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.”

Although the section herein refers to the High Court, this court having been established as a court, with the status of the High Court, has the same powers as the high court to punish for contempt of court. The term **“High Court”** must therefore be read to cover, not only the high court but also this court which is established under Article 162 of the Constitution.

This court is further granted powers under Section 29 of Environment and Land Court Act, to punish anybody who refuses, fails or neglects to obey an order or direction given by the court. The mode of punishment is a fine of up to Kshs 20,000,000/= or imprisonment for a term of 2 years. Clearly, there is no paucity of powers of this court to punish for contempt of court.

WHY THE STATUTES PROVIDES FOR PUNISHMENT FOR CONTEMPT

Contempt has been defined as conduct that defies authority and dignity of the court.

Black's law Dictionary (9th 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.”

Courts in this county have, and continue to hold, that the reason courts are allowed to punish for contempt is to uphold the rule of law and protect the fundamental supremacy of the law. It has been stated that a court order is not a suggestion or an opinion but a directive which must be complied with to the fullest extent, otherwise chaos and anarchy will set in and all and sundry defy court orders.

In the case of **TEACHERS SERVICE COMMISSION and KENYA NATIONAL UNION OF TEACHERS – PETITION NO 23 OF 2013**, Hon Justice Linnet Ndolo, observed

“A court order is not a mere suggestion or an opinion or a point of law. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it in any other way is to open the door to chaos and anarchy and this court will not be the one to open that door.”

The judge proceeded to find the respondents in contempt, convicted them and netted the appropriate sentence.

WHAT IS THE STANDARD OF PROOF

The standard of proof in contempt of court matters is now well settled in this country.

In the case of **MUTITIKA VS BAHARINI FARM LTD (1985) KLR 229**, the Court of Appeal stated as follows:-

“In our view, the standard of proof in contempt proceedings, must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubts. 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 that can be said to be quasi criminal in nature.”

Clearly contempt of court is quasi criminal in nature. The standard of proof required is slightly higher than that in civil cases, and lower than in criminal cases. It is somewhere **“KATIKATI”** so to speak

From the affidavits of the parties and in consideration of the applicable law as set out herein, we are able to isolate the issues for the court's determination as follows:-

ISSUES FOR DETERMINATION HEREIN

- 1. Whether the application herein is competently before the court***
- 2. Whether there was a valid court order/decreed issued against the respondents herein***
- 3. Whether the order/decreed was served upon the respondents, or whether they were aware of the same.***

4. Whether the respondents are guilty of contempt of court

5. What is the appropriate punishment to be metted against the respondents.

1. On whether the application is competently before the court:-

The wording of Section 5(1) of Judicature Act means that the high Court will seek to exercise powers to punish for contempt as may for the time being is applicable in England. It means therefore, that the courts in Kenya will follow the law in England on matters of contempt. The law in England, particularly relating to notice to the Crown (Attorney General) has been changed, following the implementation of the famous Lord Wolf Access to justice report of 1996. The implementation of the report led to enactment of the amendment of the Civil Procedure Rule 81, which replaced Order 52 that required notice to the Crown before commencement of contempt proceedings. As it is in England today, there is no requirement for notice and consequently no notice was required to be issued before the commencement of these proceedings.

The case of **FOOTBALL FEDERATION –VS- KENYA PREMIER LEAGUE LTD & 2 OTHERS** dealt with this issue and held that no notice to the Attorney General was necessary. The Honourable Judge held:-

“coming back to our issue of whether notice to the Crown (DPP) was necessary, the aforementioned provisions left out the requirement of notice to the Crown Office (read the Attorney General or DPP) prior to the filing an application for contempt as was previously required under Order 52 of the said Supreme Court of England Rules. It follows therefore that no such notice to the DPP was necessary in this case.”

The issue of notice to the DPP or the Attorney General before the filing of the contempt application is now settled, that it is not required. The application is therefore competently before the court for consideration.

