



**Kanee v Birdi & 2 others (Environment and Land Case Civil Suit
E228 of 2020) [2024] KEELC 103 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 103 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E228 OF 2020
OA ANGOTE, J
JANUARY 18, 2024**

BETWEEN

PETER MWANGI KANEE PLAINTIFF

AND

JASPER SINGH BIRDI 1ST DEFENDANT

DAVINDER SINGH VIRDI 2ND DEFENDANT

JASMINDER SINGH VIRDI 3RD DEFENDANT

RULING

Background

1. Vide a Notice of Motion dated 6th October, 2022, brought pursuant to the provisions of Articles 41, 47 & 50 of *the Constitution* of Kenya, 2010, Section 30 of the *Contempt of Court Act*, 2016(repealed) and Order 40 Rule 4 of the Civil Procedure Rules, the Plaintiff/Applicant seeks the following reliefs as against the Defendants/Respondents:
 - i. That the Honorable Court be pleased to issue summons, an order compelling and or directing, Jaspal Singh Birdi, Davinder Singh Virdi and Jasminder Singh Virdi to appear before Court within the next seven (7) days and or such period as shall be directed by the Court to explain to the Court why they have failed and or refused to comply with this Honorable Courts orders given on 21st July 2022.
 - ii. That the Honorable Court be pleased to cite Jaspal Singh Birdi, Davinder Singh Virdi and Jasminder Singh Virdi by ordering the contemnors to compensate the Plaintiff for disobeying the Honorable Courts' order given on 21st July 2022.
 - iii. That in the alternative the Honorable court be pleased to commit the contemnors Jaspal Singh Birdi, Davinder Singh Virdi and Jasminder Singh Virdi to jail for a period of Six (6) months



or any other period that the Honorable Court deems fit and or until they purge the contempt and or such further orders be made as may be just.

- iv. That the contemnors Jaspal Singh Virdi purge the contempt by constructing and renting in the suit property land reference No. 209/12458/8 situated at Industrial Area, Enterprise Road, Nairobi County in the same continue to develop and renting and alienating the plaintiff. [That the contemnors purge the contempt].
 - v. That the costs of this Application be borne by the contemnors.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Peter Mwangi Kanee, the applicant herein, of an even date. Mr Kanee deponed that on 21st July 2022, the Court issued orders restraining the parties from developing, leasing, charging or in any manner alienating the suit property pending the hearing and determination of the suit.
 3. According to the Plaintiff/Applicant, the Defendants/Respondents were duly served with the orders on 28th July 2022, and 3rd August, 2022 and that the above notwithstanding, the Defendants/ Respondents continued to develop and rent out the suit property.
 4. The Applicant asserts that the Respondents have no respect for the orders of the Court and their contemptuous actions have diminished the Court's dignity casting it into disrepute; that Top of Form
 5. subsequently, the Respondents should be punished by way of citation for contempt and committal to civil jail for six months and that the Respondents' contemptuous actions has caused the Applicant great loss.
 6. The Plaintiff/Applicant deposed that the Defendants/Respondents should also be denied audience by the Court until they purge the contempt and that in the alternative, the Respondents' personal property should be attached, sold and be applied as compensation for contempt to the Applicant.
 7. In response, the 2nd Respondent, on his own behalf and on behalf of the 3rd Respondent filed a Replying Affidavit sworn on 24th January, 2023. He deponed that he is aware that vide a Ruling dated 21st July, 2022, the Court prohibited all the parties from developing, selling, transferring, leasing or charging the suit property; that they have not in any way disobeyed the Court order as alleged; that the suit property known as Land Reference No 209/12458/5 has been leased out to a tenant by the name Narayan Limited and that the property was leased out on 17th August, 2021 before the Court issued the prohibitory orders.
 8. According to the deponent, the construction of the perimeter wall alleged by the Applicant was undertaken in 2021, a fact that the Applicant is well aware having used the photos of its construction to support his application of 8th December, 2021 and that as advised by Counsel, the law does not act retrospectively and therefore orders of 21st July, 2022 do not affect the aforesaid lease.
 9. It was deposed that the Applicant is not suffering any loss not being the owner of L.R No 209/12458/5 nor claiming the same; that the suit property, L.R No 209/12458/8 is none existant as the sub-division of L.R No 209/12458/5 into L.R No 209/12458/8 and L.R No 209/12458/9 were revoked by the Court in Kajjado ELC 23 of 2019 and that the Application lacks merit and should be dismissed.
 10. The Applicant filed two Further Affidavits sworn on 15th and 23rd February, 2023. Vide the Affidavits, he reiterated his assertions as set out in the Motion and Affidavit in support further deposing that the photos adduced show the contemnors developing and leasing the suit property on 10th July 2021, 16th July 2021, 18th July, 2021, 20th July, 2021 and 30th July, 2021.



