



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, M'INOTI & SICHALE, J.J.A)

CIVIL APPLICATION NO. 140 OF 2015 (UR 114 OF 2015)

BETWEEN

KIMANI GACHUHI.....1ST APPLICANT

PETER MBUTHIA GACHUHI.....2ND APPLICANT

AND

EVANGELICAL MISSION FOR AFRICA.....1ST RESPONDENT

JONG PYO IM.....2ND RESPONDENT

HWA OCK IM.....3RD RESPONDENT

CINDY SANYU OKOVA.....4TH RESPONDENT

(Being an application for contempt of this Honourable Court's Order issued on 29th January, 2016 in Civil Application No. Nai 140 of 2015

RULING OF THE COURT

The applicants, **KIMANI GACHUHI** and **PETER MBUTHIA GACHUHI** the 1st and 2nd applicants respectively filed a Notice of Motion application dated 17th January, 2018. **EVANGELICAL MISSION FOR AFRICA**, **JONG PYO IM**, **HWA OCK IM** and **CINDY SANYU OKOVA** were named as the 1st 2nd and 3rd and 4th respondents respectively. In the motion, the applicants sought the following orders:

“1. Spent

2. That this Honourable Court do find that the respondents are in contempt of Court for disobedience of the orders of the Court issued on 29th January, 2016.

3. That this Honourable Court be pleased to issue appropriate orders necessary to stop the continuing alteration of the suit property and restoration of the suit property to its status at the time of issuing the Court's order.

4. That upon granting orders 2 and 3 above, the Honourable Court do commit the Respondents herein Mrs Hwa Ock Im, Mr. Jong Pyo Im being the 1st Respondent's Directors and Cindy Sanyu Okova to civil jail for six months for contempt of Court.

5. That this Honourable Court be pleased to grant such further orders or directions as it shall deem just and expedient under the circumstances of this case.

6. That the costs of this application be provided for.”

The motion was supported by the affidavit of **Peter Mbuthia Gachuhi**, the 2nd respondent, dated 17th January, 2018 in which he deponed that he is one of the owners of LR. No. 2951/84 (the suit property); that on 29th January, 2016 this Court issued an order prohibiting the

respondents, their principals, agents, servants employees or any other person from excavating, developing or carrying out any construction or improvements and/or undertaking any activities that alter the status of the suit property; that on 9th February, 2016 the respondents' advocate vide a letter of the same date approved the draft order sent to them by the applicants' counsel; that on 5th January, 2018 he visited the suit premises and found that new buildings had been erected thereon and further construction was on-going in clear breach of the order of this Court. He swore a further affidavit dated 25th April, 2018 in which he deponed that when he visited the suit property on 2nd February, 2018 he found the respondents agents and/or employees **"...continuing with the illegal construction thus altering the status quo of the suit property;"** He annexed photographs of the alleged construction.

In his replying affidavit dated 25th April, 2018 **Hwa Ock Im**, the 3rd respondent herein and the secretary of the Board of Directors of the 1st respondent took issue with the fact that the parties in CA No. 140 of 2015 wherein prohibitory orders were issued are the two applicants and the 1st and the 2nd respondents only; that the order of 29th January, 2016 which was directed towards the 1st respondent restrained the **"...1st respondent, its principal agents, servants, employees or any other person from excavating developing or carrying out any construction or improvements and/or undertaking any activity that alters the status quo..."** of the suit property; that no substantial alteration have been effected so as to alter the nature of the suit property; that they **"...have simply refurbished and/or cleaned the school..."** in order to have a safe environment; that the respondents have not willfully disobeyed the orders of 29th January, 2016; that the photographs annexed to the 2nd applicant's affidavit sworn on 25th April, 2018 are not authentic and are not in consonance with **section 106 A and 106 B** of the Evidence Act.

On 26th April, 2018 the motion was before us for plenary hearing. Learned Counsel **Mr. Macharia** and **Milly Odari** appeared for the applicants while Senior Counsel, **Ahmednasir Abdullahi** appeared for the respondents.

In urging the motion, Mr. Macharia contended that the respondents were aware of the order issued on 29th January, 2016; that there is an admission that the respondents are undertaking works on the suit property and this is clearly demonstrated by the pictures annexed to the further affidavit dated 25th April, 2018. He urged us to punish the respondents for contempt of the court orders. Counsel relied on several authorities including this Court's decision of **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR** on what constitutes sufficient notice of an order and the decision of **A.B. & Another vs R.B. [2016] eKLR** on the importance of obeying court orders. On what constitutes contempt of Court, reliance was placed on this Court's decision of reliance was placed on this Court's decision of **Lucy Waithira Mwangi & 2 Others vs. Stephen Maida Kimanga & 4 Others [2017] eKLR** in citing the words of Lord Justice Clerk in the Scottish case of **Roberton vs. Her Majesty's Advocate [2007] HCJAC 63** that:-

"Contempt of court is constituted by conduct that denotes willful defiance of or disrepute towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law; whether in civil or criminal proceedings."

In opposing the motion, Mr. Ahmednasir senior counsel, contended that that the respondents bought the suit property in the year 2005; that a school stands on the suit property; that there are 1000 students of ages 1-4 who attend the school learned senior counsel described the school as **"thriving"** and urged us to find that the respondents have not altered the suit property from being a school. Secondly, it was his contention that the author of the photographs annexed to the 2nd respondent's affidavit is unknown thus casting doubt on their authenticity and finally that the alleged contempt had not been proved to the required standard. He relied on several authorities in support of his proposition.

In a brief response **Mr. Macharia** reiterated that the photographs are admissible and that **section 106 B** is inapplicable as it refers to computers and further that the order breached by the respondent is not ambiguous.

We have considered the motion, the rival affidavits, the oral submissions made before us, the authorities cited and the law.

At the outset, we wish to state that this Court takes very seriously violations for its orders. In this Court's ruling in the matter of **Dr. Fred Matiang'i vs. Miguna Miguna & 4 others [2018] eKLR** it stated:-

"Before we go into a determination of the twin principles for grant of stay, we need to make it clear that as a Court we do not take lightly allegations of contempt of court. No court should. When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities."

It is not in dispute that on 29th January, 2016 this Court made several orders including an order that:-

"4 The 1st Respondent, its principals, agents, servants, employees or any other person be and are hereby restrained from excavating, developing or carrying out any construction or improvements and/or undertaking any activities that alter the status quo on all that parcel of land known as L.R. No. 2951/84 the subject of these proceedings pending the hearing and determination of the applicants intended appeal against a portion of the said ruling delivered on 19th May, 2015."

It is also not in dispute that the respondents were aware of the said order as the respondents approved the draft order vide their letter of 9th February, 2016 addressed to the applicant's counsel.

However, the contentious issue is whether there is contempt of the court order issued on 29th January, 2016. The applicants contend that

there is clear breach whilst the respondents deny being guilty of contempt of the order.

It is trite law that the standard of proof in contempt proceedings is higher than proof on balance of probabilities, almost but not exactly, beyond reasonable doubt.

In the case of *Mutitika vs. Baharini Farm Limited [1985] KLR 229, 234* this Court stated:

“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.”

We are in agreement with the above summation of the law that in order to punish for contempt it must be demonstrated that a contemnor has willfully defied the order of the court. The law places the standard of such proof as being higher than proof on a balance of probability and almost but not exactly beyond reasonable doubt. The order of 29th January, 2016 forbid the 1st respondent, its principles agents, servants, employees or any other person from digging up, levelling, developing or carrying out any constructions or improvements and/or undertaking any activities that alter the status quo of the suit property. The question that we must inevitably answer is whether by digging, leveling, developing or carrying out any construction or improvements and activities without altering the status quo is in disobedience of the court order of 29th January, 2016? It is common ground that the suit property comprise of a school. The activities “...that alter the status quo on the land known as LR. No. 2951/84...” were forbidden. Did the order permit construction as long as it did not alter the status quo of the suit property from being a school? Could the school, which was described as “thriving” expand? Could it also suffer diminution by a reduction of the number of students? Suppose the school was to become so popular, are the respondents allowed to engage in further constructions to cater for increased students as long as the status of a school is maintained? Or was the school to maintain the exact number of students as at 29th January, without increasing them? We are not sure. In our view the order of 29th January, 2016 is ambiguous. In the persuasive decision of Ex-parte *Peter Nyamu Karaguri vs. A.G. of Kenya and 5 others*, Odunga, J. held as follows:

“The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof which is the criminal standard not being attained especially on affidavit evidence .”

Accordingly, we are not convinced that the allegation of contempt of court has been proved to the required standard of an offence of a quasi-criminal nature. Having come to the above conclusion, we do not deem it necessary to interrogate the complaint that the photographs annexed to the 2nd applicant’s affidavit of 25th April, 2018 are inadmissible. The upshot of the above is that we do not find merit in the motion dated 17th January, 2018. It is hereby dismissed with costs.

Dated and delivered at Nairobi this 20th day of July, 2018.

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

K. M’INOTI

.....

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR