



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO 479 OF 2017**

**IRUNGU GACHAGO.....APPLICANT/PLAINTIFF**

**VS**

**JOYCE WATIRI MACHARIA.....1<sup>ST</sup> RESPONDENT /DEFENDANT**

**NELSON NJUGUNA KAMAU.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**RULING**

1. This is a ruling in respect to the application dated 08/05/2019 and filed on 10/05/2019 brought under certificate of urgency seeking for the following orders;

a. Spent.

b. This Honourable Court do cite Joyce Watiti Macharia and Nelson Njuguna Kamau for contempt of this Court's orders issued on the 22/11/2018 by Honourable Lady Justice J.G Kemei and commit them to civil jail for a period of 6 months or less as the Court may please.

c. A warrant of arrest and detention to civil jail to issue against Joyce Watiti Macharia and Nelson Njuguna Kamau.

d. Costs of the application to be awarded to the Plaintiff/ Applicant.

2. The application is premised on the grounds that this Honourable Court pronounced itself vide a judgment delivered on 22/11/2018 which gave specific orders against the Defendants/ Respondents herein requiring the Respondents to vacate from LOC 8/KANDAGENYE/1301 and move to LOC 8/KANDAGENYE/1300 and payment of costs. That the said orders have not been set aside, however the Respondents have with no reasonable justification, deliberately refused to comply despite being fully aware of the said orders. That the acts of the Respondents have denied the Applicants enjoyment of the fruits of the judgment in their favor. That they ought to be cited for contempt in the interests of justice and to uphold the dignity of the Court.

3. In his supporting affidavit, the Applicant posits that the contemnors and their legal representatives are well aware of the Court orders issued on 22/11/2018 as they were physically present and the Applicant did remind them of the same through a letter written to the contemnor's lawyers. That despite the said orders remaining in force the Respondents have refused to move to the second plot as directed by the Honourable Court which failure amounts to contempt of Court orders aforesaid. That the failure by Respondents to move is a deliberate defiance to the Court orders and they have denied the Applicant his enjoyment of the fruits of the judgment. That the Respondents should not be afforded audience by this Court until they purge of their contempt.

4. The Respondents in response to the application through the replying affidavit of Joyce Watiri Macharia claims that after the delivery of the judgment she abandoned the suit land however the Applicant has not put her into possession of the second plot neither has he transferred it to her. She states that it is okay for the house on the suit land to be removed and the materials be placed on the second plot. That she understood the Court orders to have been a declaration of rights and did not mean she should physically move as she was not physically living on the suit land and is therefore convinced that she is not in contempt of the Court orders, and contends that the application was therefore unnecessary and should be dismissed.

5. The application was canvassed through written submissions.

6. The Applicant submitted that this Court is well seized of jurisdiction to issue the orders sought herein. That it is clear from the Respondent's reply that they were well aware of the Court orders which they chose to interpret otherwise. That having established the Respondents are in express disobedience of the Court orders they ought to be condemned and punished by the honourable Court. He relied on the case of **Shimmers plaza ltd vs. National Bank of Kenya ltd C.A no. 33 of 2012** in urging the Court to allow their application where

it was stated that;

“We reiterate that Court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather is mandatory and a person does not choose whether to obey a Court order or not....The Courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left right and Centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity and authority of the Court must be protected and that is why those who flagrantly disobey them must be punished lest they lead us all to a state of anarchy.”

7. The Respondents in their submissions challenged the Applicant’s application for want of process that the Applicant failed to extract an order following the decree of the Court, failing to seek leave before lodging the application and failing to serve the application to the Respondents personally. That the requirement for personal service of the order is mandatory. She faults the Applicant for failing to file an affidavit of service to show that the decree and the order was personally served on her and contends that no service was effected on her. That the decree did not give timelines on when the Respondent was required to move from the suit land and the letter from the Applicant’s advocates was also vague and did not specify the timelines within which the Respondent was required to comply. That the application does not relate to the 2<sup>nd</sup> Respondents as he has not built any structures on the suit premises. That the Applicant has not put the Respondents in possession of the second plot therefore he too is in contempt of the Court of the Court orders they are seeking to enforce. They relied on the case of **Christine Wangari Gachege vs. Elizabeth Wanjiru & 11 Others** [2014]eklr where the Court appeal set out the procedure to be followed for contempt proceedings.

