



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 310 OF 2017

**ARTHUR MATHITU NDERITU & JOSEPH**

**WACHIRA NDERITU suing as representatives of STANELY**

**NDERITU NGARI (deceased).....PLAINTIFF/RESPONDENTS**

**VERSUS**

**SETTLEMENT FUND TRUSTEES.....1<sup>st</sup> DEFENDANT**

**AYUB WANG'ONDU KIBIL.....2<sup>nd</sup> DEFENDANT/APPLICANT**

**NYANDARUA DISTRICT LAND REGISTRAR.....3<sup>rd</sup> DEFENDANT**

**AND**

**FREDRICK WAN'GOMBE NDERITU..1<sup>st</sup> PROPOSED INTERESTED PARTY/RESPONDENT**

**THAIRU NDERITU.....2<sup>nd</sup> PROPOSED INTERESTED PARTY/RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 20<sup>th</sup> February 2019 brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Section 5 of the Judicature Act, *Order 51 Rule 1 of the Civil Procedure Rules* and all other enabling provisions of the law where the Applicant seeks for the following orders:

**i. Spent.....**

ii. That this Honorable Court be pleased to enjoin Fredrick Wang'ombe Nderitu and Thairu Nderitu as interested parties/Respondents for the purposes of this application.

iii. That Arthur Mathitu Nderitu, Joseph Wachira Nderitu, the Respondents herein, be punished by the court for contempt of court orders made by this court in the instant suit under the judgment and decree dated 22<sup>nd</sup> March, 2012 and the eviction order dated 14<sup>th</sup> November, 2017.

iv. That the court directs the court bailiff, Mr. Joseph Kariuki Karoki trading as M/s Muibau Auctioneers, to demolish destroy and remove the new buildings built by the Respondents in the property known as Land Title Number NYANDARUA/SOUTH KINANGOP/3273 and the County Police Commander, Nyandarua County the OCPD, Kinangop Police Division and the OCS, Haraka Police Station do jointly provide security to the court bailiff and maintain law and order during such demolition, destruction and removal.

v. That the County Police Commander, Nyandarua County, the OCPD, Kinangop Police Division and the OCS, Haraka Police Station do jointly provide adequate security to the 2<sup>nd</sup> Defendant/Applicant to enable the 2<sup>nd</sup> Defendant/Applicant take vacant possession of the suit land, being Land Title Number NYANDARUA/SOUTH KINANGOP/3273.

vi. That the orders herein be served upon the County Police Commander, Nyandarua County, the OCPD, Kinangop Police Division and the OCS, Haraka Police Station for compliance.

vii. That this Honorable Court do make any other or further orders that the court may deem necessary to give effect to the judgment and decree dated 22<sup>nd</sup> March, 2012 and the eviction order dated 14<sup>th</sup> November, 2017.

viii. That the costs of this application be paid by the Respondents.

2. The said application is supported by the grounds set on the face of it as well as on the sworn affidavits of Ayub Wangonde Kibii the 2<sup>nd</sup> Defendant/Applicant herein. The matter was disposed of by way of written submissions.

### **The 2<sup>nd</sup> Defendant/Applicant's submission**

3. It was 2<sup>nd</sup> Defendant/Applicant's submission that the Application for contempt of court orders had been brought against Arthur Mathitu Nderitu herein referred to as the 1<sup>st</sup> Respondent, Joseph Wachira Nderitu referred to as the 2<sup>nd</sup> Respondent, Fredrick Wangombe Nderitu, the 1<sup>st</sup> interested party herein and Thairu Nderitu, herein referred to as the 2<sup>nd</sup> interested party.

4. That judgment and decree had been delivered on the 22<sup>nd</sup> March 2012 wherein the Plaintiff had been ordered to vacate the suit land within 60 days failure to which the Applicant was to move the court to have him evicted.

