



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 80 OF 2016

AIK APPLICANT

= VERSUS =

R S N1ST RESPONDENT

L N.....2ND RESPONDENT

PHILIP MUTENDE3RD RESPONDENT

R U L I N G

1. The application before me for determination is a Motion on Notice dated 8/6/2017 and filed on 13/6/2017. It is brought under Section 3A and 67 of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules and all enabling provisions of law. The Applicant – **AIK** – is the Defendant in this suit and the 1st Respondent – **R S N** – is the Plaintiff and estranged wife of the Defendant. The other Respondents – **L N** and **PHILIP MUTENDE** – are brought on board for their alleged role in violation of court orders issued by this court.

2. The application is essentially one for contempt of court and has the following prayers on the face of it:

Prayer (a): That the Respondents be punished for disobeying court orders issued on 28/7/2016, on 10/11/2016 and on 25/1/2017 by being committed for detention in prison for a period not exceeding 6 months and/or be punished for their disobedience of this court orders in such manner or additional manner as the court may deem appropriate.

Prayer (b): That the Respondents and their agents including their watchmen be ordered to vacate the premises and the area of land parcel No. SOUTH TESO/ANGOROMO/[...] and hand over vacant possession of the same to the Applicant pending the hearing and conclusion of the case herein.

Prayer (c): That costs of this application be provided for.

3. The premise of the application is that the Respondents abused court orders initially issued to them and started constructing a house on the Applicant’s parcel of land; that the Respondents have sealed off the suit parcel of land with a wall fence and continued with their construction activities unhindered and in defiance of court orders; that it is necessary to halt construction until the suit is heard and determined and that if need be the Respondents, their agents and watchman be removed from the suit premises; and finally that the orders of court need to be obeyed in order to protect the integrity of the court process.

4. A more informative narrative is to be found in the affidavit backing the application. In it, the Applicant deposes, *inter alia*, that he is the registered owner of land parcel SOUTH TESO/ANGOROM/7762, that the 1st Respondent – **R S N** – is his estranged wife; that the 2nd Respondent – **L N** – is his wife’s sister; and that the 3rd Respondent – **PHILIP MUTENDE** – is the foreman overseeing 1st Respondent’s construction on land parcel No. SOUTH TESO/ANGOROMO/[...].

5. The 1st Respondent was said to have filed this suit and then sought an order for injunction *EX PARTE*, which the court at first declined to grant. She came back yet again this time seeking to be allowed to construct a perimeter wall for reasons, *inter alia*, that the exposed site of construction posed insecurity to the public. The court then granted an order allowing construction of perimeter wall only. The 1st Respondent however decided to build the house as well.

6. While the first Respondent’s application for restraining orders awaited interparties hearing and determination, the Applicant filed his own application for restraining orders. The application was dated 8/9/2016. The court gave an interim restraining order prohibiting construction

of the house but allowing construction of what remained of the perimeter wall. That order was given on 10/11/2016.

7. Later on, the two applications for restraining orders, each from the opposing side, were handled together and, by a ruling delivered on 25/1/2017, the court gave an order that applied to both sides. The extracted order was as follows in the relevant part:

“That pending the hearing and determination of the suit herein, both the Plaintiff and the Defendant, by themselves, their servants, agents or people working under them or at their direction are restrained from selling, disposing off, leasing, alienating, constructing on, intermeddling, using, or interfering in any manner with land parcel number SOUTH TESO/ANGOROMO/[...]”.

8. The order of 10/11/2016 was served on the site contractor on 22/11/2016. It was also served on 1st Respondent’s advocate. The order that applied to both sides was served on the 3rd Respondent at the construction site on 30/3/2017 and a copy of the order was also put on the door of one of the rooms. On 25/4/2017 the Applicant went back to the site and found construction still going on. All this is what necessitated the filing of this application. The affidavit of the Applicant also came with photographic evidence, with annexure AIK-1 showing the site without the constructed house. It also shows 2nd and 3rd Respondents on site. ALK-3 shows construction of the house that had reached the roofing stage, and that is same position regarding ALK-4. ALK-6 shows a completely roofed house.

9. The response of the respondents appears in two forms. There are grounds of opposition filed on 18/10/2017. The grounds show the 1st Respondent saying the application is without merit, contain lies, is not based on good reasons, and is frivolous and an abuse of the court process. Then there was a replying affidavit filed on 14/11/2017 which, *inter alia*, faults the joinder of 2nd and 3rd Respondents to the application and asserts that these two are not parties to the suit. The two were said not to be mentioned by names in the orders said to have been disobeyed. They were also said not to have been served. It was further stated that the 2nd and 3rd Respondents were not agents, servants or contractors of the 1st Respondent.

