



Kitulu & 8 others v Ndolo (Sued as the Executrix of the Will of the Late Joseph Musyimi Lele Ndolo) (Environment & Land Case 233 -241 of 2017) [2024] KEELC 4327 (KLR) (22 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4327 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 233 -241 OF 2017**

TW MURIGI, J

MAY 22, 2024

**IN THE MATTER OF AN APPLICATION UNDER SECTIONS 37 & 38
OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

AND

**IN THE MATTER OF AN APPLICATION FOR REGISTRATION OF TITLE
BY ADVERSE POSSESSION OVER 40 ACRES PORTION OF LR NO. 1756/6**

BETWEEN

MUEMA KITULU & 8 OTHERS PLAINTIFF

AND

**ELIZABETH KAMENE NDOLO (SUED AS THE EXECUTRIX OF THE WILL
OF THE LATE JOSEPH MUSYIMI LELE NDOLO) DEFENDANT**

RULING

1. Before me for determination is the Notice of Motion dated 17th May, 2023 brought under Section 63 of the *Civil Procedure Act*, and Order 40 Rule 3 of the Civil Procedure Rules, 2010 in which the Applicants seek the following orders: -
 - a. Spent.
 - b. That this Honourable Court be pleased to cite the Defendant/Respondent for contempt of the orders issued by this Honourable Court on 19th March, 2018.
 - c. That the Court do issue a Notice to the Defendant/Respondent to show cause why she should not be imprisoned for 6 months or in the alternative, face the attachment and sequestration of her assets for contempt and brazen disregard of order of court dated 19th March, 2018.
 - d. That the costs of this application be assessed and borne by the Respondent.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Muema Kitulu sworn on even date.

THE APPLICANTS' CASE

3. The deponent averred that on 19/3/2018, this court delivered its judgment in the following terms: -
 - a. That this Honourable Court do direct that the Plaintiffs be registered as the proprietors of all those portions of all that portion of 40 acres or thereabouts within LR No. 1757/6 (formerly LR no. 1757 hereinafter the "suit property".
 - b. That a permanent injunction do issue to restrain the Defendant, by herself, her agents or servants from trespassing into, alienating or in any manner interfering with the Plaintiff's use and enjoyment of the suit property.
 - c. An order directing the Registrar of Titles to excise each of the Plaintiff's parcel out of LR No. 1757/6 registered in the name of the Defendant and to transfer and vest the same to the Plaintiffs herein.
 - d. Costs of the suits.
4. The deponent averred that the judgment delivered on 19/3/2018 was upheld by the Court of Appeal after the Respondent appealed against the same. He further averred that after delivery of the said judgment, the Respondent subdivided the suit property on 19/10/2019 into LR Nos. 1757/20 1757/21, 1757/23, 1757/24, 1757/25, 1757/26, 1757/27, 1757/29 and 1757/30.
5. He stated that on 14/02/2023, the Plaintiffs were unable to register the nine decrees against the suit property because of the absence of the Deed file at the land registry in Ardhi House.
6. The deponent contended that the continued disobedience of court orders is a blatant contempt of court and that the Court has the power to punish the Respondent for disobedience of its orders. That, despite issuing several warnings the Respondent has failed to make good the situation with regards to the blatant disobedience.
7. He argued that it is in the interest of justice that the application be allowed so as to protect the authority and dignity of the and to avert injustice to the Applicants.

THE RESPONDENT'S CASE

8. The Respondent filed a replying affidavit dated 2/6/2023 through her authorized agent, Andrew Ndola Ndolo, in opposition to the application. He averred that the processing of the deed plan to L.R No. 1757/6 (now L.R No. 1757/19) began in the year 2008 before the suit herein was instituted. He further averred that the title was issued after the judgment of this Court had been delivered. He further averred that the Respondent was not in breach of any court order because there was no caveat on the suit property preventing subdivision during the pendency of the suit.
9. He further averred that the Respondent was not aware of the Court order as she was not served with the same. It is the Respondent's case that the Plaintiffs did not seek for orders barring the Respondent or her agents from subdividing the suit property. That by extension, the amended court decree did not indicate that there was an express order of injunction barring the Respondent from subdividing the suit property.



