



REPUBLIC OF KENYA



Karim HP & 12 others v Hwaok IM & another; Nema (Interested Party) (Environment & Land Petition E027 of 2021) [2024] KEELC 14050 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14050 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E027 OF 2021
AA OMOLLO, J
DECEMBER 17, 2024

BETWEEN

NABATKHANU KARIM HP 1ST PETITIONER
SHRIKESH GHEEWALA 2ND PETITIONER
KAMLESH V GOHIL 3RD PETITIONER
NAGIB POPAT 4TH PETITIONER
PIUSH PATEL 5TH PETITIONER
SHAMIT SHAH 6TH PETITIONER
NAWAZ GULAMHUSSEIN CP 7TH PETITIONER
TRUSHA PATEL 8TH PETITIONER
PANKAJ PATEL 9TH PETITIONER
SHEMZIN SHUJA D 10TH PETITIONER
HAMIDA SHUJA D 11TH PETITIONER
SUSHMA SHAH 12TH PETITIONER
NAMISH SHAH 13TH PETITIONER

AND

HWAOK IM 1ST RESPONDENT
INTERNATIONAL CHRISTIAN KINDERGARTEN 2ND RESPONDENT

AND

NEMA INTERESTED PARTY



RULING

1. The Petitioners have moved the court vide the notice of motion application dated 28th May 2024 based on the provisions of section 5 of the Judicature Act and the overriding sections of the Civil Procedure Act. The application seeks orders to commit the Respondents (Hwaock IM and Jongpyo IM) as directors of the 2nd Respondents to civil jail for being in contempt of the orders of this court issued on 11th April, 2024. The Applicants avers that despite having knowledge of the orders given on the 11th April, 2024, the 1st and 2nd contemnors have in open and express defiance continued with the impugned construction and caused significant irreversible infrastructural changes to the suit property.
2. The Applicants pleaded that the contemnors have publicly announced that they will not halt the disobedience of the said orders. They posited that if the disobedience is allowed to continue, their appeal no COACA E614 of 2023 will be rendered nugatory and they will continue to suffer irreparable loss in so far as their right to a clean and healthy environment continues to be violated.
3. The application was also supported by the affidavit sworn by Nabatkhanu Karim Hassanali on 28th May 2024. It annexed a copy of the Ruling which gave the order that is alleged to have been disobeyed; and photographs at pages 28-31 (of the annexures) in their effort to prove the contempt.
4. The application is opposed vide the replying affidavit of Ms. Hwaock deposed on the 23rd of July 2024. She deposes that no further construction has taken place after the court made the order on 11th April, 2024. She avers that the images annexed to the affidavit in support of the application were taken long before the date of 11th April, 2024.
5. She stated further that the Respondent runs a school in the suit premises and that the activities that were being undertaken was the removal of debris from the premises, and landscaping and beautification of the grounds to make a clean and safe environment for learners. The Respondents instead accuse the Applicants of harassing them by persistently involving the police to lock up the premises barring ingress and egress. It is contended for the Respondents that the Police vandalized some of their properties in the suit premises. They annexed pictures of policemen in suit premises to corroborate the assertions of harassment.
6. The Applicants swore a further affidavit to contradict the facts raised in the replying affidavit. For instance, Mr Shrikesh deposes that the Respondents put cabro blocks post the issuance of the order of 11th April, 2024. He added that there has been completion of construction works in the photos contained in the supporting affidavit during the pendency of this application. They annexed more photos to corroborate their assertion.
7. The application was prosecuted by way of written submissions with the applicants' submissions dated 29th August, 2024. They cited inter alia the case of Katsuri Ltd versus Kapurchand Deepak Shah (2016)Eklr which quoted the authors of the book Contempt in Modern New Zealand thus;

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 order;



- (c) the defendant has acted in breach of the terms of the order; and
 - (d) the defendant's conduct was deliberate.
8. They submitted that the terms of the order were clear and the Respondents had knowledge thereof because the ruling was delivered in the presence of their counsel. That the Applicants went further by extracting the said order and serving it on the Respondents. The Applicants contended that there is proof of the breach of the orders as the Respondents continued with construction and in a bid to disguise their actions, they put up high walls hoarding the premises so that a person from outside cannot see what is going on in the inside.
 9. They posit that the Respondents have admitted in paragraph 4 of the replying affidavit that they have continued with construction works which causes structural changes to the suit premises. In support of their submissions, the Applicants cited the case of Republic versus School of Law and 2 others (2017) eKLR at paragraphs 23-25 which paragraphs quoted the submissions of the applicant in that case.
 10. The Respondent citing Peter K. Yego & Others Vs Pauline Wekesa Kode Acc No. 194 of 2014 which held that it must be proved that one had actually disobeyed the court order before being cited for contempt. They also cited the case of Econet Wireless Kenya Ltd Vs. Minister for Information and Communication Kenya & Another (2003) eKLR on the purpose of taking out contempt proceedings. The Applicant went further to cite Samuel M. N. Mweru & Others vs National Land Commission & 2 Others (2020) eKLR on the elements to be proved in an application for contempt.
 11. The Respondents submitted that they disagreed with contents of the supporting affidavit as subsequent to the order of 11th April, 2024, no further construction was carried on the suit property. They reiterated that all that was being undertaken after the subject orders was removal of the debris from the premises and beautification of the grounds. The Respondents urged the court to dismiss the application with costs.

Analysis and Determination:

12. It is trite law that contempt proceedings are quasi-criminal and therefore the standard of proof must be on a standard higher than in civil cases. Secondly, the burden of proof lies on the shoulders of the Applicants who are alleging the violations. The Applicants aver that they have discharged this burden. In this instance, the question for determination is whether the proof of alleged contempt has been made.
13. There is no dispute that the Respondents have knowledge of the order and they have not raised the issue that the impugned order was ambiguous/not clear. The Respondents however assert that they have not disobeyed the order as alleged and instead accused the Applicants of harassing them using the Police. Both parties have relied on photographic evidence to prove their case and which evidence I have analysed and considered.
14. The Respondents at paragraph 4 of the replying affidavit admitted to undertaking the following activities post the date of the order alleged to be disobeyed;
 - i. Removal of debris from the impugned premises.
 - ii. Landscaping and beautification of the grounds to provide a clean and safe environment for their learners and to hold open day for prospective parents.
15. The Respondents did not however elaborate on how the landscaping and beautification of the grounds were being undertaken to differentiate that these works did not involve constructing works in the suit



premises. I have observed that the photograph at page 8 of the further affidavit shows a picture of a man that he is engaging in some construction works. This picture compares to the Respondents' picture which was annexed to show the alleged denial of entry/ingress of their staff by the police. On the face of photo, the three people appear like construction workers and not school staff (by virtue of the bags at their backs).

16. Further, the Applicants photos annexed to the supporting affidavit shows some diggings on the grounds. The Respondents posited that the pictures were taken before 11th April, 2024. However, they do not deny hoarding the place and in light of their admission that they did some beautification/landscaping after the ruling, their denial lacks substance.
17. The orders issued by this court required of the Respondents not to undertake any construction works on the suit premises. It is my considered opinion and I so hold that landscaping and or beautification of grounds involves activities that constitute construction works. It was not open for the Respondents to qualify the purpose and intention of the order. I am thus persuaded that the Applicants have proved the alleged contempt by the Respondents and hereby find the 1st Respondent and the directors of the 2nd Respondent guilty.
18. In conclusion, the application is allowed in terms of prayer 4 whereby the named contemnors Hwaock IM and Jongpyo IM as directors of the 2nd Respondent shall appear before this court on a date to be given during the delivery of this ruling for show cause and sentencing. The orders for police supervision (prayer 2 of the motion) are not granted as no basis was laid. The costs of the application to the Petitioners/applicants in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2024

A. OMOLLO

JUDGE