10. The responses filed elicited the filing of a supplementary affidavit by the Applicant on 17/1/2018. He deposed, *inter alia*, that 2nd Respondent is sister to 1st Respondent and she is the one who receives money meant for construction. The 3rd Respondent was said to be living in one of the rooms in the constructed house and is 1st Respondent’s foreman. The 1st Respondent is said to be living abroad. Even then however, she has her advocate who keeps, or ought to keep, her informed. The Applicant then averred that he went to the construction site on 7/11/2017 and found the 3rd Respondent supervising on-going construction. Some annexures – AK-1- were availed showing a more completed house under construction.

11. The application was canvassed by way of written submissions. The Applicant’s submissions were filed on 31/5/2018. The submissions started with a highlight containing some background and history. Then reference was made to the ruling delivered on 25/1/2017 that restrained both sides from disposing off the plot or undertaking construction activities. Immediately after the delivery of the ruling, the Respondents side unsuccessfully sought for stay. Basically, the court declined to grant stay because the order issued was meant to preserve the suit property.

12. The Applicant submitted that it is clear that even after restraining orders were issued on two different occasions, the 1st Respondent continued construction through her agents. That’s what prompted the Applicant to file this application. It was then pointed out that when the applicant filed his application to restrain the respondents, he knew those who were engaged in adverse activities on his plot. And when the court issued the orders, he knew the persons to be served. And this is so in both instances. The 1st respondent lives abroad. But her counsel was served and he acknowledged service. For the other two Respondents, the Applicant accompanied the process server to serve the order. He also took various photographs showing the progress of the construction. The orders were not only served on the Respondents but also displayed on one of the doors of the building under construction. Even then however, construction continued.

13. The Respondents submission were filed on 17/7/2018. According to the 1st Respondent, the Applicant needed to prove contempt beyond reasonable doubt. The submissions then faulted the photographs availed. It was pointed out that the photograph said to show 2nd Respondent (ALK-1) is inadequate because it does not show when and where the photograph was taken. And the land shown on it is not shown to be the one in dispute. Even the image of the Respondent in the photograph was disputed. The image is not hers, it was said, and no evidence was availed to prove otherwise.

14. The 3rd Respondent was also said not to have disobeyed the order. Questions were asked as to whether his image is in the photos marked ALK 3, 4 & 5. Issues were even raised as to whether the house shown on the photographs is indeed the one under construction. Finally, doubts were raised as to when the photos were taken. According to the Respondents **“there is ambiguity as to whether the images annexed in the affidavit of the Defendant/Applicant reflect a true position of the state of affairs upon which the court can without further interrogation proceed to issue an order of contempt against the Respondents”.**

15. Further, it was submitted that the 1st Respondent was not served and even the other Respondents said to be served were not parties to the suit. A different concern related to the interpretation of the order issued on 25/1/2017. According to the Respondents, the order required that the Status Quo be maintained. And the Status Quo, Respondents stated, meant that the 1st Respondent was in actual active occupation of the land. The orders were said not to be tenable as they were interfering with that active occupation.

16. I have considered the application, the response made, rival submissions, and the pleadings on record generally. The antecedents and background of this matter is as given by the Applicant. The 1st Respondent filed her suit through counsel on 25/7/2016. Contemporaneously with the suit was also filed an application for temporary restraining orders. That application first came up in court *ex parte* on 26/7/2016. The court declined to issue a restraining order *ex parte* and directed that service be effected first. Records show that a few days later – on 28/7/2016 to be specific – the same application was brought to court again, this time with a heightened sense of urgency. And the urgency was said to consist in the fact that the site was exposed and was therefore dangerous to the public.

17. The court granted a limited injunctive relief allowing only construction of a perimeter wall to secure the site. The court got convinced to grant the order when the contractor then onsite, one Josephat Bless Magio, swore an affidavit dated 28/7/2016 and stressed the need to secure the site which, according to him, had trenches and a borehole which could pose danger to the public. And there were also building materials that would likely be lost or stolen if a perimeter wall was not constructed.

18. It appears clear that that was the justification the Respondents side was waiting for to start all construction work in earnest. At no single time did the court authorise construction of the house. The Applicant is shown on record to have complained about the on-going unauthorised construction. He even filed his own application for restraining orders in a bid to stop what was going on. The application also came up in court *Ex parte* but the court declined to give a restraining order. It directed that service be done first. Later on, the two counter-applications for restraining orders were entertained together and the court delivered a composite ruling on 25/1/2017.