5. That on 14<sup>th</sup> November 2017, the court issued eviction orders against the Plaintiff and anybody else from the suit property known as Nyandarua/South/Kingangop/3273 in execution of the said decree dated the 22<sup>nd</sup> March 2012 and issued on the 4<sup>th</sup> May 2012. The eviction was carried out on the 18<sup>th</sup> December 2018 by Joseph Kariuki Karoki trading as Muibu Auctioneers wherein the Plaintiff and his family were evicted from the suit land as is evidenced by annexures marked as AWK 3 and 4 as well as annexures marked as JKK 2 and 3. The Applicant was then put in possession as is evidenced by annexure marked as AWK 5 where he built a wooden fence separating his land No. Nyandarua/South/Kingangop/3273 from the Defendants' deceased's father's land No. Nyandarua/South/Kingangop/3274.

6. That thereafter, the Respondents herein moved back onto the suit land and proceeded to cause wanton destruction of the same by cutting down mature trees, uprooting, pulling down and destroying the Plaintiff's fence as is exhibited in annexure marked as AWK 7 and built new buildings in the suit land as shown by the Applicant's annexures marked as AWK 8 and AWK 9(a) and (b) wherein they have now settled on the suit land in total disregard of the courts' orders. They are therefore in contempt.

7. That after they had been evicted, the 1<sup>st</sup> interested party, Fredrick Wangombe Nderitu, had visited the suit land in the company of the press where he addressed the media before inciting the public and members of the family of the late Stanley Nderitu Ngari to go back and resettle on the suit land. The said footage is saved on the flash disk marked as AWK 6.

8. That despite the Applicant's various reports to the Police at Haraka Police station on the 18<sup>th</sup> and 19<sup>th</sup> December 2018, 7<sup>th</sup> and 22<sup>nd</sup> January 2019, vide ob numbers 10/18/12/2018, 21/18/12/2018, 16/19/12/2018, 15/07/01/2019 and 07/22/01/2019 respectively as well as reports to the DCIO Nyandarua South on the 20<sup>th</sup> December 2018, no action had been taken against the Respondents by the police hence his reason for filing the said application.

9. That save for the grounds of opposition filed by Fredrick Wangombe Nderitu, the 1<sup>st</sup> interested party, the Application was not opposed by the other parties which confirmed that what was deponed in the Applicant's affidavit remained unchallenged and uncontroverted.

10. The Applicant framed his issues for determination and sought to argue them all together wherein he submitted that after the eviction had been carried out, the 1<sup>st</sup> interested party, Fredrick Wangombe Nderitu, incited the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> Respondents and members of their families who went back to the suit land, rebuilt their houses and started committing acts of wanton destruction thereon.

11. The applicant relied on then decided cases of **George Mudiah Gicheru vs Celeste Njue Erenkanya [2018] eKLR** to submit that where the court had faced similar facts it had found both the Respondents and their families in contempt of court orders.

12. That their application to enjoin Fredrick Wangombe Nderitu, and Thairu Nderitu as the interested parties was for the purpose of execution of the application and not for the purpose of an already determined suit and therefore it could not be said that the court was functus officio.

13. The Applicant's submission further was that the powers of the court to punish for contempt of court were inherent and the same were not granted by statute as was held in the case of **Kenya Human Rights Commission vs the Attorney General & Another [2018] eKLR** which decision also declared the Contempt of Court Act invalid.

14. That although the Respondents were served with the present application, they had not purged the contempt which orders had now been sought to guarantee compliance with the court's orders in the discharge of its duties.

15. That the illegal structures built on the Applicant's land should be pulled down in an exercise to be supervised by the applicant under security of the officers mentioned at prayer 4 of the Application.

16. The Applicant, in seeking that the application be allowed, relied on the decided case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** to submit that leave of the court to file contempt proceeding was no longer required and Section 5 of the Judicature Act was now applicable in the circumstance.

## 1<sup>st</sup> proposed interested party's submission

17. The 1<sup>st</sup> proposed interested party's submission was on two grounds of opposition namely that he could not be held liable for contempt and secondly that the said application was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Section 5 of the Judicature Act, *Order 51 Rule 1 of the Civil Procedure Rules*.

18. It was his submission that the orders of the court dated the 11<sup>th</sup> March 2019 were to the effect that the Respondents be served and not the order for enjoinder of parties herein.

