



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC MISC APPLICATION NO. 1 OF 2019

JAMES MUCHINA WANDUTU.....APPLICANT

VS

COUNTY GOVERNMENT OF MURANGA.....1ST RESPONDENT

PATRICK MUKURIA, COUNTY SECRETARY

COUNTY GOVERNMENT OF MURANGA.....2ND RESPONDENT

JEREMIAH KAMAU, COUNTY ADMINISTRATOR,

COUNTY GOVERNMENT OF MURANGA.....3RD RESPONDENT

JOSEPH NJAGI, COUNTY ENFORCEMENT OFFICER,

COUNTY GOVERNMENT OF MURANGA.....4TH RESPONDENT

JOHN KARICHU, DRIVER, COUNTY

GOVERNMENT OF MURANGA.....5TH RESPONDENT

RULING

1. The Applicant filed a Notice of Motion under section 5(1) of the Judicature Act Cap 8 Laws of Kenya, Part 81.4 of the Civil Procedure Rules, 1999 of the Supreme Court of England, the inherent jurisdiction of the Court and all other enabling provisions of the law seeking the following orders; -

a. Spent

b. This application be certified as urgent and service thereof be dispensed with in the first instance. Hearing of this application to proceed ex-parte in the first instance.

c. This Honourable Court be pleased to punish the 1st Respondent herein by imposing a fine to be determined by the Honourable Court upon the 1st Respondent for willful disobedience of the orders of the High Court at Nairobi issued on 28th March 2012 in **JR.Misc. Application No.563 of 2006 R.v. Murang'a Municipal Council & Another Ex. Parter James Muchuna Wandutu.**

d. An order for the arrest and committal to prison of **Patrick Mukuria, Jeremiah Kamau, Joseph Njagi & John Karichu**, the 2nd, 3rd, 4th & 5th Respondents herein for willful disobedience of the judgement and orders of the High Court at Nairobi issued on 28th March 2012 in JR.Misc. Application No.563 of 2006 R.v. Murang'a Municipal Council & Another Ex. Parter James Muchina Wandutu.

e. That the Honourable Court to order the 1st, 2nd, 3rd, 4th & 5th Respondents, jointly and/or severally to compensate the Applicant his cost of putting up the wall Kshs.71,950.00 with interest at Court rates from 13th December, 2018 until payment in full.

f. An order directing the Officer Commanding Murang'a Police Station to provide peace and security and enforce strict compliance

with the orders of High Court at Nairobi given on 28th March 2012 in JR.Misc.Civil Application No.563 of 2006.

g. An order that the costs of these contempt proceedings be borne by the 1st, 2nd, 3rd, 4th & 5th Respondents jointly and/or severally/

h. Any other or further order that this Honourable Court may deem fit to grant.

2. The application is premised on the following grounds; That the High Court at Nairobi in **JR.Misc. Application No.563 of 2006 R.v. Murang'a Municipal Council & Another Ex.Parter James Wandutu** (the Applicant herein) heard and determined the case and issued the following orders;-

a. An order of Certiorari to remove to the High Court for purpose of quashing the decision of the Respondent herein to pull down the fence on all that land known as Murang'a Municipality/Block 2/463 made by the Respondent on 26th September 2006.

b. An order of prohibition stopping the Respondent and its servants from pulling down my fence and any other approved development carried out on the property known as Murang'a Municipality/Block 2/463.

c. On 13th December 2018 at around 3p.m. a contingent of persons, using motor vehicle No.KUL 310 belonging to the 1st Respondent herein and driven by the 5th Respondent, drove onto the said property and destroyed the fence, and thereafter loaded the iron sheets, timber and some of the barbed wire used to fence it onto the lorry.

d. The 5th Respondent is a junior functionary of the 1st Respondent and could not have executed the demotion without authority from 1st, 2nd 3rd & 4th Respondent

e. The Applicant has no other way of enforcing the said order.

3. That the judgement was delivered in the presence of the counsel for the 1st Respondent and the orders were further served on the 1st Respondent on the 23/5/12. That the said judgment has not been set aside appealed or vacated. That he is the registered owner of MURANGA/MUN/BLOCK2/463. That on 23/10/18 he and his brother who happen to be the owner of the adjacent land, MURANGA/MUN/BLOCK2/462 spent Kshs. 143,181 to fence the property. That on the 13/12/18 at around 3 pm a contingent of officers of the 1st Respondent drove to the suit land in a M/V KUL 310 belonging to the 1st Respondent and driven by the 5th Respondent who is an employee of the Respondent and known to the Applicant. They destroyed the fence and loaded the iron sheets timber and barbed wire onto the lorry and carted it away. That he witnessed the happenings from his bar namely central bar and restaurant, opposite the suit land on Kenyatta Avenue. That he instructed John Kigi Mwangi to take the photos of the occurrence on the ground which he did using his cell phone.

4. Citing hostility from the 3rd Respondent, he recalled an incident on 11/7/16 where he claimed that he sought consent to establish a timber yard on the suit lands whereupon the 3rd Respondent informed him that the suit land is designated as a bus park and that he will not be permitted to develop it. He believes that the 3rd Respondent acted upon the instructions of the 1st, 2nd, 3rd and 4th Respondents. That he has been paying rates to the 1st Respondent and attached a payment receipt for 2/1/19 in support.

5. He urged the Court to punish the Respondents for contempt. He also sought a refund of Ksh. 71,590 being the costs of fencing of the suit land. he annexed the decree of the Court in JR 563 of 2006, photographs of the suit land and fence *interalia*.

6. The application was opposed by the 1st and 2nd Respondents through the Replying Affidavit of its County Secretary, Patrick Mukuria who deponed *interalia* that the 1st Respondent is a stranger to the orders issued in JR No 563 of 2006 as it came into being in 2013. That at the time of issuing the said orders the 1st Respondent was not in existence and therefore no service was effected upon it. Equally he contends that the 2nd – 5th Respondents were not employees of the 1st Respondent and therefore not privy to the said orders. He denied that the Respondents destroyed the fence of the suit land. He termed the allegations that the 5th Respondent drove into the suit land and destroyed the fence on the instructions of the Respondents as misleading, false and baseless.

7. The 3rd Respondent reiterated the evidence of the 1st Respondent and added that the office of the 3rd Respondent was created in 2013. That he was not in the employ then of the 1st Respondent. He was unaware of the said orders which were brought to his attention upon service upon the 2nd Respondent. He denied instructing the 5th Respondent to drive into the suit land and destroy the fence and termed the allegations baseless and unfounded.

8. The 4th and 5th Respondents did not oppose the application.

9. On the 11/3/19 the parties elected to file written submissions as directed by the Court. However, the Respondents failed to file any written submissions.

10. The Applicant submitted that the Respondents had knowledge of the orders issued in JR 563 of 2006 as the judgment was delivered in the presence of its counsel and further that the orders were served upon the defunct Municipal Council of Muranga on the 23/5/12. That the 1st Respondent is the successor in title of the defunct Municipal Council of Murang'a and hence takes responsibility and liability and judgements of the defunct entity. He submitted that the Respondents had knowledge of the orders and was bound by it and had a corresponding duty to obey it.

11. It submitted that the Respondents conduct of acting in contempt is an affront to the administration of justice and the authority of the Court. That the Respondents breached the orders of the Court willingly and as such must be punished.

12. The issues for determination;

- a. Whether the Respondents are in contempt of the Court orders issued in JR 563 of 2006.
- b. Costs of the application

13. **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.”

14. 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.

(2) In any case not relating to civil or criminal proceedings as contemplated under subsection (1), an act that is willfully committed to interfere, obstruct or interrupt the due process of the administration of justice in relation to any Court, or to lower the authority of a Court, or to scandalize a judge, judicial officer in relation to any proceedings before the Court, on any other manner constitutes contempt of Court.”

Section 5(b) of the aforesaid Act gives this Court the power to punish for contempt of Court.”

15. Section 63(c) of the Civil Procedure Act provides as follows; -

“In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed—

- (a)
- (b)
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”

16. Order 40 Rule 3 of the Civil Procedure Rules provides the consequences of contempt which includes, in case of disobedience or breach of any terms of Court Order, an order for 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 6 months. This goes to show that the punishment for contempt is not light, other than attachment of the property of the guilty contemnor, his liberty is also at stake.

