



Mureithi v Ravate & 4 others; Ravasam Development Company Limited (Interested Party) (Environment & Land Case E163 of 2023) [2024] KEELC 1141 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E163 OF 2023
EK WABWOTO, J
FEBRUARY 29, 2024**

BETWEEN

PAPIAS KARINGA MUREITHI PLAINTIFF

AND

FAROUK RAVATE 1ST DEFENDANT

JUSTIN SAMOURGOMPOULLE 2ND DEFENDANT

ERIC AGBEKO 3RD DEFENDANT

PHILLIP NYAMBOK 4TH DEFENDANT

EQUITY BANK 5TH DEFENDANT

AND

RAVASAM DEVELOPMENT COMPANY LIMITED INTERESTED PARTY

RULING

1. This ruling is in relation to two applications. The first application is the application dated 4th January, 2024 filed by the 1st and 2nd Defendants and the Interested Party. The said application seeks to set aside the interim orders issued by this court on 10th November 2023 and other orders issued on 2nd January 2024. The application also seeks further orders restraining the Plaintiff, his agents, nominees, proxies or any other party from interfering, trespassing, constructing, entering and interrupting without lawful cause the 1st and 2nd Defendants' and the Interested party's quiet possession of the suit property known as L.R. No. 2/186 located in Kilimani and the developments therein. The applicants also sought for costs of the application to be borne by the Plaintiff. The said application was premised on several grounds which shall be outlined later in this ruling together with the affidavit sworn by Farouk Ravate on 4th January, 2024.



2. The second application for determination is the Plaintiff's application dated 18th January, 2024 seeking for the following orders.
 1. Spent...
 2. That this Court be pleased to cite the Nairobi Police Commandant, Kilimani OCPD and OCS for contempt for disobedience of Court Orders issued on 2nd January, 2024.
 3. That this Court be pleased to summon the Nairobi Police Commandant –Adamson Bungei, Kilimani OCPD-Moses Ndiwa and Kilimani OCS –Peter Gichuhi to appear before this court and show cause why they should not be cited for contempt.
 4. That this court be pleased to direct the Officer Commanding Kilimani Police Station and in his absence his direct subordinate to provide protection to the Plaintiff from Defendants and any other person from interfering with the quiet possession of the suit premises located on L.R. 2/186 either by themselves or their agents.
 5. Costs of the application be borne by the Defendants.
3. The application was supported by the affidavit of the Plaintiff sworn on the 18th January, 2024 and several grounds premised on the face of the application.
4. During the plenary hearing of the applications; Learned Senior Counsel Ahmednasir lead and submitted on behalf of the legal team of the 1st and 2nd Defendants and the Interested Party. Learned Counsel Kalwa submitted on behalf of the Plaintiff. Learned Counsel Nyaribo and Wachira made submissions for the 3rd Defendant while Learned Counsel Rabala made submissions on behalf of the 4th Defendant and Learned Counsel Kavagi appeared for the 5th Defendant.
5. It was the case of the 1st, 2nd Defendants and the Interested Party that the 1st and 2nd Defendants are foreign nationals and were not served with the application contrary to the orders of this Court dated 10th November, 2023. It was averred that the lack of service was deliberate in order to prevent their participation in the proceedings and shedding light on the matter. It was stated that they only got notice of the matter after they had taken over the management of the said suit property from the 3rd Defendant.
6. It was contended that the email addresses allegedly used to serve the 1st and 2nd Defendants with the application do not belong to them. It was also contended that there was material non-disclosure and falsehoods in respect to the Plaintiff's application dated 10th November 2023 and this court must take great exception to the perjury of the Plaintiff.
7. It was contended that the Plaintiff is neither the owner nor has been in possession of the suit property and that this is demonstrable from court records in HCCC No. 450 of 2011 in which the 3rd and 4th defendants together with an objector Nicholas Sankok have contended to be the owners of the property and that they had been in possession of the same.
8. It was also averred that orders issued by this court cannot be executed as there are other final orders issued in the HCCC No. 450 of 2011 that have been executed. These orders are contrary to the partial judgement of Hon. Justice Tuiyott issued in HCC No. 450 of 2011 delivered on 20th January, 2020. It was averred that this suit is an attempt by the Plaintiff and the 3rd and 4th Defendants to overturn the partial judgement in HCCC No. 450 of 2011.
9. It was contended that in the absence of any stay orders, the partial judgement delivered on 20th January, 2020 remains in full force, consequently, the Registrar of Companies in line with the partial judgement



effected the transfer of shareholding and directorship in the Interested party by striking off the 3rd and 4th Defendants' names from the Companies Register and replacing it with the names of the 1st and 2nd Defendant's and therefore the 1st and 2nd Defendants been declared the rightful owners of the Interested Party and are also the registered shareholders and directors of the Interested Party and by extension the owners of L.R. No. 2/186 Nairobi.

10. It was also argued that the partial judgement was affirmed by Hon. Lady Justice Okwany on 30th September, 2021 in her ruling where she noted that the only issue pending was the determination of the costs and rendering of accounts.
11. It was further argued that Hon. Justice Mabeya similarly affirmed the partial decree in paragraph 11 of his ruling dated 12 May, 2023 that;
“it is not in dispute that the Respondents are foreigners and are the only legal directors of the interested party. It is also not disputed that the suit property is the only known asset of the interested party and the commercial building erected on the suit property was indeed constructed by the proposed interested party and from which the decree emanates. In paragraph 30 the same ruling the court goes on to find that,..”...In prima facie case, there is no dispute as to the existence of the partial judgement of 20/1/2020. The Court also found that the 1st and 2nd Respondent be struck out as the directors and an order compelling transfer of shares to the Respondents issued.”
12. It was further stated that the 1st and 2nd Defendants filed an application for police assistance on 6th June, 2023 and Hon. Justice Mabeya allowed the same vide a ruling dated 6th October, 2023 and directed the DCIO and OCS Kilimani Police Station to assist in enforcement of the partial Judgement delivered by Hon. Justice Tuiyott on 20th January, 2020.
13. It was submitted that the 1st and 2nd Defendants took possession of the suit property from the 3rd and 4th Defendant and Nicholas Sankok pursuant to the partial judgement delivered on 20th January, 2020 and the ruling of Justice Mabeya delivered on 6th October, 2023 and that the Plaintiff has at all times been a non-party in a suit that has been in existence in relation to the suit property for over ten years.
14. It was contended that the Plaintiff is a stooge of the 3rd and 4th Defendants who have been found to be fraudulent individuals by the Court and that the 3rd and 4th Defendants are privy to the commercial case which has a bearing on this matter, and it is telling that they have not disclosed the same to this Court.
15. Learned Counsel Mr. Rabala for the 4th Defendant in opposing the application relied on the Replying Affidavit sworn by Philip Nyambok on 24th January, 2024. The 4th Defendant contended that he was a business partner with the 1st and 2nd Defendant and that the Plaintiff herein was not a party to HCCC No. 450 of 2011 and therefore, no orders arising therein would be binding upon him in this ELC Suit.
16. It was argued that the Plaintiff is the registered owner of the suit property and hence deserves protection by this court. The court was urged to dismiss the application.
17. Learned Counsel Kalwa submitting on behalf of the Plaintiff relied on the affidavit sworn by the Plaintiff on 19th January, 2024. It was argued that the Plaintiff was not a Party to the previous proceedings before the commercial court and further that the other suit did not relate to issues of ownership to the suit property. The Court was urged to dismiss the application.
18. Learned Counsel Nyaribo appearing for the 3rd Defendant submitted that any order or judgement on the issue of ownership of the suit property can only be constitutionally granted by this court. It was argued that the applicants never made any reference to Equity Bank since the loan was borrowed by the



- 3rd Defendant. It was also argued that the interim orders issued herein were extended by the consent of the parties.
19. In respect to the 2nd application dated 18th January 2024 seeking inter alia to cite the Officer Commanding Police Department (O.C.P.D), Moses Ndiwa, Officer Commanding Station (O.C.S) Peter Gichohi Kilimani Police Station and the Nairobi Police Commandant Adamson Bungei for contempt, it was averred that on 10th November, 2023, this court upon considering the application dated 10th November, 2023 issued orders restraining the defendants from evicting, trespassing, alienating, leasing and or interfering with L.R No. 2/186 located in Kilimani.
 20. It was averred that the application was duly served on the defendants herein and in the subsequent court hearings/mentions the extension of the said orders has never been interfered with though the defendants have been harassing and intimidating the Plaintiff to leave the impugned property and the OCS Kilimani has not assisted as ordered by the court.
 21. It was stated that to date, despite the existence of the orders issued on 10th November, 2023, which have not been set aside, the defendants have refused to comply with the same.
 22. It was also stated that on 2nd January 2024 the Plaintiff obtained orders seeking for police assistance in enforcement of the earlier orders issued on 10th November 2024 and that the said court order was served upon the Nairobi Police Commandant's registry on 2nd January, 2024, the Kilimani's OCPD's on 3rd January, 2024 while the Kilimani OCS's Office was served on 4th January, 2024.
 23. It was stated that on 5th January 2024, the Kilimani OCPD authorized an officer by the name Were to verify the Honourable Court Orders issued on 2nd January, 2024 which orders were verified as having been issued by this Court.
 24. It was further stated that on the same afternoon of 5th January, 2023, the OCS authorized an officer by the name Yanoo to do a ground verification and report back to the OCS. The said officer was taken to the suit property and a report was issued to the OCS by the said officer. On 9th January, 2024, the Kilimani OCS and OCPD jointly instructed an officer by the name Obino to conduct a ground operation and report back to the OCPD on the number of officers required to effect the court order. It was further stated that despite all the verification, there was no compliance to the said order.
 25. The court was urged to allow the application so as to cushion the Plaintiff from suffering irreparable loss.
 26. The application was opposed vide a replying affidavit sworn by Kevin Odhiambo a personal representative of the 1st and 2nd Defendants and also the Operations Manager of Le Blanc Co. Limited which manages the suit property on behalf of the Interested Party on the 24th January, 2024.
 27. It was deposed that the Plaintiff has never been in possession of the suit property and that an eviction can't issue against a person who has never been in possession. It was deposed that the 1st and 2nd Defendants took possession of the suit property by dint of a judgement delivered on 20th January, 2020 by Justice Tuiyott in HCCCOM No. 450 of 2011.
 28. It was contended that the 1st and 2nd Defendants being foreign nationals were never served with the orders issues by this Court on 10th November, 2023 and further the email address used to serve them doesn't belong to them.
 29. It was also contended that the orders were issued through material non-disclosure and hence impossible to execute. It was further contended that the Plaintiff is a stooge of the 3rd and 4th Defendants and has been in cohorts with them.



30. It was further contended that the judgement and orders issued in HCCCOM are yet to be set aside and this court cant and does not have jurisdiction to set aside orders of a court of a similar status and hence the Court should dismiss the application.
31. This Court has considered the two applications, rival affidavits and oral submissions made by Counsel for the parties. The Court is of the view that the following two pertinent issues arise for determination which issues can effectively dispose-off the applications: -
- i. Whether this court should proceed to set aside its interim orders issued on 10th November, 2023 and the Orders issued on 2nd January 2024.
 - ii. Whether the Officer Commanding Police Department (O.C.P.D), Moses Ndiwa, Officer Commanding Station (O.C.S) Peter Gichohi Kilimani Police Station and the Nairobi Police Commandant Adamson Bunge are in Contempt of the Orders issued by this court on 2nd January, 2024.
32. The jurisdiction of the court to set aside an order of injunction is set outlined under Order 40 Rule 7 Civil Procedure Rules, 2010 which provides as follows:
- “Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”
33. The Court has the discretionary powers to vary, review and or set aside its orders. In Patriotic Guards Ltd v. James Kipchirchir Sambu [2018]eKLR the court stated as follows:
- “It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
34. In the case of *Shah v Mbogo* [1967] EA 116 the court stated that:
- “This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
35. In the instant case, it was the Plaintiff’s case that he is the registered owner of the suit property and as such he is entitled to enjoy its possession, occupation and usage however the evidence provided confirms that he was not in occupation and or possession of the said property at the time of issuance of the interim orders on 10th November, 2023. This issue was not controverted by the Plaintiff. It has also emerged that pursuant to the partial judgement delivered by Justice Tuiyott on 20th January, 2020, orders were issued inter alia to the effect that a permanent injunction was issued restraining the 3rd and 4th Defendants from selling, disposing off, changing, interfering or intermeddling with the suit property. It was also evident that, the said orders have not been set aside nor overturned by the Court of Appeal. Had the said information been availed before this court, this court would not have arrived at the same decision. There was also no evidence that the interim orders issued by this court was served upon the 1st and 2nd Defendants who are foreign nationals. The 1st and 2nd Defendants had denied



service and further averred that the email addressed alleged to have been used for service was indeed not their proper and correct email address.

36. It is worth noting that a court may equally set aside and or vary its orders on the discovery of new and important issue or evidence which it did not have at the time of issuance of the said orders.
37. In view of the foregoing, it is the finding of this court that indeed the application does meet the threshold for setting aside of the interim orders issued herein on 10th November 2023 and orders issued on 2nd January 2024.
38. On the second issues on whether or not the Officer Commanding Station (O.C.S) and Officer Commanding Police Department (O.C.P.D) Kilimani Police Station and the Nairobi Police Commander should be cited for contempt of this court, it is trite law that to succeed in an application for contempt, the applicant must demonstrate wilful disobedience and the order said to have been disobeyed must be clear enough to leave no doubt as what is to be done or refrained from. See *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR.
39. An allegation of contempt of court is a serious matter since it puts the liberty and or property of the contemnor at grave risk. It is for that reason that the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See *Mutitika v Baharini Farm Limited* [1985] KLR 229 and *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR.
40. In the instant case, beyond the general claim that Officer Commanding Police Department (O.C.P.D), Moses Ndiwa, Officer Commanding Station (O.C.S) Peter Gichohi Kilimani Police Station and the Nairobi Police Commandant Adamson Bungei disobeyed the court orders issued on 2nd January 2024, the Plaintiff has not offered specific evidence to meet the higher standard of proof in contempt proceedings. It is also evident that there was no evidence of service of the said application specifically upon the said officers. An application for contempt has serious consequences in view of the orders that are usually sought since it seeks to curtail and limit one's freedom and as such proof of service of the said application is crucial to sustain the orders sought.
41. In view of the foregoing, this court is not satisfied that the Plaintiff has met the threshold for grant of the orders sought in his application dated 18th January, 2024 and in the circumstances the orders sought therein are declined.
42. In the end, the Plaintiff's application dated 18th January, 2024 and the 1st and 2nd Defendants together with the Interested party's application dated 4th January, 2024 are hereby determined in the following terms: -
 - i. The application dated 18th January 2024 is hereby dismissed.
 - ii. The interim orders issued by this court on 10th November, 2023 and the order issued on 2nd January 2024 are hereby set aside.
 - iii. Each party to bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF FEBRUARY, 2024

E.K. WABWOTO

JUDGE



In the presence of:

N/A for the Plaintiff.

Ms. Tharako for 1st, 2nd defendants and the Interested party.

N/A for the 3rd Defendant.

Mr. Odhiambo h/b for Mr. Rabala for the 4th defendant.

Ms. Sandra Kavagi for the 5th defendant.

Court Assistant: Caroline Nafuna.

