Qin Minxiue & another v Zhihua (Environment & Land Case E248 of 2024) [2024] KEELC 14074 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14074 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E248 OF 2024

JO MBOYA, J

DECEMBER 16, 2024

BETWEEN

QIN MINXIUE ..... 1ST PLAINTIFF

HOMEBAY PROPERTY LIMITED ..... 2ND PLAINTIFF

AND

QIAN ZHIHUA ..... DEFENDANT

RULING

1. The PlaintiffsApplicants' herein have approached the Honourable Court vide Notice of Motion Application dated the 28th September 2024, brought pursuant to Sections 1A, 1B, 3A, 63 (e) of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules, Section 5 of the *Judicature Act* Laws of Kenya 2010, and in respect of which same have sought for the following reliefs:

    i. For reasons shown, this Application be certified as urgent and its service be dispensed with and the same be heard ex parte in the first instance.

    ii. This Honourable Court be and hereby makes factual finding that the Respondent is in contempt of the Orders of this Honorable Court dated the 23rd September 2024 and issued on the 15th July 2024, issued by Hon. Justice Mboya Oguttu.

    iii. An order be and is hereby directed at the Contemnor to pay to the PlaintiffsApplicants Nine Hundred and Fifty Thousand Kenya shillings (950,000.00) being loss of rent incurred by the PlaintiffApplicant.

    iv. The respondent be punished for contempt of court and be committed to civil jail for a period not exceeding six (6) months.

    v. Costs of the Application be provided for.

2. The subject Application is anchored on various grounds which have been highlighted in the body thereof. In addition, the Application is supported by the Affidavit of Quin Minxiue sworn on the 28th September 2024 and to which the deponent has annexed two [2] documents including a Copy of the Affidavit of service.

3. Upon being served with the subject Application, the DefendantRespondent filed a Replying Affidavit sworn by one Liu Yong. For coherence, the Replying Affidavit has been sworn on the 2nd October 2024. Instructively, the deponent of the Replying Affidavit has averred that the allegations at the foot of the Supporting Affidavit are not substantiated.

4. The Application beforehand came up for Hearing on the 14th October 2024, whereupon the advocates for the parties agreed to canvass and dispose of the Application by way of written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing of written submissions.

5. The PlaintiffsApplicants filed written submissions dated the 25th October 2024 whereas the DefendantRespondent filed written submissions dated the 11th November 2024. In addition, the Respondent also filed [sic] Supplementary Affidavit dated the 9th December 2024.

6. For coherence, the various sets of written submissions [details in terms of the preceding paragraph] form part of the record of the court.

Parties' Submissions

a.Applicants' Submissions:

7. The Applicants filed written submissions dated the 25th October 2024 and wherein the Applicants adopted the grounds contained at the foot of the Application beforehand. Furthermore, the Applicants have also reiterated the contents of the Supporting Affidavit sworn on the 28th September 2024 and the Further Affidavit sworn on 25th October 2024.

8. Additionally, learned counsel for the Applicants has highlighted and canvassed two [2] salient issues for consideration and determination by the court. Firstly, learned counsel for the Applicants has submitted that the court herein proceeded to and issued orders for the maintenance of status quo pertaining to and concerning apartment A1 situate on the suit property. In particular, it has been contended that the orders of status quo were directed towards preserving the occupation, possession and use of the said apartment by the PlaintiffsApplicants.

9. On the other hand, learned counsel for the Applicants has submitted that the orders for the maintenance of the status quo [details in terms of the preceding paragraph] were issued in the presence of learned counsel for the DefendantRespondent. In this regard, it has been posited that the orders in question were therefore known to and within the knowledge of the Respondent.

10. Secondly, learned counsel for the Applicants has submitted that despite being aware and knowledgeable of the import and tenor of the orders of the court, the Respondent herein has proceeded to and disconnected water supply to the suit premises. In this regard, it has been contended that the disconnection of the water supply to apartment A1, was intended to evict the ApplicantsTenants from the suit premises.

11. Furthermore, learned counsel for the Applicants has submitted that the disconnection of the water supply to the suit apartment was undertaken during the existence of the orders of the court. To this end, it has been contended that the impugned actions by and on behalf of the DefendantRespondent therefore amounts to and constitutes contempt of court.

12. Arising from the foregoing, learned counsel for the Applicants has therefore implored the court to find and hold that the DefendantRespondent is guilty of contempt. In this regard, the Applicants have invited the court to proceed and commit the DefendantRespondent to jail for a duration not exceeding six months.

13. On the other hand, learned counsel has implored the court to proceed and order the DefendantRespondent [contemnor] to pay the sum of Kes. 950,000= only on account of loss of rent [sic] incurred by the Applicants.

14. In a nutshell, the Applicant has implored the court to find and hold that the conduct of the DefendantRespondent constitutes and amounts to contemptwilful disobedience of Court order[s] and thus the Respondent deserves to be cited and punished.

b.Respondent's Submissions:

15. The Respondent has filed two [2] sets of written submissions dated the 11th November 2024 and 9th December 2024. However, the submissions dated the 9th December 2024 have been referenced as [sic] Supplementary Affidavit.

16. At the foot of the written submissions [details in terms of the preceding paragraph], learned counsel for the Respondent has highlighted two [2] salient issues for consideration by the court. First and foremost, learned counsel for the Respondent has submitted that the allegation by the Applicants that the Respondent disconnected water supply to the suit apartment has neither been verified nor substantiated. In this regard, it has been posited that the allegation is thus devoid of evidential value.

17. Secondly, learned counsel for the Respondent has submitted that it was incumbent upon the Applicants to tender and produce before the court plausible and cogent evidence to demonstrate the alleged disobedience of the court order. To this end, learned counsel for the Respondent has cited and referenced the provisions of Section 107, 108 and 109 of the *Evidence Act* Chapter 80 Laws of Kenya.

18. Additionally, learned counsel for the Respondent has submitted that the Applicants herein are being dishonest with the court. In this regard, learned counsel has invited the court to take cognizance of the fact that in the Supporting Affidavit, the Applicants contended that same [Applicants] were called by the tenant and informed of the disconnection of the water supply to the suit apartment.

19. However, it has been contended that at the foot of the Further Affidavit, the Applicants herein now renege from the initial position and have thereafter indicated that same [Applicants] were called by the property manager and not the tenant.

20. Arising from the foregoing, learned counsel for the Respondent has therefore submitted that the contradictory positions adopted by the Applicants demonstrate that the Applicants are not candid with the court. In any event, it has been posited that the Application before the court has been inspired by ulterior motive and same is not intended to pursue the cause of justice.

21. Finally, the Respondent has submitted that the Applicants herein have not met andor satisfied the standard of proof to warrant a finding that the Respondent has committed an act in contempt of the orders of the court. To this end, the court has been invited to find and hold that contempt must be proved to the requisite standard and not otherwise.

Issues for Determination:

22. Having reviewed the Application dated the 28th September 2024, and the response thereto and upon taking into consideration the submissions filed on behalf of the respective parties, the following issues emerge [crystalise] and are thus worthy of determination:

    i. Whether the Respondent has disobeyed andor disregarded the orders of the court, or otherwise.

    ii. Whether the Applicants herein have established and demonstrated the alleged contempt to the requisite standard or otherwise.

Analysis and Determination

Issue Number 1 Whether the Respondent has disobeyed and or disregarded the orders of the court, or otherwise.

23. The Applicants herein filed an Application dated the 18th June 2024 and wherein the Applicants sought for various orders inter-alia an order of temporary injunction to restrain the DefendantRespondent from interfering with the Plaintiffs' quiet possession of apartment A1 situate on L.R No. 2723 [original number 2421].

24. Suffice it to point out that the Application under reference came up for Hearing on the 15th July 2024 and whereupon the advocates for the parties entered into a consentcompromise pertaining to the subject Application.

25. In particular, the compromise was on the following terms:

> " There be and is hereby granted an order of status quo over and in respect of apartment A1 on the suit property. For coherence, the order of status quo shall relate to the occupation, possession and use of the said apartment by the PlaintiffApplicant pending the hearing and determination of the suit."

26. My understanding of the terms of the order [details reproduced in the preceding paragraph] is to the effect that the Applicants herein were to remain in occupation and continue to be in possession of the suit apartment. In addition, the order under reference also preserved the right of the Applicants to use the said apartment.

