



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 364 OF 2015

CHRISTOPHER ONSEMBE MANDUKU PLAINTIFF

VERSUS

KENNEDY OGORA MONGARE 1ST DEFENDANT

PAUL OGEKA NYATWANGA 2ND DEFENDANT

CHARLES OTEKI RIOBA 3RD DEFENDANT

THE LAND REGISTRAR, KISII COUNTY 4TH DEFENDANT

R U L I N G

1. The plaintiff by a Notice of Motion application dated 27th July 2015 inter alia sought an order of injunction on the above terms:-

That pending hearing of the substantive suit an order of injunction do issue restraining the 1st, 2nd and 3rd defendants and/or their derivatives, agents, servants or any other person acting under their directions or authority from entering or building upon, fencing off, cultivating or in any manner utilizing or effecting any dispositions whether by way of subdivision and transfer, charge, pledge, lease or otherwise respecting land title Kisii/Municipality/ Block I/182 pending interpartes hearing hereof.

2. On 27th October 2015 the application was listed before me for directions and upon hearing counsel for the plaintiff and the counsel for the 1st, 2nd and 3rd defendants there was consensus that as the suit involved the determination as to who between the plaintiff and the defendants held the genuine and valid title, considering each side held a title which either side claimed to be genuine, that the status quo in regard to the disputed property be maintained pending the hearing of the suit. The court consequently issued directions and/or orders in the following terms-

1. The parties maintain the obtaining status quo where no party will undertake any construction or fence the suit property and or sell, alienate or transfer the suit land until the suit is heard and determined.

2. The parties to complete compliance with Order 11 of the Civil Procedure Rules (CPR) within the next 45 days and thereafter to fix the matter for mention for pretrial directions.

3. The application by the plaintiff dated 24th July 2015 is hereby dispensed with and the costs

shall be in the cause.

3. Stemming and arising from the said directions/orders the plaintiff/applicant on 30th June 2016 filed a Notice of Motion dated 22nd June 2016 expressed to be brought under Section 5(1) of the Judicature Act, Cap 8 Laws of Kenya. The application inter alia prayed for orders:-

1. That the 3rd defendant/respondent be cited for contempt of court.

2. That the court be pleased to punish the 3rd defendant/respondent by way of committal to civil jail for a term not exceeding six (6) months and/or by way of imposition of a fine payable within a prescribed period of time or attachment and sale of his property to answer for any fine imposed by this honourable court but unpaid.

3. That the 3rd respondent do purge his contempt by demolishing the perimeter wall he has erected and carting away from land parcel Kisii Municipality/Block I/182 all material he has used to erect the said wall, at his own cost.

4. The application is supported on the grounds set out on the body of the application and on the affidavit sworn in support of the application by the plaintiff dated 22nd June 2016. The plaintiff/applicant avers that the 3rd defendant/respondent is in breach of the court order issued by the court on 27th October 2015. The 3rd respondent on or about 15th June 2016 began erecting a permanent perimeter wall around the suit property. The plaintiff has deponed that when he received information that the 3rd respondent was constructing the wall he visited the site and confirmed that indeed a perimeter wall was being erected and that the persons who were carrying out the exercise affirmed that it was the 3rd respondent who had given instructions for the erection of the wall. The plaintiff states he took photographs depicting the wall under construction which photographs are annexed to the supporting affidavit as “C1” and “C2”.

5. The plaintiff avers that at the time of the institution of the suit, the fencing of the suit property was of Mabati (iron sheets) and that the 3rd respondent was now erecting a permanent one using building blocks and that would alter the character of the property. The plaintiff/applicant argues that the court order of 27th October 2015 was made in the presence of counsel for the 3rd defendant (Mr. Ochwangi) and there is no doubt the 3rd defendant was aware of the court order but has deliberately ignored the same and chose to disobey it with impunity for which he ought to be held in contempt and punished by the court.

