



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 63 OF 2012 (O.S)

IN THE MATTER OF TITLE NO. NJORO/NGATA BLOCK 2/130

CAROL CONSTRUCTION ENGINEERS LTD....PLAINTIFF/ RESPONDENT

VERSUS

NAOMI CHEPKORIR LANGAT.....DEFENDANT/ APPLICANT

RULING

(Applicant held to be in contempt and appealing against the said decision; applicant filing an application for stay pending appeal; interim stay granted; respondent raising a preliminary objection that the applicant cannot be heard until she purges her contempt; whether it is mandatory that a person cannot be heard without first purging her contempt; the law being that it is upon the discretion of the court depending on the circumstances of the matter; it is not the law that a party in contempt can never be heard; applicant deserving to be heard on merits on her application for stay pending appeal; preliminary objection dismissed; application for stay ordered to be listed for hearing)

1. This suit was commenced on 13th November 2012 by way of Originating Summons. In the summons, it was averred inter alia that the applicant (whom I will refer to as plaintiff, or the company, for ease of reference) is owner of the land parcel Njoro/Ngata Block 2/130 (the suit property) having become registered as proprietor on 11 December 2009. It is averred that the plaintiff received the property from one Martha Moraa Mayieka, who transferred the property to the plaintiff as a gift.
2. It is further averred that on 27th October 2012, an auctioneering firm descended on the premises on the instructions of the defendant and destroyed the plaintiff's property and evicted them. In the suit, the plaintiff wants a declaration that the suit property belongs to the company; a permanent injunction to restrain the defendant from the property; and damages of Kshs. 4, 250,000/=.
3. Together with the Originating Summons, the plaintiff filed an application for injunction. Interim orders were granted in the first instance by my predecessor, Honourable Justice Waithaka, for 14 days pending inter partes hearing. The orders were extended from time to time.
4. On 16th January 2013, the plaintiff filed an application for leave to commence contempt proceedings on the complaint that the defendant has violated the order of injunction and has refused the plaintiff access to the property. Leave to commence contempt proceedings was granted and the formal application for contempt was filed on 23rd January 2013.

5. The application for contempt was listed for hearing on 15th April 2013. In between, another application dated 20th March 2013 was filed on the same day. It sought orders to have the defendant summoned to show cause why she is still disobeying the court order of injunction. It was directed that this application be heard on 15th April 2013 together with the application for contempt.

6. On that day, Mr. Karanja Mbugua, learned counsel for the defendant, submitted that he had not been served with the original application for injunction, and sought orders that the application be served upon him and for time to respond to it. He also pointed out that there was a related matter, Nakuru CMCC No. 1857 of 2000. The court ordered the said file to be availed and the defendant was allowed time to respond to the applications on record. After several mentions, parties were directed to file written submissions on the now three pending applications and a consolidated ruling was delivered on 19 February 2015.

7. In the ruling, the court (Waithaka L J), observed that the suit Nakuru CMCC No. 1857 of 2000 was one filed by the defendant herein against Kenya Commercial Bank Limited (KCB or the Bank). The complaint in the suit was that KCB in purported exercise of its powers of sale as chargee, wrongfully sold the suit property. The said property in issue is the same as the suit land in this matter. The defendant was not suing because she was the registered owner, but claimed that the registered owner, one Joel Kimetet Langat, held the property in trust for her.

8. The learned Honourable Judge observed a litany of errors in the file, and significantly, she observed that the suit against the bank was dismissed on 23rd May 2011. She also noted that despite the dismissal, and technically there being no suit as the same had been dismissed, orders of eviction were later made against a person who was never added to the suit.

9. The court found it difficult to understand how orders of eviction could be issued in such circumstances, and having a duty to supervise the subordinate court, the court declared the orders of eviction to be a nullity. Apparently, it is the execution of the order of eviction issued by the Magistrates Court that led to the plaintiff being removed from the suit property and which prompted her to file this suit.

10. The court also proceeded to rule on the applications on record. The application for injunction, dated 8 November 2012, was allowed. On the application seeking leave to punish the defendant for contempt, the court observed as follows, and I feel it necessary to set it out :-

"22.... On the face of it, the defendant should be punished for contempt. However, the disobedience of this court's orders was apparently sanctioned by the invalid eviction orders issued by the Honourable Magistrate as earlier stated.