27. Other than the foregoing, it is instructive to underscore that the order that was granted by the court was issued on the presumption and position that it is the 1st Applicant [Quin Minxiue] who was in occupation and possession of the suit apartment. However, it now turns out that it was not the Applicant who was in occupation and possession of the suit apartment.

28. On the contrary, the Applicant now contends that the suit apartment was rented out to a tenant. Furthermore, it has been averred that the said tenant is the one whose water supply was disconnected by the Respondent.

29. Arising from the alleged disconnection of the water supply, the Applicant herein now contends that the DefendantRespondent has disobeyed and disregarded the lawful orders of the court issued on the 15th July 2024 but extracted on the 2nd September 2024.

30. To my mind, the orders of the court which were issued on the 15th July 2024 are crystal clear and devoid of ambiguity. Instructively, the court ordered the maintenance of status quo in terms of occupation, possession and use of the suit apartment by the 1st Applicant and not otherwise.

31. Suffice it to underscore, that the Applicant herein has not contended that same [Applicant] has since been evicted by the DefendantRespondent from the suit apartment. Furthermore, the Applicant herein has not contended that the DefendantRespondent has restrained or prohibited the Applicant from accessing, occupying andor using the suit apartment.

32. Quite clearly, the Applicant herein still has the right to occupy, possess and use the suit apartment. To this end, I am unable to appreciate and fathom the foundation upon which the contemptwilful disobedience of the Court Order is premised.

33. On the other hand, it is also worthy to point out that in serviced apartments, the suit apartment not excepted, the common areas are managed and operated by a management corporation incorporated pursuant to the provisions of the *Sectional Properties Act*, 2020 and the Rules made thereunder.

34. Additionally, it is also worth stating that the servicesconservancies including water and electricity are ordinarily paid for by the unit owners or their tenants [where the units are rented out].

35. In respect of the suit apartment, it was incumbent upon the Applicant to pay for conservancy, including water and service charge. In the same vein, if the suit apartment was demised to a tenant, then it was incumbent upon the tenant to pay for inter-alia water.

36. Arising from the foregoing, it was therefore incumbent upon the Applicants to demonstrate before the court that the disconnection of the water supply to the suit apartment, was undertaken despite payment of the water billsconservancies. In the absence of evidence to demonstrate payments for such water consumption, there exists a likelihood that the disconnection [if any] may have been lawful.

37. Notwithstanding the foregoing, it is also imperative to underscore that the Applicant herein has not tendered andor placed before the court any evidence to underpin the alleged water disconnection. Instructively, the averments that are being relied upon by the Applicants constitute hearsay and are thus devoid of probative value.

38. Back to the question as to whether the DefendantRespondent has acted contrary to the terms of the court order. I beg to underscore that the terms of the court order were express and explicit. For good measure, the terms of the orders were meant to preserve the Applicants' occupation of the suit apartment.

39. In my humble view, the totality of the averments contained at the foot of the Supporting Affidavit and the Further Affidavit, respectively, do not demonstrate any act[s] of disobedience or disregard of the court orders by the Respondent.

40. Arising from the foregoing, it is my finding and holding that the subject Application and wherein the Applicant is seeking to have the Respondent cited and punished for contempt, is based on a misapprehensionmisconception of the importtenor of the orders of the court.

41. In a nutshell, I am afraid that the Applicant herein has not demonstrated andor proved any act[s] of disobedience and or disregard of the lawful court orders issued on the 15th July 2024. For good measure, proof of any aspectact of disobedience with clarity is paramount before returning a verdictfinding of contemptwilful disobedience of court orders.

42. To buttress the foregoing submissions, it suffices to cite and reference the decision of the Court of Appeal in the case of Mutitika v Baharini Farm Ltd[1985] eKLR, where the court stated thus:

> In England matters relating to contempt are now governed by the *Contempt of Court Act*, 1981. The courts, nevertheless take the view that where the liberty of the subject is, or might be, involved, the breach for which the alleged contemnor is cited must be precisely defined – see for instance Chiltern Districts Council v Keane, [1985] Law Society's Gazette, 29th May page 1567.

43. Likewise, the necessity to prove the act[s] constituting contempt and wilful disobedience with clarity and precision was also elaborated in the case ofCarey v Laiken, 2015 SCC 17 [Canadian Supreme Court] (16th April 2015), where Cromwell J, stated as hereunder:

i. The order alleged to have been breached "must state clearly and unequivocally what should and should not be done." This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.

ii. The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.

iii. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. [emphasis supplied].

44. Without belabouring the point, it is my humble albeit considered position that the Applicants herein have failed to state with precision, particularity and specificity the limb, if any, of the court orders that have been [sic] disobeyed by the Respondent.

Issue Number 2 Whether the Applicants herein have established and demonstrated the alleged contempt to the requisite standard or otherwise.

45. Other than the failure to precisely define the limb of the court order that has been breachedviolated by the Respondent, it was also incumbent upon the Applicants to prove the allegation of contempt to the requisite standard.

46. Suffice it to underscore, that contempt proceedings are quasi- criminal. To this end, there is no gainsaying that a person who is found guilty of contempt is likely to be committed to jail and therefore disposed to lose hisher liberty.

47. Arising from the gravity of the punishment that may arise andor ensue in the event of citation for contempt, the position of the law is to the effect that any allegation that touches on contemptwilful disobedience of Court Orders must therefore be proven to the intermediate standard, namely, the standard that lies between the balance of probability and beyond reasonable doubt.

48. The Court of Appeal in the case of Akber Abdullah Kassam Esmail v Equip Agencies Ltd & 4 others [2014] eKLR, stated as hereunder:

> We are not satisfied that the proper procedure was followed in respect of the appellants before they were found to be in contempt of court. The breaches for which the appellants were being cited required to be defined precisely, and they had to be proved to a standard

consistent with the gravity of the alleged contempt, which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt.

49. Similarly, the standard of proof applicable in a matter touching on contempt andor wilful disobedience of lawful court orders was referenced in the case of Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [2021] eKLR, where the court stated as hereunder:

> 51. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed. This was aptly stated in Gatharia K. Mutikika v Baharini Farm Limited [1985] KLR 227, that:
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> 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.
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> However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.

50. In the case of Re Breamblevale Ltd [1969] 3 All ER 1062, Lord Denning MR. [as he then was] at page 1063, elaborated the standard attendant to proof of contemptwilful disobedience of Court Orders.

51. For coherence, it was stated thus:

> " A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time– honoured phrase, it must be proved beyond reasonable doubt".

52. The Supreme Court of Kenya has also highlighted the requisite standard applicable in matters pertaining to contempt. In the case of *Republic v Ahmad Abolfathi Mohammed & Sayeed Mansour Mousavi (Criminal Application 2 of 2018*) [2018] KESC 51 (KLR) (Crim) (23 April 2018) (Ruling), the Apex court stated and observed as hereunder:

> (28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:
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> "In our view, the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."

(29) The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.

53. Suffice it to underscore that the burden of proving the alleged contempt rested with the Applicant. Furthermore, the standard of proof is trite and established and same had to be metsatisfied.

54. Be that as it may, it is my finding and holding that the Applicant herein has failed to discharge the obligation cast upon her. In this regard, it is not lost on the court that the Applicant is relying on unproven hearsay evidence and unsubstantiated allegations, to propagate the contempt proceedings.

55. My answer to issue number two [2] is to the effect that the allegations and averments [which are anchored on hearsay] fall short of meeting the requisite threshold to prove a charge of contemptwilful disobedience of court.

Final Disposition:

56. Having considered the various perspectives raised and canvassed in respect of the matter beforehand and taking into account the settled position of the law pertaining to contemptwilful disobedience of court orders, I am afraid that the Application beforehand is not merited.

57. In the premises, the final orders of the court are as hereunder:

    i. The Application dated the 28th September 2024 be and is hereby dismissed.

    ii. Costs of the Application be and are hereby awarded to the Respondent.

58. It is so Ordered.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF DECEMBER 2024

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson Hilda Court Assistant.

Ms. Taragon for the PlaintiffsApplicants.

Mr. Gakuru for the DefendantRespondent.

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