



Chepstow Villas Management Limited v Secuins Agencies Limited & 2 others; Kimani & 3 others (Contemnor) (Environment and Land Case E166 of 2023) [2024] KEELC 778 (KLR) (20 February 2024) (Ruling)

Neutral citation: [2024] KEELC 778 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E166 OF 2023
JA MOGENI, J
FEBRUARY 20, 2024**

BETWEEN

CHEPSTOW VILLAS MANAGEMENT LIMITED PLAINTIFF

AND

SECUINS AGENCIES LIMITED 1ST DEFENDANT

DENCA CONTRACTORS LIMITED 2ND DEFENDANT

NAIROBI COUNTY GOVERNMENT 3RD DEFENDANT

AND

GRACE WANJIRU KIMANI CONTEMNOR

OBADIAH KIMANI KANARI CONTEMNOR

SARAH WAITHIRA WAKAIRU CONTEMNOR

ERIC THEURI NDERITU CONTEMNOR

RULING

1. There are two applications filed herein by the plaintiff/applicant. The first application dated 14/11/2023 and the second application for contempt of court dated 30/11/2023. On 14/11/2023, this court delivered its ruling pursuant to an application by way of Notice of Motion dated 14/11/2023 wherein the Plaintiff/ Applicant herein sought orders of injunction restraining the Defendants from further encroaching and building a boundary wall and Gate and or interfering with peaceful enjoyment of parcel No. LR 3858/40, pending the hearing and determination of this suit.
2. Seized with this matter the court had found that since the dispute between the parties was on the strength of their neighbouring plots and access of the 1st defendant who owns parcel number LR



3858/41 through the neck which is on parcel number LR 3858/40 owned by the plaintiff, the best order that commended itself in the circumstance was that parties maintain the status quo pending the hearing and determination of the application. The parties were directed to file their submission to the application dated 14/11/2023 for an inter partes hearing on 25/01/2024.

3. Before the hearing, the plaintiff/applicant filed another application for contempt dated 30/11/2023 seeking to have the 1st, 2nd, 3rd and 4th contemnors cited for contempt. The court ordered on 5/12/2023 that the application be served for directions and the parties attended court on 13/12/2023 and the parties were directed to attend court on 25/01/2024 for directions.
4. In application for contempt of court dated 30/11/2023, the applicant seeks orders that notice do issue on the 1st to 4th contemnors to attend court and show cause why they should not be cited for contempt of court of the ruling and orders issued on 14/11/2023. That the 1st to 4th contemnors respectively, be cited for contempt of court pursuant orders issued on the 14/11/2023 and should therefore be committed to civil jail or any other sanction to issue that this Honorable Court may deem and appropriate. That this Honorable court does order the OCS Spring Valley Police Station to ensure compliance of he status quo orders issued on 14/11/2023. Cost of this Application be provided for. The application is based on grounds that the applicant have disobeyed and continue to disobey the Orders issued by this Honorable court on 14/11/2023 for maintaining status quo in respect of the suit property which is the subject of the instant suit. That the order has been served on the 1st and 2nd respondents but they have refused to either abide by the said order and maintain *status quo* or desist from any wanton acts.
5. The parties attended court on 25/01/2024 when the two applications were mentioned and the parties agreed to canvass the applications by way of written submissions. I will deal with the application for contempt of court first dated 30/11/2023 and then the application dated 14/11/2023.
6. It is the Plaintiff's case that it is not in dispute that the orders made by the court on the 14/11/2023 had been breached by the defendants/respondents. That despite being served with the court order requiring status quo to be maintained the contemnors in apparent defiance of the said order willingly and deliberately refused to comply with the said order and continued to construct a gate on the disputed section of the boundary wall thus breaching orders issued by the court.
7. They relied on the photographs annexed as AP2 which allegedly showed the building and construction of a gate going on which according to the applicant showed a breach of the court order issued on 14/11/2023.
8. The application is opposed by one of the 1st defendant's/respondent's director, Obadiah Kimani Kanari. He filed a replying affidavit dated 20/12/2023 which he swore also on behalf of the directors of the 2nd defendant and deposed that he had authority to swear the said affidavit on their behalf. He denied that the defendants were served with the order of this court dated 14/11/2023. That they were only served with the application dated 30/11/2023 on 8/12/2023.
9. Further that the pictures attached to the application do not show when they were taken or that they were taken after the issuance of the court order dated 14/11/2023. That the directors of the 1st and 2nd defendants/respondents are law abiding citizens who cannot disobey court orders.
10. The 1st defendant's director avers that none of the directors were served with the order of this court dated 14/11/2023 and therefore he urged the court not to grant prayers 2, 3 and 4.
11. The Plaintiff/Applicant filed their submissions on the 11th May 2023. By the time of writing this Ruling the Defendant/Respondents had not filed their respective submissions.



