Mwatela & 21 others v Dhahabu Promotion Limited & 2 others (Environment & Land Case 10 of 2021) [2024] KEELC 4212 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4212 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 10 OF 2021

FM NJOROGE, J

MAY 15, 2024

BETWEEN

JOHN MWATELA & 21 OTHERS ..... PLAINTIFF

AND

DHAHABU PROMOTION LIMITED ..... 1ST DEFENDANT

MAMBRUI PROMOTION LIMITED ..... 2ND DEFENDANT

DHAHABU MAMBRUI LIMITED ..... 3RD DEFENDANT

RULING

1. For determination is a notice of motion application dated 28th July 2022 filed by the Plaintiffs under Order 40 of the *Civil Procedure Rules* for orders: -

    a. Spent;

    b. Spent;

    c. That the 1st and 3rd Defendants and Sara Centofanti be committed to civil jail for being in contempt of the court orders of 1st March 2021;

    d. That the OCS, Gongoni Police Station do supervise the execution of the orders in respect of prayer 3 in the event that there is threat of breach of peace;

    e. That costs of this application be borne by the 1st and 3rd Defendants and Sara Centofanti.

2. In support of this application are the grounds enumerated on the face of the motion and the supporting affidavit sworn by John Mwatela the 1st plaintiff on 28th July 2022. The Plaintiffs' case is that this court issued orders of temporary injunction made in an application dated 26/2/2021 on 1st March 2021 against the 1st and 2nd Defendants, orders which have never been set aside; that the 1st and 3rd defendants

and Sarah have denied the plaintiffs, their servants and guests ingress and egress from their houses and have pressed the plaintiffs to pay increased service charge; that the 3rd Defendant joined the suit after the said orders were issued and sought to vary the same to the effect that service charge be paid to it instead of the 2nd Defendant. The 3rd defendant is therefore said to be aware of the orders. The 1st Plaintiff averred that despite the said orders, the 1st and 3rd Defendants and one Sara Centofanti embarked on changing the status quo of the premises in dispute by undertaking structural repairs and constructing a perimeter wall thus causing the Plaintiffs psychological and mental torture, loss and damage. Most of the plaintiffs, it is said, opt not to come to kenya during the winter in Europe due to the activities of the two defendants and Sarah which include cutting off utilities to their houses. In addition, the Plaintiff stated that the said defendants increased the service charge contrary to the orders of the court and have denied the Plaintiffs' workers access to their individual properties.

3. In support of the application, the 2nd Defendant filed a Replying Affidavit sworn by Harrison Kazungu Kono on 19th September 2022.

4. In opposition, the 1st Defendant relied on a Replying Affidavit sworn by the said Sara Centofanti on 7th October 2022. According to Sarah, she is a director of the 1st defendant and the application is similar to another application dated 9th March 2021 that was dismissed. She averred that the applicant is guilty of material non-disclosure. She denied the allegations in the application, and in particular that any employee has been denied access, and urged the court to dismiss the application with costs. She objected that the applicant had not disclosed which of the employees are said to have been denied access. To her, the application is misguided and only aimed to delay the logical conclusion of the suit; she added that the order of 1/3/22 has, according to her legal counsel's advice, lapsed. She added that as part of security measures, all the home owners, including the Plaintiffs, within the suit premises were advised to share details of their employees which they did; that no employee whose name is on the list has been denied access and if there were, the Plaintiffs have failed to state with clarity the names of the employees denied access to the Plaintiffs' houses. She stated that a number of the plaintiffs had prior to the filing of the present application withdrawn from the suit and also withdrawn their instructions from their advocates on record and John Mwatela has no authority as he purports to plead on their behalf.

5. On its part, the 3rd Defendant filed a Replying Affidavit sworn by its director Joseph Njoroge Kungu on 16th September 2022. Joseph deposed that as at the time of filing the application, the orders dated 1st March 2021 had long expired with no extension; that the 3rd Defendant was not a party to the suit when the orders were issued and the same have never been varied. He added that the alleged developments mentioned in the Plaintiff's supporting affidavit are being undertaken by the 1st Plaintiff himself together with some other lessees without the consent of the 3rd Defendant. According to the deponent, the impugned orders only bar the 1st and 2nd Defendant from increasing the service charge over the suit properties and not the 3rd Defendant's properties which hold the Plaintiffs' houses. He stated that the 3rd defendant is the head lessor in respect of the leases belonging to the plaintiffs and other lessees not in the present proceedings; he stated that 3rd Defendant has not at any point attempted to increase the service charge; that there is no order stopping the 3rd Defendant from constructing a perimeter wall as asserted by the Plaintiffs. He added that contrary to the Plaintiffs' assertions, the 3rd Defendant has been offering the common services as per the lease agreement since the 2nd Defendant stopped offering the services in February 2021. The 3rd defendant denied demanding increased service charge and averred that it has made it clear that the lessees can continue paying the old service charge as the matter is pending resolution either amicably or by the court. In the ultimate, the deponent urged the court to dismiss the application with costs.

