Mbugua ((Suing as the personal representative of the Estate of Peter Mbugua Mukora - Deceased) v Gathaiya (Being sued as the personal representative of the Estate of Rachael Wairimu Mbugua) & 2 others (Environment and Land Case Civil Suit 853 of 2012) [2023] KEELC 301 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 301 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 853 OF 2012

JO MBOYA, J

JANUARY 26, 2023

BETWEEN

ANN NJERI MBUGUA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER MBUGUA MUKORA - DECEASED) ..... PLAINTIFF

(SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER MBUGUA MUKORA - DECEASED

AND

DAVID M GATHAIYA (BEING SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF RACHAEL WAIRIMU MBUGUA) ..... 1ST DEFENDANT

JOHN GITARI NDAMBIRI ..... 2ND DEFENDANT

GEOFFREY MUKINYA MBUKU ..... 3RD DEFENDANT

RULING

1. Vide Notice of Motion dated the 24th October 2022, the Plaintiff/Applicant has approached the court seeking for the following Reliefs;

    i. This Application be certified as urgent and heard ex-parte in the first instance and service thereafter be dispensed with;

    ii. A Declaration be made by this Honorable Court for contempt of court order against the 2nd Defendant;

    iii. The 2nd Defendant be compelled to pay the Plaintiff Kenya Shillings Ten Million, Four Hundred and Fifty Thousand, Seven Hundred and Fifty Only (KES 10,450,750) Only, being the value of the property that was demolished by the 2nd Defendant on the suit property;

iv. The Court makes an order for the Plaintiff to be allowed to enter into the suit property until the suit is heard and determined;

v. The title deed in the name of the 2nd Defendant be revoked as the transaction was made after the court had made its orders on 31st August 2017;and

vi. The cost of this Application be awarded to the Plaintiff.

2. The instant application is anchored and premised on the various grounds which have been enumerated and alluded to at the foot of the application.

3. On the other hand, the application is supported by the affidavit of the Plaintiff/Applicant sworn on the 24th October 2022 and to which the Applicant has annexed two documents inter-alia, a report and valuation of loss assessment (sic) in respect of L.R No. Dagoreti/Mutuini/917.

4. Upon being served with the instant application, the 2nd Defendant filed a Replying affidavit sworn on the 2nd November 2022 and in respect of which same denied and disputed the averments contained at the foot of the supporting affidavit.

5. Suffice it to point out that the instant application came up for hearing on the 23rd November 2022, when the advocate for the respective Parties agreed to canvass and dispose of the application by way of written submissions.

6. Pursuant to and in line with the agreement by the advocate for the Parties, the Honourable court proceeded to and issued directions pertaining to the filing and exchange of written submissions.

7. For coherence, the Parties proceeded to file written submissions. In this regard, the Plaintiff filed written submissions dated the 26th November 2022, whilst the 2nd Defendant filed written submissions dated the 6th December 2022.

SUBMISSIONS BY THE PARTIES

a. APPLICANT'S SUBMISSIONS

8. The Applicant filed written submissions dated the 26th November 2022 and in respect of which same has raised and highlighted four issues for consideration and determination.

9. Firstly, counsel for the Applicant has submitted that the Plaintiff/Applicant had been in occupation of the suit property for more than 12 years and premised on such occupation, the Plaintiff/Applicant moved the honourable court vide the instant proceedings with a view to obtaining suitable orders of ownership based on the Doctrine of Adverse Possession.

10. Furthermore, counsel for the Plaintiff/Applicant has added that upon the filing of the instant proceedings, same procured and obtained an order for maintenance of status quo, which was issued on the 30th August 2017.

11. In particular, counsel for the Applicant has reiterated that the import and tenor of the said order was to ensure that the status quo was maintained and preserved pending the hearing and determination of the suit.

12. Secondly, learned counsel for the Applicant has submitted that during the occupation of the suit property by the Plaintiff/Applicant, same constructed and developed permanent premises thereon, which the Plaintiff/Applicant thereby leased to various tenants.

13. Thirdly, learned counsel for the Applicant has submitted that during the pendency of the instant suit, the 2nd Defendant/Respondent commenced and filed proceedings before the Business Premises Tribunal vide cause number BPRT No. E338 of 2021 against the Plaintiff's tenants and in respect of which same sought to terminate the tenancies.

14. In addition, counsel for the Plaintiff has submitted that the proceedings before the Business Premises Rent Tribunal went on and concluded, culminating to adverse orders being issued against the tenancy.

15. On the other hand, counsel has further added that upon procuring and obtaining the impugned orders from the Business Premises Rent Tribunal, the 2nd Respondent proceeded to and evicted the Plaintiff/Applicants and its tenants from the suit property.

16. Additional, counsel has added that using the same orders from the Business Premises Rent Tribunal, the 2nd Defendant proceeded to demolish the Applicants premises and thus rendered the Applicant homeless/destitute.

17. Fourthly, counsel for the Plaintiff/Applicant has submitted that the actions and activities by the 2nd Defendant/Respondent including the eviction of the Applicant's tenants and demolition of the Applicants (sic) premises was contrary to and in contravention of lawful court orders issued on the 31st August 2017.

18. To this end, learned counsel for the Plaintiff has submitted that the impugned actions therefore constitutes contempt of lawful court orders and in this regard, the 2nd Defendant ought to be cited and punished for contempt.

19. To vindicate the foregoing submissions, learned counsel for the Plaintiff has cited and relied on inter-alia, the case of Econet Wireless (K) Ltd versus Minister for Information & Communication & Another (2005)eKLR and T.N Gadavarman Thiru Mulpad v Ashok Kot & Another (2006) 5 ACC, respectively to underscore the necessity to abide by and comply with lawful court orders of the court.

20. Premised on the foregoing submissions, learned counsel for the Plaintiff has therefore implored the Honourable court to find and hold that the instant application is meritorious and ought to be granted.

b. 2ND RESPONDENT'S SUBMISSIONS

21. Vide submissions dated the 6th December 2022, learned counsel for the 2nd Respondent has raised, canvassed and amplified three issues for consideration.

22. First and foremost, counsel for the 2nd Respondent has submitted that though the Plaintiff has alluded to the orders of the court which were issued on the 31st August 2017, same has however not annexed or displayed any copy of the said orders.

23. In any event, learned counsel has added that the Plaintiff has similarly not disclosed what were the terms of the Orders alluded to, which terms are critical and essential, before the Honourable court can be invited to deal with allegations of Contempt.

24. Secondly, counsel for the 2nd Defendant/Respondent has submitted that the Plaintiff/Applicant has also not confirmed whether the impugned orders were made in the presence of the 2nd Defendant/Respondent or whether same were duly served.

25. Nevertheless, counsel has added that by the time the impugned orders were made, the 2nd Defendant/Respondent was never a Party to the subject suit. In this regard, counsel has therefore contended

that the impugned order were never made with the participation or knowledge of the 2nd Defendant/ Respondent.

26. Thirdly, learned counsel for the 2nd Defendant/Respondent has submitted that the 2nd Defendant/ Respondent is the lawful owner and proprietor of the suit property and thus by virtue of such ownership, same had ownership rights to and in respect of the premises.

27. In addition, counsel has contended that the 2nd Defendant lawfully and duly mounted proceedings before the Business Premises Rent Tribunal vide BPRT Cause E338 of 2021, wherein same sought to terminate the tenancies of various tenants.

28. Besides, counsel has added that upon the conclusion of the proceedings before the Business Premises Rent Tribunal, the tribunal issued orders of eviction of the various tenants from the suit premises.

29. In this regard, counsel for the 2nd Respondent has therefore submitted that the eviction of the various tenants from the suit property which is complained of, was carried out and undertaken pursuant to lawful court orders, duly issued by the Tribunal.

30. Finally, counsel for the 2nd Respondent has submitted that the inclusion of a claim/prayer for payment of Damages in the sum of Kes.10, 450, 750/= only, by the Plaintiff/Applicant in the current application is not only unlawful but legally untenable.

31. In the premises, counsel for the 2nd Respondent has impressed upon the court that the current application is not only misconceived, but constitutes a gross abuse of the due process of the court.

ISSUES FOR DETERMINATION

32. Having reviewed the Application dated the 24th October 2022, together with the supporting affidavit thereto and having taken into account the Replying affidavit sworn in opposition thereto; and upon consideration of the submissions filed by the respective Parties, the following issues do arise and are worthy of determination;

    i. Whether the current Application and essentially, the limb pertaining to Contempt of (sic) the orders of 31st August 2017, is Res-judicata.

    ii. Whether the 2nd Defendant/Respondent has indeed disobeyed (sic) lawful court orders issued on the 31st August 2017 and thus guilty of Contempt.

    iii. Whether the Honourable Court is seized of Jurisdiction and Competence to decree and award Damages in the sum of Kes.10, 450, 750/= only on the basis of an Interlocutory Application.

    iv. Whether the Honourable Court can decree and direct cancelation or Revocation of the 2nd Defendant's title to the suit property in the manner sought.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the current Application and essentially, the limb pertaining to contempt of (sic) the orders of 31st August 2017, is Res-Judicata.

