



REPUBLIC OF KENYA



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Kiruthu v Wanjohi; Kimaru & another (Interested Parties) (Environment & Land Case E019 of 2021) [2024] KEELC 4075 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4075 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E019 OF 2021

JO OLOLA, J

MAY 9, 2024

BETWEEN

ALICE NYARUAI KIRUTHU PLAINTIFF

AND

JOSEPH MUNDUI WANJOHI DEFENDANT

AND

GEORGE KIMARU INTERESTED PARTY

KAMAU GITHENDU INTERESTED PARTY

RULING

1. Before me for determination are two Applications. By the First Application dated 11th April 2023, Alice Nyaruai Kiruthu (the Plaintiff) prays for an order that the Defendant and the two Interested Parties be cited for contempt and disobedience of the orders of this Court issued on 29th August, 2022 and that as a consequence, they be detained in prison for a term not exceeding six months or their property be attached.
2. The Application is supported by an Affidavit sworn by the Plaintiff and is premised on the grounds that:
 - (i) This Court ordered on 29th August, 2022 that the Plaintiff's use and occupation of the suit property under her possession thereof be protected and maintained;
 - (ii) The Defendant has since that order installed the 1st Interested party to occupy the matrimonial home, where he has kept the Plaintiff and her children away with menaces and threats;
 - (iii) The Defendant has through the 2nd Interested Party, further ploughed where the Plaintiff has been leasing and farming, equally with menaces and threats;



- (iv) The Defendant and the Interested Parties are clearly aware of this Court's orders;
 - (v) The said acts are clearly in blatant breach and disobedience of the subject Court order;
 - (vi) The dignity and authority of this Court should be jealously guarded; and
 - (vii) The Plaintiff is suffering great prejudice.
3. In response to the said Applications, Joseph Mundui Wanjohi (the Defendant) denies being in contempt of the Court orders. In his Replying Affidavit sworn on 16th May 2023, the Defendant avers that neither himself nor his Advocates on record have ever been served with the Court orders allegedly issued on 29th August, 2022 and he is therefore unaware of the contents thereof.
 4. The Defendant asserts that the Plaintiff is not a widow to John Wanjohi Mundui, the registered proprietor of the suit property and that her occupation of the property if at all, is illegal and amounts to trespass.
 5. The Defendant avers that he has obtained a Grant of Letters of Administration ad litem in order to bring necessary Court proceedings against the Plaintiff. He denies threatening the Plaintiff with the support of the 1st Interested Party and asserts that he cannot be an invader of the property since he is a beneficiary of his father's estate.
 6. The Defendant further avers that the Plaintiff has no authority to lease any part of the suit property since it forms part of his late father's estate. It is his case that if indeed the Plaintiff has leased any part of the property to a third party, then she has done so as an intermeddler since she is neither an administrator of the estate nor has she obtained the consent of the beneficiaries to do so.
 7. The Defendant further denies that he and the 1st Interested Parties had sent goons to the suit property to chase out the Plaintiff or her kin and urges the Court to dismiss the application.
 8. George Kimaru and Kamau Githendu (the 1st and 2nd Interested Parties respectively) are equally opposed to the orders sought by the Plaintiff. In their joint Grounds of Opposition dated 16th May 2023, they object to the Application on the grounds that:
 1. George Kimaru and Kamau Githendu's names have been included in these Court proceedings as "Interested Parties" yet they neither have any interest in the subject matter of these Court proceedings nor are they interested in participating in these proceedings;
 2. The inclusion of the 1st and 2nd Interested Parties in the Notice of Motion Application dated 11th April, 2023 is improper, unprocedural and uninformed of any known legal provision;
 3. The only Parties who ought to participate and be included in civil proceedings of the nature instituted by the Plaintiff are either Plaintiff or Defendant(s) (sic);
 4. The Plaintiff has no complaint or cause of action against the 1st and 2nd Interested Parties who are included in the present Application since they are not sued in these proceedings as Defendant (sic);
 5. The 1st and 2nd Interested Parties neither have any knowledge of the subject matter of the dispute nor any order made by this Honourable Court which the Plaintiff alleges that they breached;
 6. The Application dated 11th April, 2023 is misconceived, unmerited and amounts to (an) abuse of (the) Court process and a waste of precious judicial time; and



7. The Application dated 11th April, 2023 is only fit for dismissal with an order for costs in favour of the 1st and 2nd Interested Parties.
9. By the Second Application dated and filed herein on 24th May 2023, Joseph Mundui Wanjohi (the Defendant) prays for the following orders:
 1. That this suit be and is hereby declared as having abated for failure on the part of the Plaintiff/Respondent to take out and effect service of the summons to Enter Appearance upon the Defendant/Applicant;
 2. That this suit be and is hereby dismissed for failure on the part of the Plaintiff/Respondent to take out and effect service of the summons to Enter Appearance upon the Defendant/Applicant; and
 3. The Plaintiff/Respondent to bear the costs of this Application and the suit.
10. The Second Application is supported by an Affidavit sworn by the Defendant and is premised on the grounds:
 - (i) That the Plaintiff did not take out and effect service of the Summons to Enter Appearance upon the Defendant as required under the Civil Procedure Rules;
 - (ii) That it is in the interest of justice for this Honourable Court to allow this Application.
11. In response to the Second Application, the Plaintiff has filed Grounds of Opposition dated 8th August, 2023 wherein she objects to the Application on the grounds that:
 1. Though the Defendant may not have been served with the Summons to Enter Appearance, he was duly served with the Plaint and acted against it by way of seeking its dismissal on a preliminary point and a Ruling delivered on it;
 2. The Defendant was therefore fully informed of the suit and he has full information about the case;
 3. The Defendant has fully participated in the suit and has hitherto not complained of failure of service of summons;
 4. No prejudice has been caused to the Defendant by default on Summons as stated or at all; and
 5. The interests of justice call for continuance of the suit regardless of default of service of summons as stated or at all.
12. I have carefully perused and considered the two Applications as well as the responses thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
13. Starting with the Second Application, the Defendant herein has urged the Court to declare that the Plaintiff's suit has abated for failure on the part of the Plaintiff to take out and effect service of Summons to Enter Appearance upon the Defendant.
14. The Defendant's Application is brought pursuant to the provisions of Section 20 of the *Civil Procedure Act* (Cap 21) as well as Order 5 of the Rules made thereunder. The same Section 20 of the Act requires that upon institution of a suit such as this one, the Defendant should be served in the prescribed manner in order to enter appearance and defend the claim.



15. On the issue of service of the Summons, Order 5 Rule 1 of the Civil Procedure Rules provides as follows:

“1(1) When a suit has been filed a Summons shall issue to the Defendant ordering him to appear within the time specified therein.

(3) Every Summons shall be accompanied by a copy of the Plaint.

(5) Every Summons shall be prepared by the Plaintiff or his advocate and filed with the Plaint to be signed in accordance with sub-rule (2) of this rule; and

(6) Every summons, except where the Court is to effect service, shall be collected for service within thirty days of issue or notification whichever is later, failing which the suit shall abate.”

16. Arising from the foregoing, it was clearly the responsibility of the Plaintiff to obtain the Summons to Enter Appearance and to cause them to be served upon the Defendant. From the Grounds of Opposition as filed by the Plaintiff herein, it would appear that only the Plaint was served upon the Defendant and that there was an omission to serve the Summons. According to the Defendant, that omission was fatal and the suit herein ought to be dismissed and/or declared as having abated.

17. I was not however persuaded in the circumstances of this case that this was a suit that ought to be declared to have abated. In my considered view, the purpose of a Summons to Enter Appearance is to inform a Defendant of the institution of a suit. Upon being informed of the institution of the suit, the Defendant is expected to acknowledge receipt of such notice by filing a Memorandum of Appearance.

18. In the matter before the Court, the Defendant acknowledged due notice of the suit by filing a Memorandum of Appearance herein dated 20th September, 2021. It was also apparent from a perusal of the record herein and particularly the Affidavit of Service sworn by one Teobald Maina and dated 4th September 2021, that the Defendant was served with the Plaint filed herein together with a Chamber Summons and a Notice of Motion application both dated 26th August, 2021. He responded to the same by filing a Notice of Preliminary Objection dated 22nd September, 2021 wherein he challenged the legal capacity of the Plaintiff to file this suit. That objection was by a Ruling of this Court dated 28th September, 2022 dismissed.

19. As the Court of Appeal stated in *Equatorial Commercial Bank Limited v Mohan Sons (K) Limited* [2012] eKLR:

“... we definitely appreciate and agree that the object and scope of summons to enter appearance is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law.

In this case, that aim of summons to enter appearance was achieved since there was an unconditional appearance and participation in the proceedings which constituted voluntary and complete waiver of any defect that could have affected the summons.”

20. In the matter before the Court, it was evident that even though the Defendant had not been served with the summons to enter appearance, he had willingly submitted to the jurisdiction of this Court by Entering Appearance and voluntarily participating in the proceedings before the Court. In the circumstances herein, it would be unjust and inequitable if the Defendant were now to be allowed to implead the provisions of Order 5 Rule 1 of the Civil Procedure Rules and to have the suit herein terminated on the basis that it had abated.



21. I must further state that equity and justice behooves this Court to look at the wider interest of justice and to ensure that one party is not allowed to approbate and reprobate at the same time, for to do so would amount to an abuse of the due process of the Court. Arising from the foregoing, it was clear to me that the Second Application dated 24th May, 2023 was an afterthought and filed without any basis. I find and hold that the suit herein has remained alive by virtue of the actions and active participation of the Defendant.
22. In regard to the First Application, it is the Plaintiff's prayer that the Defendant and the two persons referred to herein as the Interested Parties be cited for contempt and the disobedience of the orders of this Court issued on 29th August, 2022. Both the Defendant and the said Interested Parties have denied violating the said orders which had essentially restrained the Defendant by way of a temporary injunction from denying the Plaintiff herein access, to use, possession and occupation of the suit property.
23. Contempt of Court is that conduct or action that defies or disrespects the authority of the Court. 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.”
24. Properly put, contempt is conduct that impairs the fair and efficient administration of justice. Section 5 of the [Judicature Act](#) confers jurisdiction on the Superior Courts to punish for contempt. Order 40 Rule 3 of the Civil Procedure Rules (2010) provides that in cases of disobedience, or of breach of any terms of a temporary injunction, the Court granting that injunction may order the property of the person guilty of such disobedience or breach to be attached and that Court 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.
25. The reasons why Courts punish for contempt is to uphold the dignity and authority of the Courts, to ensure compliance with directions of the Courts, observance and respect of the due process of the law, to preserve an effective and impartial system of justice and to maintain public confidence in the administration of justice by the Courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice.
26. Considering the issue of contempt in *Econet Wireless Kenya Limited v Minister for Information and Communication of Kenya & Another* [2005] KLR 828, Ibrahim J. (as he then was) underscored the importance of obeying Court orders, stating:

“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 whom an order is made by a 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.”
27. Contempt of Court is however in the nature of criminal proceedings and therefore, the standard of proof where one is accused of contempt is higher than that of a balance of probability. This is



because the liberty of the subject is usually at stake and the Applicant must therefore prove willful and deliberate disobedience of the Court order if the Application were to succeed. This was aptly captured in the case of *Gatharia K Mutitika v Baharini Farm Limited* [1985] KLR 227, where the Court observed as follows:

“A contempt of Court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily ... It must be higher than proof 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 in nature.”

28. In his Defence to the accusation of contempt, the Defendant contends that neither himself nor his Advocate were served with the orders issued by this Court on 29th August, 2022. That contention was however without any basis as the Defendant participated and was represented by an Advocate in the course of the Application that led to the issuance of the said orders. That Advocate was present in Court when the orders were issued and I was therefore unprepared to accept the excuse that he was unaware of the orders issued by the Court.
29. In support of her case, the Plaintiff avers that the Defendant has kept her away from the matrimonial home by installing the 1st Interested Party therein who has used threats and menaces to keep the Plaintiff and her children therefrom. It was further the Plaintiff's case that the Defendant had invaded the part of the suit land where the Plaintiff was farming by sending the 2nd Interested Party to plough thereon.
30. As it were, the said Interested Parties were not Parties to this suit and there was no evidence placed before the Court as to whether or not the Plaintiff had served them with the orders issued by the Court for them to be held in contempt of the same. It was further not clear to me how the 1st Interested Party had been installed on the suit land by the Plaintiff and what exactly he had done to keep the Plaintiff away therefrom.
31. There was also no evidence placed before the Court to support the contention that the 2nd Interested Party had been sent by the Defendant to plough a portion of the land and that he is in fact the person who had ploughed the land.
32. As it were, the Plaintiff had come to Court claiming that the Defendant whom he terms as his step-son had denied him access to his matrimonial home following the death of her husband whom she acknowledges was the father of the Defendant by a previous marriage. I did not therefore understand the orders issued by this Court on 29th August, 2022 to grant the Plaintiff exclusive possession of the 65 acres parcel of land to the total exclusion of the Defendant who also considers the same to be their home.
33. It follows that I did not also find any merit in the Plaintiff's Notice of Motion dated 11th April, 2023.
34. In the premises, I dismiss both the Plaintiff's and the Defendant's respective applications.
35. I make no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 9TH DAY OF MAY, 2024.**

In the presence of:

Mr. C. M. King'ori for the Plaintiff



Mr. Njenga for the Defendant and the Interested Parties

Court assistant - Kendi

.....

J. O. Olola

JUDGE