6. The 3rd defendant swore a replying affidavit dated 12th June 2016 in opposition to the plaintiff's application. The 3rd defendant in response to the charge that he was erecting a perimeter wall in breach of the order directing the parties to maintain and observe the status quo stated that at the time he purchased the suit property he erected an iron sheet perimeter fence around the property as hoarding before he could do the perimeter wall. He stated he had erected various pillars around the perimeter wall which were to support the perimeter wall once erected. The 3rd respondent states that the perimeter wall (iron sheet) and the pillars were standing and in place at the time the plaintiff filed the suit as attested by document 17 at page 50 of the defendants' bundle of documents which shows the walling and supporting pillars. The 3rd defendant avers that the order of status quo did not order for the demolition or removal of the perimeter fence (iron sheet hoarding) which was there at the time the order was issued. The 3rd defendant maintains that even though he was represented by counsel on 27th October 2015 when the court order for maintenance of status quo was issued no extracted order was served on him. According to the 3rd defendant he understood the order to mean that the suit property was to remain in the same state it was in at the time the order was issued.

7. Simultaneously with the replying affidavit, the 3rd defendant filed a Notice of Preliminary Objection on the grounds that:-

1. The application was premature, misconceived and void abinitio.

2. The honourable court is devoid and divested of jurisdiction to entertain and/or adjudicate upon the subject application in terms of the provisions of Section 5 of the Judicature Act, Cap 8 Laws of Kenya.

3. The application amounts to and/or constitutes abuse of the due process of court.

4. The plaintiff/applicant is non-suited.

On 13th July 2016 the court directed the parties to argue the preliminary objection and the application for contempt of court together by way of written submissions. The plaintiff/applicant filed his submissions dated 16th September 2016 on 19th September 2016 and supplementary submissions dated 7th March 2017 on the same date. The 3rd defendant/respondents submissions dated 17th January 2017 were filed on 20th January 2017.

8. The parties in their filed submissions reiterate the facts as set out in the affidavit in support of the application and in the replying affidavit in opposition thereof. The plaintiff/applicant in his submissions has argued that contrary to the 3rd defendant's assertion, that leave to commence contempt proceedings was not obtained and that the order was not served personally on him, that there was no longer a requirement for leave to be obtained and/or the order to be served personally on the alleged contemnor. The plaintiff has submitted that all that an applicant was required to prove was that the alleged contemnor had knowledge of the court order he is alleged to have breached. The plaintiff/applicant places reliance on the cases of **Christine Wangari Gachege –vs- Elizabeth Wanjiru Evans & 11 Others [2014] eKLR; Basil Critocos –vs- Attorney General & 8 Others [2012] eKLR and Kitangila Limited –vs- Keziah Mumbi Paul & 5 Others [2014] eKLR.**

9. In the case of **Kitangila Limited –vs- Keziah Mumbi Paul & 5 Others** (Supra) this court sitting at Milimani Environment and Land court Nairobi had occasion to consider whether leave was a prerequisite before a party could commence contempt proceedings and further whether personal service of the court order was a mandatory requirement. In the case, I held, following the decision in the Court of Appeal case of **Christine Wangari Gachege –vs- Elizabeth Wanjiru & 11 Others** (Supra) that leave was not required. In the case of **Christine Wangari Gachege –vs- Elizabeth Wanjiru & 11 Others** (Supra) the Court of Appeal referring to Rule 81.4 of the now amended Order 52 of the Rules of the Supreme Court of England which were applied to Kenya by virtue of Section 5 of the Judicature Act, Cap 8 Laws of Kenya stated thus:-

“An application under Rule 81.4 (breach of judgment, order or undertaking) now referred to as “application notice (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which judgment or order was made or undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavits) containing all the evidence relied upon.”