33. It is common ground and indeed evident that the instant suit was filed and/or commenced vide originating summons on the 19th November 2012.

34. Surprisingly, even though the suit was filed and lodged in November 2012, to date the Parties to this suit and in particular, the Plaintiff does not appear keen to have the substantive suit heard and disposed of.

35. To the contrary the Parties herein and more particularly, the Plaintiff/Applicant seems to be keen on mounting a plethora of application for various albeit numerous purposes.

36. Suffice it to point out that the current application is indeed the third application wherein the Plaintiff/Applicant is seeking for orders of citation and punishment of the Defendants for contempt of (sic) contempt of court orders.

37. For clarity, the first such application was dated the 15th January 2015 and same was followed by the Application dated the 10th May 2021 and finally the current application, which is dated the 24th October 2022.

38. Be that as it may, it is worthy to state and underscore that vide the Application dated the 10th May 2021, the Applicant had contended that the 2nd Defendant had violated, breached and disregarded the lawful orders of the court issued on the 31st August 2017.

39. However, vide ruling rendered on the 24th February 2022, this honourable court found and held that the allegations of contempt of the named court order had neither been established nor proved. Consequently, the court proceeded to and dismissed the named application mounted by and on behalf of the Plaintiff/Applicant.

40. Undeterred by the previous ruling of the court, the Plaintiff/Applicant has now mounted the current application and same seeks to have the 2nd Defendant cited and punished for contempt of court.

41. At this juncture, it becomes appropriate to ascertain the nature, tenor and scope of the orders of the court, which are contended to have been disregarded and which thus form the basis of the plea of contempt.

42. For coherence, the limb of the court order alluded to stated as hereunder;

> 'Therefore to achieve the status quo, the court will allow prayer two of the application. This prayer is allowed to the extent that the Respondents is restrained from dealing or further restoration of any entries registered in the register pertaining to parcels of lands known as L.R No Dagoreti/Mutuini/913, 914, 915, 916 and 917, pending the hearing of the suit.

43. It is evident from the terms of the court order, which has been reproduced vide the preceding paragraph that what was restrained was the dealing and further registration of any entries in respect of the registers of inter-alia L.R No. Dagoreti/Mutuini/917.

44. As pertains to the foregoing order, the Plaintiff/Applicant herein filed a previous application and the said application dated the 10th May 2021 was dismissed by the Honourable court.

45. Nevertheless, the Plaintiff has now filed the current application and the issues that are raised herein including (sic) obtaining of title of one of the suit properties ex post the issuance of the orders made on the 31st August 2017, had been dealt with and determined.

46. In view of the foregoing, the question that does arise is whether this court can have a second bite over and in respect of the application for contempt of court premised on the same sets of facts.

47. To my mind, such an invitation is tantamount to inviting the court to sit on an appeal on its own decision, which is inimical to the established principles of the law and thus contrary to the dictates of the Rule of Law.

48. Notwithstanding the foregoing, such an invitation is also contrary to and prohibited by the Doctrine of Res-Judicata. See Section 7 Explanation 4 of the *Civil Procedure Act*.

ISSUE NUMBER 2:

Whether the 2nd Defendant/Respondent has indeed disobeyed (sic) lawful court orders issued on the 31st August 2017 and thus guilty of Contempt.

49. The Plaintiff/Applicant has mounted and lodged the current application and same seeks various reliefs at the foot thereof. Suffice it to point out that one of the reliefs being sought is citation and punishment of the 2nd Defendant/Respondent for contempt of lawful court orders.

50. In the premises, it is therefore appropriate to discern what are this actions or activities that have been done by the 2nd Defendant/Respondent to warrant citation or punishment.

51. From the supporting affidavit, the Applicant contends that the 2nd Defendant proceeded to and commenced proceedings before the Business Premises Rent Tribunal vide BPRT Cause No. E338 of 2021.

52. Furthermore, the Applicant avers that upon the commencement of the said proceedings, the 2nd Respondent procured and obtained favorable orders against the Applicant's tenants who were conducting and carrying out Business in premises located within the suit property.

53. On the other hand, the Applicant contends that pursuant to the impugned orders issued before the Business Premises Rent Tribunal, the 2nd Respondent proceeded to and evicted the Applicants tenants and by extension demolished, the premises which were standing on the suit property.