2. Whether there was a valid Order/Decree

This suit went for full hearing. All the parties involved in the proceedings were heard, together with their witnesses. The Honourable Court rendered its considered judgment in the presence of the 1st respondent and his counsel. The 1st respondent became fully aware of the contents of the judgment on the date of delivery of the judgment 19/12/2018. The judgment of the court was reduced into a decree thereof, which was issued on the 27/2/2019. The decree of the court clearly indicates:-

1. The plaintiff's suit be and is hereby dismissed.

2. The 1st defendant's counter-claim be and is hereby allowed.

3. An order of permanent injunction be and is hereby issued restraining the plaintiff MUTIRIA KARUMBAI MACWA, by his agents, servants representatives or whatsoever, acting on his behalf, including the alleged purchasers of portions of the suit land, from entering trespassing, occupying or in any manner, interfering with the 1st defendant's use and occupation of L.R. NO RUKURINI/133.

4. Costs shall follow the events and are awarded to the 1st defendant.

A copy of the judgment of the court and the decree thereof is on record and in the court file. There is no debate that a valid order of the court was issued and does exist. The judgment and the decree of the court is clear and unambiguous, that the 1st respondent, his agents, servants, and representatives, who include the alleged purchasers of part of the suit land were permanently enjoined from entering, trespassing, occupying on in any manner interfere with the applicant's use and occupation of the suit land. The 2nd and 3rd respondents are children of the 1st respondent, while the 4-12 respondents are purchasers of portions of the suit land from the 1st respondent/plaintiff. Clearly the order of the court was against all the respondents.

3. Whether the order/decree was served upon the respondents, or whether they were aware of the same.

The general principle is that no person can be punished for disobeying a court order unless he was served personally. However, there has been a fundamental shift in our jurisprudence on matters of personal service of the order. We wish to echo the sentiment expressed by Hon Justice Lenaola in the case of **BASIL CRITICOS –VS- ATTORNEY GENERAL & 8 OTHERS (2012) eKLR** that:-

“The law has changed and it as it stands today, knowledge supersedes personal service – where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”

In respect of the 1st, 2nd and 3rd respondents who are father and sons respectively, it is obvious that they were all aware of the contents of the judgment. On the date of delivery, they were present in court when the judgment was delivered. It is because of that knowledge that the 1st defendant instructed his advocate to file Notice of Appeal, which was done on the 31/12/2018.

When the 2nd respondent appeared in court on the 22/9/2020, in answer to the motion, he confirmed being aware of the court's judgment, but stated that they initiated the process of appeal. The 3rd respondent being a son of the 1st respondent obviously was aware of the court's judgment, and in any event as will be demonstrated herein, he was served with the letter from the applicant's counsel notifying him of the

court's judgment and was served with the decree of the court.

Your Honour, after the entry of judgment, the applicant extracted a decree in conformity of the judgment of the court. The decree was issued on the 27/2/2019 duly signed by the Deputy Registrar and sealed with the court seal. Earlier on vide the letter dated 19/2/2019, the counsel for the applicant notified all the respondents of the orders of the court, demanding of them not to enter the suit land.

The decree of the court and the letter referenced herein were served upon the respondents by an authorized court process server MR SIMON GITONGA MBAE. They were served on various days, except for the 4th, 9th, 11th and 12th respondents who were not found. The process server prepared an affidavit of service dated 17/12/2019 and had it filed in court on the 10/6/2020.

However, it is our submission that even if the 4 were not served with a formal order of the court, they became aware of the judgment. We say so, for the following reasons:-

1. They interact with the other co-respondents.

2. They are in contact with the 1st respondent who became aware of the judgment the day it was delivered and the only inference that must be drawn is that they were informed of the judgment.

3. They have been served with the application for contempt but have not filed any affidavit denying knowledge of the decree. They must be taken to admit the fact that they have notice of the decree.