8. According to **Black's Law Dictionary**;[14]

a. " 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 behavior 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."

9. In **Halsbury's Laws of England** it is stated: -

a. "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 unless and until it 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 .....an application to Court by him not being entertained until he had purged his contempt"

10. In book *The Law of Contempt*[15] learned authors **Nigel Lowe & Brenda Sufrin** state a follows:-

a. "Coercive orders made by the Courts should be obeyed and undertakings formally given to the Courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside."

11. Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand*[22] 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) that: -

- (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.

12. In the case of **Katsuri Limited v Kapurchand Depar Shah** [2016] eKLR the Court observed;

“Therefore the law that governs contempt of Court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the Judicature Act[5] imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought. This duty was noted by **Platt J and Porter J** (as they then were) in the matter of an application by **Gurbaresh Singh & Sons Ltd**[6]where they stated:-

"The second aspect concerns the words of Section 5-"for the time being", which appear to mean that this Court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the Court may have. It seems clear that the Contempt of Court Act 1981 of England is the prevailing law and that the procedure is still that set out in Order 52 of the Supreme Court Rules."(Emphasis supplied)

13. Discussing the procedure in England, the Court of Appeal in *Christine Wangari Gachege vs Elizabeth Wanjiru Evans & Others*<sup>[7]</sup> observed as follows:-

*"Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the Judicature Act, [8] the Act in the cited Section 5 simply directs that this Court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.*

*The High Court of Justice in England is that level of the Court system in England, comprising three divisions, the Queen's Bench, the Chancery and Family Divisions. That Court draws its jurisdiction to punish for contempt of Court from both the statute, namely the Contempt of Court Act, 1981 and the Common Law. But the procedure to be followed in commencing, prosecuting and punishing contempt of Court cases was, until 2012, as will shortly be explained, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC), made under the Supreme Court of Judicature Act, 1873 (or simply the Judicature Act, 1873). The Judicature Act, 1873 abolished a cluster of Courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 assuming the judicial features of the House of Lords.*

*Order 52 RSC, until 2012 as alluded to earlier provide the procedure of commencing contempt of Court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice: -*

- a) An application to the High Court of England for committal for contempt of Court will not be granted unless leave to make such an application has been granted.*
- b) An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the Applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.*
- c) The Applicant must give notice of the application for leave not later than the preceding day to the Crown Office.*
- d) Where an application for leave is refused by a Judge in chambers the Applicant may apply afresh to a divisional Court for leave within 8 days after the refusal by the Judge.*
- e) When leave has been granted, the substantive application by a motion would be made to a divisional Court.*
- f) The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.*
- g) The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.*

14. The learned Judges<sup>[9]</sup> in the above case correctly pointed out that the rules applicable in the United Kingdom have been applied in Kenya with uneven degree of consistency and cited several examples.<sup>[10]</sup> The only consistency in the decided cases is that leave was a requirement.

15. However, following the implementation of the famous Lord Woolf's "Access to Justice Report, 1996", The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. On 1/10/2012, the Civil Procedure (Amendment No.2) Rules, 2012 came into force and Part 81 thereof effectively replaced Order 52 RSC in its entirety. Part 81 (Applications and Proceedings in Relation to Contempt of Court) provides different procedure for four different forms of violations.

16. **Rules 81.4** relates to committal for "breach of a judgement, order or undertaking to do or abstain from doing an act."

17. **Rule 81.11-** Committal for "interference with the due administration of justice" (applicable only in criminal proceedings)

18. **Rule 81.16-** Committal for contempt "in the face of the Court"), and

19. **Rule 81.17-** Committal for "making false statement of truth or disclosure statement."

20. An application under Rule 81.4 (breach of judgement, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

21. In the above cited case of *Christine Wangari Gachege*<sup>[11]</sup> the Court of Appeal correctly pointed out that leave, now called "permission" is not required where committal proceedings relate to a breach of a judgement, order, or undertaking.

