



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KITALE

E & L MISC. APPLICATION NO. 8 OF 2018

(CONSOLIDATED WITH KITALE E & L MISC. APPLICATION NO. 9 OF 2018)

DANIEL ODHIAMBO

OKAKA T/A TEMBOLI INVESTMENT.....APPLICANT

VERSUS

SAMUEL UDALI MTANGE.....1ST RESPONDENT

JAMES LUVAI CHUNGULI.....2ND RESPONDENT

RULING

Daniel Odhiambo Okaka t/a Temboli Investment (hereinafter referred to as the applicant) has come to court against **Samuel Udali Mtange** and **James Luvai Chunguli** vide application dated 27.7.2018 and filed on 30.7.2018 praying for an order that the respondents be cited and punished for contempt of court order issued on 29.6.2018 and served on the same date. The application is based on grounds that on 26th June, 2018, the applicant filed an application seeking for stay of attachment of his items and an order for re-opening of premises known as Mutenge Garage.

The respondents were duly served and instead of appearing in court they instructed an Auctioneer to re-open the premises, plucked the doors and carted away the items.

It is claimed that that even upon being served with a court order, the respondents defied the same and continued causing further damage to the goods thus paralyzing the applicant's business and that the respondents have shown overt defiance of a valid court order. That justice demands that they be cited and punished for disobeying a court order.

In the supporting affidavit of Daniel Odhiambo Okaka, he stated that on 26th July, 2018 the court directed their advocate to serve a Notice of Motion dated same day upon the respondents herein and to return to court for inter-parties hearing on 29th June, 2018. The 2nd respondent was duly served in his presence on 26th June, 2018 at around 4.30 p.m. and he indeed acknowledged service and agreed to receive the application on behalf of the 1st respondent.

That on 29th June, 2018, the respondents did not attend court and knowing very well that a court order was on the offing the respondents instructed an agent of Eshikhoni Auctioneers to re-open the premises and collected the goods. The collection was done in the presence of heavily armed police officers. That while they had just started the process, the respondents, the Auctioneer and the police were duly served with a court order in their presence which they defied and insists on proceeding.

The respondents threw properties all over and caused untold damage and loss to a number of items and that some goods are missing to-date. The respondents removed the main door to the premises and which forced them to use iron sheets to secure the place. That as of now, his business is completely paralysed.

According to the applicant, the respondents have no regard for valid court order and he prays that they be punished for contempt. That the respondent stopped causing further damage after their advocate warned the officers providing security of consequences involved. Indeed, the officers leading the team complied and directed the respondents to return the goods and the doors which order they defied completely.

The 2nd respondent James Luvai Chunguli in response states that he is a retired teacher and a Kenyan citizen holder of National Identity Card No. 6577413 and resident of Kiminini in Sofas Jumba Farm within Trans Nzoia County and that he is one of the administrators of Mtange

Estate, his co-administrator being Samuel Udali Mtange.

In June, 2018, he moved to an advocate's office for consultation regarding the two shops at Kitale operating as a garage part of Mtange estate where the tenants had defaulted in rent for over 5 months despite various notices and demands. That after consultation, a firm of Auctioneers in Kitale by the name Eshikhoni Auctioneers was given the job.

The Auctioneers gave out proclamation of 15 days and that the said tenants visited the Auctioneer's office and the said Auctioneers called him with information that the tenants are disputing the amount claimed and not the fact that they are in rent arrears. That after the said visit failing to materialize into an agreement of how the arrears would be settled, the Auctioneers moved to court for an order of breaking in. The Auctioneers got the breaking order dated 14.6.2018 from Kitale Law Court.

The Auctioneers were paid and they went ahead to execute the above said order on 29th June, 2018 morning hours in company of Security from Kitale Police Station. The said exercise was completed by noon and at 2.00 p.m., the said Auctioneers called to inform him of being served with an order from Eldoret Environment Court to stop the exercise yet they had already finished taking the attached items for storage in Milimani.

That upon service, the Kitale Officer Commanding Station and Auctioneers appended their signatures indicating the date and the time. The service of the order citing Mtange Estate for contempt came after the order of breaking had been executed.

M/s Sheila Sanyo Amugune, the office assistant of Mr. James Luvai states that on 16th June 2018, Mr. Luvai showed her a Court Order dated 14th June, 2018 from the Resident Magistrate's Court in Kitale vide Kitale Civil Case No. 14 of 2018. He explained to her that it was for the issue of rent arrears of Mtange Estate tenants of premises situated in Kitale along Kitale – Kipsongo road garage area. The above order stated that leave was granted to the Eshikhoni Auctioneers to break into the landlord's premises and seize goods to recover the outstanding rent arrears. The order further requested that the Officer Commanding, Kitale Police Station to provide security. That in conclusion, the order further said that this was a valid court order and anybody who disobeys it could be guilty.

That on 29th June 2018, Mr. Luvai was not feeling well he requested her to go to the lawyers and Eshikhoni Auctioneers offices at Ambwere Plaza in Kitale town to follow the execution of the order mentioned above and update him periodically.

That she went to advocate's office namely Nasike Wafula and to Eshikhoni Auctioneer's office at Ambwere Plaza and the Auctioneers were ready to execute the order they were only waiting for security who came this was at 8.30 a.m.

That in company of the security who were 8 police officers and the OCS, they headed to Mtange garage and called Caleb and Oyugi the tenants and read the court order to them twice before the process commenced.

The Auctioneer opened the two garages with the help of 20 hired men who started removing articles from the garages placing them on two lorries. Heavy components were lifted by the breakdown which made about two or three trips. That she was informed by the Auctioneer that the attached property was being taken to a storage yard. The work continued up to 12.00 p.m.

That policemen were all that time guarding the property and restoring peace so that no one could come and interfere.

That at 2.00 p.m. while still on the ground to oversee the doors of the premises to be closed after execution of the order, a male adult came whose name she was told was Wanyonyi Advocate then handed a document to the OCS and the Auctioneers who were dealing with the issue of closing the premises at about 2.15 p.m.

The OCS said that this was an order stopping the work which had already been done, she directed that they should leave the place since the work had been completed and another order had been served.

Those being the fact of the case as per the affidavits, this court ordered for the cross examination of the process server, Samwel Nyang'au Getonto who stated that he is based in Kitale and practices under licence Number is 0700. That on 29.6.2018, around 11.20 a.m. he received an order from the Kitale Environment and Land Court in Case No. 8 of 2018 and 9 of 2018, extracted by the firm of M/S Walter Wanyonyi and co Advocates to serve the defendants. He was given instruction to effect service on Auctioneers, OCS and defendants. Upon receiving the court order, he rushed to scene and at around 11.36 a.m., he went to Mtange Garage along Elgon road and He found one Archibald Nyukuri who was trying to reverse the lorry. Mr. Nyukuri is well known to him. The driver was reversing a lorry to carry the goods. There were no goods in the lorry. He served Nyukuri with the court order but he refused sign. He left Nyukuri with the orders. He rushed to the O.C.S., Kitale Police Station. At 11.50, he served the O.C.S. He accepted and stamped, signed. There were several police officers armed. He served James Luvai Chunguli, a person well known to him for over 10 years at the scene. He did not serve the 1st respondent because he was in Eldoret. He served the documents upon the 2nd respondent. He acknowledged but never signed but continued with the exercise. He never served the original order. It is not true that he served at 2.00 p.m. He served at 11.20 a.m. There was a typing error on the affidavit.

On cross examination by Mr. Andambi, he states that he has been a process server for over 12 years and that he normally goes through his documents before signing. He admits that he never served the original order. The order he served was not even certified. The OCS signed the order but Mr. Archibald did not sign.

On re- examination by Mr. Wanyonyi, he states that he is not aware of the service of the original court order. He served an order upon the respondent. His work was to serve court order under the instruction given. He would serve the order. The court order was clear. The error is human. He realized the error.

The O. C. S., Kitale No. 233027, Chief Inspector, Daniel Kedei states that he is OCS, Kitale Police Station. He was Shown the court order dated 29.6.2018. He states that the order was served on 29.6.2018 at 2.19 p.m. the order was restraining some activities. He had received an order on 16.6.2018 to give security to Eshikhoni to break into the landlord's premises. At the time of service, the order had been executed. He provided security at 8.00 a.m. the execution was completed before 2 or thereabout. The order was overtaken by events.

On cross examination by Mr. Wanyonyi, he states that he has been at Kitale for one year six months. He received an order dated 16.6.2018 from Kitale Lower Court to provide security. On 29.6.2018, he constituted a team to give security dated 14.6.2018. He does not have the occurrence book. He was not at the scene when action was done. He cannot tell what happened at the scene. He did receive a report but does not have it. When shown order, he states that the signature is his but It is a scanned document. He gave the server instructions that he needed the original document. He did nothing to stop the exercise as he never understood it, but believes the document was not authentic as it did not have the seal of the court. He explained to the process server that he could not act on a scanned document. The scanned document was received at mid-day. The original order was delivered at 2.00 p.m.

On re- examination by Mr. Andambi, he states that he could not act on a scanned document. It was received at 12.00 noon.

Mr. Archibald Wanyonyi, a Court Process Server states that he works with Eshikhoni Auctioneers. That he is aware of the order. His signature is not there. They were distrained for rent. They started at about 9.00 a.m. until noon. The order came at 2.19 p.m. The order came after execution.

On cross examination by Mr. Wanyonyi, he states that he does not have a letter for execution from Eshikhoni. The owner of the licence should be present. That Ken gave him powers to move and distrain for rent. That he opened the building. They broke in. Distress began at 8.00 a.m. until noon. He did prepare an inventory. When shown original order, he states that the signature is his. They were served after the executions.

On re- examination by Mr. Andambi, he states that the original order was served by Walter Wanyonyi. Mr. Nyang'au did not serve him.

To begin with, this court restates that the duty to obey the laws by all individuals and institutions is paramount in the maintenance of the rule of law, good order and the due administration of justice. In addition, the dignity and authority of our courts which exercise judicial authority derived from the people of Kenya must be jealously guarded.

As stated by ROMER L.J in HADKINSON VS HADKINSON (1952) ALL ER 567:

“It is the plain and unqualified obligation of every person, against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that 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 an order believes it to be irregular or even void”

For, a party who knows of an order, whether null or valid, regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null or valid. Whether it was regular or irregular, that they should come to the court and not take upon themselves to determine such question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed.” Per Lord Cottenhan L.C in Chuck Vs Cremer (1) 1 COOP TEMP COTT 342).

In most cases of contempt, the applicant has the burden of proof. However, on the willfulness issue for contempt the burden shifts to the defending party. In a proceeding for contempt for violation of a court order, the applicant must show the existence of the order and the facts establishing the respondent's noncompliance. The burden then shifts to the respondent to establish his defense and inability to comply with the order.

At the contempt hearing, the applicant must establish a prima facie case of willful contempt by showing the existence of the order of which he seeks enforcement, and the facts showing the respondent's noncompliance. The applicant must satisfy the burden of proof required by law for the specific nature of contempt before the court.

Once the applicant establishes a prima facie case, the respondent is entitled to present evidence of a defense or inability to comply with the order.

The standard of proof in contempt cases is slightly higher than “balance of probabilities” but lower than “beyond reasonable doubt”. This is the test to be applied in this case.

Contempt proceedings are *quasi-criminal* in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. This principle was reiterated in the case of *Gatharia K. Mutikika vs Baharini Farm Ltd*, where it was held as follows: -

"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 proved... I 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 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, and 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."

In *Peter K. Yego & Others vs Pauline Nekesa Kodethe* the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in a application for contempt must prove beyond peradventure that the respondent is guilty of contempt.

In this matter, it is clear that the garage was broken into despite the court order. However, the dispute revolves on service.

I have considered the evidence on record and do find that there is sufficient evidence that this court issued an order restraining and prohibiting the respondents, their servants agents assignees or persons acting under their authority from levying distress against the tenants , threatening to evict , locking the tenants premises, evicting intimidating collecting any goods or tools in trade and or in any manner whatsoever interfering with the tenants quiet possession and lawful enjoyment of the premises known as Mudenge garage along Central Elgon Road within Kitale Municipality pending hearing of interparte of the Business Tribunal Case no 01 of 2018 . The respondents were direct to remove the padlocks erected on the main door to the premises. The OCS Kitale was to provide security to ensure peace prevails.

The said order was served however, there is a probability that the respondents received the court order after the breaking into the premises and restored the property after receiving the court order. The exercise of breaking in which was pursuant to a court order issued by the lower court which commenced at 8.00am and was concluded at 1200pm. The O.C.S. Kitale Police Station received a proper court order at 2.pm after effecting the order of the Magistrate's courts.

From the foregoing, I do find that there is no evidence of the willfulness of the respondents to disobey the court order as it was served after the exercise. The upshot of the above is that the application is dismissed with costs. This order applies to Environment and Land Court, Kitale Misc. Case No. 9 of 2018. Orders accordingly.

Dated and delivered at Eldoret this 28th day of September, 2018.

A. OMBWAYO

JUDGE