



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 126 OF 2012

SIMON TOWETT MARITIM.....PLAINTIFF

VERSUS

JOTHAM MUIRURI KIBARU.....DEFENDANT

CONSOLIDATED WITH

ELC 60 OF 2013

JOTHAM MUIRURI KIBARU.....PLAINTIFF

VERSUS

KIPRONO BEIBEI NYANGUSI.....RESPONDENT

RULING

1. This ruling is in respect of Notice of Motion dated 18th July 2018, filed by Simon Towett Maritim. The following orders are sought in the application:

1. Spent.
2. *THAT this Honourable Court be pleased to find the defendant herein Jotham Muiruri Kibaru guilty of contempt of court.*
3. *THAT this Honourable Court be pleased to order that the defendant herein Jotham Muiruri Kibaru be detained in prison for a period of six (6) months or for such period as this Honourable Court shall deem necessary for being in disobedience of the Court Orders of 15th May, 2018 and for acting in contravention and in contempt of the said orders.*
4. *THAT this Honourable Court be pleased to order the defendant herein Jotham Muiruri Kibaru detained in prison for a period not exceeding six (6) months or such other period as the Court May deem fit and to pay a fine of Kenya Shillings Two Hundred Thousand Only (Kshs.200,000.00).*
5. *THAT in addition to and without prejudice to prayers 2, 3 and 4 this Honourable Court be pleased to order the defendant to demolish the offending structures at his own cost.*
6. *THAT costs of this application be provided for and the same be borne by the defendant in any event.*

2. The application is supported by an affidavit sworn by the applicant. The respondent opposed the application through a replying affidavit sworn by himself and two other affidavits, one sworn by Robert Macharia and the other by Peter Ngatia. An order was made by consent that the application be canvassed by written submissions. The respondent filed submissions on 21st November 2018. There are no submissions from the applicant on record.

3. I have considered the application, the affidavits filed and the submissions on record. The applicant seeks to have the respondent cited and punished for disobeying the orders of the court made on 15th May 2018. Those orders were made in a ruling delivered on 15th May 2018 upon hearing Notice of Motion dated 14th February 2017. The ruling was delivered in the presence of counsel for the respondent and orders made were in the following terms:

... I grant an injunction restraining the defendant (Jotham Muiruri Kinaru) from erecting structures, constructing on, depositing construction materials upon or in any other manner carrying out any developments on land parcel number Dundori/Mugwathi Block 2/20 for a period of 18 (eighteen) months from the date of delivery of this ruling. Costs of the application are awarded to the applicant.

4. All persons upon whom a court order is served or who are aware of a court order have a duty to obey it. That is the irreducible minimum. The only avenue available for a party who is not satisfied with an order of the court is to approach the court seeking variation or setting aside. The Court of Appeal recently rendered itself in **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others** [2018] eKLR as follows:

When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.

5. Contempt of court is a serious matter, both from the point of view that the very root of the dignity of the court and law and order are threatened and due to the fact that liberty and fundamental rights and freedoms of the alleged contemnor are at stake. It is therefore a general requirement that the actions or omissions that are said to constitute contempt be precisely defined and proven to a standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. In **Republic v Ahmad Abolfathi Mohammed & Another** (2018) eKLR, the Supreme Court stated as follows:

We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:

'n our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.'

[29] The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she wilfully acted in a manner that flouted the Court Order.

6. The applicant herein contends that the respondent has disobeyed the order by continuing with construction work during the pendency of Notice of Motion dated 14th February 2017 and even after the order was made. He says that he discovered so on 5th June 2018 and issued a cautionary letter through his advocates on that very date. Further, that visitation to the suit land on 11th July 2018 revealed that construction was going on and that the respondent was at that point roofing buildings which he had constructed. He annexed a copy of the letter dated 5th June 2018 and some photographs.

7. The respondent has denied violating the order after it was made on 15th May 2018. According to him, he put up a wall on the western side of his plot in January 2018, before the order was made. He did so using the services of Peter Ngatia, the deponent of one of the replying affidavits. He added that before the wall could be completed, one of his neighbours by the name of Gatu Mwangi reported him to the local chief alleging that he had encroached on his land. As a result, the respondent's advocates wrote a letter dated 11th January 2018 to Gatu Mwangi and the chief. He annexed a copy of the letter. He added that he erected the shop that the applicant is complaining about from late March to mid April 2018 and that it was not complete as at the date of his affidavit. He annexed some photographs and copies of receipts in respect of construction material used. The applicant did not file any affidavit in response to the respondent's affidavit.

8. To succeed, the applicant must prove his allegations to a standard higher than proof on the balance of probabilities but not beyond reasonable doubt. That calls for precision as regards the date and manner of the alleged contemptuous acts. In that regard, he has alleged that the respondent continued with construction work during the pendency of Notice of Motion dated 14th February 2017 and even after the order was made. Other than stating that he 'discovered' on 5th June 2018 and that 'visitation to the suit land on 11th July 2018 revealed that' construction was going on, he has not given precise dates when the construction took place. He has not stated who visited the suit land on those dates. The photographs annexed do not have dates and do not show actual construction going on. In such circumstances it is possible as the respondent contends, that the construction took place before 15th May 2018, in which case there would be no breach.

9. From the material placed before the court, I am not persuaded that the applicant has discharged the higher burden of proof facing him. I find no merit in Notice of Motion dated 18th July 2018. It is dismissed with costs to Jotham Muiruri Kibaru.

10. Ruling herein was to be delivered on 3rd April 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 29th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff in ELC No. 126 of 2012

Ms Wambui holding brief for Mr Mutonyi for the defendant in ELC No. 126 of 2012

Court Assistants: Beatrice & Lotkomoi