We are fortified in the above submissions on the 4th, 10th, 11th and 12th respondents' knowledge of the decree by the 1st respondent's own affidavit in reply to this motion, particularly paragraph 10 and 11 thereof. The 1st respondent clearly admits in paragraph 11 and 12 of his affidavit that there is an order of injunction against him in place, and does not deny breaching that order. He does not deny entering the land after the judgment of the court.

He does not deny that in spite of knowledge of the orders of injunction, he leased a part of the land in the month of January, 2020 to one GATIRIA KITHURU. He does not deny that he has continued to trespass on the land and to interfere with the applicant's use and occupation of the suit land. All the other respondents have not filed any affidavit to deny the averments of the applicant. It must be taken that they admit the various acts of interference which amount to deliberate disobedience of court order.

4. Whether the respondents are in contempt

Applying the definition of contempt as an act/conduct that defies the authority and dignity of court, it is clear from the affidavit of the applicant and the submissions herein, that the respondents are in clear contempt of court. The decree/order of the court is clear and unambiguous. The 1st respondent together with all the other respondents were permanently enjoined from (a) entering, (b) trespassing, (c) occupying, (d) or in any manner interfere with the applicant's use and occupation of the suit land. With the exception of the 2nd and 3rd respondents, all the other respondents No 4 – 12 are the purchasers, referred to in the decree. The decree of the court squarely covers them as the alleged purchasers of portions of the suit land.

There is no denial by any of the respondents that they occupy part of the suit land. There is no denial that they keep trespassing on the suit land or they have made applicant's use and occupation of the suit land impossible. The order of injunction required compliance by all. It was not a suggestion or opinion inviting arguments like the 1st respondent's attempts to do in his affidavit. These are acts by the respondents which denotes willful defiance of or disrespect towards the courts. Indeed, what the 1st respondent states in his affidavit in opposition, amounts to a clear affront and challenge to the authority of this court. He is telling the court that supremacy of the law is not important at all. He is telling the court that because he intends to appeal, he will not obey the order of the court.

We further submit that we have demonstrated that all the respondents were served and had notice of the judgment and the decree of the court. Courts have held in many occasions that knowledge/notice of the order can be proved circumstantially and directly. There is no doubt that all the respondents, have had notice and knowledge of the decree of the court.

The respondents are for punishing as the duty to obey the law by all individuals is paramount, and it matters not whether the individual thinks the order is irregular or even void. No person can be allowed to trash court orders with impunity. Courts can not fold its hands in helplessness and watch its orders being disobeyed. This would amount to abdication of its sacrosanct duty bestowed upon it by the constitution and the people of Kenya.

As stated by **ROMER L.J in HADKINSON –VS- HADKINSON (1952) ALL ER 567**

“It is the plain and unqualified obligation of every person against, or in respect of who 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.”

Clearly, the order in question has not been discharged by this Honourable Court or by the Court of Appeal. There is no order for stay of execution by the Court of Appeal. It matters not the 1st respondent intend to appeal. The intention to appeal does not vitiate the order. The Court of Appeal judges in the case of **SHIMMERS PLAZA LTD –VS- M NATIONAL BANK OF KENYA, CIVIL APPEAL NO 33 OF 2012 (2015)eKLR** while finding the respondents in contempt observed,

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right not as a favour.”

CONCLUSION

We submit that we have sufficiently demonstrated that there was a valid order of the court. There is no doubt or debate about that. The order was served upon the respondents and were made aware of the order during the date of delivery of judgment, especially for 1st, 2nd and 3rd respondents.

The law is that once the applicant proved notices, the respondent bears the evidential burden in relation to willfulness and mala fides disobedience. The respondents have not discharged that burden. They willfully disobeyed court order and should be punished.

It is immaterial that the decree served upon the respondents did not contain a penal notice. No party can be allowed to hide behind lack of penal notice to willfully disobey a court order. Once the court is satisfied that there was notice and there was disobedience, then it will punish the contemnor. In the case of **KENNETH GATHURAN KIMANI –VS- GRACE NJIRU MACHARIA ELC NO 463 OF 2017 2018) eKLR, HON JUSTICE KIMEL**, was faced with the question of the requirement of penal notice and personal service, while finding the respondent to be in contempt, she stated,

“it is my understanding that where knowledge has been proved, then personal service and the requirement of penal notice is not necessary.”

