REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 82 OF 2016

PHILIP CHEPKWONY...PLAINTIFF/APPLICANT

VERSUS

BENJAMIN TARUS & 4 OTHERS.......................DEFENDANTS/RESPONDENTS

RULING

This ruling is in respect of an application dated 19th February, 2018 brought by way of Notice of Motion by the plaintiff applicant seeking for the following orders:-

a) Spent

b) The respondents be committed to civil jail for a period not exceeding two (2) years for contempt of court.

c) Costs of the application be provided for.

Counsel agreed to canvass the application vide written submissions

Plaintiff's Submission

The plaintiff/applicant's Counsel gave a brief background to the suit. Counsel submitted that the plaintiff filed an application dated 14th April, 2016 seeking for temporary injunction restraining the defendants jointly and severally, their servants, agents and/or assigns from dealing in any way with and/or leasing out and/or trespassing, encroaching, transferring and or interfering with the parcel of land known as Moi's bridge/Moi's Bridge Block 3 (Mogoon) plot 2 pending the hearing and determination of the suit.

That on the 5th April, 2017 the Honourable court made a ruling and granted the order of a temporary injunction and further gave an order that issue in respect of the estate of Malakwen Tarus be determined in a Succession Cause.

Counsel submitted that the issues for determination are as to whether the defendant/respondents are in contempt of court and whether there was personal service upon the respondents.

On the first issue as to whether the defendant/respondents are in contempt of court, Counsel cited a Scottish case of STEWART ROBERTSON -VS- HER MAJESTY'S ADVOCATE 2007, HCAC 63, where LORD JUSTICE CLERK stated that:-

> "Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willful challenges or affronts the authority of the court of the supremacy of the law, whether in civil or criminal proceedings", The learned Judge further stated that:-

> " The power of the court to punish for contempt is inherent in a system of administration of Justice and that power is held by every Judge." And in the case of BOARD OF GOVERNORS MOI HIGH SCHOOL KABARÅK -VS- MALCOLM BELL AND ANOTHER (Supreme Court Petition No. 6 & 7 of 2013 the Supreme Court of Kenya described "the power to punish for contempt is a power of the court to safeguard itself against contemptuous or descriptive intrusion from elsewhere".

In HEELMORE -VS- SMITH, (22 (1886) LER 35 CD 455, Lord Bowen, L J aptly stated the rationale for punishing for contempt as:-

> "The object of the discipline enforced by the court in case of contempt of court is not to vindicate the dignity of the court or the person of the judge but to prevent undue interference with administration of Justice.'

Counsel submitted that despite the existence of valid court orders, the respondents went ahead to excavate stones and plough the suit land contrary to the court orders. He stated that the annexed photographs are proof that there was disobedience of the court order and that the order was very clear and unambiguous.

On the second issue as to whether personal service is a requirement on applications for contempt, Counsel cited the Court of Appeal decision of Justus Kariuki Mate and another —Vs- Martin Nvaga Wambora and another CA 24/2014) Nyeri, where it was held that personal service of the order alleged to have been disobeyed is not mandatory. The court stated that:

> "on the other hand, however, this court has slowly and gradually moved from the position that service of order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under rule 81:8 of the Supreme Court England Rules of England"

Further that the Court of Appeal in the case of Shimmer's Plaza ltd —Vs- NKB [2015] eKLR Karanja, Mwera Mwilu JJA approved the jurisprudence from the High Court that restated that knowledge of a court order suffices to prove service and dispenses with personal service for the purpose of contempt proceedings. The Court of Appeal in the above Shimmers Plaza cited with approval Lenaola J. (as he then was) Basil Criticos —Vs- Attorney Genera/ and 8 others (2012) eKLR where the learned judge pronounced himself thus:-

> "The law has changed and 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."
> The CA in shimmers Plaza Ltd also affirmed the position in the Martin Wambora case and emphasized that:-
>
> "It is important however that the court satisfied itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with the full knowledge or notice of the existence of the orders of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person 's liberty".

The court in the shimmers Plaza Ltd case found that knowledge of the judgment or orders by the advocate of the alleged contemnor sufficed it for contempt proceedings particularly where the advocate was in court representing his client.

Counsel submitted that the respondents were represented by Mr. Nabasenge who was holding brief for Mr. Kamau, therefore the respondents had knowledge of the orders of the court which they disobeyed. He therefore submitted that the respondents were aware of the valid, clear and unambiguous orders of the court but they willfully chose to disobey them and hence they should be punished for being in contempt of court orders.

Respondent's Submissions

The respondent opposed the application for contempt and cited the provisions under which the application was brought as section 29 of Environment and Land Court Act, section 4 of the Contempt of Court Act, sections 3A and 63 of the Civil Procedure Act.

Counsel listed the following issues for determination by the court:

1. Whether the contempt application is competently before the court.
2. Whether the application herein serves the purpose and essence of a contempt of court application
3. Whether the Respondents are guilty of contempt of court orders issued on 14th April 2016 and those issued.

On the issue of competence of the application, Counsel cited the Court of Appeal case of Ochino & another VS- Geor e Aura Okombo & 4 others (1989) eKLR where it was held as follows:-

> "As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) 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 indorsed 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"

The court in this case further held as follows:-

> "This requirement is important because the court will only punish as contempt a breach of injunction if it is satisfied that the terms of injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt"

Counsel therefore submitted that there is no evidence from the part of the Plaintiff that the Respondents were served with court orders. Counsel also cited various authorities on the requirement of personal service.

