



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 355 OF 2012

(FORMERLY ELDORET HCCC NO. 112 OF 2007)

JOHN KIPKIRONG NG'ETICH.....PLAINTIFF

VERSUS

JAMES KIPROP AGU NGETICH.....1ST DEFENDANT

PAUL K. NGETICH.....2ND DEFENDANT

BENJAMIN K. ROTICH.....3RD DEFENDANT

WILSON KIPCHUMBA.....4TH DEFENDANT

DANIEL ROTICH.....5TH DEFENDANT

RULING

The plaintiff prays that the court be pleased to commit the 2nd, 3rd and 4th defendants namely; **Paul K. Ngetich, Benjamin K. Rotich** and **Wilson Kipchumba Rop** to civil jail for a term of two years and fine them an amount of Kshs.20,000,000.00 for contempt of court arising out of disobedience and defiance of court orders issued on 7.11.2014 by Hon. Justice S. Munyao and which order was served upon them and subsequently confirmed on 9.10.2014. The order contained a notice of penal consequences and was duly served on the defendants and their counsel. The order was granted in the presence of both defendants and their counsel.

The alleged acts of contempt are ploughing the suit land by tractor, fencing and burning vegetation. They are accused of making bricks on the land.

Paul Ngetich defends himself and co-defendants stating that he is not aware of the preservatory orders issued against him and that none were served upon him or his co-defendants. Moreover, that he was not in court when the orders were issued. Moreover, they deny to be in contempt of the court order.

I have considered the evidence on record and submissions of both counsel on record and do find that the court order granted by Justice Munyao on the 6th October 2014 and issued on the 7th October 2014 was to the effect that the land in dispute which was 15 acres was not to be interfered with in the survey exercise that was ongoing and that the land was not to be allocated to anybody by the Chebarus Society or any other entity until the court makes a determination of who is entitled to own it. That any party in default of the order would be deemed in contempt of court and liable to a jail term of 2 years or to a fine of Ksh.20 Million or to both jail term and fine as provided for by section 29 of the Environment and Land

Court Act no 19 of 2011. The allegation against the respondents are that the respondents have invaded the suit land and have started ploughing, burning vegetation, making bricks and claiming ownership.

It is clear that the court order was issued in the presence of both counsel and therefore, evidence of service is not necessary. However, there is no clear evidence that the survey exercise interfered with the said 15 acres. There is no evidence that the Chebarus Society or any other entity has allocated the suit to any person. This court did not make any order in respect of possession and use of the land but only orders on survey of the 15 acres.

It has been held several times that whenever a court order is made such an order is binding and whoever has difficulty has the option to come to court to seek an explanation rather than defy it. In the case of Ex-Parte Peter Nyamu Karaguri Muhuri Karaguri V Attorney General Of Kenya & 5 Others [2013]eKLR, H.C at Nairobi Civil Miscellaneous Application 405 of 2007, the learned judge Odunga J. observed that;

“The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself.”

Contempt of court in this context may be defined in terms of Civil Contempt. In the premises, according to the Halsbury's Laws of England, civil contempt has been described as follows;

“...disobedience to process is a civil contempt of court to refuse or neglect to do an act required by a judge or order of the court within the time specified in the judgment order requiring a person to abstain from doing a specified act, or to act in breach of an undertaking given to the court by a person, on the faith of which the court sanctions a particular course of action or inaction...” (See Halsbury's Laws of England, 4th Edition (9th Re-Issue), Pg 33, para 52.)

While Black's Law Dictionary defines contempt as follows;

“The failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order. (See Black's Law Dictionary, 7th Edition at pg 313)

In Hadkinson Vs. Hadkinson (1952) 2 All ER 567 at pg 569 it was held as follows;

“A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it...it would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed...”

In Mutika vs. Baharini Farm Ltd [1985] KLR 227 at pg 230 and 233 the learned judges Hancox, Nyarangi JJA and Gachuhi Ag JA,

“The principle propounded in re Maria Annie Davis [1889] 21 QBD 236, and 239, that

“Recourse ought not be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the latter Master of the Rolls in the case of Re Clement seem much in point: 'It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I am say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and

which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be mode of dealing with persons brought before him. On accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to the true measure of the exercise of the jurisdiction' must be born in mind... “

In Teachers Service Commission V Kenya National Union Of Teachers & 2 Others [2013] eKLR Ndolo J observed that: -

“38. 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 has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.”

In the case of Bell vs. Tuhoy & Another (2002) 3 All ER 975 Pg 981, para 22, the honourable learned judge Neuberger. J opined as follows;

“That an order made by a judge of unlimited jurisdiction, for instance in the High Court must be obeyed, and failure to observe it can amount to contempt of court, however irregular it might be unless and until it is reversed or set aside”. (see Bell vs. Tuhoy & Another See also Issacs vs. Robertson (1984) 3 All ER 140 at 142-143, (1985) AC 97 at 101-103)

In Safepak Limited V Malplast Industries Limited [2008] eKLR, H.C at Nairobi Civil Suit No. 365 of 2007, the learned judge P.M Mwilu stated as follows;

“The burden of proof is on the Applicant to clearly show that the Respondent was in contempt. And that is the position in RE BRAMBLEVALE LTD 1970] Ch.128 at page 137 where Lord Denning MR. said.

“A contempt of court is an offence of a Criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honored phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that when a man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given then his lies can be thrown into the scale against him. But there must be some other evidence.”

In our Court of Appeal Civil Application No.39/1990 Refrigerator & Kitchen Utensil Limited Vs- Gulabchand Popatlal Shah & Others approving the standard of proof in contempt cases as set out in the case of Gatharia Mitika & Others –Vs- Baharini Farm Limited Civil App No. 24/1995 Gatharia Mitika & Others –Vs- Baharini Farm Limited Civil App No. 24/1995, their Lordships held that in cases of alleged, contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but proven to a standard which is **higher than proof on a balance of probabilities** but not as high as **proof beyond reasonable doubt**. The charge must be proved beyond peradventure”

Our jurisprudence has shifted from the rigid principles that there must be personal service. A party cannot feign ignorance of a court order and yet the advocate was in court. **Lenaola J** in the case of Basil Criticos Vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows: -

“...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”

In this matter, the advocate for the respondents was in Court representing the respondents the orders were made in his presence. There is an assumption which is not unfounded, and which in my view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it requires him/her to report back to the client all that transpired in court that has a bearing on the client's case. This is the position in other jurisdictions within and outside the commonwealth.

In addressing the issue whether service of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in ***Bhatnager v. Canada (Minister of Employment and Immigration)***, [1990] 2 S.C.R. 217 at p. 226, LJ Sopinka, held that: -

“In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Ministers of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in such a case there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister.”

The Court went on to state that;

“On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt.... Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved. (See Avery v. Andrews (1882) 51LJ Ch. 414) (Emphasis by underline).”

In ***United States v. Revie*** 834 F.2d 1198, 1203 (5th Cir. 1987), the court held that the defendant had adequate notice of a show cause order because his attorney was on notice. Therefore, a client may be similarly "served" with a court's order by his attorney's communication of its contents and this communication is presumed if the attorney has knowledge of the order.

It is notable that our jurisprudence has shifted from the rigid principles that there must be personal service. A party cannot feign ignorance of a court order and yet the advocate was in court. I do find the respondents counsel and his clients were in court when the order was made and therefore the applicant has satisfied this court that the respondents were aware of the court order.

However, the application lacks merit as the order granted by Justice Munyao on the 6th October 2014 and issued on the 7th October 2014 was to the effect that the land in dispute which was 15 acres was not to be interfered with in the survey exercise that was ongoing and that the land was not to be allocated to anybody by the Chebarus society or any other entity until the court makes a determination of who is entitled to own it. That any party in default of the order would be deemed in contempt of court and liable to a jail term of 2 years or to a fine of Ksh.20 Million or to both jail term and fine as provided for by section 29 of the Environment and Land Court Act. The allegation against the respondents are that the respondents have invaded the suit land and have started ploughing, burning vegetation, making bricks and claiming ownership and yet there was no order stopping ploughing and fencing. The plaintiff had the opportunity to raise these issues and pray for suitable orders but he did not. There was no order of status quo on the ground as claimed by the applicant. Ultimately this court finds that the application does not meet the required standard of proof and therefore, is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF SEPTEMBER, 2017.

A. OMBWAYO

JUDGE