54. It is the foregoing acts or activities (details which have been enumerated in the proceedings paragraph) which are contended to be in contempt of the orders issued on the 31st August 2017.

55. Give the foregoing observations, it is now appropriate to juxtapose the averments against the terms of the order issued on the 31st August 2017. For ease of reference, the terms of the order issued on the 31st August 2017 had hitherto been reproduced elsewhere herein before. However, there is no harm in further reproduction.

56. Consequently, same are reproduced as hereunder;

'Therefore to achieve the status quo, the court will allow prayer two of the application. This prayer is allowed to the extent that the Respondents is restrained from dealing or further restration of any entries registered in the register pertaining to parcels of lands known as L.R No Dagoreti/Mutuini/913, 914, 915, 916 and 917, pending the hearing of the suit.

57. Looking at the contents of the impugned court order and contrasting same against the impugned actions, which have been alluded to by the Plaintiff/Applicant, I am unable to discern breach of the impugned court orders.

58. For coherence, the impugned court orders did not anticipate and or deal with eviction of tenants pursuant to lawful court orders issued by the Business Premises Rent Tribunal.

59. In any event, assuming that the proceedings before the Business Premises Rent Tribunal were likely or bound to affect the Rights or Interests of the Plaintiff/ Applicant in any manner, whatsoever, then it behooved the Applicant to apply to be joined therein and thereafter to seek inter alia, Stay of proceedings.

60. Notwithstanding the foregoing, there is yet another perspective that merits mention and due consideration. For clarity, this perspective relates to whether execution and enforcement of lawful court orders which have not been quashed, rescinded and set aside, constitutes contempt.

61. Quite clearly, the Plaintiff concedes that the 2nd Defendant lodged and commenced proceedings before the Business Premises Rent Tribunal and thereafter procured favorable orders.

62. Be that as it may, the Plaintiff/Applicant has not indicated or averred whether same has since sought to review the impugned orders of the Business premises tribunal or otherwise filed Judicial Review proceedings to impugn the illegality thereof.

63. Despite the foregoing, the Plaintiff/Applicant is bold enough to approach the Honourable court herein and contend that the 2nd Defendant ought to be cited and punished for actualizing orders procured from the Business premises tribunal against known tenants and which orders have neither been challenged nor impeached.

64. I am afraid that execution and implementation of lawful court orders (which have not been challenged, impugned or rescinded) cannot constitute and or otherwise found the basis for Contempt proceedings, either in the manner sought herein or at all.

65. In a nutshell, I come to the conclusion that the actions or activities which have been complained of, do not in my view, constitutes contempt to warrant citation and punishment of the 2nd Defendant/ Respondent.

66. Thirdly, it is common knowledge that before a Party can be cited and punished for contempt, it behooves the Applicant to prove that the impugned actions or acts, that are alleged to constitutes contempt, to the satisfaction of the court.

67. Clearly, the standard of proof envisaged prior to and before citation and punishment for contempt is higher than the usual standard of proof in respect of ordinary civil matters.

68. To underscore the standard of proof required in respect of contempt proceedings, it is appropriate to recall, restate and reiterate the holding of the Court of Appeal in the case of Mutitika versus Baharini Farm Ltd[1985] eKLR, where the Court of Appeal observed as hereunder;

> " Re Breamblevale Ltd [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063, had this to say,
>
> "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".
>
> With the greatest possible respect to that eminent English judge, that proof is much too high for an offence "of a criminal character" and, ipso facto, not a criminal offence properly so defined.
>
> "We agree with Mr. Khaminwa's submissions in this respect. 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. We envisage no difficulty in courts determining the suggested standard of proof. 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 offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved"

ISSUE NUMBER 3

Whether the Honourable court is seized of Jurisdiction and Competence to decree and award Damages in the sum of Kes.10, 450, 750/= Only, on the basis of an Interlocutory Application.

69. Quite curiously, the Plaintiff/Applicant has also sought that the court be pleased to decree and award unto her the sum of Kes.10, 450, 750/= only on account of (sic) the demolition of the premises that were alleged to be on the suit property and which are said to be have been demolished by the 2nd Respondent.

70. As to whether or not there were premises, which were demolished by the 2nd Defendant/Respondent, is a question of fact, which can only be verified and proved during a plenary hearing.

71. In any event, it is common knowledge that whilst dealing with and handling an interlocutory application, the court is prohibited from carrying out and or undertaking a mini-trial on the facts and evidence, which are in controversy in a particular matter.

72. To this end, I beg to state that it is not within my competence and jurisdiction at this interlocutory stage, to make pronouncement on substantive issues of facts, not least, whether there were any demolitions, either as alleged or otherwise.

73. Be that as it may, what the Plaintiff/Applicant has sought for at the foot of the current application is the equivalence of Special or Liquidated Damages.

74. Furthermore, a claim for Special or Liquidated damages, is one which is by law required to be particularly pleaded and specifically proved. For clarity, the particulars of such claim, must no doubt be contained at the foot of a primary pleading (read Plaint or Counterclaim).

75. Additionally, once the Applicant/Claimant has particularly pleaded such a claim for special/liquidated damages, then same is required to bring fourth cogent and credible evidence to prove the claim. It is not enough to throw such figures on the head of the Court and contend that you (the Applicant), is entitled to the named damages.

76. Simply put, claims for Special or Liquidated Damages, must be specifically proved.

77. Without belaboring the point on the manner of pleading and proving claims of Special or Liquidated damages, it suffices to restate and reiterate the holding in the case of John Richard Okuku Oloo versus South Nyanza Sugar Co Ltd [2013] eKLR, where the court stated and observed as hereunder;

> " In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v. Murunga & others Nairobi CA NO. 192 of 1992 (ur) appears in the Jivanji case.
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> "It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v. Nakaye [1972]ea 446, Ouma v. Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v. Chebon Civil Appeal Number 22 of 1991 (ur). In the latest case, Cockor JA who dealt with the issue of special damages said in his judgment:
>
> "It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v. Nairobi City Council [1976] KLR 304

after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ's judgment at 532 - 533 in Ratcliffe v. Evans [1892]QB 524, an English leading case of pleading and proof of damage.

"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damages is done. To insist upon less would be to relax old and intelligible principles. To insists upon more would be the vainest pedantry."

78. Clearly, a claim for special or liquidated damages, can only be pleaded in the primary pleadings and thereafter proved in the usual manner of trial, upon production of the requisite evidence.

79. In a nutshell, no award of Special or Liquidated damages can be decreed or made on the basis of an Interlocutory application, in the manner sought by the Plaintiff/Applicant herein.

80. Before departing from the subject issue, I beg to note that it is becoming so frequent and indeed notorious for Parties and more particularly, those represented by Advocates to seek substantive reliefs on the basis of an Interlocutory application.

81. For me and speaking for myself, it is not a very pleasant occurrence. In this regard, it is an aspect that requires remedial and corrective measures, certainly on the part of the Practitioners.

82. Suffice it to mention that both the Practitioners and the court are in the service of mankind and therefore both are called upon to adhere to and uphold the National Values and Principles of Governance, inter alia, the Rule of law.

83. In my humble view, time is ripe for all and sundry to re-examine our fidelity to *the Constitution* 2010 and in particular, adherence to the rule of law.

ISSUE NUMBER 4

Whether the Honourable court can decree and direct Cancelation of the 2nd Defendant's title to the suit property in the manner sought.

84. Taking the cue from what I have alluded to in the preceding paragraphs, it must have become apparent that no court can grant a substantive order, including one for revocation of title on the basis of an interlocutory application.

85. I beg to restate and reiterate that prayers/reliefs, including the one seeking revocation of title herein can only be impleaded in the primary pleadings and thereafter proved in the usual manner.

86. Unfortunately, the Plaintiff/Applicant herein and her able counsel, are of the contrary view and persuasion.

87. Nevertheless, the principles and Doctrines of law are established and hackneyed and in any event, same cut across, irrespective of whether one appreciates the said principles or otherwise.

88. In short, I beg to reiterate that the prayer for revocation or cancellation of the 2nd Defendant's title (sic) over and in respect of the suit property cannot issue on the basis of the subject Interlocutory application.

FINAL DISPOSITION

89. Having analyzed and dealt with the various, albeit numerous issues that were outlined in the body of this Ruling, it is evident and or apparent that the impugned Application other than being mischievous, is legally untenable and Bad in law.

90. Consequently and in the premises, the Application dated the 24th October 2022, be and is hereby Dismissed with costs to the 2nd Defendant/Respondent.

91. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26 TH DAY OF JANUARY 2023.

OGUTTU MBOYA,

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Otieno for the Plaintiff/Applicant

Mr. Tim Okwaro for the 2nd Defendant/Respondent

N/A for the 1st and 3rd Defendant/Respondent