



Sum (Suing as the administrator of the Estate of Ernest Sum) v Samoei (Environment & Land Case E057 of 2022) [2024] KEELC 4369 (KLR) (28 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4369 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E057 OF 2022**

JM ONYANGO, J

MAY 28, 2024

BETWEEN

VERONICA SUM (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ERNEST SUM) PLAINTIFF

AND

JOEL SAMOEI DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated 17th October 2023 and the Notice of Preliminary Objection dated 30th October 2023. In the Notice of Motion, the Plaintiff seeks an order to cite the Defendant/Respondent for contempt and for his committal to civil jail for exhibiting contempt of court orders and an order that the Officer Commanding Station-Moiben Police Station to ensure compliance with the said orders and lastly that costs be in the cause.
2. The application is premised on the grounds set out on the face of the Notice of Motion and the Applicant’s Supporting Affidavit sworn on 17th October 2023. In the said affidavit she depones that she is the daughter of the Plaintiff/Applicant who is the administratrix of the estate of the late Ernest Sum who was the registered proprietor of parcel L.R 2226 (I.R. 603) (suit property). That *vide* a ruling dated 13th March, 2023 this court issued injunctive orders against the Defendant/Respondent barring him from trespassing on the suit property. It is her contention that despite the aforementioned order, the Respondent continues to commit acts of trespass and illegally deal with the suit property.
3. She avers that the Respondent has also threatened her family and employees. Several complaints have been made to officers at Moiben Police station but nothing has been done. It is her contention that unless the Respondent herein is cited for contempt and committed to civil jail, there is danger that her mother will suffer substantial loss and damage from the continuous unlawful acts. She states that the Respondent’s actions infringe on her mother’s constitutional right to quiet enjoyment of the suit property.



4. In response to the application, the Respondent filed a Notice of Preliminary Objection and Replying Affidavit sworn on 30th October 2023. He deposes that the entire application is defective as the deponent is not the Plaintiff and that she is not competent to swear the Supporting Affidavit. He states that he is aware of the ruling and the order extracted on 13th March, 2023. He further states that he has been residing on a portion of suit property which was purchased by Celine George Poland from the registered proprietor, Ernest Kimnetich Sum in 1982. That he is the agent and manager of the said Celine George Poland. He adds that when this suit was filed, he had been residing on the portion measuring 100 acres with his entire family. That his stay has never been interrupted since 1982 and even after the injunctive orders were issued on 10th March 2023 he was still on the suit parcel conducting his usual farming activities.
5. He avers that he did not trespass, encroach or develop any structure on the suit property as he has all along occupied the permanent houses erected on the suit property by Celine George Poland. He denies threatening the plaintiff, her family or her employees as alleged. He states that 3 criminal cases face the Sum family in respect to the land. He states that a petition which was filed by Sum's family claiming rights to use the land was dismissed. He avers that Edel Sum cannot complain on behalf of Veronica Sum as she is not the Plaintiff as she is only a beneficiary of her late father's estate. It is his contention that he has not disobeyed any order issued by the court and he is on the land as of right doing what he has done since 1982.
6. The Defendant/Respondent filed a Supplementary Affidavit sworn on 31st October, 2023. He deposed that the application is not filed with the consent of the Plaintiff and that the Plaintiff also declined to file the same as it is signed by one Edel Sum. He has since learnt from a reliable source that the deponent and her sister are forcing their mother who is the plaintiff to pursue this suit and that a family scuffle has since ensued as the Plaintiff has changed her position in regards to the ownership of the suit property. He avers that the deponent and her sister are doing things without the consent of their mother. That their intention is to oust the deponent who is the manager of the land owned by Celine George Poland.
7. The Notice of Preliminary Objection raises the following grounds: The supporting Affidavit to the application dated 17th October 2023 is sworn by a person other than the Plaintiff who claims to be aggrieved. The deponent of the Supporting Affidavit dated 17th October 2023 is not the administrator of the estate but a beneficiary of her father's estate and she cannot complain on behalf of the Plaintiff. The Defendant has been living on the land since 1982 and therefore he cannot be termed as a trespasser and cannot be restrained. The application is frivolous, vexatious and an abuse of court process in that a beneficiary cannot fight against another beneficiary.
8. The court directed that the Preliminary Objection and application be heard concurrently and that both be canvassed by way of written submissions. The Plaintiff filed her submissions on 16th November, 2023 and the Defendant filed his submissions on 29th January, 2024.