19. That since the 1<sup>st</sup> proposed interested party was yet to be enjoined in the proceedings, he could not be termed as a Respondent and neither could he be enjoined at this stage as he was not party in the concluded suit as was held in the decided cases of **JMK vs MWA & Another [2015] eKLR** and **Lilian Wairimu Ngatho & Another vs Moki Savings Co-operative Society Limited & Another [2014] eKLR**

20. Further submissions were that the court was functus officio as the matter had already been concluded and a judgment entered.

21. On the second issue, it was his submission that the provision under which the present application as brought, being Section 5 of the Judicature Act, was repealed by Section 38 of the Contempt of Court Act No.46 of 2016 and that the said contempt proceedings could not be brought without leave of the court.

22. That before the said enactment of the Contempt of Court Act No.46 of 2016, leave could be sought under Rule 3(3) of the Order 52 of the Rules of the Supreme Court. That there having been no leave sought then present application was a non-starter as was held in the case of **URSK VS KIRDI [2014] eKLR**.

23. That the Application did not meet the threshold as required by the law and the same ought to be dismissed.

### Analyses and determination.

24. The application under consideration was filed on **21<sup>st</sup> February 2019**. The applicant seeks two substantive orders, namely, that the Respondents herein be held in contempt of the court order, and secondly that the interested parties herein be enjoined for the purpose of this application.

25. I have considered the Affidavits on record, the annexures, the submissions of counsel and authorities relied on. 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.”*

26. In **Johnson Vs Grant (1923) SC 789 at 790** Clyde L J noted:-

*“The phrase ‘contempt of court’ does not in the least describe the true nature of the class of offence with which we are here concerned... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged.” (Emphasis mine).*

27. In the case of **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** the court of Appeal held as follows:

*For many years in the history of the Judiciary of Kenya the courts have, pursuant to **section 5 (1)** of the Judicature Act, resorted to the prevailing law of England in the exercise of the power to punish for contempt of court.....*

*Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when section 5 of the Judicature Act was enacted. By Act No.7 of 2011, **Article 163 (9)** of the Constitution was operationalized by the enactment of the Supreme Court Act (CAP 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt.*

*Under **section 29** of the Environment and Land Court Act, it is an offence punishable, upon conviction to a fine of not exceeding Kshs.20,000,000 or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the court given under the Act....*

*We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of court has been expressly clothed with jurisdiction to punish for contempt of court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of court applications*

28. At the time the contempt of court act was committed in the year 2018, the Contempt of Court Act which commenced on the 13<sup>th</sup> January, 2017 had been declared invalid by the High court in the case of **Kenya Human Rights Commission (supra)**. In his application, the Applicant also filed this application pursuant to all other enabling provisions of the law. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court's orders.

29. It was in this respect as observed in the case of **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008**, that the High Court (read Environment and Land court) has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.

30. In addition, in the case of **Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR**, it was held that where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

31. Section 29 of the Environment and Land Court is clear to the effect that;

*Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both*

Having found as herein above, I find the following issues stand out for determination:-

- i. Whether the interested parties herein can be enjoined in the present proceedings.
- ii. Whether this court is functus officio in terms of the application for contempt of court orders.
- iii. Whether the Applicant ought to have sought leave to institute these contempt proceedings.
- iv. Whether notice was issued to the contemnors
- v. **Whether the Respondents are guilty of contempt of court order issued on the 22<sup>nd</sup> March 2012 as well as the eviction order dated the 14<sup>th</sup> November 2017.**

33. It must be noted on the one set that although the application dated the 20<sup>th</sup> February 2019 was served upon all the parties herein as per the affidavit of service filed on the 11<sup>th</sup> March 2019, only the 1<sup>st</sup> proposed interested party filed his response to the same wherein he attacked the procedure in which it had been filed thus failing to address the substance of the Application.

34. On the first issue herein as to whether the interested parties herein can be enjoined in the present contempt proceedings, I find that since contempt proceedings are quasi criminal in nature. The proof required is not on a balance of probabilities but on a higher standard. In **Halsbury's laws of England at para 463 Vol 9(1) ( Re-issue) 3**, it was stated as follows:-

*"...and a person not a party against whom any judgement or order may be enforced is liable to the same process for enforcing obedience to it as if he were a party".*

35. In the instant case, the alleged contemnors are family members to the deceased plaintiff. If they committed any act of contempt of a court order they can be punished even if they were not party to the suit. It is not contested that they were aware of the judgment and the court decree issued on the 22<sup>nd</sup> March 2012 as well as the eviction orders that were subsequently issued by the court on the 14<sup>th</sup> November 2017. The question which then arises is whether the alleged contemnors disobeyed the said order by going back to the suit land and rebuilding thereon before settling there.

36. To answer this question, it was upon the Applicant to prove satisfactorily that there was re-entry on the suit land by the proposed interested parties despite eviction orders having been issued against them. I have considered the annexures herein annexed to the Applicant affidavit as well as seen the flash disk marked as AWK6 and I am convinced beyond a shadow of doubt the Respondents herein jointly with the interested parties acted in contempt of the court orders of 22<sup>nd</sup> March 2012 . The Applicant had therefore proved that the proposed interested parties had indeed acted in contempt of court orders.

37. On the second issue as to whether this court is functus officio to the said application for contempt of court orders, I find that the doctrine of *functus officio* was well stated by the Court of Appeal in the case of **Telkom Kenya Limited v John Ochanda (Suing on his Behalf and on Behalf of 996 Former Employees of Telkom Kenya Ltd [2013]eKLR** where it held that

*"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon--*

*The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazaire Co, (1879), 12 Ch.D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions.---*

38. The Supreme Court in **Raila Odinga and 2 Others – vs- IEBC and 3 Others (2013) eKLR** cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, **"The origins of the Functus Officio Doctrine, with Special Reference to its Application in**

Administrative Law” (2006) 122 SALJ 832 in which the learned author stated;

*“The functus Officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter....The (principle) is that one such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”*

39. The doctrine does not bar a court from entertaining a case it has already decided. **What it does bar is a merit based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued** meaning procedural interlocutory applications only.

40. However, if it was a matter of correcting a clerical error or an incidental consequence of the final decision like execution proceedings or contempt of court proceedings, which would be possible under the Civil Procedure Rules, this doctrine is not applicable. I therefore find that this court is not functus officio in the contempt proceedings before it.

41. On the fourth issues as to whether notice was issued to the contemnors I find that the position on the procedure to be followed was that the application notice and the affidavit or affidavits must be served personally on the Respondent unless the court dispenses with service if it considers it just to do so, as was held in **Justus Kariuki Mate and another vs Martin Nyaga Wambora and another, (2014) eKLR** and **Christine Wangari Gachege (supra)** In addition, knowledge of an order supersedes personal service as was held in the case of **Kenya Tourist Development Corporation vs Kenya National Capital Corporation & Another, Nairobi High Court Civil Case No. 6776 of 1992**. Further the Court of Appeal case of **Kenya Bus Services v Susan Muteti, Nairobi Civil Appeal No 15 of 1992** held that an advocate is a special agent authorized to Act for his Client, and by virtue of serving him the Respondents were served.

42. On the last issue as to whether the Applicant ought to have sought leave to institute contempt proceedings, the Court of Appeal in the case of **Christine Wangari Gachege V Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** discussed the law of contempt as it is now and held that:-

*“We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application like the one before us, for committal for contempt relating to breach of this court's order ---”*

43. That is the law as restated and I rely on it wholly and find that the application before me is not a non-starter, the Applicants not having sought leave of the court to institute this application. Leave of court is no longer required and I find the application is competent and rightly before this court.

44. In the end, find all the Respondents/interested parties herein are in contempt of court orders of the judgment and decree dated the 22<sup>nd</sup> March 2012 as well as the eviction order dated the 14<sup>th</sup> November 2017 and proceed to punish them for contempt. The Respondents and the interested parties are herein condemned to pay a fine of Ksh. 100,000/- each in default to serve a term of 2 months in civil jail effective immediately.

45. The Application dated the 20<sup>th</sup> February 2019 is herein allowed in its entirety with costs to the 2<sup>nd</sup> Defendant/Applicant.

**Dated and delivered at Nyahururu this 23<sup>rd</sup> day of July 2019**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**