10. According to the Respondent, the application herein is baseless, unmerited and misleading as the Applicants have failed to demonstrate that the Respondent disobeyed the court order. The Respondent urged the Court to dismiss the application with costs.
11. The application was canvassed by way of written submissions.

THE APPLICANTS SUBMISSIONS

12. The Applicants' submissions were filed on 13/06/2023.
13. On their behalf, Counsel submitted that it is common ground that: -
 - i. At the inception of the proceedings, the suit property known to both the Applicants and the Respondent was LR No. 1757/6.
 - ii. The suit property remained in place until 19/10/2019 when the Defendant registered the twelve subdivisions aforesaid.
 - iii. That pending the determination of Civil Appeal No. 394 of 2018, the Respondent subdivided the suit property into twelve sub-parcels without notice to the court or to the Applicants.
14. Counsel for the Applicants identified the following issues for the court's determination: -
 - i. Whether the Defendant is in contempt of the judgment/orders of the court dated 19/03/2018; and
 - ii. Costs and to what scale.
15. Learned Counsel submitted that the jurisdiction of this Court to punish for contempt of court is governed by Order 40 Rule 3 of the Civil Procedure Rules, 2010.
16. Counsel submitted that the Respondent was aware of the order dated 19th March, 2018 as she challenged the same in the Court of Appeal. Counsel further submitted that the Respondent knew or ought to have known that she was bound by the terms of the said order as the same had not been set aside and was still in force.
17. Counsel submitted that the Respondent subdivided the suit property in order to defeat enforcement and must suffer the consequences thereof.
18. Counsel argued that the Respondent should be cited for contempt of court and thereafter summoned to show cause why she should not be imprisoned for a set term, or otherwise fined and/or have her property sequestered. Counsel contended that since the Applicants have commenced execution, the Respondent ought to be punished with a hefty order of costs of Kshs. 500,000/= in respect of the present application.
19. To buttress his submissions, Counsel relied on the authorities annexed to the list of authorities dated 07/06/2023.

THE RESPONDENT'S SUBMISSIONS

20. The Respondent's submissions were filed on 18/07/2023.
21. On her behalf, Counsel outlined the following issues for the court's determination: -
 - a. Whether the Respondent is in contempt of any order of this Court; and
 - b. Who should be condemned to shoulder the costs of the application.



22. As regards the first issue, Counsel submitted that neither the Respondent nor her Advocates were ever served with the amended Court order which is basis of the present application. Counsel submitted that it will be a blatant disregard of justice and fairness for the Respondent to be punished on the basis of an order that she was not aware of.
23. Counsel reiterated the Respondent's assertion that the processing of the Deed plan for LR No/ 1757/6 (now LR No. 1757/19) began in the year 2008, way before the suit herein was filed. That the new Title deed was issued in the year 2019 after judgment of the court was delivered. On that account, Counsel argued that the Respondent was not culpable of subversion of any court order. Counsel argued that no caveat was lodged against the suit property preventing subdivision during pendency of the suit.
24. Counsel argued that the Plaintiffs neither sought for orders barring the Respondent's interference with the suit property nor did the amended court order indicate that the Respondent was expressly barred from interfering with the suit property. Counsel argued that if indeed there was such an order barring the Respondent from interfering with the suit property, then the said order was unclear and ambiguous.
25. Counsel submitted that the Applicants have failed to meet the required standard of proof.
26. On costs, Counsel submitted that having failed to prove contempt of court to the required standard, the Applicants should be condemned to pay the costs of the application. Concluding his submissions, Counsel urged the Court to dismiss the application with costs. To buttress his submissions, Counsel relied on the authorities annexed to the list of authorities dated 04/07/2023.

ANALYSIS AND DETERMINATION

27. Having considered the application, the respective affidavits and the rival submissions, the issue that falls for determination is whether the Respondent is in contempt of the Order issued on 19/03/2018.
28. The Black Law Dictionary 9th Edition defines contempt of court as follows:-

“conduct that defies the authority or dignity of the court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment,”
29. In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another (2005) eKLR* the court observed as follows:-

“It is essential for the maintenance of the Rule of Law and order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect to whom an order is made by the court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”
30. The law guiding the present application is Order 40 Rule 3(1) of the Civil Procedure Rules which provides as follows:-

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.

31. The High court of South Africa in the case of *Carla Burchell v Barry Grant Burchell Eastern Cape Division Case No 364 of 2005* held that in order to succeed in civil contempt proceedings, an Applicant has to prove:-
 - i. The terms of the order
 - ii. Knowledge of these terms by the respondent
 - iii. Failure by the respondents to comply with the terms of the order.
32. In the case of *Samuel M.N. Mweru & Others v National Land Commission & 2 Others (2020) e KLR* the court set out the elements to be proved in an application for contempt of court as follows:-

“Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated “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 knowledge’
 - c. The defendant has acted in breach of the terms of the order and
 - d. The defendant’s conduct was deliberate”.
33. The first issue for determination is whether the terms of the order were clear. The record shows that this Court delivered its judgment on 19/03/2018 in the following terms: -
 - a. That this Honourable Court do direct that the Plaintiffs be registered as the proprietors of all those portions of all that portion of 40 acres or thereabouts within LR No. 1757/6 (formerly L.R No. 1757 hereinafter the “suit property”.
 - b. That a permanent injunction do issue to restrain the Defendant, by herself, her agents or servants from trespassing into, alienating or in any manner interfering with the Plaintiff’s use and enjoyment of the suit property.
 - c. An order directing the registrar of title to excise each of the Plaintiff’s parcel out of L.R No. 1757/6 registered in the name of the Defendant and to transfer and vest the same to the Plaintiffs herein.
 - d. Costs of the suits.
34. The order was unambiguous as it directed the Plaintiffs to be registered as the proprietors of 40 acres portion within the suit property. It also restrained the Respondent from interfering with the Plaintiffs use of the suit property and in addition to directing the Registrar of titles to excise each of the Plaintiff’s parcel out of the suit property. To this end, I find that the order issued on the 19/03/2018 was clear and unambiguous.



35. The next issue for determination is whether the Respondent was served or had proper notice of the order. The Applicants contended that the Respondent was aware of the terms of the order as she appealed against the same. The Respondent on the other hand averred that she cannot be said to be in breach of the court order since she was not served with the amended order and was not aware of the terms. It is not in dispute that the Respondent appealed against the judgment delivered on 19/03/2018. I am therefore satisfied that the Respondent was aware of the terms of the order.
36. As regards the issue whether the Respondent has deliberately breached the court order, the Applicants have a duty to prove their case beyond the balance of probabilities. This is because contempt of court is in the nature of criminal proceedings and the liberty of the subject is usually at stake. The Applicants must prove wilful and deliberate disobedience of the court if they are to succeed as was held in the case of *Gatharia K. Mutikika v Baharini Farm Ltd (1985) KLR* where the court held that:-
- “ A contempt of court is an offence of a criminal nature. A man may be sent to prison. It must be proved satisfactorily.....It must be higher than prove on a 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 criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal nature.”
37. In the case of *Peter K. Yego & Others vs Pauline Wekesa Kode ACC NO. 194 of 2014* the court held that:-
- “ it must be proved that one had actually disobeyed the court order before being cited for contempt”
38. The Applicants have a duty to prove beyond a balance of probabilities that the Respondent has interfered with the Plaintiffs use and enjoyment of the suit property. It is not in dispute that judgment was delivered in favour of the Applicants’ to the extent of their respective ownerships parcels of land.
39. A keen perusal and understanding of the order dated 19/03/2018 shows that the Respondent was prevented from interfering with the Applicants’ full enjoyment of their respective rights and interests within the parcels of land they occupied in the suit property and not from subdividing her land. The Applicants did not allege and prove that the Respondent has subdivided their land nor demonstrate that there was a restriction or caveat in the land register preventing subdivision of the suit property.
40. From the foregoing, it is crystal clear that the Applicants have not demonstrated that Respondent deliberately disobeyed the Court order dated 19/03/2018 in order to cite the Respondent for contempt of court.
41. The upshot of the foregoing is that the application dated 17th May 2023 is devoid of merit and the same is hereby dismissed with costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF MAY, 2024.

In the presence of:

Court assistant Alfred.



Ms. Chania for the Applicants

Ms. Chematia holding brief for Ndalila for the Respondent.