10. In the **Kitangila Limited** case (supra) after making reference to the case of **Superior Homes (K) Ltd –vs- East African Portland Cement (HC ELC No. 931 of 2013** (unreported) and the case of **Christine Wangari Gachege** Case (supra), I observed as follows while holding no leave was required:-

“I have made, reference to these authorities to illustrate the current procedure and practice in commencing committal proceedings in the High Court of Justice in England and to dispel the notion that an applicant in proceedings for contempt of court in an application grounded under Section 5(1) of the Judicature Act needs to obtain leave before commencing contempt of court proceedings related to breach of a judgment, order or undertaking. No such leave is required. Equally for applications under Order 40 Rule 3(1) relating to breach of disobedience of injunction orders no leave would be required to be obtained before commencing contempt of court proceedings.”

11. The 3rd respondent in the present matter has argued that the order was not extracted and served upon him. The 3rd respondent does not deny he was aware of the court order. At any rate his counsel and the plaintiff's counsel were present in court when the court made the order. From the replying affidavit sworn by the 3rd respondent, the 3rd respondent is labouring to demonstrate that he never interfered with the status quo of the property. He argues that there was always the Mabati (iron sheets) perimeter wall supported by some pillars. The 3rd respondent did not file a replying affidavit to the plaintiff's application for injunction dated 27th July 2015 but he filed grounds of opposition dated 29th July 2015. The photographs the 3rd respondent refers to in his replying affidavit attached to the defendants' bundle of documents at pages 49 and 50 do not show the pillars he states were erected to support the perimeter wall. The photographs at page 50 merely shows the iron sheets (Mabati) hoarding. The photographs annexed "C1" and "C2" to the applicant's supporting affidavit clearly show a freshly dug out trench and the foundation of a stone wall coming up. The iron sheet hoarding appears to have been removed to pave the way for the erection of the wall. The 3rd respondent's explanation was as captured in paragraph 14 of his replying affidavit thus:-

14. That over a time, part of the hoarding (read the iron sheet surrounding the perimeter wall fence), fell off owing to disuse and/or lack of reinforcement, occasioned by the respect and/or adherence to the court order for maintenance of status quo.

12. What however has not been explained is the freshly dug out foundation and the fresh stones laid. If what the 3rd respondent has explained is true one would have expected a bushy surrounding and not what is depicted by annexures "C1" and "C2". The implication is the iron sheet walling must have been removed to give room for the perimeter stone wall to be erected and that obviously was after the suit had been filed. The court order alleged to have been breached by the 3rd respondent was issued barely 3 months following the filing of the suit and the acts complained of by the plaintiff as constituting contempt came along barely 7½ months from the date the order was issued. The 3rd respondent has maintained that the suit property was fenced at the commencement of the suit albeit by iron sheet wall (hoarding) and denies that he engaged in any acts that was inconsistent with the order for status quo ordered by the court.

13. The 3rd respondent has additionally argued that he was not personally served with the order he is alleged to have breached and thus he cannot be held to be in contempt of the same. For his part, the plaintiff/applicant contends the 3rd respondent was aware of the court order and its contents and yet chose to breach the same with impugntiy and for that reason he ought to be held to be in contempt of court and punished as court orders are not made in vain. The 3rd respondent relied on the cases of **Mwangi HC Wangondu –vs- Nairobi City Commission CACA No. 95 of 1998 (unreported)** and **Mutitika –vs- Baharini Farm Limited [1985] KLR 227** where the courts had held that the court order must be personally served and the same must have been endorsed with a penal notice for a party to be adjudged to be in contempt of the order.

14. There is ample authority that it is not mandatory for a court order to be served personally on a party for a party who breaches the order to be held to be in contempt of such order if it is shown the party had knowledge of and was aware of the order. In the case of **Gatimu Farmers Company –vs- Geoffrey Kagiri Kimari & 3 Others [2005] eKLR**, L. Kimaru, J. held thus:-

“Any person who becomes aware of such an order of the court and deliberately disobeys it is liable to be punished for contempt of court. As is stated in Halsbury's Laws of England, 4th Edition Volume 9, Para 65:-

“Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly endorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has notice, had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph and otherwise.”

The most important aspect of obedience of an order of the court is knowledge. If a person becomes aware of an order of the court which binds him, he has no option but to obey it.”

