



Warab Limited v Machakos County Government & 9 others (Environment & Land Case 220 of 2008) [2024] KEELC 13267 (KLR) (19 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13267 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 220 OF 2008
CA OCHIENG, J
NOVEMBER 19, 2024
IN THE MATTER OF AN APPLICATION BY 8TH, 9TH AND 10TH
DEFENDANTS AGAINST SARA W. BANU; NDOLO KITHUKA;
BENARD MUKOMBI FOR AN ORDER OF COMMITTAL TO PRISON
FOR CONTEMPT OF COURT AND SEQUESTRATION OF THEIR
PROPERTIES.**

BETWEEN

WARAB LIMITED PLAINTIFF

AND

**MACHAKOS COUNTY GOVERNMENT 1ST DEFENDANT
JOSEPH KIOKO 2ND DEFENDANT
HARRISON MUSYA MUSAU 3RD DEFENDANT
FLORENCE KAMENE 4TH DEFENDANT
NATIONAL LAND COMMISSION 5TH DEFENDANT
ANTHONY MUTUA 6TH DEFENDANT
DAVID KAVOO 7TH DEFENDANT
PETER MUMO MAINGI 8TH DEFENDANT
MUSEMBI NZIOKA 9TH DEFENDANT
BENJAMIN SEVE 10TH DEFENDANT**



RULING

1. What is before Court for determination is the 8th, 9th and 10th Defendants' Notice of Motion Application dated the 8th August, 2024 brought pursuant to Section 5(1) of the *Judicature Act*, Order 52 Rule 3 of the Rules of the Supreme Court of England (First Schedule of Civil Procedure Rules of England 2011), Section 63(c) of the *Civil Procedure Act* and Order 40 Rule 2 and 3 of the Civil Procedure Rules. The Applicants seek the following Orders:-
 - a. Spent.
 - b. An order of committal to prison for Contempt of Court be made for such period as this Honourable Court may determine, against:
 - i. Sarah W. Banu
 - ii. Ndolo Kithuka
 - iii. Benard Mukombifor disobedience of the Court Judgment dated 8th May 2020 and Decree issued by this Honourable Court on 18th April 2023.
 - c. This Honourable Court do issue an order of sequestration to sequester such real and personal properties to the full satisfaction of the damage and personal loss caused by the Contemnor estimated by the Applicant to amount to Kshs. 6,000,000/= of the following person:
 - i. Sarah W. Banu
 - ii. Ndolo Kithuka
 - iii. Benard Mukombifor disobedience of the Court Order given by this Honourable Court on judgment of 08th May 2020 and decree issued on the 18th April 2023.
 - d. As a matter of urgency, the Honorable Court be pleased to issue an injunction restraining the Respondent Sarah W. Banu, Ndolo Kithuka And Benard Mukombi their servants and/or agents or any person claiming by them or through them from developments in the nature of fencing, construction of structures of a permanent nature Land known as 337/996 Mavoko Township till this matter is heard and concluded.
 - e. This Honourable Court be pleased to require the personal attendance in court of Sarah W. Banu, Ndolo Kithuka And Benard Mukombi during the hearing of this Application and to continue so attending till their discharge or otherwise by this Honourable Court the summon to attend.
 - f. This Honourable Court be pleased to find that the 1st defendant and 2nd defendant are in contempt of the court judgment issued on 08th May 2020; decree issued on the 18th April 2023 and that they be committed to civil jail.



He claims that the Plaintiff is in deliberate disobedience of the orders of the court that were pronounced through the Judgment delivered on the 8th May 2020. Further, that a reading of the Judgment at page 3, paragraph one, the Plaintiff/Respondent had sought ‘a declaration that she is the lawful and sole owner/proprietor of all that property known as L.R number 337/996 Mavoko Township measuring 1.713 Ha,’ which prayer was dismissed by the Court. He argues that the Plaintiff is feigning ignorance that the issue of the legitimacy of her title was not addressed, yet the court in its Judgment held that the Plaintiff did not possess a good title as her Deed Plan was found unauthentic as stated in paragraphs 28, 29, 45 of the impugned Judgment.

7. He reaffirms that the Plaintiff's suit was dismissed in its entirety and the net effect is that she does not hold a good title to the property. Further, that the Applicants have been in peaceful occupation of the suit land since 8th May 2020 after the delivery of the Judgment upto 15th June 2024 when the Plaintiff trespassed thereon and fenced off the land. He insists that the Plaintiff is in contempt of court order and deserves no leniency.
8. He sought for the cancellation of the defective title since the Plaintiff did not have a good title and there being no appeal preferred, the Judgment to stand, as Plaintiff failed to prove she holds a legitimate title. He explains that the court held that the Applicants had proved their cases in ELC 180 of 2009; ELC 183 of 2009 and ELC 185 of 2009 with ELC 220 of 2008 being the lead file.
9. The Application was canvassed by way of written submissions.

Analysis and Determination

10. Upon consideration of the instant Notice of Motion including the respective Affidavits and rivalling submissions, the only issue for determination is whether the Plaintiff's agents' Sarah W. Banu, Ndolo Kithuka, Benard Mukombi should be cited for contempt of the Judgement of this Court dated the 8th May 2020.
11. Black's Law Dictionary (Tenth Edition) defines contempt of court as follows:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
12. On contempt of Court, Section 63(c) of the [Civil Procedure Act](#) provides as follows:-

“In order to prevent the ends of justice from being defeated, the Court may, if it so prescribed, grant a temporary injunction and in case of disobedience, commit the person guilty thereof to prison and order that his property be attached and sold.”
13. While Section 29 of the [Environment and Land Court Act](#) states 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.”
14. Further, Section 4(1) (a) of the [Contempt of Court Act](#) defines civil contempt as:

“Willful disobedience of any judgement, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court.”



15. In the case of *North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi* (2016) eKLR, Justice Mativo (as he then was) provided parameters on civil contempt and stated inter alia:-

“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.”

16. Further, in *Ochino & another V Okombo & 4 others* (1989) eKLR the Court of Appeal held that:-

“We have to follow the procedure and practice in England. As we read the law, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of section to compel him to obey.”

17. In this instance the Applicants' claim the Plaintiff and its agents are in contempt of the Judgment of this court, which fact is disputed by the Plaintiff. The Plaintiff insists that in the impugned Judgment, its title to the suit land was not revoked and it is still the registered proprietor of the suit land as per the Certificate of Search it annexed. Further, that it has been paying rates to Machakos County and cannot be held in contempt, since it using its own land.

18. For the avoidance of doubt I wish to reproduce the prayers the Plaintiff sought in its Amended Plaint as well as certain excerpts from the impugned Judgment.

19. In the Amended Plaint, dated the 18th December, 2008, the Plaintiff sought the following Orders:-

- a. A permanent injunction restraining 2nd, 3rd, 4th, 6th, 7th, 8th, 9th and the 10th Defendants and each of them whether by themselves, officers, agents, employees and/or servants from entering, trespassing, possessing, allotting, selling or offering for sale, constructing, developing or in any other manner whatsoever interfering with the Plaintiff's quiet possession, use and enjoyment of all that property known as L.R No. 337/996 Mavoko Township or any part thereof.
- b. A mandatory order compelling the 2nd, 3rd, 4th, 6th, 7th, 8th, 9th and the 10th Defendants, their servants, officers, employees and agents to forthwith vacate and hand over to the Plaintiff's vacant possession of all that property known as L.R No. 337/996 Mavoko Township and to forthwith remove at their own cost the developments illegally constructed and/or erected thereon and in default the Plaintiff be at liberty with the assistance of duly authorized auctioneers and the O.C.S Athi River Police Station to forcefully demolish any construction and/or developments erected and to evict the Defendants and their agents at their own cost.
- c. A permanent injunction restraining the 5th Defendant whether by himself, officers, servants or agents from accepting, approving and/or registering any sub-division, survey plans, Deed



Plans, Transfer, Lease, Charge, Title or any other document or transaction presented by the 2nd, 3rd, 4th, 6th, 7th, 8th, 9th and the 10th Defendant's or any other person other than the Plaintiff in respect to all that property known as L.R Number 337/996 Mavoko Township.

- d. A declaration that the purported allocations and/or Letters of Allotment issued by the 1st Defendant in respect of all and/or any part of all that property known as L.R. Number 337/996 Mavoko Township in favour of the 2nd, 3rd, 4th, 6th, 7th, 8th, 9th, and the 10th Defendants are invalid, illegal, null and void in law and their continued occupation and/or possession of the suit property is illegal.
 - e. A declaration that the Plaintiff is the lawful and sole owner/proprietor of all that property known as L.R. Number 337/996 Mavoko Township measuring 1.713 Hectares.
 - f. Damages under paragraph 10, 11 and 13 above.
 - g. Costs of this suit and interest thereon.
 - h. Any other or further relief that this Honourable Court may deem fit and just to grant.
20. While in the Judgment, the Court had observed as follows:-

“ 46. DW4 gave evidence to the effect that the Deed Plan number 163310 annexed on the Plaintiff's title is not authentic. DW4 further informed the court that the said Deed Plan could not have been issued by the Director of Surveys because the survey plan in support of the Deed Plan had been cancelled by the Director of Surveys in 1991. 47. The Plaintiff did not call evidence from the private surveyor who purportedly prepared the survey plan that gave rise to L.R. No. 337/996 and Deed Plan number 163310 dated 4th June, 1992 to controvert the evidence of DW4. 48. Indeed, other than the evidence of the Plaintiff's Director, the Plaintiff did not adduce evidence from a witness who has the expertise in matters of survey to controvert the assertions by the Defendants that survey plan number F/R No. 210/124 had been cancelled because it overlapped other existing parcels of land, and therefore a Deed Plan could not have been issued on the same land. 49. Although the Plaintiff produced in evidence a Letter of Allotment showing that it had been allocated unsurveyed land measuring 2.14 Ha, there was no explanation why the Grant that was issued to the Plaintiff showed the acreage as 1.713 Ha. This big difference in terms of acreage shows that the Letter of Allotment produced by the Plaintiff was not referring to the same parcel of land that is depicted in the Grant for L.R. No. 339/996. 50. The evidence before me shows that the title in respect of L.R. No. 339/996 was issued to the Plaintiff unlawfully. Indeed, the Defendants proved that after the cancellation of the Survey Plan for L.R. No. 339/996, another Survey Plan for L.R. No. 1077-1079 was prepared and approved by the Director of Surveys. This Survey Plan took into consideration the existence of the earlier survey for L.R Nos. 337/992 and 993. 51. In the circumstances, I find and hold that the Plaintiff has not proved its case on a balance of probabilities. On the other hand, the 1st, 8th, 9th and 10th Defendants herein (who are Plaintiffs) in ELC. Nos. 180 of 2009, 183 of 2009 and 185 of 2009 (which were consolidated) have proved their respective cases. 52. For those reasons, the Plaintiff's suit, that is, ELC Case No. 220 of 2008



is dismissed. Each party will cater for its/his own costs in all the consolidated suits.” Emphasis mine

21. From a reading of the excerpt of the Judgment, it is very clear that the court indeed found that the title held by the Plaintiff was not authentic, was issued unlawfully as it was not supported by a Survey plan nor Deed Plan. In my view, the deponent’s averments that the Plaintiff is still the owner of the suit land is preposterous since the court already dismissed its suit as against the Defendants and held that its title was illegally obtained. Further, since the Plaintiff never appealed against the impugned Judgment, I find that it is not the owner of the suit land as claimed and as indeed trespassed thereon, illegally fenced it and should hence be restrained therefrom.
22. Based on the facts before me while associating myself with the decisions cited above, I am of the view that since the Plaintiff admitted fencing the suit land and placing agents thereon, the Applicants have indeed demonstrated that the Plaintiff is indeed in contempt of the Judgment. From the averments in the Replying Affidavit, in my view there is demonstration that there was willfulness and mala fides disobedience of the orders of this court.
23. In the circumstances, I find that Sarah W. Banu, Ndolo Kithuka and Benard Mukombi are indeed in contempt of the Judgment of this Court dated the 8th May 2020.
24. It is against the foregoing that I find the 8th, 9th and 10th Defendants/Applicants’ Notice of Motion Application dated the 8th August, 2024 merited and will allow it.
25. I award the 8th, 9th and 10th Defendants costs of the instant Application.
26. I direct that this matter be mentioned on the 21st January, 2025 for sentencing of the Contemnors.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF NOVEMBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Mutava for Respondent/Plaintiff

Aunga for 8th, 9th and 10th Defendants/Applicants

Court Assistant – Simon/Ashley