12. I have considered the pleadings in totality and the submissions herein. I have also considered the provisions of Order 40 Rule 3 of Civil Procedure Rules which states as follows: -

3. (1)

“In cases of disobedience or of breach of any such terms, the Court granting an injunction may Order the property of the person guilty of such disobedience or breach to be attached, and may also Order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release”.

13. It is the Plaintiff's case that the Order was served on the 1st and 2nd defendants but that the defendants went against the said Order by not maintaining *status quo* and in apparent defiance of the order issued on 14/11/2023 the 1st to 4th contemnors willingly and deliberately refused to comply with the said order and continued to construct a gate on the disputed section of the boundary wall.

14. I have perused the plaintiff's application dated 30/11/2023 together with the Supporting Affidavit as well as the Order issued by the Court on 14/11/2023. The applicants in their application and in the Supporting Affidavit admit that construction of the gate continued and they have even annexed photographs of continued construction marked as “AP2”. The Order issued by the Court on 14/11/2023 was to maintain *status quo* meaning the respondents were to maintain status as at the date of filing the application dated 14/11/2023. Meaning the no further construction was permissible on the disputed portion and not even placing of a gate.

15. The Plaintiffs accuse the defendants for disobeying the Court Order by continuing construction on the disputed portion of the suit property and erecting a gate and yet at the time they approached the Court, they admit that the construction on the disputed portion of the property had commenced. To me, these are contradictory statements. The Court has not been told what actions the alleged 1st to 4th contemnors did before and after service of the Court Order. The 1st to 4th contemnors and or 1st and 2nd defendants/respondents herein have stated that they were never served with the court order dated 14/11/2023. This position is supported by the plaintiffs' own pleadings where there is no proof that the would be contemnors were served with the said Court Order.

16. At paragraph 4 of the Supporting Affidavit the plaintiff states

“That thereafter we extracted the order and caused the same to be served upon the respondents”.

There is no affidavit of service attached to attest to the fact that the alleged contemnors were served at all.

17. This court is being asked to issue a notice to show cause to the 1st and 2nd defendants and thereafter commit them to civil jail for Contempt of Court for having deliberately disobeyed Orders issued by the Court on 14/11/2023.

18. In the case of *Refrigerator & Kitchen Utensils Ltd -vs- Gulabchand Popatial Shah & Others* Civil Appln. No. 39 of 1990, the Court of Appeal while approving the standard of proof in contempt cases as set out in the case of *Gatharia Mitika & Others -vs- Babrain Farm Ltd*, Civ. Appln. No. 24 of 1995 held that in cases of alleged contempt, the breach for which the contemnor is cited must not only be precisely defined but proven to a standard which is higher than proof of a balance of probabilities but not as high as proof beyond a reasonable doubt. This is because, as already stated, the charge of contempt of Court is an offence of criminal character and a party may lose his liberty. I



must therefore satisfy myself beyond any shadow of a doubt that the defendants and/or its employees or agents disobeyed the order of 14/11/2023.

19. The *Black's Law Dictionary 9th Edition*, defines contempt as:

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice”.

20. Section 5(1) of the *Judicature Act* which provides that:

“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 that power shall extend to upholding the authority and dignity of subordinate courts.”

21. Section 29 of the *Environment and Land Court* is clear to the effect that;

“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”

22. In the case of *Exparte Langely* 1879, 13 Ch D/10 (CA) Thesiger L.J stated at P. 119 as follows: -

“...the question in each case, and depending upon the particular circumstances of each case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made” And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.”

23. In the case of *North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi* (2016) eKLR Justice Mativo stated as follows: ' writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated as follows: -

“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 - (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.”

24. From the evidence on record, I cannot safely hold that the Respondents disobeyed the Court Order issued on 14/11/2023. In my considered view, and having taken into consideration the evidence and all the materials on record, I am not satisfied that the Applicants have proved the alleged contempt on the part of the defendants and/or its employees or agents. The photographs produced are not accompanied with a certificate and therefore one is left wondering whether the land where the gate is constructed in the disputed portion. Further it is not clear when the said photographs were taken was it after the issuance of the court order or before. Consequently, I do find that plaintiff's applications dated 30/11/2023 lack merit and I hereby dismiss it.



25. I now turn to the Defendant's Application dated 14/11/2023. The same seeks to for an injunction to restrain the defendants/respondent or his agents from encroaching and building a boundary wall and Gate or interfering with the quiet enjoyment of parcel No. LR No. 3858/40 until the determination of this application.
26. The plaintiff's case is that Anita Patel who is the Manager of plaintiff/applicant is duly appointed by the owners and residents of parcel of land known as LR 3858/41 situate in Spring Valley and a copy of letter o Authority was also annexed marked as 'AP1'. It is the plaintiff/applicant's case that the 1st and 2nd defendant/respondent encroached on the suit property and commenced constructing a wall on a portion of it claiming to have been authorized by the 3rd defendant/respondent.
27. That there was an earlier survey undertaken which was requested by the owners of LR No. 3858/40. It was to establish boundaries and to ascertain the property claims of right of way from the abutting parcel LR No. 3858/41. The survey showed that suit property had a neck entrance into the property 3858/41 had not access though the neck entrance from LR No. 3858/40 since any access that was granted was through a local arrangement.
28. It is the plaintiff's contention that the sub-division that had been approved by City Council in 2004 to create access for the rear of parcels LR No. 3858/40 was never enacted and was thus voided and can therefore not be used to lay claim to the neck entrance and that the dispute between the plaintiff and the defendants where the later claims to have approval to access their property through the neck of the suit property has been reported to Spring Valley Police Station. The plaintiff attached an OB copy marked as "AP4".
29. The applicant therefore seeks grant of prayers sought in the application dated 14/11/2023.
30. Vide the replying affidavit sworn by one of the directors, Obadiah Kimani Kanari on 21/12/2023, the defendants contended that Anita Patel who deposed the supporting affidavit of the application dated 14/11/2023 is not which is included in its total area. Further that the parcel LR No. 3858/41 since parcel 3858/41 belongs to the 1st defendant and they have attached a copy of eh sale agreement and a search marked as SI and S2 respectively.
31. The 1st defendant contend that that they got approval from 3rd defendant to construct boundary wall and they attached the relevant documents marked as S3 and S4. Further that the 1st defendant has been paying rates of the parcel LR No. 3858/41 which belongs to the 1st defendant.
32. That the 1st defendant being owner of LR 3858/41 has no interest at all in LR 3858/40 and that the wall is being constructed on the boundary wall as indicated on the survey map and not on the plaintiff's parcel since the work is being done on the 1st defendant's and not the plaintiff's land. He is therefore not interfering with the plaintiff's quiet possession
33. That the opinion expressed in the surveyor's report which is produced by the plaintiff is incorrect. It is the contention of the 1st defendant that the plaintiff's objective is to deprive the 1st defendant of its parcel of land LR No. 3858/41.
34. It is his contention that the plaintiff is not entitled to the injunctive orders since he has not fulfilled the requirements of the celebrated case of *Giella vs Cassman* (1973) EA 358. He therefore urged the court to dismiss the application.



35. The applicant herein have sought for injunctive orders which are governed by Order 40 Rules 1(A) & (B) of the Civil Procedure Rules, which provides as follows:-

“Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

36. From the above provisions of law, it is very clear that the Court has discretion to grant temporary order of injunction in instances where the property in dispute is in danger of being wasted, damaged or alienated.

37. The two suit properties are registered in the name of the Plaintiffs/ Applicants as well as the 1st defendant.

38. Having obtained the Certificate of Title (registration), the Plaintiffs/Applicants and the 1st defendant are qualified under Section 26(1) of the Land Registration Act 2012 to be the absolute and indefeasible proprietors of the suit properties herein. There is no evidence tendered to show that the Applicants’ title herein has been challenged although the title of the 1st defendant is being challenged.

39. The applicants have alleged that the 1st defendants/Respondents have started construction of a wall and gate thus interfering with their quiet possession of the suit property. Therefore, the applicants have sought for an order of injunction in order to enjoy quiet possession.

40. To grant an injunction the court is guided by the by the principles set out in the case of *Giella...vs... Cassman Brown & Co. Ltd (supra)*, which are as follows:-

- a. The Applicant must establish that he has a *prima facie case* with probability of success.
- b. That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.
- c. When the Court is in doubt, to decide the case on a balance of convenience.

41. Have the Applicants herein established the above stated criteria to warrant the court grant the orders sought?

42. As held earlier by the Court, the Applicants are the registered owners of the disputed suit property and thus prima-facially, they are the absolute and indefeasible owners of the said property. The alleged act of construction of a wall and a gate allegedly on their portion of property goes against the spirit of Sections 24(a) and 25(1) of the Land Registration Act. Thus, the Court finds that the Applicants have established that they have a *prima-facie case* with probability of success at the trial.



43. On the second limb of if order not granted, the Applicants can adequately be compensated by an award of damages, this Court will echo the findings in the case of *Olympic Sports House Ltd...vs...School Equipment Centre Ltd* (2012) eKLR, wherein the Court held that:-

“ A party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.

44. Equally, the applicants crystalized right herein cannot be adequately compensated by an order of injunction.

45. On the third limb, the Court acknowledges that the portion of the suit property referred to as the neck is in dispute and whether or not it is part of the Plaintiffs/ Applicants piece of land is what is will be determined in the main suit. However, it is clear that when the Court is in doubt, it should decide on balance of convenience. As the Court cannot at this juncture authoritatively state where the neck part of the suit property lies, it is its considered view that then the balance of convenience lies in maintaining the status quo. The status quo herein being that any further construction of the wall and gate ought to be stopped until the matter is determined.

46. Having now carefully considered the pleadings herein, the instant Notice of Motion application and the written submissions, the Court finds that the Notice of Motion dated 14/11/2023 is partially merited and it is allowed in terms of prayer No.3 wherein an injunction restraining the Defendant / Respondent by himself, his agents from further encroaching and building a boundary wall and Gate or in any other way, interfering with peaceful enjoyment of land parcel number LR 3858/40.

47. Consequently, I make the following orders:

- a. That the application dated 30/11/2023 is not merited and is therefore dismissed.
- b. That the application dated 14/11/2023 is partially merited and prayer 3 is granted.
- c. The costs of this application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2024.

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MOGENI J

JUDGE

In the virtual presence of; -

Mr. Mathini for the Plaintiff/Applicants

Mr. Onindo for the 2nd Defendant/Respondent

None appearance for the 3rd Defendant / Respondent

Ms. Caroline Sagina: Court Assistant

