



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 83 OF 2017

CHEBOTERA KESUMO

(Suing as the next friend to KIPKETER MAIYO SANGA

alias KIMAIYO).....PLAINTIFF

VERSUS

JENIFA CHEPTOO KIPKENY.....1ST DEFENDANT

LAND REGISTRAR, NANDI COUNTY.....2ND DEFENDANT

RULING

The plaintiff/applicant has come to court for orders that the 1st defendant/Respondent be committed to civil jail for such a period as would be deemed necessary and or in the alternative be ordered to pay a fine as stipulated by section 29 of the Environment and Land Court Act, 211 for being in contempt of court by blatantly and with impunity disobeying and breaching the orders issued on 15th day of January, 2019. That the 1st defendant/respondent be ordered to purge her contempt before hearing of the main suit and that the plaintiff/applicant be allowed to put up a semi-permanent structure to reside in through well wishers pending the hearing and determination of the main cause. That the 1st defendant/respondent be condemned to pay the costs of this application.

The application before court is based on grounds that the trial court vide its orders issued on 15th day of January, 2019 restrained the 1st defendant/respondent from cutting down trees and or interfering with the suit pending the hearing and determination of the application dated 14th January, 2019 which application was then set down for hearing inter-parties on 23rd January, 2019. That the said order was duly served upon the 1st defendant/respondent in person on 16th January, 2019.

That subject court order had a penal notice clearly stipulating the penalties for non-compliance. That at the time the aforesaid orders were issued, the 1st defendant/respondent had neither cut down all the trees on the suit parcel nor demolished the house on the suit parcel which the plaintiff/applicant has been residing in.

That the 1st defendant/respondent has disobeyed the orders in force by;

(a) Continuing to cut down trees.

(b) Demolishing the house earlier occupied by the plaintiff/applicant.

(c) Threatening to dispose off the said parcel of land to 3rd parties while knowing very well that the question of ownership is still pending determination by this honorable court.

(d) Has threatened to forcefully evict the applicant from the suit parcel of land.

(i) That the 1st defendant/respondent, her agents and/or servants have with total impunity disregarded, ignored, neglected and/or refused to comply with the aforesaid court order hence rendering appropriate orders necessary.

(ii) That the 1st defendant/respondent make good threats to dispose off the suit parcel of land hence compromising the substratum of the main cause.

(iii) That the 1st defendant/respondent is well aware of the orders in force but is disobeying the same intentionally hence bringing the sanctity and dignity of this court to question/disrepute.

(iv) That the conduct of the 1st defendant/respondent is deliberate and calculated at lowering the dignity, honour and sanctity of this honourable court.

(v) That the 1st defendant/respondent ought to be committed to civil jail and/or be fined for being in contempt of the court order as stipulated by law.

The application is supported by the affidavit of Chebotera Kesumo where she states that the 1st Defendant/Respondent threatened her with eviction vide her demand letter dated 16th December, 2018. That she forwarded the aforesaid letter to her Counsel on record, Ms. Isiaho who informed her that she called one Mr. Melly, advocate from the firm of Amolo Sagasi & Company Advocates and informed him that there was a case pending before the High Court hence the demands made in the demand letter were uncalled for.

The 1st Defendant/Respondent is well aware that the issue of ownership of the suit parcel of land known as known as NANDI HILLS/KOSOIYWO BLOCK 1 /808 is still pending before this honourable court as evidenced by the proceedings of 24.07.2017. That the 1st Defendant/Respondent has decided to employ short cuts to have her evicted from the suit parcel of land yet the case on ownership is still pending determination.

That when persisted with her threats to cut down trees on the suit parcel of land, she was instructed by counsel on record to file an injunctive application seeking preservative orders, hence the application dated 14th January, 2019.

The trial court vide the aforementioned application issued orders on 15th day of January, 2019 restraining the 1st Defendant/Respondent from cutting down trees and or interfering with the suit pending the hearing and determination of the application dated 14th January, 2019 which application was then set down for hearing inter-parties on 23rd January, 2019. That the aforesaid order was duly served upon the 1st Defendant/Respondent in person on 16th January, 2019 by her counsel on record.

That above order had a penal notice clearly stipulating the penalties for noncompliance hence the instant contempt application.

That at the time the aforesaid orders were issued, the 1st Defendant/Respondent had neither cut down all the trees on the suit parcel nor demolished the house on the suit parcel which the Plaintiff/Applicant has been residing in.

That she resided with her brother for many years on the suit parcel of land prior to his demise. The house having been demolished by the 1st Defendant, she has now been left destitute and that she is forced to sleep at the Kapsabet District Hospital's patient waiting bay as she has nowhere to go.

That she prays to be allowed to build a semi-permanent structure to reside in as the case proceeds for main hearing. The 1st defendant/respondent does not have any right, legal or equitable over the suit parcel of land. The 1st Defendant/Respondent albeit be orders has disobeyed the orders in force by;

(a) Continuing to cut down trees.

(b) Demolishing the house earlier occupied by the Plaintiff/Applicant

(c) Threatening to dispose off the said parcel of land to 3rd parties while knowing very well that the question of ownership is still pending determination by this honorable court.

(d) Ferrying away the trees she had cut.

(e) Has threatened to forcefully evict the Applicant from the suit parcel of land. A bundle of photographs showing the trees subsequently cut down by the Defendant and the demolished house are annexed and marked CK5.

She sought the intervention of the local administration specifically the area chief and the village elders to try and have the 1st defendant/respondent comply with the court orders in force hence this application.

That to confirm that what she is saying is the truth, she is willing to have the said area chief (who was even called by his counsel on record to intervene in vain) to be summoned to clarify the position to this honorable court.

That the 1st defendant/respondent has threatened to do anything to forcefully take possession of the suit parcel of land.

That the 1st defendant/respondent has threatened to transfer the suit parcel of land to 3rd parties yet the matter is still pending before court hence rendering preservative orders necessary.

That the 1st defendant/respondent, her agents and/or servants have with total impunity disregarded, ignored, neglected and/or refused to comply with the aforesaid court order hence this application.

That should the 1st defendant/respondent make good her threats to dispose off the suit parcel of land, the same will compromise the substratum of the main cause.

That the 1st defendant/respondent is well aware of the orders in force but is disobeying the same intentionally hence bringing the sanctity and dignity of this court to question/disrepute.

That the conduct of the 1st defendant/respondent is deliberate and calculated at lowering the dignity, honour and sanctity of this honourable court.

That the 1st defendant/respondent ought to be committed to civil jail and/or be fined for being in contempt of the court order as stipulated by law.

The 1st defendant filed an undated replying affidavit stating that she disputes any service of the subject order issued on 15th January, 2019 which is alleged to have been served upon her and it only came to her notice after her advocate on record called her and informed her that there was an application for contempt that had been served upon him.

That it is well within the plaintiff's knowledge that the subject parcel of land belongs to herself late husband and she as they bought it together. That the contents of the sworn affidavit by the plaintiff in the said affidavit is indeed false, malicious and the plaintiff who is her sister in-law's only intention is to cause her great embarrassment besides exposing her to great ridicule, odium and contempt among the family members and public at large.

That she is aware of the consequences of disobedience of a court order but the said court order issued on 15th January, 2019 was not served to her and/or at all.

This court observes that court orders should be obeyed otherwise there would be chaos in our justice system as the rule of law will be abandoned. In Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:

“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, 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 void”.

This position was confirmed by the Court of Appeal in Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990. In 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. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...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 inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realization of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court...Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant”.

In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.

In **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. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...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 inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...”

Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly.

As was held in **Teacher’s Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013**:

“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. 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 any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

It was therefore appreciated by **Ojwang, J** (as he then was) in **B vs. Attorney General [2004] 1 KLR 431** that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

However, I have considered the application supporting affidavit and the replying affidavit and do find that it is not clear that the applicant served the order made on the 15.1.2019 as in the affidavit of service, M/s Isiaho is not clear as whether she served the order of injunction or not. She only states that she served the application and therefore, it is doubtful that she served the order made on 15.1.2019. The photographs annexed in the supporting affidavit are not dated and therefore, it is not clear when they were taken.

For this court to punish for contempt, the applicant must prove beyond the balance of probabilities but not beyond reasonable doubt that the respondent has willfully disobeyed the court order.

I do find that the applicant has not satisfied this court that the 1st defendant has willfully disobeyed the court order as there no evidence of proper service. The upshot of the above is that the application is dismissed with costs in the cause.

Dated and delivered at Eldoret this 21st day of February, 2019.

A. OMBWAYO

JUDGE