The jurisprudence on contempt has progressively changed and what used to be dogmatic approach to matters contempt is no longer tenable.

We pray that the court finds all the respondents to be I contempt and punish each one of them by imprisonment for a period of 6 months and further order the removal of all the structures on the land.

We also pray for costs of the application.

LIST OF AUTHORITIES RELIED ON:

1. KENNETH GATHURA KIMANI –VS- GRACE NJERI MACHARIA

ELC CASE NO 463 OF 2017 (2018) eKLR

2. TEACHERS SERVICE COMMISSION

–VS–

KENYA NATIONAL UNION OF TEACHERS

PETITION NO 23 OF 2013

3. FOOTBALL FEDERATION OF KENYA

-VS-

KENYA PREMIER LEAGUE LTD & 2 OTHERS (2015) eKLR

4. SHIMMERS PLAZA LTD-VS- NATIONAL BANK OF KENYA

C.A NO 33 OF 2012 (2015) eKLR

DATED AT MERU THIS.....DAY OF.....2020

FOR: MURANGO MWENDA & CO

ADVOCATES FOR THE APPLICANT

4. The Respondents’ submissions are reproduced in full herebelow without any alterations whatsoever:

RESPONDENTS’ WRITTEN SUBMISSIONS

Your Lordship, these are our humble submissions on behalf of the respondents.

The plaintiff/applicant on 10/6/2020 filed his application to have the respondents committed to civil jail and an order for the demolition of all buildings on the suit land.

The applicant in his application avers that the respondents are in contempt of court orders in the decree issued on 27/2/2019.

The 1st respondent filed his replying affidavit which raised several grounds in opposition to wit;

- i. The orders the applicant states were not obeyed were not made against the respondent.
- ii. The respondent has appealed against the orders of the court.
- iii. That proceedings to commit the 1st respondent to civil jail are unprocedural and unconstitutional.
- iv. That the applicant should be given a chance to be heard in appeal where the subject matter is a parcel of land which the applicant and his children are in possession and have their families thereon.
- v. That the 1st respondent aged over 80 years bundling him in civil jail will render his intended appeal nugatory since the subject matter is a parcel of land which he is in occupation with his family.
- vi. That the 1st respondent has been on and off hospital and apart from being not present where the court made the orders alleged by the application he was not served with same.

These are the averments contended by the other respondents as in the 1st respondent's replying affidavit.

Your Lordship, in the case of Katsuri Limited –Versus- Kapurchand DeparShar (2016) eKLR, the court noted the learned authors of the book contempt in modern Newzealand where they authoritatively state as follows;

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that;

- a) The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant.**
- b) The defendant had knowledge of or proper notice of the terms of the order**
- c) The defendant has acted in breach of the terms of the order; and**
- d) The defendant's conduct was deliberate.**

Your Lordship, the applicant must prove these elements beyond reasonable doubt, at least higher than the standard in civil cases since the liberty of the defendant could be affected.

The orders issued on 19/12/2018 were injunction orders. Your Lordship, the 1st respondent has been in occupation of the suit land together with his children where they have constructed and lived for many years. These orders apart from being served on the respondents, are ambiguous since the applicant is talking of demolition leading to eviction which were not orders issued by the court.

Your Lordship, the subject matter herein is a parcel of land where the 1st respondent has been in occupation of for a long period of time with his family who are the 2nd -12th respondents. It therefore follows that the respondents are not disobeying any court orders because they have been in occupation of the land and the orders issued were injunction orders and not eviction orders, issues raised in the appeal.

The 1st respondent is aged and currently experiencing health problems as he has lately been in and out of hospital. Instead of bundling him in a civil jail which will automatically render his appeal nugatory, we urge this Honorable court to give the parties herein a chance to ventilate their issues on ownership rights over the suit land in the appeal.

In the case of Katsuri Limited (Supra) the court stated that;

“the power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted as a last resort”.

Your Lordship, the 1st, 4th, 9th and 11th respondents were not served with the orders and the decree alleged to have been disobeyed.

In the case of Woburn Estate Limited –Versus- Margaret Bashforth (2016) eKLR the court stated that;

“in the matter before us, the appellant has alleged that the order was not served personally on it nor was there dispensation

with such service. It is therefore uncontroverted that the judgment of 16/4/2013 and the order of 31/3/2014 were not served on the appellant”.

In the same case of Woburn Lord Denning in Re Bramblevale Limited (1970) I CH 128 at page 137 stated that;

“A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him”.

It is our submission that the threshold that ought to be met for committal to civil jail has not been met. The application is only filed with mere allegations because as already submitted, the respondents are in occupation of the suit land and cannot therefore be said to have disobeyed any such orders. If anything, all the respondents were not personally served with the orders to warrant the prayers sought.

Furthermore, it has already been established that the act of committal civil jail is unconstitutional and should not be enforced.

Your Lordship, we urge this Honorable court to be guided by these submissions and dismiss the applicant’s application and give the parties herein a chance to ventilate their issues in the appeal instead of curtailing the liberty of the respondents by throwing them to civil jail yet the 1st respondent is overly aged and sickly.

Authorities

1. Woburn Estate Limited – Versus- Margaret Bashforth (2016) eKLR.

2. Katsuri Limited –Versus- Kapurchand DeparShar (2016) eKLR.

We so humbly submit.

DATED AT MERU THIS.....DAY OF.....2020
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FOR: GICHUNGE MUTHURI & CO.

ADVOCATES FOR THE RESPONDENTS

5. I have considered the pleadings, the submissions and the authorities proffered by the parties in support of their diametrically divergent assertions. The authorities proffered by the parties in this matter are good authorities in their facts and circumstances. I, however, opine that no two authorities are congruent to a degree of mathematical exactitude in their facts and circumstances. As the principles enunciated by those authorities have been enunciated in their submissions which have been reproduced in full in the earlier part of this ruling, I deem it a veritably pyrrhic exercise to regurgitate them. I have taken those principles into account before making my decision in this matter.

6. Prayer b in the application reads as follows:

“(b) That the Honourable Court be pleased to find all the respondents (1-12) are in contempt of court for disobedience of the orders of the court contained in the final decree herein which was issued on 27/2/2019”

7. On 16th November, 2020, the advocate for the applicant told the court that the applicant and the 4th, 5th,6th,7th,9th,10th respondents had reached an arrangement to purchase the portions of land they occupy from the applicant. It is therefore pellucid that the application has been substantially compromised. This being the case prayer b is not tenable.

8. I have carefully considered the submissions proffered by the parties to buttress their diametrically incongruent assertions. From the totality of the facts and circumstances of this case, I find that all the alleged contemnors were aware of this court’s judgment delivered on 19th December, 2018.

9. I agree with the respondents’ advocate and as stated in the case of **Katsuri Limited versus Kapurchad Deparchar [2016] eKLR** THAT: ***“The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted as a last resort.”***

10. Even if the alleged contemnors are convicted, this does not allow the applicant to enjoy the fruits of his judgment. Perhaps he should consider other enforcement measures.

11. The following orders are hereby issued:

a) The 4th,5th,6th,7th,9th, and 10th respondents are excluded from this application and are, therefore, found not to be in contempt of court.

b) The applicant should consider filing another application excluding the 4th,5th,6th,7th,9th and 10th respondents.

c) Costs shall be in the cause.

Delivered in open Court at Chuka this 25th day of November, 2020 in the presence of;

CA: Ndegwa

Murango Mwenda for the Applicant.

Miss Materi for the Respondents.

P. M. NJOROGE

JUDGE