



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 57 OF 2017**

**ISAAC CHEBON.....1<sup>ST</sup> PLAINTIFF**

**STEFFANO KIPYEGEN.....2<sup>ND</sup> PLAINTIFF**

**DANIEL CHESAINA.....3<sup>RD</sup> PLAINTIFF**

**THE TRUSTEES BOROWONIN FULL GOSPEL CHURCH OF KENYA.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF BARINGO.....DEFENDANT**

**RULING**

This ruling is in respect of an application brought by way of notice of motion dated 11<sup>th</sup> January 2018 seeking for the following orders:

- a) Spent.
- b) That this Honourable Court be pleased to find the defendant's County Executive Committee for Agriculture, Livestock and fisheries and Kapropita Ward Administrator in contempt of the Court order issued on 20<sup>th</sup> February, 2017 and confirmed on 25<sup>th</sup> September 2017.
- c) That the County Executive Committee and Ward Administrator be committed to civil jail for a term of six months for contempt of court for having deliberately disobeyed orders of this Honourable Court issued on 20<sup>th</sup> February 2017 and confirmed on 25<sup>th</sup> September 2017.
- d) That this honourable court be pleased to make any other or further orders geared towards protecting the dignity and authority of the Court.
- e) That the costs of this Application be provided for.

Counsel for the parties agreed to canvass the application by way of written submissions. Counsel for the applicant relied on the grounds on the face of the application together with the supporting affidavit of ISAAC CHEBON the 1<sup>st</sup> plaintiff herein.

It was Counsel's submission that the plaintiffs moved this Honourable Court seeking an order of Injunction restraining the Defendant from constructing a cattle dip on plot number BARINGO/KEWAMOI "B" /856 and the court granted the said orders as prayed.

Counsel for the plaintiff/applicant submitted that the application dated 14<sup>th</sup> February 2017, was heard *inter partes* and a ruling delivered on 25<sup>th</sup> September 2017 in the presence of the defendant's advocate, which ruling confirmed the earlier orders of injunction issued on 20<sup>th</sup> February 2017. Counsel stated that the ruling dated 25<sup>th</sup> September 2017 and order of 20<sup>th</sup> February 2017 were duly served upon the defendant which the defendant duly received and stamped as per the annexure.

Mr. Chebii for the applicant submitted that on 5<sup>th</sup> January 2018, the defendant moved to the suit property and started surveying it in readiness to construct a cattle dip in complete contravention of the Court Order and/or ruling. Further on the same day they were served with a warning letter and Court Order directing them not to carry out the construction and/or disregard the Court orders.

It is Counsel's submission that the defendant was therefore fully aware of the court order made and issued by this hounorable court on 20<sup>th</sup>

February 2017 and confirmed on 25<sup>th</sup> September as service of the said order and ruling was not only effected upon them but their Advocate on record was also in Court when the ruling was delivered.

Counsel stated that in response to the application the defendants contended that the tender for the construction of the cattle dip in issue was awarded by the defendant in January 2017 to DAMATEK BUILDERS LIMITED, a limited liability company who has neither been enjoined in these proceedings and further, it is a separate and distinct entity from the defendant. Further that the defendant stated that they fully complied with the court order by directing the contractor to stop the construction, who upon receipt of the said directive suspended the construction; hence they have not breached any Court Order.

Counsel listed the following issues for determination

1. Whether the defendant was served with the Court Orders and/or was aware of the same?
2. Whether the defendant is in contempt of the said Court Orders and/or Ruling?
3. Whether the defendant has purged the contempt?

Counsel submitted that the defendants were served with the court order and acknowledged receipt by stamping and signing the same. Further that the defendants' advocate was present in court when the ruling was delivered on 25th September 2017.

It was Counsel's submission that the defendant's contention that the Court Order was brought to their attention on 5th January 2018 which they claim that they complied with by ordering its agent to stop the construction is unfounded. Further that the Ward Administrator implemented the project yet he knew the same had been stopped by an order of this Honourable Court in February 2017. His allegation that he was not served with the court order is unfounded as he had knowledge of the Court order through their agents.

Counsel relied on the case of NAIROBI MILIMANI HIGH COURT JR No. 187 OF 2014 EDWARD MUTINDA NDETEI & 15 OTHERS -VERSUS- THE GOVERNMENT OF MAKUENI COUNTY where in determining the issue of service the Court cited the case of GATHARIA K. MUTITIKA & 2 OTHERS -VS- BAHARINI FARM LTD where it was held that

*"it is quite clear on the authorities that anyone who, knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt... The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught"*

He also cited the case of NAIROBI MISC.CIVIL APPLICATION NO. 316 OF 2010 BASIL CRITICOS -VS- ATTORNEY GENERAL & 4 others where Lenaola J (as he then was) stated

*that the law has changed and so as it stands today, knowledge supersedes personal service and for good reason. ....where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary"*

Counsel therefore submitted that the defendant was aware of the Court order as they were served and their Advocate was in Court at the time it was issued, but they choose to blatantly ignore it and therefore they are in contempt of the court order issued on 20th February 2017 and confirmed 25th September 2017. He also stated that the photographs annexed to the application clearly show that the defendant went ahead with the construction in complete contempt of the court order. Further he stated that the defendant has admitted expressly that they acted in contempt of the Court Order which they allege they have purged.

It was Counsel's submission that the blatant and deliberate conduct of the defendant ignoring Court orders is a great affront to the authority of this honourable court and a good example of impunity, utter disregard of the rule of law and judicial process and a classic case of parties who have no respect for the authority and the jurisdiction of the court. He therefore urged the court to allow the application and punish the respondents for contempt of court.

## **DEFENDANT'S WRITTEN SUBMISSIONS**

In response to the application Counsel for the respondent submitted that the said application is misconceived, incompetent and amounts to abuse of court process. It was Counsel's submission that the alleged contemnors have never been personally served with the said orders with a penal notice as mandated by law.

Counsel further submitted that there is no affidavit of service on the court record to support the application and hence there is nothing to demonstrate that the respondents received the orders in issue. Counsel cited the provisions of Order 5 rule 15 (1) of the Civil Procedure Rules which provides as follows:

"The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and witnessing the delivery or tender of summons. "

He also cited the case of Eldoret P & A No. 29 of 2014, Estate of Kiptallam Cherunya, this Honourable Court held:

*The applicant did not file an affidavit of service showing that the 2nd respondent or their four sons were personally served with the orders of 27<sup>th</sup> January, 2015. Learned counsel to; 'the applicants, Mr. Omboto, freely conceded the point. He however sought to rely on the fact that the alleged contemnors were in court on 16<sup>th</sup> February, 2015. In absence of proof of service with that order, the chamber summons is a legal quick-sand. That finding is sufficient to dispose off the matter*

Similarly in Nairobi Civil Case no. 69 of 2015, Sam Nyamweya & 3 others –vs- Kenya Premier League Ltd & 2 others (2015) eKLR the Honourable Court while determining a similar application with similar facts at pages 17, 18, 19 & 20 held:

*“What is disputed is service and or knowledge of the said order. ....My first observation is that the affidavit does not state upon whom the order was to be served This is the applicant's case and the burden of proof lay on him, first, to prove service by way of a watertight affidavit of service evidence which is lacking .... Where service is denied, it was incumbent upon the plaintiff to procure an affidavit of the process server. This was not done, and instead, the plaintiff shifts the burden of proof onto the Respondents to prove that service was not effected upon them by (calling for the cross examination of the process server). I reiterate that contempt proceedings are of a criminal nature and involve, if proved, loss of liberty, the applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like in the case of any other ordinary matter like service of summons to enter appearance or hearing notice upon a party, where, even if service was regular, the courts have found that ex parte proceedings or judgment made in default could still be set aside on terms in the discretion of the court I find that there is no credible and or reliable description of how service of the impugned order was served upon the 1<sup>st</sup> defendant's MD to persuade this court to accept the process server's depositions. This court believes Mr. Oguda's deposition that on the material day he left the offices at 4.30 pm as that evidence has not been controverted by any other credible independent evidence capable of belief The upshot of all the above expositions is that I find that there was no personal service upon the 1<sup>st</sup> defendant's managing director Mr. Jack Oguda, of the order of 20<sup>th</sup> February, 2015 on 20<sup>th</sup> February, 2015.*

Mr. Kibii Counsel for the defendant stated that Richard Rotich was served with the order in issue on 5th January, 2018 more than 1 1 months after the order was issued and has been in full compliance of the same. The alleged contemnor in obedience of the said order vide letter dated 6th January, 2018 as demonstrated by annexure RRI in his replying affidavit sworn on 2nd March, 2018 wrote to the contractor, DAMATEK BUILDERS LTD to hold in abeyance any works until the suit herein is heard and determined and this was fully heeded.

It was Counsel's submission that the construction company DAMATEK LTD, which is accountable for the impugned acts, has never been served with the said orders with a penal notice as mandated by law or any papers in these proceedings or at the very least an order for its joinder in these proceedings sought. Counsel further cited the case of NAIROBI CIVIL APPEAL NO.36 OF 1989, OCHINO & ANOTHER V OKOMBO & 4 OTHERS (1989) ECLR at page 2 where it was held;

*As we read the law, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. As this court pointed out recently in the case of Mwangi Mangondu V Nairobi City Commission (Civil Appeal No. 95 of 1988): "This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt".*

Mr. Kibii finally submitted that the plaintiff/applicant has not met the threshold for contempt which is beyond reasonable doubt and the applicant has failed to discharge the same and prayed for the dismissal of the application with costs.

### **Analysis and determination**

It is important to lay the basis of contempt of court proceedings and the jurisdiction of the court to punish contempt of court. Contempt of court is governed by Contempt of Court No. 46 of 2016. The objectives of the Act are to

- a) Uphold the dignity and authority of the court,
- b) Ensure compliance with the directions of the court,
- c) Ensure the observance and respect of due process of law,
- d) Preserve an effective and impartial system of justice, and
- e) Maintain public confidence in the administration of justice as administered by court

Section 4 provides for what constitutes contempt of court. It states that Contempt of Court

(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 —
- (c) (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.

The Act also provides for the jurisdiction of the superior courts to punish contempt of court. It defines superior courts as having the meaning assigned to it by Article 162(1) of the Constitution and includes the Employment and Labour Relations Court and the Environment and Land Court. This section therefore gives this court the mandate to punish contempt of court.

Courts punish contempt of court to uphold the dignity and the authority of the court and to preserve an effective and impartial system of justice. If orders of the court are not obeyed then it would make courts a laughing stock and individuals can take the law in their own hands choosing to obey orders when it suits them and disobey with impunity when it does not.

Courts also do not give orders in vain, the orders and directives given must be obeyed or if a person is of the view that they have difficulty in the implementation of an order, then they must approach the court for direction on the implementation of the order and give explanation on the difficulty. There are also procedures to be followed if one is dissatisfied with an order of the court. There can be an application for review of the order or an appeal of the order to the superior court.

According to the book on Contempt in Modern New Zealand, in an application for contempt of court, 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.

It is therefore a requirement to establish that the contemnor was personally served or had knowledge of the alleged order. The reason why personal service is important is because of the nature of the punishment which involves the curtailment of the freedom of an individual and the fact that it is quasi criminal in nature. The standard of proof in contempt proceedings is much higher than in civil cases.

The Court of Appeal held in the case of **Mutitika Vs Baharini Farm Limited [1985] KLR 229, 234** that:

*“In 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.”*

This enjoins courts to exercise restraint when dealing with cases of contempt where the standard of proof has not met the threshold.

Further in the explanatory notes in Order 52 Rule 3(1) of the England Supreme Court Practice Rules which are applicable in our jurisdiction provide that:

***“No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt, or, if, the order is***

***directed to a group of persons or a corporation, some appropriate member has been personally served.”***

In the current case the respondents allege that they were not personally served with the order. They further state that the order was served on 5th January 2018 that is 11 months after the order was issued and that they wrote a letter informing the contractor to stop the work until further orders of the court.

The applicant did not attach an affidavit of service to demonstrate that the officers who are allegedly in contempt were personally served. This is a requirement to clear the doubt as to whether the persons were served. If such affidavit is not filed then it would be the applicant's word against the respondents with the court being unable to determine whose side of the story to believe. From the letter annexed by the respondent, it shows that there was some good intention of obeying the court order. It shows that the respondent had knowledge of the order and should not be heard to say that they were not aware of the order.

In the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** Lenaola J (as he then was) stated that :

***“...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”***

This reinforces the fact that if a party acts in a manner to show that he was aware of the order then the issue of personal service is superseded by knowledge of the order.

The High Court of South Africa in the case of *Kristen Carla Burchell vs Barry Grant Burchell* held that in order to succeed in civil contempt proceedings, the applicant has to prove **(i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.** Once an applicant has satisfied the court that he has met these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.

As earlier stated that courts when dealing with contempt proceedings must exercise the discretion and only grant such orders in clear scenarios where the standard of proof has been met.

In the instant application I am not satisfied that that standard of proof has been attained. Having said that, I hereby dismiss the application dated 11th January 2018 with no orders as to costs.

**Dated and delivered at Eldoret this 17<sup>th</sup> day of July, 2018.**

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Mr. Kandie holding brief for Mr. Chebii for Plaintiff/Applicant and in the absence of Mr. Kiboi for Respondents.

Mr. Koech: Court Assistant.