



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 68 OF 2018

PATRICK MAGOTO YANO.....PLAINTIFF

VERSUS

PAUL KIMWAMBOK KOSGEL.....1ST DEFENDANT

PAULINE WANJIKU WATHIKO.....2ND DEFENDANT

JANE NASAMBU FWOTI.....3RD DEFENDANT

RULING

1. What is before Court is the application dated **25th October, 2018** brought under **Order 40 rule 3 (1) and 3(3) of the Civil Procedure Rules, Section 3, 3A, 63(e) and 1A of the civil procedure Act and Section 4 (1) of the Contempt of Court Act.**
2. The said application is based on the following grounds which in summary is that the court issued orders injunction on **23/7/2018** and **25/9/2018** which orders were served together with the requisite Penal Notices, to the 3rd defendant who and has disobeyed the said Court Orders and invaded the suit land by building a house thereon and demolishing one house belonging to the plaintiff. The actions of the 3rd Defendant are in contravention of the court orders made on **23/7/2018** and **25/9/2018**, prohibiting dealing adversely that is, inter alia, building with suit land **Makutano/Suwerwa Block 1/Bwake/191** pending *inter partes* hearing and pending hearing and determination of the suit; the 3rd defendant has not purged the disobedience of the court order.
3. The application is supported by the affidavit of Patrick Magoto Yano who is the Plaintiff herein where he confirms that he filed the instant suit on **23/7/2018** seeking among other orders an injunction restraining the defendants from interfering in any way with parcel of land known as **Makutano/Suwerwa Block 1/ Bwake/192** pending the hearing of the suit. That the court ordered that status be maintained and the defendants to cease all activities. He avers that despite the orders of the court, the 3rd Defendant has gone ahead and roofed the house that was incomplete and completed the same.
4. He reiterates that the said order was served and that the same was confirmed on **25/9/2018** in the presence of the defendants and their advocate. He further avers that in the circumstances, the 3rd defendant breached the court order by purporting to continue building when she had been enjoined against doing so. He contends that unless the court orders are respected, then the dignity of this court will be lowered. He reaffirms that the 3rd defendant should be jailed for a period not exceeding a months for contempt.
5. The application is opposed by the 3rd Respondent who filed a replying affidavit dated **12/11/2018**. She deposes the entire allegations in the application are false and that the application is meant to delay the finalization of the suit herein. She avers that she has been living in portion of the suit plot while the applicant's brother, one Evans Kipkemoi Cherutich on the other remaining portion since **2010** to date while the applicant is at large and the he knows nothing on the ground. It is the 3rd defendant's contention that she has been having a small shop built thereon as from **2010**. To the 3rd defendant, she has not disobeyed any court order and that the roofing was already done at the time of filing case in the court contrary to the applicant's allegations. She further avers that at the time the application was filed in court in **July 2018** she had constructed the premises within the portion she has been occupying without any problem and that upon being served with summons, she stopped fixing the doors to the behind rooms though the front room was operational as a shop. She claims that the she is a senior, law abiding citizen of this country and always obey court orders and or laws of the land. She avers that the alleged claims of contempt are not clear and are aimed to frustrate her from carrying out developments on my plot. She has asked this court to direct the Deputy Registrar to visit the site to establish the truth of the matter.
6. On **13/10/2018** the court gave directions for the application to be canvassed by way of written submissions. Only the applicant's submissions are on record.

Analysis and Determination

7. Upon perusing the application dated 25th October 2018 including the supporting and replying affidavits as well as the annexures thereon plus the submissions on record and the following are the issues for determination:

Whether the 3rd Respondent is in contempt of the Court Order dated the 25/9/2018.

8. Contempt of Court is defined under Section 4 of the Contempt of Court Act No. 46 of 2016 as follows:-

“(1) Contempt of Court includes -

(a) civil contempt which means willful disobedience of any judgment, decree, direction, Order, or other process of a Court or willful breach of an undertaking given to a Court;

(b) Criminal contempt which means the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which -

(i) Scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the Court;

(ii) Prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) Interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice”.

9. Black’s Law Dictionary, 9th Edition at page 360 defines contempt as follows;

“Contempt is a disregard of, disobedience to, the rules, or Orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

10. The procedure for institution of contempt proceedings is set out in Section 5 of the *Judicature Act Cap 8 Laws of Kenya*. That section provides as follows:-

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

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

11. It is trite law that court orders must be obeyed at all times. In the classical case of *Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim J (as he then was) stated as follows:-

“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”.

12. The Court of Appeal confirmed this position in *Wildlife Lodges Ltd vs. County Council of Narok and Another* [2005] 2 EA 344 (HCK) where the Court expressed itself as follows:

“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.”

13. In the case of *North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi* (2016) eKLR where Justice Mativo stated that:

“Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated 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 - (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”.

14. In summary the three elements that must be proved in contempt proceedings are:

(a) Applicant must demonstrate terms of orders;

(b) Applicant must demonstrate knowledge of terms by respondent;

(c) Applicant must demonstrate failure of respondent to comply with court order.

15. It is also trite law that the standard of proof in contempt is higher than that in Civil Cases, but lower than the standard of beyond reasonable doubt as required in criminal proceedings.

The applicant has succeeded in demonstrating that the first two limbs of the requirements stated in **paragraph 12** have been complied with.

16. I observe that in its ruling dated **25/9/2018** that the court noted that the position of the defendants is that the 3rd defendant was in occupation of the premises.

17. The Originating Summons was filed on **23/7/18**. This court views the allegations of further development of the suit land with a pinch of salt for the reason that one of the photographs marked **PMY1** (which is alleged to be of an earlier date) bears the date **10/10/2018** later than the date **13/8/2018** on the photographs marked **PMY 5(a)** and **PMY5 (b)** (which are alleged to be of a more recent date).

18. I have also examined the contents of the affidavit of the 1st respondent said to contain an admission and failed to locate any such admission of the accusations levelled against the 3rd defendant. In any event a more complex issue as to whether that alleged admission could bind the 3rd respondent would have arisen if there was the semblance of such an admission, for that affidavit is sworn not by the 3rd respondent but by the 1st respondent yet orders are sought in the application against the 3rd respondent alone.

19. This court would not hesitate to punish any party in this case for the offence of contempt of court if proved to the standard set out herein before. However, in the circumstances of this case it is not safe to rely on such photographic evidence to convict the 3rd defendant of the offence of contempt which carries with it serious penalties.

20. The third element required to prove contempt has therefore not been established to the standard required in law.

21. I therefore find that in view of the weak and conflicting affidavit evidence presented in the current circumstances, the application dated **25/10/2018** is devoid of merit and it is hereby dismissed with costs to the Defendants.

Dated, signed and delivered at Kitale on this 21st day of March, 2019.

MWANGI NJOROGE

JUDGE

21/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Lemayan holding brief for Magare for plaintiff

Ms. Chebet holding brief for Chebii for defendant/respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

