



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 482 OF 2017**

**KIMANJA KAMAU (Suing as the personal representative of the representative of  
the estate of GIDEON GITUNDU KIMERE-deceased.....PLAINTIFF/APPLICANT**

**VS**

**FRANCIS MWANGI MWAURA.....1<sup>ST</sup> DEFENDANT RESPONDENT**

**PAUL MBEKE WAITHAKA.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**RULING**

1. The Plaintiff/Applicant filed the Notice of Motion dated 13/10/2017 Under order 40 Rules 3(1), (2) and 3, order 51 rule 1 of the Civil Procedure Rules, section 1A, 1B,3A and Section 63 c) and e) of the Civil Procedure Act, seeking the following orders;

- a. That this Court be pleased to issue an Order of committal to prison of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents herein for six months or such period as this Court may determine for their disobedience of the orders of this Court granted on 23.09.2013 and the penal notice dated 24.09.2013
- b. That the Respondents be and are hereby restrained from filing any pleadings documents and or taking any further / other proceedings in this matter until it purges its contempt.
- c. That all necessary and consequential orders or directions be given in order to meet the ends of justice and uphold the authority, dignity and honour of the Court
- d. That costs be provided for.

2. The application is premised on the following grounds

- a. That this Honourable Court issued an order on 23.09.2013 in this suit against the Respondents as follows; "That an order of status quo in terms that there be no intermeddling in the suit properties and no acts of waste by the Defendants is hereby issued."
- b. That order was served on 1<sup>st</sup> Respondent on 26.09.2013 at 11.00 am while the 2<sup>nd</sup> Respondent was served on 26.09.2013 at 10.45 am.
- c. That the said orders have been in force since issuance and the advocates of the Respondents have been aware of their subsistence.
- d. The Respondents have refused, neglected and or otherwise failed to comply with the said orders and have gone ahead and re-entered the suit land and started cultivation and planting on the parcel of land without nay notice or Court order.
- e. In the circumstances it has become necessary to have the Respondents committed to civil jail for the contempt of Court orders in order to avert further disobedience of the valid Court orders.
- f. That the continued disobedience of the Court orders is likely to embarrass and delay the just and fair hearing of the suit herein.
- g. That the deliberate conduct of the Respondents is contemptuous to this Court and a real threat to the dignity of this Court and this Court needs to make orders to ensure its orders of 23.09.2013 are complied with.

h. The application should be allowed in the interests of justice and fairness.

3. Kimanja Kamau in his supporting affidavit affirms and reiterates the grounds on the face of the application and has attached a copy of the Court order dated 23.09.2013, the penal notice dated 24.09.2013, the affidavit of service upon the Respondents with the Court order dated 03.10.2013 and copies of photographs showing cultivation and crops planted on the suit land allegedly by the Respondents. He avers that it is in the interests of justice and the need to uphold the dignity of this honourable Court that the application be allowed and he is of the opinion that he has no other way of enforcing the said Court order other than by seeking the orders herein.

4. The application was opposed by the Respondents who filed independent replying affidavits each.

5. Francis Mwangi Mwaura, the 1<sup>st</sup> Respondent, in his replying affidavit dismisses the application herein as being frivolous, false and dishonest and claims to have always abided by the Court orders. He avers that the application is an attempt to frustrate the hearing and final determination of the suit. He claims that the Applicant is not keen in pursuing the matter to conclusion. He avers that he is the rightful and registered owner of parcel no. LOC 2/GACHARAGE/2667 which he purchased from one Tabitha Waithira and has annexed a copy of the certificate of title. He avers that his title is legitimate and it is not tainted with any illegality or fraud as alleged and being a bonafide purchaser and registered owner he is protected by law. He avers that the pleadings as filed do not disclose any form of contempt hence he is of the view that the application is misconceived. He avers that the issues herein can only be determined if the matter goes to full hearing.