23. *What then should the court do in the circumstances as obtaining now ?*

To the extent that the apparent disobedience was based on an invalid court order, I spare the defendant from jail sentence. However, to the extent that by her actions and those of her agents (advocates and auctioneer) the plaintiff has suffered loss, I direct that the Originating Summons be set down for assessment of liquidated damages as pleaded.

24. *The transaction leading to the eviction orders was set in motion by the defendant and her advocate in CMCC 1857 of 2000. The defendant and her advocate knew or ought to have known that CMCC 1857 of 2000 had long been dismissed. When the defendant filed her application for execution before the subordinate court, she took responsibility for all that followed. Her counsel, as court officer had a duty to draw the subordinate court's attention to the dismissal orders made earlier. Indeed, the fact that the same court had observed in its judgment that there is no plaint against the "added party" should have made the defendant cautious. In a nutshell and for the avoidance of doubt, I find the application for contempt dated 22nd January, 2013 successful to a limited extent with costs to the plaintiff.*

25. *The defendant having been spared jail sentence for the reasons stated above, the plaintiff is at liberty to deal with its land as it wishes and take possession (if it's not in occupation).*

26. *For the avoidance of doubt, should the defendant attempt to obstruct or frustrate the plaintiff's occupation of LR No. Njoro/Ngata/Block 2/130, the officer commanding Menengai Police Station to ensure enforcement of this order."*

11. After the above ruling, a Notice of Appeal was filed on 27th February 2015, and thereafter, the defendant filed a motion dated 6th March 2014, seeking orders of stay of execution of the said ruling, pending appeal to the Court of Appeal. This application was placed before me, as Waithaka L. J, had now been transferred to another station. I granted an interim stay of execution pending inter partes hearing.

12. The plaintiff responded to the application by filing Grounds of Opposition, in which a Preliminary Objection (P.O) was also raised. The P.O is drawn as follows :-

1. *By a preliminary objection, notice of which is hereby given, that the said application be struck out by that :-*

(a) (i) *The defendant/applicant has no right of audience in law before this Honourable Court as she is in contempt of court, rightly stated in the ruling delivered on the 19th February, 2015.*

(ii) *Unless and until she should purge her contempt of court the defendant's application for stay of execution should not be entertained.*

13. I directed the parties to file written submissions on the P.O.

14. In his written submissions, Mr. Kagucia, learned counsel for the plaintiff, submitted that the defendant is in contempt of court and has no right of audience until she purges her contempt. He relied on the case of ***Econet Wireless Kenya Ltd vs Minister for Information and Communication of Kenya & Another (2005) eKLR; Kenya Tea Growers Association vs Francis Atwoli & 5 Others (2012) eKLR; Basil Criticos vs Attorney General and 8 Others (2012) eKLR; and Mawani vs Mawani (1977) KLR 159.***

15. On the other hand, Mr. Karanja Mbugua for the defendant, submitted that a party to a suit has a right of audience in court especially where he/she has exercised his or her right of appeal against a decision that found her or him guilty of contempt. He relied on the cases of ***Akber Esmail vs Equip Agencies Ltd (2014) eKLR; Alken Connections Ltd vs Safaricom Ltd (2013) eKLR ; N.H.IF vs Boya Rural Nursing Home Ltd (2007) eKLR ; and Gordon vs Gordon (1904- 1907) All E.R 702.***

16. I also took in oral submissions of Mr. Katithi, holding brief for Mr. Kagucia, and Mr. Karanja for the defendant. I take the following view of the matter.

17. The P.O is essentially arguing that the defendant is in contempt and therefore cannot be heard on her application for stay of execution pending appeal, until she purges her contempt. The question therefore arises, first, whether the defendant was held in contempt, and if so, whether it is mandatory that she cannot be heard before first purging the contempt.

18. On the first point, I have looked at the ruling delivered on 19th February 2014. I am actually not too sure whether the court held that the defendant is in contempt, or whether the court was of the view that there was a disobedience of an order, but that there was an excuse, for the reason that the defendant was executing another order of court. I do not wish to interrogate that decision further, for if I do so, I will be seating on an appeal against it, of which I have no jurisdiction.

19. I am however prepared to tackle this preliminary objection on the assumption (but it should not be

said that I am categorical that the defendant was held in contempt) that the defendant was held in contempt. Does that mean that she must not be heard until she purges her contempt ? That is exactly what the plaintiff has argued but which is opposed by the defendant.

20. I am grateful to counsels for the authorities that they have provided and I must say that they have been extremely useful in enabling me assess this application. On the authorities provided by counsel for the plaintiff, in the case of **Mawani vs Mawani**, the court held that the contemnor must purge his contempt before he may be heard. That case involved the custody of certain children, and the court ordered the children to be returned by the respondent, before the respondent could be heard any further. The other two authorities tendered, in my view, did not exactly address the issue whether the contemnor should be heard before first purging his contempt.

21. In the case of **Econet Wireless**, the issue addressed therein in the ruling of 17 June 2005, which was the ruling placed before me, was whether an application for contempt ought as a matter of course to be given precedence over all other applications. There was, in the matter, another application which questioned the jurisdiction of the court. Ibrahim J (as he then was) gave priority to the application challenging the jurisdiction of the court.

22. The issue in the other two authorities tendered, that of **Basil Criticos vs AG** (the ruling of 12th October 2012), and **Kenya Tea Growers Association vs Francis Atwoli** (ruling of 2nd August 2012) did not directly involve the question whether a contemnor deserves to be heard before first purging the contempt. The matter before court, in both matters, were straightforward applications for contempt, which were heard and determined. In the former case, the application was dismissed, and in the latter case, the application was allowed.

23. I have also read the authorities tendered by counsel for the defendant. I think the same are on point in this case. Starting with the old English case of **Gordon vs Gordon**, an application was made to have a party not be heard until she purges her contempt. The issue related to a child custody case. The child was with the mother who was ordered to have him returned to the jurisdiction of the court. She did not return the child and she was held to be in contempt. She appealed on the basis that the court had no jurisdiction to make certain orders that it did.

24. At the hearing, a preliminary objection was taken that she cannot be heard before first purging the contempt. Dealing with the matter, the court was unanimous that it is not in all instances that a party in contempt cannot be heard. In fact, the court wondered how the appellant could challenge the legality of the order, if she was not given a hearing. It was her case that the order was illegal and she deserved to be heard on that point. In his judgment, Williams L. J was of the following opinion :-

" It was admitted, and could not be otherwise admitted, that if the objection was to the very order which had created the contempt and the objection was one of the character which I have described, the fact that the person taking the objection was in contempt would not deprive him the right to be heard."

25. In determining the question whether a party in contempt cannot be heard our Court of Appeal in the case of **NHIF vs Boya Rural Nursing Home Ltd**, held as follows :-

"It is apparent from the ruling of the learned Judge that he understood the law to be that a contemnor who has made an application to set aside the order alleged to have been disobeyed cannot be heard on such application unless and until he has obeyed the order first and then question it later. If that is so, then the learned Judge with respect misapprehended the law for a court has an absolute discretion whether or not to hear a contemnor who has not purged the contempt."

26. In **Hadkison v Hadkison (1952) 2 All ER 567 Denning L.J said at page 575** : *'I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues it impedes the cause of justice by*

making it more difficult for the court to ascertain the truth or to enforce orders which it may make, then, the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed'."

27. A similar holding was made by the more recent decision of the Court of Appeal in the case of **Akber Abdullah Kassam Esmail vs Equip Agencies & 4 Others**. In the matter, the High Court had held that the appellant could not be heard until he purged his contempt. On appeal, the Court of Appeal was categorical that it is not in all cases that a contemnor cannot be heard and it falls within the discretion of the court considering the circumstances of the case.

28. I am guided by the above authorities and I do hold that it is not the law that a person in contempt must not be heard until he purges his contempt. Whether or not to hear a party in contempt is up to the discretion of the court, after considering all the surrounding circumstances of the particular case. That is not to mean that a contemnor is free to flout the orders issued by the court.

29. In our case, the defendant has made intention to appeal the ruling delivered on 19th February 2014.

30. It is within her rights to do so. In the meantime, she has asked for a stay of execution of that ruling pending appeal. It is apparent that the defendant wishes to challenge the very order that may have held her to be in contempt. She is perfectly entitled to challenge it.

31. She has for the moment been granted an interim stay of that order. In other words, she is not in the interim bound to execute the order of 19th February 2014. Given those circumstances, it will be unfair to deny her the right to be heard on whether or not her application for stay should be considered. Whether or not the same will be allowed is another matter which will be considered at the hearing of the application.

32. In so far as this preliminary objection is concerned, it is hereby dismissed with costs. Upon delivery of this ruling, I will proceed to give a date for the hearing of the motion for stay pending appeal.

33. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 19th January, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr Kagucia for plaintiff

Mr Karanja Mbugua for defendant

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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