22. After evaluating the above Rules, the Court of Appeal in the above cited case concluded that;

*"we find that on the basis of the new Civil Procedure Rules (of England) contained in the Second Supplement to the 2012 White Book, 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..."* On that basis, I find that it was not necessary for the Applicant to seek leave before filing this application,

hence this application is properly before the Court.

23. From the forgoing, it is the view of this Court that there was no basis for the Applicant to seek leave before filing the application for contempt.

24. In respect to the issue of service of orders, the affidavit of service as sworn by Alice Kanini Wachira states that the Respondents were served personally at their residence and place of business accordingly along with their advocates with the Court order/decreed. Rule 81.8(1) allows the Court to dispense with the service on the basis of notice or knowledge of the terms of the orders. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was made or was notified of its terms by telephone email or otherwise. There is growth of jurisprudence on this matter arising from the changes in the law of contempt of Court in England which are still applicable to the Courts in Kenya.

25. In the case of **Basil Criticos Vs Attorney General & 8 Others (2012) EKLRLenaola J** (as he then was) stated 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.

The above position was affirmed by the Court of appeal justices in the case of **Justus Kariuki Mate & Anor Vs Hon Martin Wambora CA 24 of 2014.**

26. In the instant case the record shows that the judgment was delivered in the presence of Mr Kinuthia Wandaka of Kinuthia Wandaka Advocates on the 22/11/18. On the 29/1/19 the said orders were brought to the attention of the said advocates by way of a demand letter calling for compliance by the Defendants. The decree of the Court issued on the 13/12/18 was annexed to the said demand letter. The Respondents have acknowledged the said decree but faulted the Applicants for not serving them with the said order. I have looked at the terms of the said decree and are word for word with the terms of the orders issued in the judgement delivered on the 22/11/18 by the honourable Court. The Court finds the claim of the Respondents that they invariably ignored the decree on the grounds that it was not an order, at the very least, superfluous.

27. It is therefore the holding of the Court that the Respondents had constructive knowledge of the orders aforesaid.

28. As to whether the Respondents are guilty of willful disobedience of the Court orders, I place emphasis on the decision in the case of **Teachers Service Commission V Kenya National Union of Teachers & 2 Others (2013) EKLRL 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”.

29. 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.

30. I wish to address the response of the 1<sup>st</sup> Respondent to the application. The 1<sup>st</sup> Respondent in her Replying affidavit stated as follows;

“ from the date the judgement was given by this Court, I abandoned the land subject matter of this Court and do not know why this application has been filed.

The Applicant has not put me in possession of the second plot or transferred it to me. The Applicant is free to remove the house on the suit land and place the materials on the 2<sup>nd</sup> plot without citing me for contempt

The orders framed were just declaration of rights and not directions that I should move physically as I was not living on the suit premises.”

31. From the response, It is clear that the Respondent had knowledge of the orders . The orders of the Court are as follows;

“ a. That the Defendants are by themselves their servants agents or any one claiming through them ordered to vacate from the first plot No LOC8/KANDEGENYE/1301 and move to the second plot the road heading to Githigara Shopping Centre being LOC 8/KANDEGENYE/1300.

b. The Defendants counterclaim is dismissed.

c. The plaintiff shall have the costs of the suit and the counterclaim.”

The wording of the said orders are clear. The Respondents are being ordered/commanded to vacate parcel 1301 and move to parcel 1300. The claim that the orders are declaratory is incorrect. As to the issue of not being put in the second plot, that the Court finds is a new cause of action which was not before the Court at the hearing. The Court notes that the tone of the Respondent's response reeks of disobedience of Court orders. It is this disobedience that the law of contempt seeks to punish. It is not for the Applicant to remove the structures on the suit land. The responsibility lies with the Respondents. The Respondents cannot purport to hold the Applicant responsible for the vacation including removing the structures unlawfully standing on the land.

32. The Court finds the Respondents in contempt of Court orders issued on the 22/11/18. There is no evidence that the Respondents have purged the contempt.

33. I allow the application with costs to the Applicant. I reserve the sentence until the contemnors are heard on mitigation.

**34. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANGA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2019**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Ndegwa for the Plaintiff/Applicant

Wandaka for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents

Kuiyaki and Njeri, Court Assistants