



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 105 OF 2017

SOSPETER KITHUMBI MURANGIRI (*Suing on his own behalf and on*

behalf of Ikandu Clan).....**PLAINTIFF**

VERSUS

ALBERT NJERU.....**1ST DEFENDANT**

MWANIKI MUGO MACHARIA.....**2ND DEFENDANT**

MWANIKI MBUGI.....**3RD DEFENDANT**

ANTONY NYAGA MACHARIA.....**4TH DEFENDANT**

MUGO ITHAGA.....**5TH DEFENDANT**

MUTHEE MACHARIA.....**6TH DEFENDANT**

CHARLES NGARI.....**7TH DEFENDANT**

MURIITHI MUGO MACHARIA.....**8TH DEFENDANT**

JOSPHAT NTHIGA MUKABI.....**9TH DEFENDANT**

RULING

1. By a notice of motion dated 25th May 2018 brought **under Order 40 Rules 3 & 8 of the Civil Procedure Rules, section 5 of the Judicature Act, Chapter 8 Laws of Kenya** and **all the enabling provisions of the Laws Kenya** the Plaintiff sought the following orders against the Defendants;

a. All the Defendants stated herein above namely (Albert Njeru, Mwaniki Mugo Macharia, Mwaniki Mbugi, Antony Nyaga Macharia, Mugo Ithaga, Muthee Macharia, Charles Ngari, Murithi Mugo Machari and Josphat Nthiga Mukabi, their servants, agents and workmen be committed to civil jail for six (6) months for disobedience of the court's orders of 29th November 2017, issued on 6th December 2017 and served to all the parties on 23rd January 2018 and 24th January 2018.

b. That the Defendants herein to pay the costs of this application.

2. The said application was based on the grounds set in the said motion the gist of which was that the Defendants had blatantly disobeyed the court orders made on 29th November 2017 and had persisted in such disobedience.

3. The said application was supported by the supporting affidavit of the Plaintiff sworn on 25th May 2018. It was averred that the court order of 29th November 2017 was extracted and duly served upon all the Defendants at their respective homes and an affidavit of service sworn by Plaintiff's advocate on 25th May 2018 was annexed to the supporting affidavit.

4. The Plaintiff further stated in his said affidavit that on 12th January 2018 when the Plaintiff, under the escort of police officers, went to the suit properties to proceed with the exercise of survey, they were violently attacked by the Defendants and their agents in consequence of

which some of the Plaintiff's agents were seriously injured. The Plaintiff swore that the said incident was reported to Kiritiri Police Station and a written complaint made to the Director of Criminal Investigation (DCI).

5. The 9th Defendant filed a replying affidavit sworn on 25th June 2018 on behalf of all the Defendants in opposition to the Plaintiff's said application. The 9th Defendant stated that the court order of 29th November 2017 was made in their absence and that they had not been served with the court order. He indicated in paragraph 5 of the replying affidavit that the Defendants would seek leave of court to cross-examine the advocate who swore the affidavit of service dated 25th May 2008.

6. The Defendants, nevertheless, denied having disobeyed the court order of 29th November 2017 and put emphasis on the fact that the Plaintiff had not explained what exercise he had gone to undertake on the suit properties. The Defendant also contended that there was no evidence that any person was injured and that they had not been charged with any criminal offence. They, therefore, contended that the Plaintiff's application was an afterthought and brought in bad faith hence the same should be dismissed.

7. When the said application was listed for hearing on 26th June 2018, the Plaintiff sought and was granted leave to file a further affidavit within 7 days with corresponding leave to the Defendants to file a further affidavit within 7 days upon service. The advocates for the parties also consented to canvass the said application through written submissions. The advocates were to file and exchange their written submissions within 30 days after exchanging their further affidavits. However, by the time of preparation of this ruling, there were no further affidavits or written submissions on record.

8. The court has considered the Plaintiff's said application as well as the Defendant's replying affidavit in opposition thereto. The court is of the view that the following issues fall for determination;

- a. Whether the Defendants were served with or had knowledge of the court order made on 29th November 2017.
- b. Whether the Defendants are guilty of wilful disobedience of the said court order.
- c. Who shall bear the costs of the application.

9. It is now well settled that as a general rule, a person cannot be punished for disobedience of a court order unless either the order has been duly served upon the alleged contemnor or he had knowledge of the order through alternative means such as notification by telephone, email, or counsel acting for such person. See **Shimmers Plaza Limited Vs National Bank of Kenya Ltd [2015] eKLR**.

10. Although the Plaintiff's supporting affidavit claimed that the order of 29th November 2017 was made in the presence of the Defendant's advocate, there is no evidence on record to support such a position. On the contrary, the court record indicates that the ruling of 29th November 2017 which resulted into the order in issue was delivered in the presence of Ms Muriuki holding brief for Mr Ngari for the Plaintiff and in the absence of the Defendant's counsel.