19. The order issued is in the last paragraph of that ruling and the relevant part runs thus:

“Accordingly, pending hearing and determination of the suit herein, both the Plaintiff and the Defendant, by themselves, servants, agents, or people working under them or at their direction are restrained from selling, disposing off, leasing, alienating, constructing on, intermeddling, using, or interfering in any manner with land parcel No. SOUTH TESO/ANGOROMO/[...]”.

20. The order extracted from the ruling was as follows in the relevant part:

“That pending the hearing and determination of the suit herein, both the Plaintiff and the Defendant by themselves, their servants, agents, or people working under them or at their direction are restrained form selling, disposing off, leading, alienating, constructing on, intermeddling, suing or interfering in any manner with land parcel No. SOUTH TESO/ANGOROMO/[...]”.

It can be seen that the extracted order is on all fours with order granted in the ruling in substance, tenor, purport and meaning.

21. An earlier order had also been given interparties, this time restraining the 1st Respondent (as Plaintiff) from constructing or undertaking any other activity on the land. The order was granted on 10/11/2016 and was subsequently extracted by the Applicant’s side. The relevant part of the extracted order is as follows:

“That an order of injunction be and is hereby issued restraining the Plaintiff, her agents, servants, contractors and all persons claiming to act through her from doing construction or undertaking any other activity on land parcel No. SOUTH TESO/ANGOROMO/[...] until the two applications dated 25/7/2016 and 8/9/2016 are heard and determined”.

22. The position of the Applicant is that construction of the intended house went on in utter disregard of the court orders restraining it. And all this happened at the behest of 2nd and 3rd Respondents as the people on the ground, and with the blessings and financing of the 1st Respondent who lives in U.S.A. That is why the Applicant wants the Respondents punished.

23. It is clear that the 2nd and 3rd Respondents were represented by Ashioya who filed grounds of opposition and a replying affidavit. In addition he filed short submissions on 18/10/2017. I have looked at these submissions too. Their main thrust is that the two Respondents are not mentioned by names in the two orders of which they are said to be in contempt. They had no responsibility, it was submitted, to do or not to do anything. According to counsel, these Respondents were not aware of the orders and were not agents of 1st Respondent who lives in U.S.A.

24. The submissions of the Respondents advanced arguments based on standard of proof required, evidential value of the photographs availed, status of the 2nd and 3rd Respondents in the suit, non-service of the orders on 1st Respondent, and interpretation of the order issued on 25/1/2017. Also raised as a pertinent point is that the Applicant and the 1st Respondent, though estranged, are still husband and wife and that the disputed land is very much family land. A related point is that there are pending divorce proceedings in Nairobi.

25. On the standard of proof, the Respondent did not avail a decided case showing that proof should be beyond reasonable doubt. I make this observation because that has not been the position in Kenya. The requirement to prove contempt beyond reasonable doubt is very much to be found in English Law jurisprudence. For instance: In **RE Bramblevale Limited [1969] 3 ALL ER 1062** at page 1063, Denning L J (as he then was) made a dictum as follows:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt”.

26. And in **Dean Vs Dean [1987] FLR 517** (Civil Division) the court stated that contempt of court whether civil or criminal is a common law misdemeanour and it has long been recognised that proceedings of contempt of court were criminal or quasi-criminal in nature and that the case against the alleged contemnor must be proved to the criminal standard of proof, namely beyond reasonable doubt.

27. In Kenya however, the standard seems to be different. True, I have heard it argued more than once that the proof in Kenya is also beyond reasonable doubt. But the preponderant position in Kenya is as stated by the court of Appeal in the case of **Gatharia Mutitika & others Vs Baharini Farm Limited [1987] eKLR** where the court expressed itself as follows while differing from the English Law position:

“With the greatest possible respect to that English judge, the proof is much too high for an offence “of a criminal character”

and ipso facto not a criminal offence properly so defined in our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, and almost but not exactly, proof beyond reasonable doubt. We envisage no difficulty in court determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature”.

Given all this, I take the position that the Respondents counsel was not very correct in his observations concerning the standard of proof in Kenya.

28. The other concern related to the value of the photographs availed by the Applicants. The concern raised focused on lack of clarity as to where and when the photographs were taken, whether the land shown on them is indeed the land in dispute, whether the image on one of them is really that of 2nd Respondent, whether the house shown on some of them is indeed the house under construction, and, finally, whether the photographs could have been taken elsewhere and then alleged to have been taken on the disputed land.