On the second issue as to whether the application serves the purpose and essence of a contempt of court application, Counsel submitted that contempt applications are meant to uphold the dignity of the court. Counsel cited the case of Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 as was cited with approval in Kasamani Charles Lutta & 4 others v Amani National Congress & 3 others [2017) eKLR:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void"

Counsel further relied on the case of Republic v The Speaker, Nairobi City County Assembly & another Ex-Parte Robert Ayisi, County Secretary, Nairobi City County [2017] eKLR where Odunga J held thus:

"in contempt of court proceedings as opposed to execution proceedings, the dispute is no longer just between the parties before the Court, but the matter moves to higher pedestal as the dignity of the Court is now brought into question by acts of impunity committed by the contemnor"

Counsel therefore submitted that the Applicant's main objective in filing this application is not to uphold the dignity of this Honourable Court but to intimidate the Respondent.

On the 3rd issue as to whether the respondents are guilty of contempt of court orders issued on 5th April 2017, Counsel relied on the case of Duncan Manuel Murigi VS Kenya Railways Corporation (supra) held as follows:-

"A contempt of court is an offence of a 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".

The 1st Respondent in his replying affidavit sworn on 14th September 2018, stated that he has not trespassed or entered into anybody's land particularly that of the Plaintiff and that there is no evidence that he disobeyed the court orders. Counsel also relied on the case of

Josephine Muthinja —VS- Lilian Muthamia and 2 others while referring the case of Mwangi Mangondu —VS- Nairobi City Commission Civil Appeal No. 95 of 1998 where it was held as follows:-

"This requirement is important because the court will only punish as contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of injunction has been proved beyond reasonable doubt".

Counsel therefore urged the court to dismiss the application with costs to the respondents.

Analysis and determination.

This is an application for contempt of court against the respondents for allegedly disobeying court orders. This application arose from orders that were granted by this court against the respondents on 5/4/17. The Applicant's Counsel argued the application and stated that the contemnors had disobeyed the court orders and that they were duly served with the order but blatantly chose to disobey the said order.

In the book on Contempt in Modern New Zealand, in an application for contempt of court, 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.

It should be noted that in an application for contempt the following ingredients must be proved. The applicant must prove that the terms of the order were clear and unambiguous and that the same were binding on the defendant. The orders must be clear and directed to the defendant to do or not to do a certain act with a penal notice on the consequences for disobedience of the order.

The applicant must also prove that the order was served on the respondent but knowledge of the order supersedes personal service as was held in NAIROBI MISC.CIVIL APPLICATION NO. 316 OF 2010 BASIL CRITICOS -VS- ATTONEY GENERAL & 4 others where Lenaola J (as he then was) stated

that the law has changed and so as it stands today, knowledge supersedes personal service and for good reason. ….where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary"

If there is proof that the respondent had knowledge of the order then the issue of personal service is superseded by the knowledge of the order. How can an applicant prove that the respondent had knowledge of the order? Where a litigant is represented by Counsel who has authority to act on his or her behalf and the said Counsel was present during the pronouncement of the ruling that gave the order, then it

should be assumed that the Counsel communicated the contents of the order to his client and the repercussions of the disobedience. Counsel only act on instructions from clients as they do not own the cases themselves. Without instructions from clients then Counsel would not have cases to present in court unless they are the litigants themselves.

Litigants are under an obligation to obey Court orders whether they are in agreement with the contents or not. They have an opportunity to question the implementation of the order through laid down procedures and disobedience is not one of them. In the case of Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK) the Court expressed itself thus:

> "It was the 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 until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid — whether it was regular or irregular.... In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt…….'

The orders in the application were to restrain the respondents from interfering with the suit land until this case is heard and determined. There was a further order that the issues in respect of the estate of the late Malakwen Tarus be determined in a Succession Cause. This made the case two pronged of which the issues might be determined in a succession cause.

Contempt of court applications are meant to safeguard the intergrity of the court and upholding of rule of law to avoid anarchy when court orders are not respected. If there were no sanctions in respect of disobedience of court orders then the Courts would have no business issuing orders which would be blatantly disobeyed. Even in traditional dispute resolution systems there are orders issued and sanctions for non compliance.

I have considered the rival submissions of both Counsel for the applicant and the respondents and come to the conclusion that the applicant has not met the threshold required in contempt of court proceedings. The issue of service, clarity, inambiguity of the order and knowledge are still hanging in the balance. Is the application meant to safeguard the intergrity of the court or to score against the respondent? Proof in contempt proceedings is higher than in normal Civil cases as it involves the curtailment of freedom of the contemnor if the same is proved. Courts must therefore be keen to ensure that a person's freedom is not curtailed wrongfully , which might lead to other violations of rights.

It is worth mentioning that the Contempt of Court Act 2014 was decalred invalid and unconstitutional vide a judgement in the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** on 9th November 2018 where Mwita J held that:

> ***"..... that Sections 30, and 35 of the impugned Contempt of Court Act No 46 of 2010 are inconsistent with the Constitution and are therefore null and void.***
>
> ***".... that the entire Contempt of Court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution and encroaches on the independence of the Judiciary.***

Until this judgement is appealed against, it remains the precedent which we are under obligation to follow. The application was premised on other sections of the law and the impunged Act but the saving grace is that Civil Procedure Rules and the Environment and Land Court Act gives the court powers to punish contempt of court.

It is therefore my humble view that the application lacks merit and is dismissed but the respondents are reminded that the orders are still in force and obedience of the same is mandatory. The dismissal of this application does not give the respondents a ticket of disobeying the orders. Costs of the application in the cause.

Dated and delivered at Eldoret this 16th day of January, 2019

M.A ODENY

JUDGE

RULING READ in open court in the presence Mr.Oduor holding brief for Mr. Mathai for Plaintiff/Applicant and in the absence of counsel for Defendants/Respondents.

M/s Topista – Court Assistant

M. A. ODENY

JUDGE