



REPUBLIC OF KENYA



KENYA LAW
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**Muthiani v Mutunga & 3 others (Environment & Land Case
E043 of 2023) [2024] KEELC 326 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 326 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E043 OF 2023
A NYUKURI, J
JANUARY 31, 2024**

BETWEEN

JAMES NZAU MUTHIANI PLAINTIFF

AND

MUISYO MUTUNGA 1ST DEFENDANT

MUEMA MUTUNGA 2ND DEFENDANT

MASYULA MUTUNGA 3RD DEFENDANT

MWIKUYU MUTUNGA ALIAS MWAI MUTUNGA 4TH DEFENDANT

RULING

Introduction

1. Before court is the Notice of Motion dated 5th October 2023 filed by the plaintiff seeking the following orders;
 - a. An order of committal to be made against the respondents, Muisyo Mutunga, Muema Mutunga, Masyula Mutunga and Mwikuyu Mutunga alias Mwai Mutunga to prison for such period as this Honourable Court may deem fit and just in that the respondents have disobeyed the orders made by this Honourable Court on the 6th July 2023 restraining the defendants/ respondents, whether by themselves, their families, their servants and/or agents or others whomsoever from entering, using, trespassing, developing or in any other manner howsoever from interfering or denying the plaintiff/applicant and/or his agents from accessing land parcel number Wamunyu/kambiti/351 until hearing and final determination of the suit herein.
 - b. An order that costs of and occasioned by this motion be paid by the respondents.



2. The application is premised on the grounds on its face and the supporting affidavit sworn on the 5th of October 2023 by James Nzau Muthiani, the plaintiff in this matter. The applicant's case is that on 6th July 2023, this Honourable Court granted an order of temporary injunction restraining the defendants from entering, using, trespassing, developing or in any manner interfering with or denying the plaintiff access of parcel number Wamunyu/Kambiti/351 (hereinafter referred to as the suit property).
3. The applicant further stated that the above order was served both on the respondents and their advocates on 21st August 2023 and 3rd August 2023 respectively, but that in contempt thereof, the respondents have failed to comply with the order and continued to trespass on the suit property. He attached a copy of the order of 6th July 2023, an affidavit of service and photographs of goats grazing on the suit property.
4. The application is opposed. Muisyo Mutunga, Muema Mutunga and Masyula Mutunga, the defendants herein, swore a replying affidavit dated 24th November 2023 opposing the application. They deponed that the application contained misleading statements aimed at using the court process to mete injustice on the respondents.
5. According to the respondents, they are beneficial owners and in occupation of land parcel number Wamunyu/Kambiti/40 which is registered in the name of Kiasyo Kiilu and which is separate from the suit property. They denied having been served with the order of 6th July 2023. They also denied ever grazing on the suit property and stated that the goats in the photographs presented by the plaintiff do not belong to the respondents and that the person captured in the photographs is not one of the respondents or their agents. They implored the court to dismiss the application.
6. The parties were directed by court to file their respective submissions in arguing their respective cases. On record are the applicant's submissions filed on 30th November 2023 and the respondents' submissions filed on 4th December 2023, all of which this court has considered.

Analysis and determination

7. I have carefully considered the application, the reply thereto and rival submissions filed by the parties. In my view, the sole issue that arise for determination is whether the applicant has proved contempt against the respondents.
8. Contempt is any conduct that despises and defies the authority and dignity of the court. The Black's Law Dictionary, 11th Edition defines contempt as follows,

The act or state of despising. The quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.
9. The law governing contempt proceedings is provided for in Section 5 of the *Judicature Act*, which provides as follows;

The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.
10. The law for the time being, applicable in the High Court of justice in England with regard to punishing for contempt is part 81 of the English Civil Procedure (Amendment No. 2) Rules, 2012.



11. Contempt power of the court is inherent within its jurisdictional authority that ensures a court has power to enforce compliance of its own orders. Enforcement of court orders and ensuring compliance thereof is at the core of the rule of law and a democratic state, maintaining a civilized life.
12. In the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] 1 KLR 828, the court held as follows;

It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proven contemnors. It is the plain and unqualified obligation of every person against whom an order is made by a court of competent jurisdiction to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.
13. To prove contempt of a court order, the applicant must prove that there exists clear, unambiguous terms of an order that are binding on the respondent; that the respondent had knowledge of those clear terms of the order; and that the respondent willfully or deliberately breached the terms of the order.
14. In the South African Case of *Kristen Carla Burchell v Burry Grant Burchell, Eastern Cape Division* Case No. 364 of 2005, the court held that to succeed in contempt proceedings, an applicant must prove (i) the terms of the order, (ii) knowledge of these terms by the respondent, and (iii) failure by the respondent to comply with the terms of the order.
15. As contempt proceedings are quasi-criminal proceedings where the liberty of the respondent is at stake, the standard of proof is higher than that of ordinary civil cases although below the standard proof in criminal cases of beyond reasonable doubt. I agree with the reasoning in the case of *De Lange v Smuts* [1998] ZACC 6; 1988(3) SA 785 (CC) parag 147, which was cited with approval in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR, where the court stated as follows;

The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant in road upon personal liberty. Clearly, it will constitute breach of Section 12 of *the Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case, there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedure.
16. In the instant application, the applicant contended that the respondents violated and or breached the injunctive orders of this court made on 6th July 2023 by trespassing on the suit property, when they had been served with the said order. He attached the order, affidavit of service and photographs of goats and a man in the suit property. In a rejoinder, the respondents denied service and stated that the goats shown in the photographs do not belong to them, neither is the man in the photographs one of the respondents or their agents.
17. Having considered the order in issue, it is clear that the said order issued on 6th July 2023 was in clear and unequivocal terms that the respondents are restrained from trespassing and interfering with the suit property in any manner. In that regard therefore, I find and hold that the order in question is couched in clear, unambiguous terms.



18. On whether the respondents had knowledge of the same, the plaintiff produced a return of service showing that service of the order was done on the respondent's advocate. A party's advocate is their lawful agent and therefore service on the agent is service on the principal. Since the defendants' advocates were served on 3rd August 2023, I find and hold that the respondents had knowledge of the order.
19. Regarding whether there was wilful breach of the order of 6th July 2023, the applicant stated in paragraph 3 of his supporting affidavit that the respondents being aware of the orders herein "have completely neglected and failed to abide by the order hence contempt". He proceeded to attach photographs of grazing goats on the suit property as proof of his assertion. He also stated in paragraph 4 of the supporting affidavit that the respondents have continued to trespass on the suit property and continued to interfere with the plaintiff whenever he tries to access the suit property.
20. Having considered the averments made by the applicant and the denial by the respondents that neither the goats in the photographs belong to them nor the man in the photographs is one of the respondents or their agent, it is my considered view that the applicant has not presented before court sufficient material to prove that trespass was committed by the respondents as he has failed to demonstrate the nexus between the goats and the man in the attached photographs with the respondents. I therefore find and hold that the applicant has not proved on the required standard that the respondents breached the order of 6th July 2023.
21. In the premises, I find and hold that the applicant has failed to prove contempt against the respondents. Ultimately, I find no merit in the application dated 5th October 2023, which I hereby dismiss with costs to the respondents.
22. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31ST DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of:

Mr. Muia for defendants/respondents

Mr. Mutua Makau for plaintiff/applicant

Josephine - Court Assistant