11. It was deposed that the Agreement adduced by the Respondents is with respect to LR No 209/12458/8 area 0.3520; that the allegations that the licensor is registered as proprietor of all that premises situate on L.R No 209/12458/5 is untrue and that the Respondents are occupying LR No 209/12458/8.
12. The Applicant submitted that the Respondents were duly served with the orders of 21st July, 2022 on 30th September, 2022 and the same is evinced by the Affidavit of Service sworn by one Peter Muendo Keli, a licensed process server and that further, the Respondents' Counsel were present in Court at the time of the issuance of the orders.
13. As to whether the Respondents were in contempt of Court orders, Counsel answered in the affirmative stating that despite knowledge of the Court orders, the Respondents constructed a boundary wall and further opened a garage which they run to date and that while dealing with the question of contempt, the Court in Econet Wireless Kenya Ltd vs Minister for Information and Communication of Kenya[2005]eKLR affirmed that respect for the authority and dignity of the Court is essential for the maintenance of law and order.
14. The Respondents' counsel submitted that contempt refers to the willful disobedience of any judgement, decree, direction, order or other process of a Court or willful breach of an undertaking given to a Court; that in this case, the Respondents have not disobeyed the Court orders as the construction of the perimeter wall was done in the year 2021 while the leasing of L.R No 209/12458/5 was done on 17th August 2021, before the orders of 21st July 2022.
15. It was submitted that nonetheless, the property L.R No 209/12458/8 claimed by the Applicant is non-existent as the purported subdivision of L.R no 209/12458/5 into two portions, that is L.R No 209/12458/8 and L.R N0.209/12458/9 was revoked vide judgment delivered on 5th May 2020 at Kajiado, ELC.
16. It was submitted that in the case of Gatharia K Mutikika vs Baharini Farm Ltd(1985) KLR 227, the Court affirmed that contempt, being a serious offence of criminal character which may result in imprisonment, must be proved satisfactorily and that the burden of proof is higher than on a balance of probabilities, but not beyond reasonable doubt. Reliance in this respect was also placed on the case of Oilfield Movers Ltd vs Zahara Oil and Gas Limited [2020]eKLR.

Analysis and Determination

17. Upon consideration of the application, Affidavits and submissions, the sole issue that arises for determination is:
 - i. Whether the Respondents are in contempt of the Court Orders issued on 21st July, 2022 and if so;
 - ii. what are the appropriate orders to issue?
18. By way of a brief background, vide a Motion dated 8th December, 2021, the Applicant sought as against the Respondents temporary injunctive orders restraining them or any persons acting under them from trespassing onto, evicting, alienating and or transferring, or in any manner whatsoever interfering with his right to ownership, possession and use of a portion of Land Reference Number 12458/8 situated at Industrial Area, Enterprise Road, Nairobi County.
19. The Motion proceeded for inter-partes hearing and vide its Ruling rendered on the 21st July, 2022, the Court issued status quo orders restraining any of the parties from developing, selling, transferring, leasing, charging or in any other manner alienating the suit property.