Plaintiff's Submissions

9. In his submissions the Plaintiff submitted on the issues relating to contempt of court proceedings and those raised in the responses by the Respondent.
10. Based on the decisions of *Carey v Laiken*, 2015 SCC 17, *Econet Wireless Kenya Limited v Minister for Information and Communication of Kenya* (2005), *T.N Gadavarman Thiru Mulpad v Ashok Khot and anor* (2005) 5 SCC, *Mahinderjit Singh Bitta v Union of India & Others* 1A 100 of 2010, the



Applicant submitted that the Respondent knew of the court orders which were clear and intentionally failed to act on them and is therefore in breach of the court orders and he should face the consequences.

11. The Applicant relied on the decisions of *Celine George Poland v Jonah Chiroch and Veronicah Sum* ELC Case no. 418 of 2012, Succession Cause no. 38 of 2018 *In the estate of Christopher Kipchirchir Sum, Carey v Laiken*, 2015 SCC17, to demonstrate that the Respondent was guilty of contempt. He contended that it was established in the first case that the suit property does not belong to Celine Poland as Celine failed to prove that she purchased the suit property. The said judgment was not challenged on appeal by *Celine George Poland*. The Applicant maintains that the Respondent is misguided as Poland's claim over the suit property has long been dismissed thus it is apparent that the Respondent is in contempt as he admits that he is in continuous use of the suit property to date.
12. On whether Edel Sum ought to have sworn the Supporting Affidavit, it has been submitted that the plaintiff is senile and suffers from dementia and by virtue of the law the deponent as the daughter of the Plaintiff can swear the affidavit on her behalf since she is incapable of defending her interests. The Applicant relied on the case of *MMK v AMK* Miscellaneous Civil Application 51 of 2015 (2016) KEHC 4741 (KLR). She submitted that the Respondent's Supplementary Affidavit is based on hearsay evidence and is thus not admissible based on the decision of *Kinyatti v Republic* (1984) eKLR.
13. With regards to the Preliminary Objection, the Applicant submitted that the Preliminary Objection by the Respondent deals with facts instead of strictly confining itself to the law thus rendering the same defective. Relying on the decision of *Mukhisa Biscuit Manuufacturing Co. Limited v. West End Distributors Ltd* (1969) EA 696 the Applicant submitted that the Respondent has not satisfied the test as set out in the said case for the Preliminary objection to be successful. It is the Applicant's contention that the Respondent is well aware of the injunctive orders issued by this honourable court and he has deliberately disobeyed the said orders.

Respondent's Submissions

14. The Respondent submits that by the time the injunctive orders were issued he had already ploughed and planted crops on the suit property as he had resided thereon since 1982. He submits that he is the manager and agent of Celine George Poland who is the owner of the 100 acres of the suit property. It is his contention that he has not trespassed onto the rest of the land belonging to the Plaintiff/Applicant. It is his further contention that he cannot be found to be in contempt as he has been in continuous occupation of the suit property. He submits that the prayer for contempt ought to fail. On the affidavit of Edel Sum, the Respondent submits that the application cannot stand as the deponent cannot complain on behalf of the Plaintiff as she is only a beneficiary of the estate of her late father. He avers that he is ready to prove before the court that the Plaintiff is not behind the filing of this suit and prays that the application be dismissed with costs.

Analysis And Determination

15. I have carefully read and considered the case urged by the Applicant, the response offered, the rival submissions filed herein and the law applicable.
16. On 13th March, 2023 this court issued a temporary injunction against the Defendant/Respondent pending the hearing and determination of the main suit.
17. The injunctive orders issued clearly restrained the Defendant or anybody under his instructions from trespassing, encroaching and/or developing any structure on the suit property or do anything against the interests of the plaintiff her assignees, relatives or servants occupying the suit land pending the hearing and determination of the main suit.



18. The court record also bears witness to further orders issued on 27th September 2023 in relation to the orders issued on 13th March 2023 where the Defendant herein sought in an application to set aside the orders of injunction and the court found that it was a tactic to delay the matter.
19. Through the application dated 17th October 2023 the Plaintiff presents an application stemming from the same orders issued on 13th March 2023. The following issues arise for determination:
 - i. Whether the preliminary objection should be sustained;
 - ii. Whether the Supporting Affidavit is defective;
 - iii. Whether the plaintiff is entitled to the orders sought.
20. In *Oraro v Mbaja* the court defined A Preliminary Objection as follows:

“A Preliminary Objection correctly understood, is now well defined as and is declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection and yet bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”
21. The court finds that the Preliminary Objection dated 30th October 2023 is based on facts and is not purely on a point of law for the following reasons: Firstly, it is based on factual details touching on whether the Defendant is a trespasser or not. Secondly, it is based on the authenticity of the Supporting Affidavit in regards to the identity of the deponent and her relationship with the plaintiff who is the administrator of the estate of the late Ernest Sum.
22. Based on the *Mbaja case* (*Supra*) it is only finding that the Preliminary Objection is marred with contested facts and does not qualify to be a Preliminary Objection as described by the law. It thus fails.
23. The court will now proceed to determine the second issue. The Respondent in his Replying Affidavit and submissions has invited the court to find the entire application defective as the deponent is not the Plaintiff/Applicant in this case.
24. The court notes that the Supporting Affidavit was sworn by one Edel Sum who is the daughter of the Plaintiff/Applicant in this case. Edel Sum states under paragraph 10 of her affidavit as follows:

“I am reliably informed by the advocates on record which information I find to be correct and accurate that the defendant/respondent’s actions unlawfully infringe on my mother’s constitutionally granted right...”
25. Upon close examination of the affidavit the deponent has attached a Grant which shows that the Plaintiff/Applicant who is the deponent’s mother is the administratrix of the estate of Ernest Sum – Deceased and the deponent’s name appears as a beneficiary at the bottom of the Grant. She has also annexed a copy of the order issued on 13th March 2023 which the Defendant is alleged to have disobeyed.
26. The question is whether the deponent is privy to the information set out in the Supporting Affidavit.
27. From the contents of the affidavit and documents annexed, the information is not exclusive. As the daughter to the Plaintiff and a beneficiary of her late father’s estate it is obvious that she is expected to be privy to the information stated in the affidavit including the court order.



28. This court finds that the facts set out in the Supporting Affidavit are within the deponent's knowledge. It is therefore not true that the Supporting Affidavit offends the provisions of Order 19 rule 3 of the Civil Procedure Rules which provides as follows:

“Affidavits shall be confined to such facts as the deponent is able of his knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

29. The Defendant/Respondent has failed to provide a good basis to discredit the Supporting Affidavit.

30. On the issue of contempt, the court notes that the Defendant/Respondent whom the Applicant wishes to cite for contempt has not disputed the injunctive orders issued on 13th March 2023. He has not denied knowledge of the same as evidenced in paragraph 4 of the Replying Affidavit.

31. The explanation offered by the Defendant in defence of the said contempt is that he has been residing on the land and dealing with the suit property ordinarily as the owner of the land would, and that he should not be held in contempt for activities carried out ordinarily by an owner of the land.

32. This court notes the explanation offered by the Defendant about the land being owned by Celine George to be contrary to the finding in the case of Celine George v Jonah Chiroch and Veronicah Sum ELC 418 of 2012 where the court dismissed the plaintiff's allegations that she had purchased a portion of the suit land namely I.R 663 (L.R 2226) or that she had any interest therein.

33. The court has had occasion to peruse the said judgment together with the ruling in Succession Cause No. 38 of 2018 where Celine George was one of the Applicants seeking to be joined in the matter as an interested party or beneficiary on the grounds that she was a purchaser. The court in rejecting her application held in part that:

“...Since the claim raised herein is the same claim already canvassed and determined by the Environment & Land Court, it is clear that the issue of Celine George Polland's entitlement to a share in the said property or lack thereof has already been canvassed and conclusively determined by a court of a status equal to this High Court...”

34. The Respondent cannot claim that Celine George is a beneficiary of the estate via purchase. He alleges to be an agent of the owner and contends that he should not be found to be in contempt for doing activities in the suit parcel that an owner would ordinarily do when dealing with the land. The Defendant is feigning ignorance as he is aware of the current position in regards to ownership of the suit property given the above mentioned decisions. Furthermore, he is aware of the temporary injunctive orders set out in the ruling dated 10th March 2023 whose orders were issued on 13th March 2023.

35. The court notes the blatant admission of and disobedience of the said orders despite knowledge of the same under paragraphs 7,8 and 9 of the Replying Affidavit. The same excuse has been reiterated throughout the Respondent's submissions.

36. In Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR, the court in its elaborate decision on contempt of court proceedings in Kenya relied on learned authors of the book Contempt in Modern New Zealand who succinctly stated thus: -

“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.

37. Considering the circumstances of the case, it is the court's finding that disobedience by the Respondent was done willingly, deliberately and intentionally. Blatant disobedience of court orders cannot be countenanced. The excuse offered by the Respondent is no defence and cannot hold before this court. It is my finding that the applicant has proved the elements of contempt of court.

38. Consequently I find and hold that the defendant is guilty of contempt for disobeying the orders of injunction issued by this court on 13th March 2023. The Respondent shall personally appear in open court on 12th June, 2024 to show cause why he should not be punished for contempt.

39. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 28TH DAY OF MAY 2024

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J.M ONYANGO

JUDGE

In the presence of;

Miss Moronge for the Applicant.

Mr. Miyianda for the Respondent

Court Assistant: Brian