29. *Prima facie*, these concerns look genuine and reasonable until one thinks further and realises that counsel for the Respondent has taken the photographs as stand-alone evidence instead of what they really are: back-up evidence for depositions made by the Applicant. The fact of the matter is that no photograph or image perse can adequately explain its contents or where and when it was taken. Whether one is looking at photographs or images as we ordinarily do in daily newspapers or on our Television sets, they make little or no sense at all if not accompanied by written or oral communication explaining what they are all about. And this is the same when one is using them in a court of law.

30. In the matter at hand, the photographs, marked variously as AIK-1, AIK-3, AIK-4 and AIK-6 show progress in the unauthorised construction of the house on the disputed plot. If counsel for the Applicant had bothered to check, or cared to think more if he checked, he would have found that at each point the photographs were availed, the applicant made a serious point and then availed the photographs as back-up evidence. The move to isolate the photographs and treat them as stand-alone evidence is very much a creation of the Respondents counsel. It was the wrong move to make. Worse still, he makes that wrong move and then proceed to base his submissions on it. The correct approach in my view would have been to look at the averments made at each stage the photographs were availed and then disapprove the averments.

31. And disapproving the averments should not consist of bare denials. Where a person builds a good case against an opponent, mere denials cannot be taken as a good defence or response. I am aware of the legal maxim: *FACTUM NEGANTIS NULLA PROBATIO*, meaning no proof is incumbent on a person who denies a fact. But a party – particularly a defendant – would do well in a court of law by not taking this maxim literally. I say this because a good case is always displaced by a good defence. And a good defence is not one containing only bare or mere denials. A good defence always comprise of denials that are accompanied by good and credible explanations. And the standard of proof for the Respondent is low; it is on a balance of probabilities. Their task is therefore easier.

32. I am making these observations because of the manner the Respondent approached the issue of photographs. To them, the woman shown on one of the photographs is not the 2nd Respondent. That denial is good. But it should have been followed with an explanation. And a good explanation would, in my view, consist in the 2nd Respondent availing her own photograph or, as an alternative, availing herself in court so that the court can see her. That would have shown the Applicant to be a liar.

33. It was suggested that the house shown on the photograph may have been taken at a place other than the disputed plot. Again here, it is not enough to insinuate. Give explanation. Tell us where they were taken. Give us your own photographs showing how the site looks like. Had this been done, I am reasonably sure that the court would have chosen to visit the site first before concluding this application.

34. The point made in all this is that the Respondent’s counsel made pertinent points but failed to advance them to their logical conclusion. In a manner of speaking, the points were made and then left hanging in the air. The end result is failure by the Respondent to displace the Applicant’s position.

35. There was then the issue of the status of the 2nd & 3rd Respondents in the suit. To the Respondents; they are non-parties and cannot therefore be cited for contempt. Each case needs to be appreciated in light of its own facts and/or circumstances. The 1st Respondent lives in U.S.A. She is constructing a house here in Kenya. She does it through people. The Applicant knows the 1st Respondent well. She is his wife. The orders issued by the court not only restrained the 1st Respondent but also her servants, agents, or people working under her or at her direction. The 2nd and 3rd Respondents are in this category. Where the issue is whether persons who are not a parties to the suit are an agents, servants, employees or something else, the interpretation of these terms by the court should be liberal and broad, not narrowly or shallowly grammatical or strictly legalistic. A narrow, strict or legalistic approach would make crooks on hire to escape punishment easily and the courts would become laughing stocks to such crooks.

36. A part from the 1st Respondent, the other people restrained did not have to be parties to the suit. Normally, restraining orders issued by courts are worded in generally the same way that the orders herein are worded. Now a question arises whether a person not named in a suit as party but served with a court order can be punished for contempt. And my answer to this is a **SIMPLE YES**. A different position would make punishment for contempt well-nigh impossible. It would make it very easy for parties to suit to circumvent court orders. The parties would do so by easily making other people perform restrained tasks for them. People who are found performing tasks or acts in violation of court orders do not require to be enjoined in the case as parties. And this is so because they are not meant to be parties to the case. They are only brought to court to answer for what they have been found doing.

37. And a related concern also arises: Does one need to go to great lengths to prove that an alleged contemnor is an agent, or servant or employees of the restrained party. Again here, it would depend on the circumstances of the case. I think the court should approach the issue with a very open mind. In my view, where performance of certain tasks or work is restrained at a given place, it is enough for the court to infer that a person seen performing such tasks or work at that place is indeed a servant, agent, employee of the party in the suit against who

the order is issued. I am not therefore persuaded that the 2nd and 3rd Respondents needed to be parties to the suit. To me, it is enough that the Applicant saw them and had knowledge that they were involved in one way or another in the undertaking of the unauthorised activity on the disputed plot.

38. Counsel for the 1st Respondent also submitted that the 1st Respondent was not served. It would appear to be his position that the 1st Respondent should have been personally served. I beg to differ. To me, it is enough that counsel for 1st Respondent was served or was in court when the orders were made. And that is precisely the position that obtains here.

39. I need to explain my position: There is always a rebuttable presumption that when an advocate appears in court on instruction of a party, it behoves him to report back to the client all that transpired in court that has a bearing on the client's case. Therefore knowledge of the judgment or order made by the court by the contemnor's advocate suffice in contempt proceedings. My views would find support in the Canadian case of **Bhatneger Vs Canada (Minister of Employment and immigration) [1990] 2 SCR 217** where it was held, *inter alia*, that a finding of knowledge on the part of the client would be inferred from the fact that the solicitor was informed. Similarly, in the American case of **United States Vs Revie: 834 F. 2d 1198, 1203 (5th Cir. 1987)** it was held that a defendant had adequate knowledge of a notice to show cause order because his attorney was on notice.

40. In our local jurisprudence, Lenaola J (as he then was) expressed generally similar views in the case of **Basil Criticos Vs Attorney General [2012] eKLR** when he stated the view that personal service was not needed where a part clearly acts and shows that he had knowledge of the court order. He observed further that service would be unnecessary where a party is represented by counsel who was present in court when the orders were made.

41. Counsel for the Respondent also raised issues with the interpretation of the orders. I find this to be a red-herring of sorts. Clearly, the orders as issued are in plain and clear language. It is clear for instance that use of the land or construction on it is restrained. And if for any reason counsel for the Respondent did not understand the orders so that he could explain them well to his clients, he needed to seize the first opportunity to seek clarification or interpretation from the court. He never did so. He now belatedly turns around to raise the issue of interpretation. I have said that the issue is a red-herring possibly meant to turn attention away from the fact that illegal construction has already taken place with full knowledge and even participation of his client.

42. The court was told to note "**other intervening factors**" like the parties being husband and wife or the disputed land being family land, or even that there is a pending divorce case in Nairobi. All this really does not matter. Nothing in them or about them obviate the need to respect and obey court orders. Obedience of court orders is paramount as it plays primal role in the sustenance of judicial authority and efficacy.

43. Disobedience of such orders undermines the very foundation of the rule of law and also undermines the authority and dignity of the courts. Infact, it is the very concept of justice that is undermined by contempt and not necessarily the individual judge or court seized of the matter. Obedience therefore is not optional; it is compulsory and one does not choose whether to obey a court order or not.

44. I have taken time to make reference to Respondents submissions in order to point out and explain why I don't agree with them. I need to point out also that I have read Applicant's submissions and I am generally in agreement with their substance, tenor, and thrust. The disputed plot is registered in the name of the Applicant. When he complained, he knew and had seen what was happening. When he says he knows the people involved, I take him seriously. He showed well that when the matter came to court the first time, no building was there. And this is true because when the 1st Respondent came to court seeking to be allowed to construct a perimeter wall, her then contractor swore an affidavit talking of foundation trenches and an open borehole which posed danger to members of the public.

45. When the Applicant was filing this application, the situation had changed. The affidavit that came with his application and the photographs availed as annexures told of a house that had been constructed over time to the point where roofing was complete. If one were to agree with the Respondents or their counsel, the work was done by unknown people. In other words, it is some faceless characters, unknown or possibly unknowable, who financed and oversaw the construction of the building, with the clients being completely clueless as to what was happening. Fortunately however, the Applicant gave his story and demonstrated its truth. The Respondents on the other hand would rather hide behind the technicality of the law or distort truth through unsubstantiated insinuations. Only the gullible can buy their story.

46. I am convinced that the three Respondents were in it all. The Applicant has convinced me beyond a mere balance of probabilities that all the three were involved. What happened was not a single incident. It is something that happened over a period of one year. What the Applicant availed show that he saw it and he knew the people behind the unauthorised construction. Among these people are the three Respondents. I therefore find the application herein meritorious and grant prayers (a) and (b). And because of the blatant manner in which disobedience of this court's orders was done, I also grant costs of the application to the Applicant. In different circumstances, I would have ordered each side to bear its own costs.

47. Having found merits in the application and allowed it, I now direct that if the Respondents happen not to be in court at the time of the delivery of this ruling, the Applicant should act with all due dispatch to ensure they are brought to court for further necessary action.

Dated, signed and delivered at Busia this 28th day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Absent

1st Respondent: Absent

2nd Respondent: Absent

3rd Respondent: Absent

Counsel for the Applicant: Absent

Counsel for the Respondents: Present

Court Assistant: Nelson Odame