15. Mabeya, J. in the case of **Africa Management Communication International Ltd –vs- Joseph Mathenge Mugo & Another [2013] eKLR** reiterated the view that personal service was not a pre requisite before a party can be adjudged to be in contempt when he stated thus:-

“It is clear that the 1st defendant was aware of the orders of the court as he complained that the plaintiff had run an advertisement concerning the same on the dailies...To that extent, I find the 1st defendant had knowledge of the existence of the order and the issue of personal service upon him does not therefore arise. In any event the 1st defendant did not contest knowledge of the existence of the order. I am guided by the holding of Lenaola J. in the case of Basil Criticos –vs- Attorney General & 8 Others [2012] eKLR where he stated thus:-

“The law has changed and as it stands today knowledge supercedes personal service...where a party clearly acts and shows he had knowledge of a court order the strict requirement that personal service must be proved is rendered unnecessary.”

In the above cases the courts departed from the earlier position held in the **Mwangi Wangondu** case (supra) and the **Mutitika** case (supra) that the order had to have been personally served and endorsed with a penal notice for contempt to arise. As I stated in the **Kitangila Limited** case (Supra), I am in agreement with the view taken by Mabeya J. and Lenaola J. (as he then was) in the **Africa Management Communication Internal Ltd** case (supra) and **Basil Criticos** case (supra) respectively that it is not mandatory that the court order has to be personally served and endorsed with a penal notice.

16. In the present case, the parties advocates were present in court on 27th October 2015 when for all practical purposes the court made the order for maintenance of the status quo with the consent of the parties. The 3rd defendant/respondent has not stated that his advocate never communicated the terms of the order to him. Indeed by his replying affidavit he concedes being aware of the order for the observance of the status quo having been made. My view is that the 3rd defendant was aware of and had knowledge of the contents of the order issued by the court on 27th October 2015.

17. Having held that the 3rd defendant had knowledge of and was aware of the contents of the order, I have now to decide whether the 3rd defendant breached and/or disobeyed the court order. Earlier in this ruling, I observed that it was evident that the iron sheet hoarding was removed and there was a freshly dug foundation where the stone wall was being erected. The plaintiff deponed that when he went to the site after receiving reports that a wall was being erected he was informed it was the 3rd defendant who had given instructions for the wall to be erected. This in my view was inconsistent with the order for the observance and maintenance of the status quo as the 3rd respondent was erecting a permanent wall where hitherto there had only been a temporary iron sheet wall (hoarding). I am therefore satisfied that the 3rd respondent acted in breach of the court order which apart from requiring the parties to maintain the obtaining status quo, expressly barred any party from constructing or fencing the suit property.

18. Court orders are meant and are intended to be obeyed once they are issued. If parties were to be allowed to breach and/or disobey court orders at will, the administration of justice would be dealt a fatal blow as there would be no observance of the rule of law and anarchy and the law of the jungle would take centre stage. The court would be put into disrepute as parties would have no reason to seek the courts intervention when its orders are ignored and/or disobeyed with impunity. The court has to stamp its authority to uphold its dignity.

19. In the instant matter, I hold and find that the 3rd respondent acted in contempt of court when he set out to erect a permanent perimeter wall over the suit property in the face of an order of the court barring him from doing so. Although ordinarily a conviction on a charge of contempt of court would invite a custodial sentence, I have considered the attendant circumstances in this matter and I have elected rather

than commit the 3rd defendant to serve a prison term, I will give him the option to pay a fine and I hereby order the 3rd respondent to pay a fine of kshs. **50,000/=** within a period of 10 days from the date of this ruling failing which the 3rd respondent, the said **Charles Oteki Rioba**, shall be arrested and committed to serve a prison term of **30 days** from the date of such arrest and committal to civil jail.

20. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 12th day of May, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff/applicant

..... for the 1st, 2nd and 3rd defendants/respondents

..... for the 4th respondent

..... court assistant

J. M. MUTUNGI

JUDGE