11. In the circumstances, it is necessary for the Plaintiff to prove service of the court order upon the Defendants. The affidavit of service on record was sworn by the Plaintiff's advocate, Njeru Robinson Ngari, on 25th May 2018. It was sworn that the Defendants were **personally** served at their respective homes and that they were hostile and acted menacingly towards the team effecting service. The Defendants allegedly refused to endorse their signatures on the court order.

12. The Defendants, on the other hand, denied service and threatened to seek leave of the court to cross-examine the maker of the affidavit of service. The court has noted from the record that the Defendants never actually sought to cross-examine the deponent of the affidavit of service. Instead, their advocate consented with the Plaintiff's advocate to have the instant application canvassed through written submissions. The Defendants do not positively deny knowledge of the order of injunction in their replying affidavit. They simply denied service and the alleged disobedience.

13. In the circumstances of this case the court is satisfied that service of the court order was effected in the presence of the Plaintiff's advocate as sworn in the affidavit of service. The Defendants recognized that they had an opportunity to challenge the contents of the affidavit of service as proclaimed in their replying affidavit but they did not avail themselves of the opportunity. As things stand now, the contents of the affidavit of service have not been challenged through cross-examination. The court finds and holds that the court order dated 29th November 2017 was served upon all the Defendants.

14. The 2nd issue is whether the Plaintiff has demonstrated wilful disobedience of the court order on the part of the Defendants. The Plaintiff's supporting affidavit gave a summary of what transpired on 12th January 2018 when the Plaintiff and his agents went to the suit properties to undertake the exercise of survey. They were violently attacked by the Defendants and their agents some of whom were apparently armed with bows and arrows. At least one person was shot with an arrow whereas others were injured in other ways. The Plaintiff stated that the attack was reported to Kiritiri Police Station whereas a written complaint was made to the DCI on alleged complicity of some police officers.

15. Although the Defendants generally denied having disobeyed the court order, they did not directly respond to the events of the day. They were more concerned with a disclosure of the particular exercise that the Plaintiff and his agents were undertaking on the suit properties. They were also quick to point out that no evidence or medical evidence was tendered before court to prove that anyone was actually injured. They did not specifically deny that they were at the scene on the particular day that the Plaintiff and his agents were attacked. The Defendants' response was very casual and evasive.

16. In the case of **Mutitika Vs Baharini Farm Ltd [1985] KLR 227 the Court of Appeal** held, *inter alia*, that;

“...It is perfectly clear on the authorities that anyone who, knowing of an injunction, or an order of stay, wilfully does something or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt. See Acrow Vs Rex Chainbelt Inc [1971] 3 ALL ER 1175 at page 1180. The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught.”

17. The court is aware that the standard of proof in cases of alleged contempt of court is slightly higher than a balance of probabilities but not as high as beyond reasonable doubt. See **Mutitika Vs Baharini Farm Ltd** (supra) The court must really be satisfied that the alleged contemnors knowingly and wilfully disobeyed the court order. In the circumstances of this case, the court is satisfied that the Defendants who have a land dispute with the Plaintiff wilfully disobeyed the court order in a bid to prevent the Plaintiff from undertaking the survey and demarcation of the suit properties.

18. The courts have always maintained that court orders must be obeyed by all. The mighty and the lowly are bound to obey them. The public officials as well as civilians are bound to obey court orders. In the case of **Hadkinson Vs Hadkinson [1952] ALLER 567** it was held, *inter alia*, that;

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

19. In the case of **Refrigeration and Kitchen Utensils Ltd Vs Gulabchand Poptal Shah & Another, Civil Application No. 39 of 1990**, the Court of Appeal held, *inter alia*, that;

“...It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors...”

20. Similarly, in the case of **Shimmers Plaza Ltd Vs National Bank of Kenya Nairobi Civil Appeal No. 33 of 2012 [2015] eKLR**, the Court of Appeal held that;

“We reiterate that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:

“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.”

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed upon us by the Constitution...”

21. The 3rd issue relates to costs of the application. Although costs of a matter or application are usually at the discretion of the court, the general rule is that costs shall follow the event in accordance with the provisions of **section 27 of the Civil Procedure Act (Cap 21)**. In the circumstances of this case, costs of the application shall be awarded to the successful party who is the Plaintiff.

22. The upshot of the foregoing is that the court finds and holds that the contempt alleged against the 1st – 9th Defendants has been proved to the required standard. They are accordingly convicted of contempt of court. The Defendants shall, however, be accorded an opportunity to tender mitigation, if any, before sentencing. It is hereby ordered that the 1st – 9th Defendants shall attend court personally on a date to be fixed by the court upon delivery of the ruling for mitigation and sentencing. The Plaintiff is hereby awarded costs of the application.

23. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 17th day of JANUARY, 2019.

In the presence of Mr Momanyi for the Defendants and in the presence of the Plaintiff in person.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

17.01.19