



Wachira (Suing as the administrator of the Estate of Esther Nungari Kinuthia) & 2 others v Duntow & 2 others (Environment & Land Case E010 of 2023) [2024] KEELC 3803 (KLR) (22 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3803 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E010 OF 2023**

**OA ANGOTE, J
APRIL 22, 2024**

BETWEEN

**JAMES GODFREY WACHIRA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ESTHER NUNGARI KINUTHIA) 1ST PLAINTIFF
DAVID WAWEU GAKUYA (SUING AS ADMINISTRATOR OF THE ESTATE OF GAKUYA WAWERU) 2ND PLAINTIFF
DAVID MBURU MWANGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF PENINAH WARURA MWANGO) 3RD PLAINTIFF**

AND

**ABDIWELI ADEN DUNTOW 1ST DEFENDANT
NAIROBI COUNTY GOVERNMENT 2ND DEFENDANT
THE CHIEF LANDS REGISTRAR 3RD DEFENDANT**

RULING

1. Vide a Notice of Motion dated 6th December, 2023 brought pursuant to the provisions of Articles 23(3), 40, 48 and 159 (2)(d) of the [Constitution](#) of Kenya, 2010, Section 5(b) of the [Contempt of Court Act](#) No 46 of 2016, Sections 3, 3A and 63(c) of the [Civil Procedure Act](#), Cap 21, Sections 24, 25 and 26 of the [Land Registration Act](#), 2012, and Order 40 rules 1 & 4, and 51 Rule 1 of the [Civil Procedure Rules](#), 2010, the Plaintiffs seek the following reliefs;
 - a. That this Honourable Court be pleased to issue summons to the 1st Defendant/Respondent to appear before this Honourable Court on a date set by this Court to explain why the Orders issued by Honourable Justice O.A Angote on the 23rd October, 2023 have been breached under his watch and complicity.



- b. That this Honourable Court be pleased to issue conservatory orders restraining the 1st Defendant/Respondent either by themselves, their servants, representatives and/or assigns from construction of a building transferring, sub-dividing, disposing off the suit property and evicting the Plaintiffs/Applicants from the property.
 - c. That this Honourable Court cites the 1st Defendant/Respondent for contempt of Court and he be committed to civil jail for a period of six months.
 - d. That this Honourable Court orders the OCPD Buruburu to ensure the compliance of these orders granted by Honourable Justice O.A Angote on 23rd October, 2023.
 - e. That this Honourable Court be pleased to make any others orders as it may deem fit.
 - f. That the costs of this Application be borne by the Defendant.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of David Waweru Gakuya, the 2nd Plaintiff, who deponed that on 23rd October, 2023, the Court issued orders for the maintenance of the prevailing status quo in respect of L.R Nairobi/Block 50/627 (formally L.R No 36/VII/344 Eastleigh) (hereinafter the suit property) pending the hearing and determination of the suit.
 3. Mr Gakuya, the 2nd Plaintiff, deponed that despite having been served with the Court Order by a licensed court process server, the 1st Defendant, on 2nd December, 2023, at around 4.00am, forcefully evicted tenants from the suit property with the aid of armed goons and policemen and proceeded to demolish the same; that the aforesaid evictions were further carried out without any notice leaving the Plaintiffs' tenants homeless and in the cold and that the Chief Lands Registrar proceeded to write a letter to the DCI on the illegalities on the register of the suit property with instructions to it to investigate the circumstances.
 4. Mr Gakuyo urged that the actions of the 1st Defendant have resulted in unnecessary tension and hostility among the Plaintiffs and its tenants; that the 1st Defendant has proceeded to excavate the property and is in the process of undertaking construction and that unless restrained, the suit will be rendered nugatory and the Plaintiffs will suffer irreparable harm.
 5. The 1st Defendant filed a Replying Affidavit in which he deponed that the Motion is misconceived, incurably defective and incompetent; that he has not evicted, nor caused to be evicted any person from the suit property as alleged; that he applied for eviction orders which orders were granted on the 15th August, 2023 by Hon Gakuhi Chege and that by the time the Court issued orders on 23rd October, 2023, the orders of 15th August, 2023 had already been issued and acted upon.
 6. Mr Duntow deponed that he purchased the land through a legal process and will suffer substantially if justice does not prevail; that a Court Order was served upon him in which the Court ordered that the status quo be maintained and that in response to the complaint letter written by the Plaintiffs regarding the evictions, the IG of Police noted that no officers were involved in the eviction and subsequent demolition on the date and time alleged.
 7. The 2nd Plaintiff filed a Further Affidavit in which he deponed that the Replying Affidavit consists of mere denials; that despite alleging that eviction orders had been issued by Hon Gakuhi, the 1st Defendant has not adduced the aforesaid orders nor any other pleadings with respect to the alleged matter and that in any event, as stated by the 1st Defendant, eviction orders were issued on 15th August, 2023 before this matter was filed in this Court on 23rd October, 2023.



8. The 2nd Plaintiff deposed that at no point on 23rd October, 2023 did the 1st Defendant disclose to the Court the existence of the Tribunal's Orders; that it is apparent that the 1st Defendant's actions are and have always been unjustified and in blatant disregard of the law; that as late as Monday, the 22nd January, 2024, works were still ongoing on the suit property and that unless stopped, the 1st Defendant will continue his contemptuous actions which will render the suit nugatory.
9. The 2nd & 3rd Defendants did not participate in the application. The parties filed written submissions and authorities which I have considered.

Analysis and Determination

10. As aforesaid, before the Court is the Motion dated 6th December, 2023. It is however noted that the parties vide their submissions made reference to the Motion of 13th December, 2023. Similarly, it is noted that a number of orders in the present Motion have already been granted. It is therefore critical for the Court to delineate what is precisely before it.
11. By way of a brief background, vide a Motion dated 12th July, 2023, the Plaintiffs moved the Court seeking, inter-alia, for injunctive orders restraining the Defendants from interfering with the suit property and the tenants thereon, prohibitory orders restraining the Defendants from converting the title, and inhibition orders preserving the suit property and the structures erected thereon, pending the hearing and determination of the matter.
12. The Court granted interim injunctive orders and directed that the matter proceeds for inter-partes hearing on 25th July, 2023. On the said date, directions were issued on filing of pleadings with respect to the Motion and the matter was set down for mention on 23rd October, 2023. Interim orders were extended.
13. On 23rd October, 2023, the Court directed that the prevailing status quo be maintained pending the hearing and determination of the suit and set the matter for pre-trial directions. The Plaintiffs filed the present Motion alleging breach of the orders of the court. The application came up before the Court on 8th December, 2023 where the prayer summoning the 1st Defendant was granted.
14. The Plaintiffs also filed a Motion on 13th December, 2023 seeking an order directing the OCS-California Police Station, OCPD Buruburu Police Division and County Police Commander-Nairobi City County to enforce the status quo orders issued by the Court. These orders were granted on the 15th December, 2023. The Motion of 13th December, 2023 is therefore spent.
15. In the same vein, order (v) herein seeking orders directing enforcement of the status quo orders of 23rd October, 2023 is moot there being similar existing orders in force. On 16th January, 2024, the Court directed that the parties file responses to the contempt application, being the present Motion.
16. It is noted that prayer 3 of this Motion seeks the grant of conservatory orders. The Court opines that seeking conservatory orders alongside contempt orders is a misnomer. The said prayers should have been sought in a separate Motion.
17. In any event, the status quo orders granted by the Court are still in force and their import is to prevent any interference with the suit property by any party. Further still, it appears that the order seeking conservatory orders was forgotten or ignored. The Plaintiffs have not endeavored to demonstrate the existence of the principles for granting the said conservatory/injunctive orders and no submissions were made on the same.



18. Ultimately the sole issue that falls for the Court’s consideration is whether the Defendants are in contempt of the Court Orders issued on 23rd October, 2023. The [Black’s Law Dictionary](#) (Ninth Edition) defines Contempt of Court as;

“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

19. Discussing contempt, the Supreme Court in [Republic vs Ahmad Abolfathi Mohammed & Another](#) [2019] eKLR posited thus;

“There is no doubt that an act in contempt of the Court constitutes an affront to judicial authority; and the Court has the liberty and empowerment to mete out penalty for such conduct, in a proper case. The object is, firstly, to vindicate the Court’s authority; secondly, to uphold honourable conduct among Advocates, in their standing as officers of the Court; and thirdly, to safeguard its processes for assuring compliance, so as to sustain the rule of law and the administration of justice”

20. Due to the repeal of the [Contempt of Court Act](#), 2016, [see The [Kenya Human Rights Commission vs Attorney General & Another](#) [2018] eKLR] the substantive law governing contempt proceedings is the [Judicature Act](#). Section 5 of which provides as follows:

“(1) 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 such power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

21. Additionally, Section 29 of the [Environment and Land Court Act](#) under the title offences provides as follows;

“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. As a matter of principle, Courts do not act in vain and their orders must at all times be obeyed. This was articulated by the Court of Appeal in [Shimmers Plaza Limited vs National Bank of Kenya Limited](#) [2015] eKLR which stated thus:

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”.



The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

23. It is trite that contempt proceedings are quasi-criminal in nature due to the severe consequences they attract. Consequently, the standard of proof in such proceedings is higher than the balance of probabilities in civil cases, although not as high as beyond reasonable doubt. As stated by the Supreme Court in Republic vs Ahmad Abolfathi Mohammed & Another [2018] eKLR;

“The standard of proof in cases of contempt of Court is well established. In the case of Mutitika vs Babarini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”

24. In order to succeed in civil contempt proceedings, the Applicant has to prove that the terms of the order were clear, unambiguous and binding on the Respondent; Knowledge of the terms by the Respondent; failure by the Respondent to comply with the terms of the order; and deliberate conduct by the Respondent.
25. In the cases of North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi (2016) eKLR and Republic vs Attorney General & Another Ex parte Mike Maina Kamau [2020] eKLR Justice Mativo, dealing with the question of contempt, relied on the exposition by the learned authors of the book “Contempt in Modern New Zealand” who 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) that:-

- (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.”



26. The Court will be so guided.
27. The Plaintiffs allege that the 1st Defendant breached the orders of this Court issued on 23rd October, 2023. This is denied by the 1st Defendant who maintains that he has at all times abided by the orders of the Court.
28. To begin with, it is not in dispute that on 23rd October, 2023, the Court issued orders directing that the parties maintain the prevailing status quo with respect to parcel No. Nairobi/Block 50/627(formerly known as L.R No 36/VII/344 Eastleigh) pending the hearing and determination of the suit. This is a valid order of the Court whose terms are clear and precise.
29. As to the question of knowledge and/or notice of the terms of the order, the 1st Defendant admits service of the same at paragraph 10 of his Replying Affidavit. The Court also notes that Counsel for the 1st Defendant was present when the Court issued the orders.
30. The next question is whether the 1st Defendant is in breach of the order as alleged. The Plaintiffs claim that on 2nd December, 2023, the 1st Defendant and/or with persons under his instructions raided the suit property, destroyed it and evicted the tenants. The Plaintiffs have in this respect adduced photographs of the alleged eviction and demolitions that occurred on 2nd December, 2023.
31. On his part, the 1st Defendant maintains that he did not breach the Court orders. He however states that he applied for and was granted eviction orders by the Business Premises Rent Tribunal on 15th August, 2023 and that at the time the orders of 23rd October, 2023 were issued, the orders of 15th August, 2023 had already been acted upon.
32. The Court takes this as an admission by the 1st Defendant that he did in deed interfere with the suit property by evicting the tenants from the suit property. In light of this admission, the burden of proof shifted to him to prove his assertion that the interference with the property was pursuant to lawful orders issued by the Tribunal, before the 23rd October, 2023.
33. Speaking on the concept of shifting burdens, the Court of Appeal in the case of *Mbuthia Macharia vs Annah Mutua & Another* [2017]eKLR stated thus;
- “ 16. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”
34. Similarly, the *Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14 describes it thus:
- “ The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”
- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes



evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence”

35. The 1st Defendant has adduced into evidence orders issued on 15th August, 2023 by the Tribunal which read as follows:

“That Order Number 2 of the orders issued on the 31st July, 2023 by Hon Gakuhi Chege and Hon Joyce Akinyi Osodo, be and are hereby amended to read;

That OCS California Police Station to ensure compliance of the orders dated 31st July, 2023.”

36. These orders are not in themselves eviction orders. They make reference to orders of 31st July, 2023 which have not been exhibited. The Court is therefore unable to find that there were lawful eviction orders in place.

37. The Court notes that on 23rd October, 2023 when it issued the status quo orders, the Plaintiffs’ Counsel informed the Court that the prevailing status was that the Plaintiffs were in possession of the suit property and had tenants thereon.

38. Counsel for the Defendant was present in Court on the aforesaid date. He did not dispute this assertion by the Plaintiffs’ counsel, neither did he inform the Court that they had been granted eviction orders which they had already executed. He readily acceded to having the status quo maintained.

39. It is disturbing that Counsel now seeks to shift the goal post as regards the prevailing status quo at the time of the issuance of the orders by stating that eviction had already issued. The 1st Defendant has not supported his assertion that the eviction he carried out was lawful, or that the eviction happened before the status quo orders were made. The Court therefore makes a positive finding on the question of contempt.

40. For those reasons, the Motion of 6th December, 2023 is found to be merited and the Court proceeds to issue the following final orders:

- a. An order be and is hereby issued that the 1st Defendant, Abdiweli Aden Duntow is in contempt of the orders of this Court.
- b. The 1st Defendant, Abdiweli Aden Duntow, to appear in person in court for mitigation and sentencing.
- c. The 1st Defendant to pay the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF APRIL, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Nduva holding brief for Ondiek for 1st Defendant

Ms Owour for Isinta for 2nd Defendant



