Northwest Capital Apartments Limited v Ohuru (Environment & Land Case E213 of 2023) [2024] KEELC 3956 (KLR) (20 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3956 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E213 OF 2023

JA MOGENI, J

MAY 20, 2024

BETWEEN

NORTHWEST CAPITAL APARTMENTS LIMITED ..... PLAINTIFF

AND

WILSON OHURU ..... DEFENDANT

RULING

1. The Defendant/Applicant brought two applications before this court both dated 12/03/2024. The first application was brought under Article 40, 50 and 159 of *the Constitution* of Kenya, Order 45 Rule 7, Order 45 Rule 1, Order 51 Rules 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the *Civil Procedure Act*, seeking orders that:

    i. Spent

    ii. That this Honorable court be pleased to issue a temporary stay of the orders issued on the 5th day of March 2024 by Hon. Justice Mogeni, pending the hearing and determination of this Application

    iii. That this Honorable Court be pleased to discharge vacate and/or set aside the orders issued on 5th day of March 2024 by Hon. Justice Mogeni

    iv. That in the alternative to prayer 3 above, this Honorable Court be pleased to review the Ruling and the Orders issued on the 5th day of March 2024 by Hon. Justice Mogeni

    v. That this Honorable Court be pleased to extend time for the Respondent to file a Response to the Application dated 15th December 2023.

    vi. That upon grant of prayer 5 above, this Honorable Court be pleased to deem the Affidavit of Wilson Ohuru Omwange sworn on the 23rd day of February, 2024 as properly on record, in the interest of justice

vii. That this Honorable Court be pleased to make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice.

viii. That the costs of this Application abide the outcome of the suit.

2. The application is based on nine (9) grounds on its face among them being that in the court's ruling of 05/03/2024, the plaintiff misrepresented material facts to the court. That whereas the plaintiff sought injunctive orders the court issued status quo orders granting the plaintiff quiet possession which in essence gave an eviction order at a preliminary stage. The applicant avers that the plaintiff failed to disclose to the court that they were not in possession of the suit property and therefore the status quo order granting quiet possession to the plaintiff cannot be implemented and the plaintiff has resorted to using the police to intimidate tenants and the management of the suit property.

3. That the material non-disclosure of the plaintiff may lead to the defendant/applicant being said to be in contempt yet the plaintiff who is seeking equity from the court has come to court with dirty hands.

4. That the applicant's advocates failed to file a response to the application dated 5/12/2023 and the advocate's error should not be visited on the client as Article 159 (2) of *the Constitution* provides that justice should be dispensed without undue consideration to technicalities.

5. The application is supported by an affidavit sworn by the plaintiff/applicant on the 12/03/2024, in which he reproduced the terms of the court's orders over the suit property of 5/03/2024 whose copies are annexed to the affidavit and marked as WOO-1. Also attached to the affidavit are copies of the Replying Affidavit marked as WOO-2 which the applicant stated were filed outside the 14 days window on which lapsed on 23/02/2024.

6. The application is opposed the plaintiff/respondent vide a replying affidavit sworn on 22/03/2014 by Evanson Kamau Waitiki. The respondent avers that the application does not meet the threshold of review as contemplated under Section 80 of the Civil Procedure Rules and also the application has not addressed the issues the court dealt with in its ruling by granting the status quo orders.

7. That the defendant/applicant failed to comply with the court's directions for filing responses and submissions to the application dated 15/12/2023 and the instant application offends the doctrine of functus officio.

8. That the court ruling of 5/03/2024 was to preserve the substratum of the suit property and that the applicant herein has not produced a certificate of ownership and neither has the applicant produced any new information to warrant a review to attest to the fact that the said information was not within the custody of the applicant.

9. The respondent avers that the applicant faults the finding of the court which cannot be subject of review but a ground of Appeal and therefore in the circumstances the applicant seems to be asking the court to sit on its own appeal yet it is functus

10. That the applicant has not demonstrated existence of new evidence or that there was a mistake on the face of the record. That the application is a delay tactic to cause the order dated 5/03/2024 not to be implemented.

11. The applicable law on setting aside of orders are the provisions of section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, which avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. Order 45 Rule 1 (b) of the Civil Procedure Rules in addition spells out conditions that must be met in an application for review of a decree or order as follows:

a. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made,

b. mistake or error apparent on the face of the record,

c. or for any other sufficient reason,

d. the application must be made without unreasonable delay.

12. The applicant/defendant's main arguments in its pleadings were that the orders of this court should be set aside and/or reviewed on the grounds that there was material non-disclosure on the part of Plaintiff that they were in possession leading to the issuance of the said orders, and that the defendant was not given an opportunity to be heard.

13. I have perused the court record, and note that the orders made by this Court on 5/03/2024 were interim after the court was satisfied that the defendant/applicant was served but chose not to file any response. The court issued status quo orders to preserve the substratum of the suit property, to await the final orders upon hearing of the suit giving the parties a chance to be heard.

14. Under the provision of Rule 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (What is now termed as "The Mutunga Rules") provide as follows:

> " Setting Aside, Varying or Discharge – An Order issued under Rule 22 may be discharged, varied or set aside by the Court either on its own motion or an application by a party dissatisfied with the order".

15. It means this court has discretionary powers to discharge, vary or set aside its own orders either on its own motion ("Suo Moto") or on an application by a party. In the instant application the defendant/applicant is within their right to have moved court under the filed application dated 12/03/2024 seeking the orders above stated.

16. A clear reading of the provisions of review and setting aside indicate that Section 80 of the *Civil Procedure Act* is on the power to do so while Order 45 sets out the rules on doing it.

17. Section 80 provides that any person who considers himself aggrieved: -

a. By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of Judgement to Court which passed the decree or made the Order and the Court may make such order thereto.

On the other hand Order 45 (1). States as follows: -

Any person considering himself aggrieved: -

a. By a Decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is allowed by this Act, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the

order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of Judgement to the Court which passed the decree or made the order without unreasonable delay".

18. From the stated provisions, it is clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably.

19. The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible. The applicant I note has averred that he is the one in possession of the suit property and not the plaintiff a fact that is not contested by the plaintiff/respondent.

20. In discussing the scope of the review, the Supreme Court of India in the case of Ajit Kumar Rath – Versus – State of Orisa, 9 Supreme Court Cases 596 at Page 608 had this to say: -

> " The power can be exercised on application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier; that is to say the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason".....means a reason sufficiently analogous to those specified in the rule..."

21. Closer home in the case of Nyamongo & Nyamongo – Versus – Kogo (2001) EA 170 while discussing what constitutes an error on the face of the record, the Court rendered itself as follows: -

> " An error apparent on the face of the record cannot be defined or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review though it may be one for appeal....."

22. Additionally, in his authoritative write up, Sir. Dinashah Fardunji Mulla in "Code of Civil Procedure" 18th Edition (a writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that "..the expression "any other sufficient reason" ....means a reason sufficiently analogous to those specified in the rule.

23. This means that any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out....would amount to an abuse of the liberty given to the court or tribunal under the Act to review its orders and or Judgements.

24. There is another very useful guidance in the matter which is the case of Tokesi Mambili and Others – Simion Litsanga Civil Appeal No. 45 of 2003 where the court held as follows: -

> " In order to obtain a review an applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason".

25. Applying the above principles to the instant application, I have to satisfy myself that there is ground to justify a review of the order, namely to have the status quo order reviewed. The order of status quo was justifiable because both the plaintiff and the defendant each claim ownership of the suit property where there is a building that houses tenants. The defendant failed to file a response to the application dated 5/12/2023 despite having been properly served.

26. I have considered the application by the defendant/applicant and in my view the application does not satisfy any of the conditions necessary for review under Order 45 Rule 1 of the Civil Procedure Rules to warrant the Court to grant a review. It cannot be said there has been discovery of new and important matter/or evidence which was unavailable at the time the order was made and neither has it been demonstrated there was some mistake or error apparent on the face of the record to warrant review. The applicant has equally not shown there was some other sufficient reason to justify a review.

27. The second application was filed by the plaintiff/applicant under sections 13, 14 and 29 of the *Environment and Land Court Act* No. 19 of 2011, Section 1A, 1B & 3A and 63 of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders:

    i. Spent

    ii. That this Honorable Court be pleased to cite the Defendant/Respondent one Wilson Ohuru for the willful and intentional contempt of the Order of this Honorable Court issued on 5th March, 2024 and further, the said person be committed to civil jail for six (6) months and be ordered to pay a hefty fine to this Honorable Court

    iii. That this Honorable Court be pleased to order the officer-in charge of Villa Franca Police Station, Embakasi and/or any other police station in the Republic of Kenya to provide security to Plaintiff/Applicant during the enforcement of the Court Orders issued on the 5th March 2024

    iv. That this Honorable Court be pleased to grant any other or further orders, for the purpose of protecting the dignity and authority of the Court

    v. That the costs of this Application be provided for.

28. The application is premised on the grounds listed on the face of the application and the annexed affidavit of Evanson Kamau Waitiki. The core grounds are that the defendant/respondents together with their advocates were served with the court order of 5/03/2024 and through their whatsapp platform acknowledged receipt and even typed "thank you" as evidenced by annexture EKW-2. They however went ahead and disobeyed the court order served upon them.

29. The plaintiff therefore state that the defendant/applicant is in contempt of court and is in flagrant contempt of this courts orders and the court must step in to ensure its orders are obeyed.

30. The defendant did not file a response to this second application but referred to the application through his submissions dated 24/04/2024 that the allegations of contempt are baseless since there is no proof of service nor of disobedience of court order. That annexture EKW-2 which the plaintiff claims to be a true copy of the whatsapp conversation does not meet the standards of Section 106 B (4) of the *Evidence Act* where electronic evidence needs to be supported by the certificate.

31. The defendant in his submissions underscored the importance of the summons carrying a penal notice and that failure to have the notice means the application for contempt is incompetent. He relied on the cases of Vulpin Limited vs Postone Limited & Another [2021]Eklr, and Mwangi HC Wang'ondu vs Nairobi City Commission (UR) Civil Appeal No. 95/1988.

32. On his part the plaintiff in his submissions referred to the cases of Hadkinson vs Hadkinson 1952, 2 ALL ER 56, Republic vs County Chief Officer, Finance and Economic Planning Nairobi, City County Ex Parte Stanley Muturi, where the court underscored the importance of Court Orders, Republic vs Ahmed Abolfathi Mohammed & Another [2018] eKLR, among others. In the latter case the Supreme Court underscored the necessity to punish for contempt of court orders. The application is equally opposed by the plaintiff/respondent.

33. 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.

34. 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."

35. 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

36. 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 infact 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."

37. 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."

38. It is clear that on 05/03/2024, the court issued orders of status quo restraining the defendant/ respondent from interfering with the suit property and the defendant was served with the said orders. However, the defendant has disputed in his submissions the fact that he was never served with the court orders of 05/03/2024. At the same time he contests that there was no penal notice attached to the summons. I am convinced that the defendant was served with said court orders since in his submissions he infers that there is no attached electronic certificate attached.

39. The absence of service of a penal consequence notwithstanding, it is my view and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the penal notice. See in this regard the decisions in Kenya Tea Growers Association vs Francis Atwoli & Others , Nairobi High Court Constitutional Petition No 64 of 2010, Husson v Husson, (1962) 3 All E.R. 1056, Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497, and Davy International Ltd vs Tazzyman (1997) 1 WLR 1256 .

40. Culpability for contempt of court was explained in the cased of Mwangi H.C. Wangondu vs Nairobi City Commission , Nairobi Civil Appeal No. 95 of 1998 the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

41. In the present case the acts of contempt alleged by the Plaintiff are that the defendant has blocked his access to the suit property as ordered by the Court. The orders reproduced in the foregoing are clear that was status quo order requiring that the plaintiff occupies the suit property without interruption having proved their ownership acquired through a public auction. The defendant has not placed before this court any evidence of ownership except receipts of tenancy apparently for rent paid in 2024 despite the claim that they have been on the suit property for the past 19 years. No evidence was produced to support this claim.

42. Equally the plaintiff has not placed before this court evidence of disobedience of the court order to attest to the defendant failing to obey a lawful court order. The plaintiff alleges to have involved the OCS Villa Franca who was "unable to convince" the defendant to obey a lawful court order. It is not clear how an OCS could not bring the defendant to obey a lawful court order. It is also not evident when the plaintiff and the OCS served the order on the defendant.

43. Consequently, arising from the foregoing, I find that the Plaintiff has not discharged the burden of proof applicable in contempt of court cases. I am therefore left with no choice but to find that the plaintiff has failed to prove to this court that the defendant is in contempt of the court order dated 5/03/2024.

44. Ultimately this court makes the following orders:

    a. The Defendant/Applicant's Notice of Motion Application dated 12/03/2024 is without merits and is hereby dismissed.

    b. The plaintiff's application dated 12/03/2024 on contempt of court is found to be without merits and is hereby dismissed.

    c. Parties shall bear their own costs of the applications.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2024

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MOGENI J

JUDGE

In the virtual presence of:

Mr. Karwenda for the Defendant

Mr. Oriwa for Plaintiff/Applicant

Ms C. Sagina: Court Assistant

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MOGENI J

JUDGE