20. According to the Applicant, the Respondents in blatant breach of the aforesaid orders continued to carry out construction and renting of the suit property.
21. On their part, the Respondents deny any allegations of contempt maintaining that they have abided by the orders of the Court; that the lease referred to by the Applicant was entered into on 17th August, 2021 before the Court orders aforesaid and that the same is nonetheless with respect to L.R No 209/12458/5 and not the suit property which is not in existence.
22. The 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.”
23. Discussing contempt, the Supreme Court in *Republic vs Ahmad Abolfathi Mohammed & another* [2019] eKLR posited thus;
- “There is no doubt that an act in contempt of the Court constitutes an affront to judicial authority; and the Court has the liberty and empowerment to mete out penalty for such conduct, in a proper case. The object is, firstly, to vindicate the Court's authority; secondly, to uphold honourable conduct among Advocates, in their standing as officers of the Court; and thirdly, to safeguard its processes for assuring compliance, so as to sustain the rule of law and the administration of justice”
24. Due to the repeal of the *Contempt of Court Act*, 2016, [see *The Kenya Human Rights Commission vs Attorney General & Another* [2018] eKLR] the substantive law governing contempt proceedings is the *Judicature Act* Section 5 of which provides;
- “(1) 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 such power shall extend to upholding the authority and dignity of subordinate courts.
- (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”
25. Additionally, section 29 of the *Environment and Land Court Act* under the title offences provides as follows;
- “Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”
26. As a principle, Courts do not act in vain and their orders must at all times be respected. This was articulated by the Court of Appeal in *Shimmers Plaza Limited vs National Bank of Kenya Limited* [2015] eKLR as follows:
- “We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order



or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”.

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by *the Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

27. It is trite that contempt proceedings are quasi-criminal in nature due to the severe consequences they attract. Consequently, the standard of proof in such proceedings is higher than the balance of probabilities in civil cases although not as high as beyond reasonable doubt. As stated by the Supreme Court in *Republic vs Ahmad Abolfathi Mohammed & another* [2018] eKLR;

“The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held 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.”

The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”

28. In order to succeed in civil contempt proceedings, the Applicant has to prove: (i) the terms of the order were clear, unambiguous and binding on the Respondent, (ii) knowledge of these terms by the Respondent, (iii) failure by the Respondent to comply with the terms of the order and, (iv) deliberate conduct by the Respondent. In the cases of *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi* (2016) eKLR and *Republic vs Attorney General & Another Exparte Mike Maina Kamau* [2020] eKLR Justice Mativo, dealing with the question of contempt relied on the exposition by the learned authors of the book “*Contempt in Modern New Zealand*”^{^} who succinctly stated;

“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.”



29. Having perused the orders of 21st July, 2022, the court finds that its terms were clear and precise and their import was to restrain the parties from interfering with the suit property pending the hearing and determination of the suit.
30. The Applicant asserts that the orders were duly served on the Respondents. Indeed, the Respondents have not denied this. They were present when the Court rendered its decision. The only question is whether the Respondents are in breach as alleged.
31. With respect to the proof of breach of the Court orders, the Applicant has attached photographs alleged to be in respect of the constructions on the suit property. Having keenly analyzed the same, and bearing in the mind the burden of proof for contempt, the Court opines that the same are inadequate to aid the application.
32. It would have been prudent for the Applicant to contextualize the photographs to enable the Court determine whether the actions captured in the photos occurred at the place and at a time when the same would have amounted to acting in contempt of this Court's orders. Further, there was need to produce of a certificate of electronic evidence.
33. As regards claims of renting out the property, no evidence has been adduced by the Applicant. The Respondents on their part claim that whereas they have indeed rented the property, the same is in respect of L.R 12458/5 and not the suit property which does not in any event exist and that further, the license Agreement was entered into on 17th August, 2021 before the orders herein.
34. While the parties appear to wade into the question of the legitimacy of the suit property, this is not the arena for the same. The Court is simply supposed to answer the question of whether there was contempt of its orders of 21st July, 2022 or not
35. Ultimately, it is the Court's finding that the Applicant has not sufficiently established contempt by the Respondents. The upshot of the foregoing is that the application dated 6th October, 2022 is unmerited and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF JANUARY, 2024.

O. A. ANGOTE

Judge

In the presence of;

Mr. Kimuyu for Plaintiff's/Applicant's

Ms Gichuhi for Defendants

