



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC APPLICATION NO. 318 OF 2017**

**PURITY MUTHONI PLEIN.....PLAINTIFF/APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF LAIKIPIA.....1<sup>st</sup> DEFENDANT/RESPONDENT**

**WILFRED KIMOTHO DANIEL.....2<sup>nd</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 27<sup>th</sup> March 2018 brought under *Order 40 Rule 3 of the Civil Procedure Rules* Section 1A and 3A of the Civil Procedure Act where the Applicant herein seeks that both the Respondents herein be detained in prison for a term not exceeding six months for disobeying the court orders granted on the 2<sup>nd</sup> May 2017, barring them from continuing with any construction on the suit land.

2. The Plaintiff herein commenced this suit on 1<sup>st</sup> March 2017 by way of a Plaint against the 1<sup>st</sup> Defendant herein. Together with the Plaintiff, the Plaintiff filed a Notice of Motion dated the same day under a Certificate of Urgency wherein she sought orders restraining the 1<sup>st</sup> Defendant with either by itself, its servants, agents or employees from receiving and approving any other high density buildings and/or architectural plans or all those plots known as Nyahururu Municipality Block 8/1005-445 which is adjacent to the plaintiff's parcel of land known as Nyahururu Municipality block 8/2036 which is a Medium density zone.

3. Upon hearing the Plaintiff ex-parte on 2<sup>nd</sup> March 2017, the Court made orders in the following terms:-

i. That the application is hereby certified as urgent and service thereof be dispensed within the first instance.

ii. That pending the hearing and determination of this application inter-partes the defendant is herein restrained with either by itself, its servants, agents or employees from receiving and approving any other high density buildings and/or architectural plans or all those plots known as Nyahururu Municipality Block 8/1005-445 which is adjacent to the plaintiff's parcel of land known as Nyahururu Municipality block 8/2036 which is a Medium density zone.

iii. Cost of the application be in cause

iv. Inter parte hearing was set for the 16<sup>th</sup> March 2017

4. On the 16<sup>th</sup> March 2017, when the matter come up for the hearing of the application inter partes, counsel for the 1<sup>st</sup> Defendant/Respondent herein was not ready to proceed whereon leave was granted to the 1<sup>st</sup> Respondent/Defendant to file his replying affidavit within 7 days and to serve the same to the Applicant/Plaintiff. Corresponding leave was also granted to the Applicant/Plaintiff to file a response to the replying affidavit within 7(seven) days of service. The hearing date was re-scheduled for the 2<sup>nd</sup> May 2017 with an extension of the interim orders.

5. On the 12<sup>th</sup> April 2017, the Applicant/Plaintiff returned to court with another application dated the 10<sup>th</sup> April 2017 seeking for orders that the 1<sup>st</sup> Respondent/ Defendant be cited for contempt of the orders of 2<sup>nd</sup> March 2017 and consequently be committed to jail for a period to be determined by this court.

6. Upon perusal of the application and hearing of the counsel's submission thereto, the court was not satisfied that the application was urgent and directed for service to be effected for hearing together with the application for injunction on the 2<sup>nd</sup> May 2017.

7. On the 2<sup>nd</sup> May 2017, Counsel for the 1<sup>st</sup> Defendant /Respondent was not ready to proceed with the hearing of both the Applications upon which the court gave the following orders.

i. That the Defendant/Respondents do file and serve their papers to both applications dated the 1<sup>st</sup> March 2017 and 10<sup>th</sup> April 2017 within 7 days.

ii. That the hearing of the application dated the 10<sup>th</sup> April 2017 for contempt of court orders to take precedence and be heard in the first instance

iii. That there be no constructions on the suit land in the meantime.

iv. That the hearing of the application dated 10<sup>th</sup> April 2017 is scheduled for hearing on the 15<sup>th</sup> June 2017, the acting county secretary Laikipia county, the 1<sup>st</sup> Respondent/Defendant, Mr. Nderitu to attend court in person.

8. On the 15<sup>th</sup> June 2017 counsel for the Plaintiff confirmed that the 1<sup>st</sup> Defendant/Respondent had ceased constructing and abandoned their application for contempt seeking instead to have their application dated 1<sup>st</sup> March 2017 be disposed of by way of written submissions. He also sought for leave to file a supplementary affidavit to respond to the issues raised and interim orders to be extended.

9. Counsel for the 1<sup>st</sup> Defendant/Respondent submitted that the acting secretary was present in court pursuant to the orders dated 2<sup>nd</sup> May 2017. That once the orders were issued, his clients had served the same to the parties who were constructing on the suit land wherein they had stopped the constructions. He was in agreement that the application dated 1<sup>st</sup> March 2017 be disposed of by way of written submissions and sought for corresponding leave to respond to any issues raised in the Plaintiff/Applicant's supplementary affidavit.

10. The court marked the application dated 10<sup>th</sup> April 2017 for contempt as abandoned as the same has been purged and granted leave to the Plaintiff/Applicant to file and serve their supplementary affidavit within 14 days. Corresponding leave was also granted to the Respondent/Defendant to file their response to the same within 14 days of service if need be.

11. Further orders were that parties file their written submissions to the Application dated the 1<sup>st</sup> March 2017 within 30 days of service. Highlighting of the written submission was scheduled for hearing for the 21<sup>st</sup> September 2017. Interim orders were extended.

12. On 25<sup>th</sup> July 2017 there was yet another application filed seeking to enjoin the 2<sup>nd</sup> Defendant/Respondent based on the fact that he was the lawful allottee of Nyahuru Municipality block 7/105, land upon which the construction was going on. He also sought that the court reviews its orders made on the 2<sup>nd</sup> March 2017. The applicant was enjoined to the proceedings ex-parte and directions issued for service of the Application to be effected.

13. On the 21<sup>st</sup> September 2017, Mr. Mwangi, counsel for the Plaintiff/Applicant submitted that he had just been served with the 2<sup>nd</sup> Defendant/Respondent's application dated the 24<sup>th</sup> July 2017 and sought for leave to respond to the application and to file supplementary submissions thereafter.

14. Mr. Siglai advocate holding brief for Mr. Kamanga for the 1<sup>st</sup> Defendant/Respondent submitted that Counsel for the 1<sup>st</sup> Defendant/Respondent had not filed his submissions secondly that they had also just been served by the interested party, the 2<sup>nd</sup> Respondent herein.

15. Mr. Mukira, counsel for the 2<sup>nd</sup> Defendant/Respondent sought for the interim orders to be vacated and for the applications to proceed simultaneously.

16. The Court granted leave to the Plaintiff and 1<sup>st</sup> Respondent to file and serve their responses to the 2<sup>nd</sup> Respondent's application dated the 24<sup>th</sup> July 2017 within 14 days.

17. That upon service, all parties were to file and serve their written submissions within the stipulated 14 days. Leave was also granted to the 2<sup>nd</sup> Respondent/interested party to file and serve their response to the application dated 1<sup>st</sup> March 2017 within 14 days and thereafter file their submissions. Highlighting of submissions to the applications dated the 24<sup>th</sup> July 2017 and 1<sup>st</sup> March 2017 respectively were to be submitted on the 23<sup>rd</sup> November 2017 on which day both Counsel for the Defendant/Respondents were not ready and the matter was adjourned to the 19<sup>th</sup> February 2018 on which day, Counsel for the Defendant/Respondents had not fully complied with the orders of the court issued on the 23<sup>rd</sup> November 2017. The matter was adjourned to the 30<sup>th</sup> April 2018.

18. On 5<sup>th</sup> April 2018 an application for contempt of court dated the 27<sup>th</sup> March 2018 and filed on the 4<sup>th</sup> April 2018 was placed before me wherein the Plaintiff sought for orders that both the Respondent/ Defendants be cited for contempt of the orders of 2<sup>nd</sup> March 2017 and consequently be committed to jail for a period to be determined by this court.

19. The court directed that in line with the provisions of the Contempt of Court Act, that the application be served upon the Defendants herein and further, that a notice to show cause to issue upon both Defendants for them to appear in court to show cause why contempt of court proceedings should not be commenced against them.

20. The matter was scheduled for hearing on the 14<sup>th</sup> May 2018 on which date directions were taken that the Application dated the 27<sup>th</sup> March 2018 be disposed of by way of written submissions.

21. I have considered the submissions filed by the parties. The Plaintiff's submission is to the effect pursuant to their application dated the 1<sup>st</sup> March 2017, seeking for interim injunction against the 1<sup>st</sup> Respondent, the court issued interim orders on the 2<sup>nd</sup> May 2017 expressly ordering that there be no construction on the suit land which was adjacent to the Plaintiff's parcel of land, pending inter partes hearing thereof. That the said order was valid but the Respondents have wilfully failed to comply with the said order and should face the consequence.

22. That the 1<sup>st</sup> Respondent was enjoined since he approved the 2<sup>nd</sup> Respondent's plan to construct on the suit land.

23. The Plaintiff further submitted that their application was competent before the court because it was brought under Order 40 Rule 3(1) of the Civil Procedure Rules which is clear on the consequence of a breach of terms granted by the court. That the said provision under sub Section 2 also stipulated the procedure for making such application.

24. The Plaintiff also relied on the provisions of Section 5 of the Judicature Act which was a substantive law on the contempt of court and which confers power to the court to punish for contempt of court. Reference was also made to the decided case of **Sam Nyamweya & 3 Others vs Kenya Premier League & 2 Others [2015] eKLR**.

25. That although the said orders were directed to the 1<sup>st</sup> Respondent before the 2<sup>nd</sup> Respondent was enjoined that, indeed the 2<sup>nd</sup> Respondent had admitted in his replying affidavit that he had been informed through a letter by the 1<sup>st</sup> respondent of the existence of the court's order halting constructions on the suit land and that he should stop the construction immediately.

26. That although service of an Order upon a contemnor was one of the requirements to sustain the present application, yet there is no doubt that the 1<sup>st</sup> Respondent had been served with the court order wherein he in turn wrote to the 2<sup>nd</sup> Respondent informing him of the court's orders. Nothing would have been easier than to comply with the same notwithstanding that he was not a party to the suit at the time. That personal service was not mandatory in the circumstance.

27. While submitting that it was essential that the 2<sup>nd</sup> Respondent be served personally with the court order, the Plaintiff relied on the decided cases of

**i. Justus Kariuki Mate & Another Vs Martin Nyaga Wambora & Another (CA 24/2014) Nyeri,**

**ii. Shimmers Plaza Ltd Vs NBK (2015) eKLR**

**iii. Lenaola J in Basil Criticos Vs Attorney General & 8 Others (2012) eKLR**

28. That it was not true that the suit land was not known as the Plaintiff had categorically stated that it was Nayhururu Municipality Block 8/1005-445 and had even annexed the allotment letter and approved Plan to the same. Further, the 2<sup>nd</sup> Respondent had admitted as much in his replying affidavit.

29. The Plaintiff submitted that the Respondents were guilty of contempt of court as defined by the Black's Law Dictionary. That although the court had issued orders that there be no construction to be done on the suit land, the 2<sup>nd</sup> Respondent continued to build on the suit land as is evidenced in the Photographs annexed thereon.

30. They relied among others on the decided cases of:

**i. Stewart Robertson vs Her Majesty's Advocate, 2007 HCAC63, Lord Justice Clerk**

**i. North Tetu Farmers Co. ltd vs Joseph Nderitu Wanjohi [2016]eKLR**

**ii. Africa Management Communication International Ltd vs Joseph Mathenge Mugo & Another [2013]eKLR**

31. In opposing the application, the 1<sup>st</sup> Respondent/Defendant filed a Replying Affidavit sworn on 29<sup>th</sup> June 2018 contending that they had not failed to comply with the court orders. That indeed they being employees of the county government of Laikipia were not involved in the construction at the suit premises as those were private property.

32. That there had been no demonstration by the Plaintiff/Applicant proving that they had had been in contempt as they had not issued any approval plans after the issuance of the orders and further that once they had received the court orders that had written to the property owners notifying them of the same. Vide their letter dated the 18<sup>th</sup> May 2017.

33. Their submissions filed on the 24<sup>th</sup> July 2018, the 1<sup>st</sup> Respondent/Defendant submitted that the Plaintiff's application was misplaced and incompetent in as far as it had purported to state that they were in contempt of court orders because the same had failed to state in which manner the court orders had been contravened.

34. That there was no evidence that they had issued any approvals of building plans that were of high density since the issuance of the court order.

35. Further that there was no evidence that the 1<sup>st</sup> defendant/Respondent had been engaged in any construction on the suit land, further that

the photographs taken at the initial stage of the application for injunction are very different from the photographs annexed to the present application thus it cannot be safely said that they were taken at the suit land.

36. The Application was further contested by the 2<sup>nd</sup> Defendant/Respondent's replying affidavit dated 10<sup>th</sup> May 2018 and their submissions filed on the 29<sup>th</sup> June 2018 to the effect that the said Application was incompetent as it was brought under the wrong provisions of the law being Order 40 Rule 3 of the Civil Procedure Rules which provision is only applicable after an order for injunction has been issued. That the orders issued were declaratory orders directed to the 1<sup>st</sup> respondent/Defendant.

37. That the order were issued in a vacuum and not against the 2<sup>nd</sup> Defendant/Respondent him not being a party to the proceedings herein.

38. That further the suit land was not identified and neither was the proprietors disclosed hence the Plaintiff cannot purport to state that the 2<sup>nd</sup> Defendant/Respondent was in contempt of the court orders.

39. The 2<sup>nd</sup> Respondent relied on the decided case in **Ramadhan Salim vs Evans M. Maabi T/A Murphy Auctineers & Another [2016] eKLR** and **Kyoga Haulier Ltd vs long Distance Truck Driver & Allied Workers Union [2015] eKLR** where the court held that one could not be held in contempt where orders were of temporary injunction.

40. The 2<sup>nd</sup> Respondent/Defendant also submitted that there had been no service upon them of the court order and therefore, their application could not stand.

41. That in the case of **Duncan Manuel Mungai vs Kenya Railway cooperation in Misc Application No. 275 of 2007**, the court held that the court order had to be served personally upon the contemnour. That there was no proof of service upon them.

42. I have considered the Affidavits on record, the annexures, the submissions of counsel and authorities relied on. Black's Law Dictionary (Ninth Edition) defines contempt of court as:-

*“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”*

43. In **Johnson Vs Grant (1923) SC 789 at 790** Clyde L J noted:-

*“The phrase ‘contempt of court’ does not in the least describe the true nature of the class of offence with which we are here concerned.... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged.” (Emphasis mine).*

44. In the case of **ECONET Wireless Ltd vs Minister for Information & Communication of Kenya & Another [2005] eKLR** it was held that:

*“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 contemnour or demand that it is purged or both. For instance an alleged contemnour 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 contemnour would have no right of audience in any court of law unless he is punished or purges the contempt.”*

45. On the basis of the above holding in the **ECONET** case supra, this court directed that the contempt of court proceedings herein as commenced must be determined before the substantive motion and other preliminary objections raised, including objections as to jurisdiction of this court to hear and determine the dispute and or the locus standi or necessity of other parties to the suit could be determined.

46. I have heard submissions by both counsel for the Applicant and the Defendants. The law guiding the present application is Order 40 Rule 3(1) of the Civil Procedure Rules which stipulates that:-

*In cases of disobedience, or of breach of any such terms, the court granting an injunction may order 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 six months unless in the meantime the court directs his release.*

47. From the affidavit evidence, submissions by the respective parties' counsels on record the applicable law and decided cases, the following issues stand out for determination:-

**i. Whether the application had been brought under the proper provisions of the law.**

**ii. Whether there was any valid court order issued by this court on 2<sup>nd</sup> May, 2017.**

**iii. Whether the order of 2<sup>nd</sup> May, 2017 was served upon the Respondents or whether the Respondents were aware of the orders of 2<sup>nd</sup> May, 2017.**

**iv. Whether the Respondents are guilty of contempt of court order issued on 2<sup>nd</sup> May, 2017.**

48. On the first issue as to whether the application had been brought under the proper provisions of the law. The Plaintiff in this case has invoked the jurisdiction of the court under Order 40 of the Civil Procedure Rules and not Section 5 of the Judicature Act. Likewise in the case of **Republic vs County Council of Nakuru Ex-Parte Edward Alera t/a Genesis Reliable Equipment & 2 others [2011] eKLR** the same related to an order that was not in the nature of an injunction and Section 5 of the Judicature Act applied in the circumstances of that case. From the foregoing, I find that the Plaintiff's application is properly before the Court.

49. **On the second issue as to whether there was any valid court order issued by this court on 2<sup>nd</sup> May 2017, the court finds that indeed on the 2<sup>nd</sup> May, 2017 this court issued ex-parte interim orders to this effect;**

*"That pending the hearing and determination of this application inter-partes the defendant is herein restrained with either by itself, its servants, agents or employees from receiving and approving any other high density buildings and/or architectural plans or in any way interfering with the designated use of all those plots known as Nyahururu Municipality Block 8/1005-445 which is adjacent to the plaintiff's parcel of land known as Nyahururu Municipality block 8/2036 which is a Medium density zone"*.

50. That at the time, parties to the suit were the Plaintiff and the 1<sup>st</sup> Defendant/Respondent. Parties have not disputed that there indeed there was a valid order issued by this court. This issue thus rests.

51. On the third issue as to whether service of the **order of 2<sup>nd</sup> May 2017** alleged to have been disobeyed, was effectively served, the applicant maintains that the orders were served upon the 1<sup>st</sup> Respondent/Defendant who was party to the suit at the time, a fact which is not denied by the 1<sup>st</sup> Defendant/Respondent. The 1<sup>st</sup> Defendant/Respondent on the other hand has not denied receipt of the court order but maintains that they wrote to the 2<sup>nd</sup> Defendant/Respondent herewith forwarding to him a copy of the said order and instructing him to stop any constructions on the suit land. Receipt of this letter is not denied by the 2<sup>nd</sup> Defendant/Respondent although his stand is that the order ought to have been personally served upon him.

52. On this point, the Court of Appeal in the case of **Shimmers Plaza Ltd Vs NBK (2015) eKLR** approved the growing jurisprudence right from the High Court that has reiterated that knowledge of a court order suffices to prove service and dispenses with personal service for the purposes of contempt proceedings. The Court of Appeal in the above Shimmers Plaza case cited with approval Hon **Lenaola J in Basil Criticos Vs Attorney General & 8 Others (2012) eKLR** where the learned Judge pronounced himself thus:-

*"...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."*

53. **This court finds that the defendants had knowledge of the court's orders and therefore personal service was therefore unnecessary.**

54. On the last issue as to **whether the Respondents are guilty of contempt of court order issued on 2<sup>nd</sup> May, 2017, the court is guided by** the Scottish case of **Stewart Robertson vs. Her Majesty's Advocate, 2007 HCAC 63**, Lord Justice Clerk stated that:

*"contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings"*

55. Further, Romer L.J in **Hadkinson vs. Hadkinson(1952) ALL ER 567** stated that:

*"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"*

56. From the foregoing, it is trite that contempt of court proceedings and applications are subtle and criminal in nature and would impose criminal sanctions if a conviction followed.

57. In the instant case, I find that indeed the 1<sup>st</sup> Defendant/Respondent was served with the court order of 2<sup>nd</sup> May 2017, however there was no tangible evidence placed before me to make a finding that they (1<sup>st</sup> Defendant/Respondent) disobeyed and disregarded the said court order. In this regard, the 1<sup>st</sup> Respondent/Defendant is herewith discharged.

58. On the contrary, I find that the 2<sup>nd</sup> Respondent/Defendant in the present case willfully and intentionally defied orders of the court despite service of the order and penal notice upon him. The action of the 2<sup>nd</sup> Defendant's continued construction on the suit land ran afoul of the terms of the court orders issued on the 2<sup>nd</sup> May 2017 which had restrained him from interfering with the designated use of all those plots known as Nyahururu Municipality Block 8/1005-445 pending the hearing and determination of the application for injunction.

59. To protect the dignity and authority of the court of law, this court, shall be firm on any person who deliberately disobeys court orders or attempts to scuttle the court process.

60. I find that the 2<sup>nd</sup> Respondent/Defendant herein is in contempt of court orders and proceed to punish him for contempt. The application

dated the 27<sup>th</sup> March 2018 is herein allowed as against the 2<sup>nd</sup> Respondent/Defendant, the defendant is condemned to pay a fine of Ksh. 100,000/- in default to serve a term of 2 months in civil jail effective immediately.

**Dated and delivered at Nyahururu this 19<sup>th</sup> day of November 2018**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**