17. Contempt is necessary for maintenance of law and Order and so that the dignity of the Courts is upheld. It is trite law that every person against whom a Court Order is made against has unqualified obligation to obey the Order however unpalatable the Order may be until or unless the Order is discharged or set aside. See **Econet Wireless Kenya Ltd vs. Minister for information & Communication of Kenya & Another [2005] 1 KLR 828** where the Court noted;

“Where an application for committal for contempt of Court orders is made the Court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance, an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious—a contemnor would have no right of audience in any Court of law unless he is punished or purges the contempt.”

18. In the **Teachers Service Commission V Kenya National Union of Teachers & 2 others (2013) EKLR** Justice Ndolo stated as follows;

“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 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”.

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

20. In order to succeed in civil contempt proceedings, the Applicant is duty bound to prove the following 4 elements; -

- 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.

21. On the onset, I wish to address the mistaken belief by the Respondents that the orders, if any, were issued against defunct Muranga County Government and not the County Government.

22. The Urban Areas Act which was enacted to provide for the criteria of establishing urban areas provides for pending actions and proceedings in Courts. Section 59 of the stated Act provides thus:

“Any legal right accrued, cause of action commenced in any Court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against the body established by law.”

23. The current County Governments are established under the provisions of Article 176 of the Constitution and replaced the Local Authority whose Town Clerk was sued in this case. In the case of **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** Majanja, J stated that:

“The County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgment. The Court cannot grant orders incapable of enforcement as the Town Council and its town clerk no longer exist. (**Minister of Land & 2 Others Exparte Kimeo Stores LTD (2011) eKLR, Kenya National Examination Council vs. Republic Exparte Geoffrey Gathengi Njoroge & Others CA Civil Appeal No. 266 of 1996.**”

24. I have perused the judgement of the Court issued in 2012 in JR No 563 of 2006. The parties in this case were the Plaintiff and the Muranga Municipal Council and Director of Physical Planning. The orders issued are stated in para 2 of the ruling.

25. The Applicant has beseeched this Court to punish the Respondents for contempt of the above orders. The Applicant has argued that the judgement was delivered in the presence of the counsel for the Respondents. Order 5 rule 3 states that a suit against a corporation must be served on the principle officers of the organization. In this case the Applicant has averred that the Respondents were served with the Court orders in 2012. The affidavit of service dated the 9/7/19 is scanty on the particulars of the person who was served. The process server depones that he travelled to the said offices on 23/5/12 where he found a lady at the reception and served her with the orders. The name of the person served was not disclosed nor did the Applicant disclose if indeed a principal officer of the 1st Respondent was served. The Respondents have denied service of the orders.

26. The Court finds that there is no clear proof of service of the Court orders aforesaid. This leads the Court to inquire whether the Respondents had knowledge of the order and whether the breach was willful.

27. Knowledge of existence of a Court order is much more important than anything else. That is why the Court of Appeal in the case of **Shimmers Plaza Limited** 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.’

28. In the case of Canadian case of **Bhatnager v Canada Minister of Employment and Immigration [1990]2 SCR.217**, where the Canadian Supreme Court held that a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed.

29. Guided by the decision in **Bhatnager** above, it is the finding of the Court that since Counsel of the 1st Respondent was present in Court when the orders were issued, it can be presumed that its officers had constructive knowledge of the same.

30. Whether there was willful breach of the orders? The Respondents have denied the responsibility of destroying both the fence and the wall of the suit premises. They deny ever instructing the 5th Defendant to drive into the property and destroy the fence. Contempt being a serious quasi criminal offence which if proven could take away the liberty of a contemnor, the standard of proof is higher than that of balance of probability applicable in civil cases. It is however, lower than that of beyond reasonable doubt applied in criminal cases. The Applicant attached photographs of the fence before and after demolition. However, it does not show who demolished the fence and more still the alleged motor vehicle No KUL 310 that was said to have been driven by the 5th Respondent into the property to cause the destruction of the fence. It does not show the contingent of officers accused of having carried out the acts of destruction of the fence.

31. The Applicant bore the cardinal duty and responsibility to prove contempt to the required standard. He failed to do so.

32. The Court is not satisfied that the Respondents were responsible for the breach of the Court orders, destroyed the fence and, is, in the circumstances, unable to hold them in contempt thereof. In the circumstances, it is therefore, not necessary to determine the rest of the prayers in the application.

33. The application is dismissed with costs to the Respondents.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF JULY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Githinji for the Applicant

Ms Maina HB for Ms Wilfred Ngugi for the 1st – 5th Respondents

Irene and Njeri, Court Assistants