6. The applicant filed a supplementary affidavit on 9/11/2022. In that affidavit the deponent responded to the replying affidavits filed by the 1st and 3rd defendants. He stated that the 3rd respondent was aware of the orders of 1st March 2021; that on 11/11/21 the orders were extended pending the hearing and determination of the suit; that the plaintiffs' employees have not accessed the plaintiffs' premises since 1/7/2022; he annexed the affidavit said to be sworn by workers who claimed to have been barred from the plaintiffs' premises. He stated that that Sarah has made major modifications to the properties some of which make the property unsafe for the plaintiffs in the event of an emergency.

The Deputy Registrar's Report Dated 13/3/23.

7. The Deputy Registrar, pursuant to an order of this court issued on 9/11/22 following an application made by the plaintiffs' advocate as well as an averment that the defendants are untruthful contained in John Mwatela's supplementary affidavit of 7/11/2022, made a site visit and filed a report on 13/3/22. The general conclusion to be drawn from the observations in the said report are that the 1st and 3rd defendants have indeed interfered with the suit property in a manner prohibited by the order issued on 1/3/2021. The application was canvassed by way of written submissions.

Analysis And Determination

8. I have carefully perused and considered the application and the responses thereto. I have equally perused and considered the rival submissions and authorities placed before this court by the parties. The issue for determination that emerges is whether the 1st and 3rd Defendants and the said Sarah should be held in contempt of this court's orders dated 1st March 2021.

9. The Plaintiffs had filed an application under certificate of urgency dated 26th February 2021 seeking *inter alia* injunctive orders against the 1st and 2nd Defendants. Having considered the application *ex-parte* in the first instance, the court granted temporary orders on 1st March 2021 for a period of 14 days. The said orders were framed as follows:

    a. That the application be and is hereby certified urgent.

    b. That a temporary injunction period of 14 days do issue stopping the defendants, their agents and/or servants from altering the original design plan of the common areas in any way, blocking the original entrances accessing the beach, blocking or changing the original common pathways, car park, erecting any perimeter walls, and putting up new entrances to the beach on parcels of land namely plot numbers Land Portion Numbers 624/5, No. 624/6, No. 624/7, No. 624/8, No. 624/9, No. 624/10 ,No. 624/51, No. 624/52, No. 624/53, No. 624/54, No. 624/55 on which the applicants houses stand pending the hearing of the application.

    c. That a temporary injunction period of 14 days do issue stopping the defendants, their agents and/or servants from claiming/charging the applicants the new increased service charges for use of common areas on parcels of land namely plot numbers Land Portion Numbers 624/5, No. 624/6, No. 624/7, No. 624/8, No. 624/9, No. 624/10 ,No. 624/51, No. 624/52, No. 624/53, No. 624/54, No. 624/55 on which the applicants houses stand and instead the applicants be allowed to continue paying the old service charges to the 2nd respondent/ defendant pending inter partes hearing of the application.

    It is the above orders that the Plaintiffs claim were disobeyed by the 1st and 3rd Defendants and the said Sarah.

10. Contempt of court is that willful conduct or action that defies or disrespects authority of a court. The reason why courts punish for contempt was stated in *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, by Ibrahim, J. (as he then was) as follows: -

> "It is essential for the maintenance of the rule of law and order that the authority and the 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 whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void."

11. Contempt of Court proceedings are in their very nature criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. Therefore, due to the gravity of consequences that ordinarily flow from contempt proceedings, it is significant 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) wilful failure or neglect by the Respondent to comply with the terms of the order.

12. In this case, the terms of the orders were clear and unambiguous as to the actions that the defendants were restrained from doing. The orders as framed were to lapse after 14 days. I have perused the court record and found that on 1/3/2021 the orders were issued as stated by the plaintiff. Soon after the application dated 26/2/21 was filed and those orders issued, two applications for contempt orders were filed by both parties, with each side alleging that the other had breached the order. Those applications came up on various dates between 16/3/21 and 30/6/21 during which sittings the orders of 1/3/21 were extended. The original application for injunction was rarely addressed during those sittings but it is clear that on each occasion when the court extended the orders, it was in reference to the orders made in that application on 1/3/21. However, on 30/6/2021 the court, while issuing a ruling date for the two applications, extended the orders up to 11/11/2021 which was the ruling date.

13. The ruling was however not delivered on that date and the matter was not mentioned for extension of the orders. The ruling was delivered on 28/4/22 in the presence of counsel for all the parties and no application for extension of the orders is recorded as having been made or such application granted.

14. It is the case then that the orders issued on 1/3/2021 must be deemed to have lapsed on 28/4/2022. As at the time of filing this present application on 2nd August 2022, there is no doubt then that the orders had expired. But the respondents ought not be relieved to get away so quickly with such serious allegations without any further inquiry and hence the question that now arises is: has the applicant established that during the earlier period of subsistence of the orders the respondents breached them?

15. The court on 9/11/22 ordered that the Deputy Registrar do visit site and prepare a report and she finally filed a report dated 13/3/23, based on a site visit conducted on 7/3/23, confirming that the 1st and 3rd defendants have interfered with the suit property in a manner prohibited by the order issued on 1/3/2021.

16. By the time of the Deputy Registrar's visit on 7/3/23, the subject orders had long since lapsed on 28/4/22. This court does not find any proceedings showing the orders of 1/3/21 were ever extended till the hearing and determination of the suit. If the contempt motion dated 28/7/22 is to succeed,

the applicant must demonstrate that the actions undertaken occurred during the subsistence of the orders, i.e. between and 28/4/22. The ruling delivered on 28/4/22 determined contempt in respect of the period before 9/3/2021 and dismissed the claims of breach. The period during which the conduct of the respondents is to be examined is that between 10/3/2021 – 28/4/2022. It can not be said from the Deputy Registrar's report that the developments complained of occurred after 10/3/2021. Has the plaintiff established that there was breach during that period? Many of the actions complained of as being in breach were also described in the ruling dated 28/4/2022. I can not revisit the matters and facts dealt with in those applications. Therefore, without specific averments with dates given as to when subsequent breaches occurred, this court would not be able to hold the respondents in contempt. The Deputy Registrar's report gives no dates and does not indicate any work was ongoing at the time of the site visit. Only the affidavit evidence of the applicant can save the day. The affidavit dated 28/7 /22 is not specific as to dates. The attached photographs have no imprinted dates and certificate as required of such evidence. The applicant's further affidavit dated 7/11/2022 also omits to give the timelines during which the events alleged to have been committed in breach occurred, save for one issue at paragraph *18*, and that is the exclusion of the plaintiffs' employees from the suit premises since 1/7/2022 a date which is far much later than the date of the lapse of the orders, 28/4/2022. The affidavit evidence of the applicant is his own undoing. Going by the findings of the Deputy Registrar, if the complaints in the application had been presented with much greater precision, this court may no doubt have had reason to consider the allegations of breach with greater depth than it already has. However, the applicant has failed to attain the threshold required in proving that there was contempt.

17. It is necessary for applicants seeking alleged contemnors to realize that normally, the court does not have the facts and it relies on their affidavit evidence alone to determine if an order of conviction for contempt will issue against respondents. General statements accusing the respondents of having done this and that will not aid an applicant. Even in applications like the current one where it is very clear from the report of a Judicial Officer commissioned by this very court that certain actions were undertaken that were contrary to the orders of the court and which report follows a one-day visit during which no breach was witnessed by the judicial officer as occurring in her presence, the burden is still on the applicant to fill in the gaps and establish that the actions in the report occurred at a time when the order was still subsisting. Such a report only gives the current status and the judicial officer does not need and indeed should get into the arena of conflict. For the court to act on the report by the Deputy Registrar alone without any datelines may be prejudicial to the rights of the respondents in this case, and also contrary to the rule that contempt must be proved beyond a balance of probability. Any respondents may be truly sinfully and blissfully black but since the court is a mere adjudicator and was not part of the alleged events, it does not know that and proof is needed to the required standard, otherwise the court may convict persons who are merely being painted black to settle undisclosed scores. Affidavit evidence in contempt applications thus needs to be airtight since the liberty of the individual is at stake, and there is need to establish exactly when and how the acts of the alleged contemnors occurred. Statements in the affidavit need be backed up by sufficient documentary evidence and if photographs are attached the necessary certificate requisite thereto under Section 106B of the *Evidence Act* needs be exhibited. In the case of *Samwel Kazungu Kambi v Nelly Ilongo & 2 Others* [2017] eKLR the court said as follows:

> "21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.

22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.

23. The conditions set down in Section 106B were not met by the Petitioner. He could not therefore be allowed to produce the photographs. His claim that the respondents were estopped by virtue of Section 120 of the *Evidence Act* from challenging the evidence having not raised the issue at the pre-trial conference is not valid. The production of evidence did not feature in the pre-trial conference. Knowing the kind of the evidence he intended to rely on, it was upon the Petitioner at that early stage to bring up the discussion. He did not do so. The respondents never gave him any hint that they would not be opposing the production of the photographs. The estoppel envisaged by Section 120 of the *Evidence Act* is therefore not applicable in the circumstances of this matter."

18. On the grounds set out herein above alone, and notwithstanding the findings in the Deputy Registrar's report cited herein above, this court declines to find the defendants in contempt of the orders dated 1st March 2021. The outcome is that the notice of motion dated 28th July 2022 lacks merit and it is hereby dismissed with no orders as to costs.

19. This suit shall be mentioned on 29th May 2024 for directions as to hearing and in view of matters contained herein parties should ensure they have complied by filing their trial bundles by then to enable issuance of a hearing date.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 15TH DAY OF MAY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI