



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO. 493 OF 2017

WILLIAM GATHECA NGUYO.....PLAINTIFF/APPLICANT

VERSUS

FRANCIS KARIUKI MUTHEE.....1ST DEFENDANT/RESPONDENT

JOHN NJOROGI KAMAU.....2ND DEFENDANT/RESPONDENT

RULING

1. On the 28th February 2018, this court delivered its ruling pursuant to an application by way of Notice of Motion dated 28th September 2017 wherein the Plaintiff/ Applicant herein sought orders of injunction restraining the Defendants from interfering with plot No C320 SIPILO TRADING CENTER, pending the hearing and determination of this suit.
2. The court had found that since the dispute between the two parties was on the strength of allotment letters held, the best order that commended itself in the circumstance was that parties maintain the status quo pending the hearing and determination of the suit. The parties were directed to comply with the provisions of order 11 of the Civil Procedure Rules so that the matter could proceed for hearing of the main suit herein.
3. While the matter was pending hearing, Counsel for the Plaintiff filed another application under certificate of urgency dated the 12th June 2018, wherein he sought for orders that the Defendants be cited for contempt of orders of court issued on the 28th February 2018 to maintain the status quo.
4. On the 13th June 2018, the court certified the matter as urgent and directed that the application to be served upon the Defendant/Respondents for hearing of the same inter parties on the 26th June 2018. Further orders were to the effect that both Defendants be present in court at the hearing date without fail.
5. On the said date, the matter did not proceed for hearing as the Defendant/Respondent's Counsel sought for an extension of time to file two sets of affidavits having already filed their grounds of opposition dated 25th June 2018 to the application. Both parties conceded to having the application dated 12th June 2018 prosecuted by way of written submissions.
6. The Plaintiff/Applicant filed their submissions on the 18th July 2018 while the Defendant/Respondents filed their respective submissions on the 18th October 2018.
7. On the 22nd October 2018, when the matter came up for highlighting of the parties' written submissions, Counsel for the Defendants absent as he was indisposed. The court also noted that despite an order, made in the presence of the Defendant's Counsel, that both Defendants be present, they had failed to appear in court. Warrants of arrest were issued to both Defendants and the matter set for mention on the 29th October 2018.
8. On the 29th October 2018, the court inquired from both the Defendants as to why they did not present themselves in court on the 22nd October 2018 to which they explained that their motor vehicle had developed mechanical problems and there had been no network at the place they had encountered the mechanical problem. The court excused them with a warning wherein the warrants of arrest were lifted and the matter proceeded with the highlighting of the parties written submissions.

The Plaintiff/Applicant's case

9. It was the Plaintiff's case that it was not in dispute that the orders made by the court on the 28th February 2018 had been breached by the Defendants. That this was not the first time the Defendants were breaching orders issued by the court.

10. They relied on the photographs annexed as WGN 9 which showed the situation on the ground as at 22nd August 2017 to wit building materials had been deposited on the plot. That the annexures marked as FKM 1 of the Defendant's replying affidavit also showed the position on the ground as at 6th October 2017. But thereafter 2 weeks and as per the affidavit sworn on 17th October 2017, and photos marked as FKM 6 in comparison to the Photos marked as FKM 1 the same depict a big difference on the ground. That the annexure marked as FKM 6 clearly showed excavations on the ground and the foundations set ready for construction.

11. Counsel submitted that this situation had been the first instance of breach which they had overlooked because they had wanted the case to proceed for hearing.

12. That the second breach of the court order had occurred after the ruling of 28th February 2018 wherein the Respondent's Counsel had admitted that he had informed his clients the Defendants herein that the orders of injunction had been vacated and therefore they were free to continue with the construction.

13. That both Counsel were in court when the ruling was delivered on 28th February 2018 and thus he failed to understand why Counsel would choose to hear only part of the same.

14. That around the 10th April 2018 the Plaintiff/Applicant had called him and complained that the Respondents herein were on the suit land and were continuing with the work on the ground wherein he had asked them to take photographs of the same. He relied on the photographs annexed as WGN 10 of their application, photographs that were taken on the 15th April 2018.

15. Counsel submitted that the photograph annexed as WGN 10 showed that the excavation and foundation had now been filled up. He had thus complained personally to Counsel for the Respondents on the disobedience of the court order wherein he (Counsel for the Defendants) had undertaken to seek from the court and/or record, the interpretation of the meaning of the term status quo.

16. That vide a letter dated the 9th May 2018, Counsel for the Defendants had confirmed to him that he had communicated the order of status quo to his clients and had asked them to maintain the same.

17. That up to that point, they were willing to forgive them, but soon thereafter, on or about the 3rd June 2018, the Plaintiff/Applicant had visited the suit land and had been astonished to find that constructions had continued as per photographs marked as WGN 12 which now showed that the ground had been finished and the walls built.

18. That was what had pushed them to file the present application seeking that the Respondents be cited for contempt for the 3rd time. The photographs were self-explanatory and the allegations of non-service were neither here nor there as Counsel for the Defendant/Respondents was aware of the court's orders.

Defendant/Respondents' case

19. The Defendant/Respondents' relied on the replying affidavits sworn on the 2nd July 2018 by both the parties and their Counsel, as well as on their written submissions filed in court on 18th October 2018 wherein they denied committing acts of contempt before the 28th February 2018 when the ruling was delivered.

20. That Parties had appeared in court on diverse dates being the 17th October 2017, 29th November 2017 and 11th December 2017 wherein the Applicant had not raised the issues of breach of order of status quo on those three occasions.

21. That when the matter came up for ruling on the 28th February 2018, the orders of status quo had escaped Counsel's attention as deponed in his further affidavit and the annexure marked as WM4 to wit his court attendance form, wherein he had indicated that the application had been dismissed.

22. That further, the Plaintiff was under legal obligations to extract and order from the said ruling and ensure that the same was served upon the Defendants by a competent process server.

23. He relied on the decided case of **Ochino & Others vs. Okombo & 4 others [1969] KLR** where the Defendants were not served with a copy of the court's order

24. That issue of status quo had been brought to Counsel's attention in May 2018 through a call wherein after, he had perused the court file and seen that indeed the court had issued the orders of maintenance of status quo to which as a sign of good faith, he had written to the Plaintiff's Counsel apologizing for the oversight and promising that the status quo would be maintained.

25. That it was not true that the Defendants had continued with the constructions after 7th August 2018 because they were busy pursuing confirmation of ownership of the suit land from the County Government Laikipia, as evidenced by annexures FKM 2, a letter seeking for confirmation of ownership of the suit property and annexure FKM 4 the response thereof.

26. That annexure WGN 10 was a photograph taken way before the application dated 28th September 2017 was filed. That the status quo as at 9th May 2018 was captured in annexure WGN 12 which is the stage at which the Defendants were informed of the orders of status quo.

27. That from the date of service of the ex- parte orders that were issued on 22nd October 2017, the Defendants had maintained the status quo

and had no knowledge of the order of 28th February 2018.

28. The Defendant/Respondents prayed for the application dated the 12th June 2018 to be dismissed and the suit heard on priority basis for reasons that there was a project that had stalled on the ground.

29. In rejoinder, Counsel for the Plaintiff submitted that the annexures on record spoke for themselves. That it was not disputed that he had communicated with the Defendants' Counsel on the 15th April 2018 when the photographs were brought to his attention which explains why at paragraph 9 of the Respondent's affidavit, Counsel for the Respondents' stated that he had received communication complaining about the construction. That the Defendants had not produced any photographs/evidences to prove that the status quo had been maintained and that they had stopped the construction at a certain stage.

30. That the communication was on the 15th April 2018 and on the 9th May 2018 respectively therefore the Defendants cannot be heard to say that the status quo was in June 2018.

31. The Respondents were not apologetic hence they continued to deny their defiance of court orders despite the photographs on the court record.

32. I have considered submissions by both Counsel for the Applicant and the Defendants. The Black's Law Dictionary (Ninth 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.”

33. The law guiding the present application is Order 40 Rule 3(1) of the Civil Procedure Rules which stipulates that:-

In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

34. From the sworn affidavits, annexures, submissions by the respective parties' Counsel s on record, the applicable law and the decided cases, the following issues stand out for determination:-

i. Whether there was any valid court order issued by this court on 28th February, 2018.

ii. Whether the order of 28th February, 2018 was served upon the Respondents and/ or whether the Respondents were aware of the orders of 28th February, 2018.

iii. Whether the Respondents are guilty of contempt of court order issued on 28th February, 2018.

35. **On the first issue as to whether there was any valid court order issued by this court on 28th February 2018, vide a ruling delivered on the 28th February, 2018 this court directed as follows;**

‘Since the dispute between the two parties is on the strength of allotment letters issued to them in regard to the suit plot herein, I find the order that best commends itself to the circumstances of this case to be an order of status quo and I proceed to order that status quo be maintained pending the hearing and determination of the suit.’

36. Parties to the suit have not disputed that indeed there was a valid order issued by this court. This issue thus rests.

37. On the second issue as to whether service of the **order of 28th February, 2018** alleged to have been disobeyed, was effectively served, the Applicant maintains that Counsel for the Respondents was in court when the ruling was delivered but then chose to hear part of the ruling while ignoring the rest. The Defendant/Respondents on the other hand, while relying on the case of **Ochino & Others vs. Okombo** (supra) have maintained that the Plaintiff was under a legal obligation to extract and order from the said ruling and ensure that the same was served upon them by a competent process server.

38. The jurisprudence now favours knowledge of the existence of court orders as opposed to strict personal service. In the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** the Court of Appeal quoted the statement by **Lord Justice Thesinger** in the case of **Exparte Lantey 1879,13 Ch D 110 (CA)** where the Lord Justice stated;

“... the question in each case and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of court that you can infer from the facts that he had notice in fact of the order which has been made. And in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such notice ought to prove it beyond reasonable doubt.”

39. Knowledge of existence of a court order viz a viz personal service was considered in the case of **Shimmers Plaza Limited (supra)** and that was why the Court of Appeal stated;-

“Kenya’s growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings, for instance, Lenaola J in the case of Basil Criticos v Attorney General and 8 Others [2012]eKLR pronounced himself as follows:

‘..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.’

40. The Court of Appeal in the *Shimmers case* (supra) posed the question whether knowledge of a court order or judgment by an advocate of the alleged contemnor would be sufficient for purpose of contempt proceedings and answered the question in the affirmative stating:-

“We hold the view that it does. This is more so in a case as this one where the advocate was in court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him to report back to the client all that transpired in court that has a bearing on the clients’ case...”(emphasis)

41. Indeed from the court’s record, the same is clear that the ruling was delivered in the presence of Counsel for both parties. This court thus finds that the Defendants had knowledge of the court’s orders and therefore personal service was unnecessary

42. In the court of Appeal decision of **Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another [2014] eKLR** the Court of Appeal held that personal service of the order alleged to have been disobeyed is not mandatory. The court stated:

“On the other hand, however, this court has slowly and gradually moved from the position that service of the 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 (1) (Supra).”

43. On the last issue as to whether the Respondents are guilty of contempt of court order issued on 28th February 2018, which is the matter at hand, I have considered the submission by Counsel as well as looked at the annexures herein annexed to the pleadings thereto. It is not in dispute that the photographs annexed as FK1, WGN 10 and WGN.12 are photographs taken at the suit land showing different stages of the ongoing construction on the suit land.

44. The order that has been flouted, directing parties to maintain the status quo was issued on the 28th February 2018. From the Defendants’ affidavit sworn on the 2nd July 2018 and an annexure in form of a photograph taken on the 6th October 2017 (see para 8) and marked as FKM1 the same shows the building materials on the ground. The annexure marked as WGN 10, a photograph taken on the 15th April 2018 after the order of status quo was issued, clearly shows that a foundation had been dug, while the picture marked as WGN 12 taken on the 3rd June 2018 clear show that the foundation was now complete, the floors constructed and now the walls had been partially put up. These photos need no further explanation.

45. The Scottish case of **Stewart Robertson vs. Her Majesty’s Advocate, 2007 HCAC 63**, Lord Justice Clerk stated that:

“ contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings”

46. Further, Romer L.J in **Hadkinson vs. Hadkinson(1952) ALL ER 567** stated 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”

47. From the foregoing, it is trite that contempt of court proceedings and applications are subtle and criminal in nature and would impose criminal sanctions if a conviction followed.

48. I find that the 1st and 2nd Respondent/Defendants herein willfully and intentionally defied orders of the court despite knowledge of the same. Their action of continued construction on the suit land ran afoul of the terms of the court orders issued on the 28th February 2018 which had directed that they maintain the status quo on plot No C320 SIPILI TRADING CENTER pending the hearing and determination of the main suit.

49. To protect the dignity and authority of the court of law, this court, shall be firm on any person who deliberately disobeys court orders or attempts to scuttle the court process.

50. I find that both the 1st and 2nd Respondent/Defendants herein in contempt of court orders and proceed to punish them for contempt. Both the Defendant/Respondents are hereby condemned to pay a fine of Ksh. 100,000/- each in default to serve a term of 3 months each in civil jail effective immediately.

51. The Plaintiff/Applicants application dated the 12th June 2018 is herein allowed with cost.

Dated and delivered at Nyahururu this 5th day of February 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE