



On 14<sup>th</sup> February 2017 when the application was listed for hearing, Mr. Sagasi Counsel for the Defendant/Respondent raised a preliminary objection that one Colleta Jemeli Lagat who swore an affidavit in support of the application is not a party to the suit hence a stranger.

The court overruled Counsel for the Defendant/Respondent and dismissed the preliminary objection on the grounds that it would be in the interest of justice that matters are heard without undue technicalities.

The court gave an order that the application proceeds.

By consent, Counsels agreed to file written submissions in respect of the application dated 6<sup>th</sup> February 2017.

Both Plaintiff/Applicant and Defendant/Respondent's Counsels have filed the written submissions.

### **PLAINTIFF/APPLICANT'S CASE**

The Plaintiff/Applicant's application was supported by the annexed affidavit of Mrs Colleta Jemeli Lagat and Kipkosgei Choge Advocate.

In her supporting affidavit Mrs. Colleta Jemeli Lagat deposes that she is the wife of the Plaintiff and the Defendant respondent is their neighbor, her husband the Plaintiff herein having purchased land from him. She further deposes that she is aware of the court orders issued on 20<sup>th</sup> August, 2016 and confirmed on 3<sup>rd</sup> November 2016 which she personally directed the process server one Robinson Getange to serve upon the respondent. She further confirms that the said orders and pleadings were served on the respondent personally.

Mrs. Colleta Jemeli Lagat avers in her affidavit that the respondent is aware that her husband is out of the country and that is why he has taken into harassing her by demolishing her fence in total disregard and disobedience to the court order which sanctioned the maintenance of the status quo. She further avers that the respondent has threatened her with eviction.

She urged the court to cite the Defendant respondent for disobedience of court order.

The annexed affidavit of Kipkosgei Choge Advocate in support of this application also reiterates the contents of Mrs. Colleta Jemeli's affidavit and urged the court to grant the orders as prayed.

### **PLAINTIFF'S COUNSEL'S SUBMISSIONS**

Mr. Kipkosgei Choge filed written submissions dated 22<sup>nd</sup> February 2017 in support of the Plaintiff/Applicant's application for contempt of court.

Mr. Choge, Counsel for the Plaintiff applicant referred the court to the definition of contempt of court as per **BLACK LAWS DICTIONARY (9<sup>TH</sup> EDITION)** 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 a fine of imprisonment”.***

Counsel also referred to the case of **JOHNSON VS GRANT (1923) SC 789 at 790 Clyde LJ** noted.

*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 the court which is offended, a petty and misleading view of issues involved, it is the fundamental supremacy of the law which is challenged.*

Counsel further relied on the case of **TEACHERS SERVICE COMMISSION VS KENYA NATIONAL UNION OF TEACHERS & 2 OTHERS (2013) eKLR** where Ndolo J observed that:

*“ The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice.....it is about preserving and safeguarding the rule of law”*

Mr. Choge further submitted that there exists two legal regimes in this country regarding punishment for contempt of court which is section 5 of the Judicature Act and Section 63 of the Civil Procedure Act.

Section 5:

*“The High Court and the Court of Appeal shall have the same power to punish for contempt of court..... and that power shall extend to upholding the authority and dignity of subordinate courts”.*

He submitted on the provisions of Section 63 of the Civil Procedure Act and the need to prevent ends of justice from being defeated.

The court has powers under order 40 Rule 2(1) and 3 to order a person to be detained in prison for a time not exceeding six months in case of disobedience or breach of the orders granted. Counsel submits that from the court record and the replying affidavit filed by the defendant it is clear that the defendant had knowledge of the court order and that the affidavit of service filed in court shows that the order had penal notices.

Counsel further submitted that the defendant respondent was present in court when the orders were made.

Counsel relied on the case of **BASIL CRITCOS VS AG & 8 OTHERS 2012 eKLR**.

Lenaola J (as he then was). stated;

*“ the law has changed and as it stands today knowledge supercedes 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”*

The question is whether there has been a deliberate and an intentional non-compliance with the court order. Counsel answered this question in the affirmations and urged the court to allow the plaintiff's application for citing the defendant for contempt of court. He stated that a party must comply with an order whatsoever he thinks of such order.

This application was opposed by the defendant/respondent through the replying affidavit and submission from his counsel.

### **DEFENDANT'S COUNSEL'S SUBMISSIONS**

The defendant Respondent's counsel's submissions dated 28<sup>th</sup> February 2017 which were filed on the same date vehemently opposed the plaintiff/applicant's application.

Counsel submitted that the two supporting affidavits sworn by Colleta Jemeli Lagat and that of her counsel Kipkosgei Choge had the same contents of an earlier application dated 15<sup>th</sup> August 2016 which application was determined on 3<sup>rd</sup> November 2016.

Counsel urged the court to peruse the affidavits which are on the court records and stated that they had contradictory information.

Counsel for the defendant respondent submitted that Mrs Colleta's supporting affidavit for the current application and that of Patrice Lagat for the application dated 15<sup>th</sup> August 2016, avers that the fence was demolished. See paragraph 7 of Mrs. Colleta's affidavit and ground "d" of application dated 15<sup>th</sup> august, and paragraph 10 of Patrice Lagat's affidavit.

It was further submitted that the current application cannot be based on the previous application as no new violation has been proved or demonstrated to warrant orders for committal for contempt of court.

Counsel stated that this is a delaying tactic as the matter had been scheduled for hearing of the main suit on 14<sup>th</sup> February, 2017. He urged the court to dismiss the application with costs and set down the suit for hearing.

### **Issues and determination.**

I have considered the submissions for and against the application for contempt of court and I have come to the conclusion that the issues for determination are as follows:

1. Whether there was personal service of the orders granted by this court on 20<sup>th</sup> August, 2016 and confirmed on 3<sup>rd</sup> November, 2016.
2. Whether the alleged contemnor is culpable for contempt of court.
3. If the alleged contemnor is found culpable, whether the Plaintiff applicant can be granted the remedies sought.

### **On Issue No.1**

Under Order 40 Rule 3 of the Civil Procedure Rules, it provides for the consequences for breach of an order of injunction and stipulates that in cases of disobedience, or 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.

The issue of personal service is straightforward as the respondent has acknowledged in his submission of knowledge of the court order as he was present in court when it was confirmed. This makes it unnecessary to delve into it to establish knowledge of the order as required by law and procedure of contempt of court applications.

### **Issue No. 2.**

Having found that the defendant respondent was personally served and had knowledge of the order, the next issue is whether the contemnor is culpable for contempt of court. Was the order unambiguous and clear in its terms?

In response to the clarity of the order, the court finds that the same was clear as it was for the preservation of the status quo on the portion of 2.175 acres of **NANDI/KONGOR/432** occupied and possessed by the applicant in the defendant's share. This was unambiguous.

The next issue for determination is whether the defendant/respondent is culpable for contempt of court. The applicable law as stated in **MWANGI H.C. WANGONDU -VS- NAIROBI CITY COMMISSION, NAIROBI CIVIL APPEAL NO. 95 OF 1998** is that the threshold of proof required in contempt of court is higher than in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt to the contemnor's culpability.

It is not disputed that the defendant was personally served and had knowledge of the order. What is

disputed is as to whether the defendant was in contempt of the said order.

It was submitted by the defendant's Counsel that the supporting affidavit of the current application for contempt and the previous application for injunction are similar. The court was urged to peruse the grounds and the supporting affidavits for both applications and I find that the averments are similar stating that a fence had been demolished. When the court ordered for a status quo to be maintained, what was the status quo as at 3<sup>rd</sup> November, 2016? Had the fence been demolished which necessitated the plaintiff's recourse to court's interventions? Has the respondent done anything contrary to the prevailing status quo after the confirmation of the order on 3<sup>rd</sup> November, 2016?

In the circumstances and in response to the above questions I find that the plaintiff has not demonstrated any evidence to show that the respondent is culpable for contempt of court. The Plaintiff has neither exhibited any photographs to show the alleged violation of the demolished fence nor the fencing of the entry to his homestead.

It is now settled that the standard of proof in contempt of court matters that it must be higher than proof on a balance of probabilities almost but not beyond doubt. This was stated by the Court of Appeal in **MUTITIKA -VS- BAHARINI FARM LIMITED (1985) KLR 229** and as cited in **TEACHERS SERVICE COMMISSION -VS- KENYA NATIONAL UNION OF TEACHERS**.

Having said that, I find that the plaintiff/applicant has not met the standard of proof whether on a balance of probability; on a standard almost but not exactly as beyond reasonable doubt, or on the standard of beyond reasonable doubt. There is no evidence adduced before this court to warrant the committal of the respondent to prison for contempt of court.

Consequently, I find that this application lacks merit and is therefore dismissed.

**IT IS ORDERED THAT:**

- (a) The application dated 6<sup>th</sup> January, 2017 is dismissed.
- (b) Costs of the Application in the cause
- (c) Parties to fix a hearing date for the main suit.

**Dated and delivered at Eldoret this 7<sup>th</sup> day of March 2017.**

**M. A. ODENY**

**JUDGE**