6. Paul Mbeke Waithaka, the 2<sup>nd</sup> Respondent avers that he is the rightful and registered owner of parcel no. LOC.2/ GACHARAGE/2665 and his rights are protected by the law. That he has not acted in contempt of the Court order. He dismisses the application as incompetent and an attempt to delay the final determination of the suit herein. He avers that since the Applicant Plaintiff obtained the interim orders he got comfortable and is now not keen in pursuing the suit to final determination. He has attached a copy of the title in his name and a copy of the sale agreement through which he avers he acquired the land. He avers that the main suit should be expediently resolved in order to fully determine the issues herein.

7. In his supplementary affidavit, the Applicant avers that the Respondents in their replying affidavits failed to address the issues raised in the application in regard to contempt of Court orders. He denies the allegation that his application lacks merit. He claims that the Respondents are not bonafide owners of the suit property. That he has never carried out any activity on the suit land. He avers that the 2<sup>nd</sup> Respondent has been in violation of the Court order carrying out cultivation on the suit land while aware of the Court order barring him from such activities. He avers that Court orders must be obeyed at all times.

8. The Applicant submitted that the Court order issued on 23.09.2013 was in respect of land parcels numbers L.R LOC 2/GACHARAGE/2665,2666,2667,2668,2669,2670, and 2671 restraining the parties herein from intermeddling with the said parcels of land in order to maintain the status quo. That the Court has been extending the said orders since then. That the Respondents herein were served with the Court orders and duly acknowledged receipt of the same. That in contempt of the said orders the Respondents started to plough and cultivate the suit premises. He submits that the Respondents were fully aware of the subsistence of the Court order as personal service was effected on both of them and they both acknowledged receipt of the orders and a return of service was duly filed on record. He avers that the photographs show interference with the suit premises. He avers that the Respondents did not challenge the photographs neither did they dispute the knowledge of the subsistence of the Court order and also, they did not deny that they are carrying out cultivation on the suit premises. That the Respondents did not impeach personal service upon them. In view of the foregoing he avers that the Respondents have deliberately chosen to disobey the Court orders, the same were not issued in vain and urges the Court to allow his application as prayed. He has referred the Court to various case law.

9. The Respondents submitted that the orders sought are not tenable and the application is an attempt to frustrate the main hearing of the suit in which the main issues for determination will be resolved. They gave a back ground of the issues that precipitated the current suit and aver that the Respondents are purchasers for value without notice. They challenge the enforceability of the Court order and aver that it has since expired. They point out that the last time the order was extended and or revived was on 24/03/2015 and the extension period was not defined. That the matter was in Court several times thereafter and there was no direction in regard to the interim orders. That an expired order cannot be a basis of contempt proceedings. They submit that the Respondents have never entered the suit land and have not committed acts of destruction therein and that they have always obeyed the Court orders. They aver that the application does not give clear details of who amongst the two Respondents committed to the breach. They draw the attention of the Court to the standard of proof required for contempt proceedings as set out in the case of **Katsuri limited vs. Kapurchand Depar Shar [2016] EKLR**, **Priscilla Wanja Kibui Vs James Kiongo Kibui & Anor (2014) EKLR** and **Ochieng Nyamogo & Anor Vs Kenya Posts & Telecommunications Corporation (1994) EKLR**. They also emphasized on personal service. They challenged the legitimacy of prayer No. 2 and is of the view that that would amount to driving a party from the seat of justice by draconian procedures.

## Determination

10. 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.

11. 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.”

12. 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.

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 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.”

15. In the **Teachers Service Commission V Kenya National Union of Teachers & 2 others (2013) EKLK** 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”.

16. In the case of **Kenya Tea Growers Association Vs Francis Atwoli & 5 others (2012) EKLK** SC Judge Justice Lenaola cited with approval the case of **Clarke & Others Vs Chadburn & Others (1985) 1 ALL ER (PC) 211** in which the Court observed that;

“I need not cite authority for the proposition that it is of high importance that orders of the Courts should be obeyed, willful disobedience to an order of the Court is punishable as a contempt of Court, and I feel no doubt that such disobedience may properly be described as being illegal... even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

17. In the case of **Gatharia K Mutikika Vs Baharini Farm Limited** the Court observed;

“The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of Court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily provided.... It must be higher than proof on a 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 offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge. Recourse ought not be had to process of contempt of Court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to

bear upon the subject. A Judge must be careful to see that the cause cannot be the mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found....Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt.....it is competent for the Court where a contempt is threatened or has been committed, an on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

18. 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. See the case Mititika above.

19. 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.

20. The Court has perused the file record and set out the proceedings as thus; The Plaintiff filed suit on the 18/9/2013 and simultaneously filed an application under certificate of urgency seeking interim injunction against the Defendants from intermeddling and committing acts of waste and destruction on parcel Nos Loc 2/Gacharage/2665-2671 pending the hearing of the application/suit. On the same day the Hon Court granted the orders as follows;

"That an order of status quo in terms that there be no intermeddling in the suit properties and no acts of waste by the Defendants is hereby issued pending the interpartes hearing on the 7th October 2013.

That the application be served within the next 3 days."

21. The Plaintiff proceeded to extract the orders together with a penal notice dated 24.9.2013 and the same together with the pleadings were served on the Defendants on the 26/9/2013. See the affidavit of service dated the 3/10/2013.

22. Come the 7/10/2013, it would appear that the Court was not sitting however by consent parties fixed the hearing of the application for 29.10.2013. Nothing is on the record to explain what transpired on the 29.10.2013, however on the 5/12/13 the firm of T M Njoroge through its representative fixed the hearing of the application exparte for the 10/2/2014. Notice to the Defendants was to issue.

23. Parties appeared before the Hon Judge on the 10/2/2014 and 13/5/2014 but were not ready to proceed and finally when they returned on the 24.3.15 before Hon Lady Justice L Waithaka, with all the parties represented by their learned counsels, the proceedings are recorded as thus;

"Mr Njagi (holding brief for Mr. T M Njoroge for the Plaintiff); The mention is to take a hearing date. Parties have complied.

Mr Kirubi (for the 1st Defendant); The status quo agreed upon on 18/9/2013 can be maintained pending the hearing and determination of the suit. I also wish to abandon my notice of preliminary objection filed on 5.10.2013.

Court; The Plaintiff to file his list of documents and further statements within 14 days. Corresponding leave is granted the Defendants. Hearing on 24/6/2015."

24. The Court notes that the same orders, (notwithstanding their expiry) were served on the Defendants on the 16/3/2016 whereupon they endorsed their names and signed at the back of the said orders.

25. From the proceedings cited above, it would appear that the orders issued on the 18/9/2013 were not extended and did expire on the 7/10/2013 when the hearing of the application was to take place. Further come the 24/3/2015, there were no orders subsisting capable of being maintained as regards the application dated the 18.9.2013 and as requested by Mr Kirubi. In any event the Court never extended nor granted any orders in respect to the status quo or otherwise pending the hearing and determination of the suit. This being a Court of record the record of the proceedings speaks for itself.

26. It is therefore clear that in the absence of a Court order legally obligating the Defendants to obey, the Applicant has not demonstrated that there was indeed a Court order, binding on the Defendants and whose terms were clear and capable of being obeyed. I agree with the learned Counsel for the Defendants that the orders expired/lapsed and therefore no contempt of Court can hold in the circumstances. There is nothing on record to support the Applicants submissions that the Court had been extending the said orders. None by way of a Court order or in the proceedings on record. It would appear that the Plaintiffs laboured under a mistaken belief that there were valid interim orders subsisting. The first limb of the requirements stated in paragraph 19 is not complied with and there is no reason to go into the other.

27. In the end the application is devoid of merit is hereby dismissed with costs to the Defendants.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH DAY OF MARCH 2018.**

**J G KEMEI**

**JUDGE**