



**Ominde v Odongo (Environment and Land Case Civil Suit
300 of 2016) [2023] KEELC 260 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 260 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 300 OF 2016
SO OKONG'O, J
JANUARY 26, 2023**

BETWEEN

WALTER EDWIN OMINDE PLAINTIFF

AND

VICTOR OTIENO ODONGO DEFENDANT

RULING

1. This suit was filed on November 15, 2016. For the last 6 years, no serious attempt has been made by the parties to fix the suit for hearing. What the parties have engaged in are interlocutory applications that they have brought one after the other. What is before me is one such application brought by the plaintiff by way of a notice of motion dated August 6, 2022. In the application, the plaintiff has sought an order for the committal of the defendant to civil jail for a period of 6 months for being in contempt of the orders of injunction that were made herein on April 11, 2017; that is, 5 years as of the date of the application.
2. This is not the first application for contempt of the said orders brought by the plaintiff against the defendant. A similar application was brought on January 8, 2018 through a notice of motion application of the same date. The January 8, 2018 application was compromised on October 17, 2018 when the parties agreed that the dispute between them seemed to be the boundaries of Title No Kisumu/ Nyalenda “B”/1508 (hereinafter referred to only as “Plot No 1508”) owned by the plaintiff and Title No Kisumu/ Nyalenda “B”/1182 (hereinafter referred to only as “Plot No 1182”) owned by the defendant.
3. Under the said compromise, the parties entered into a consent that the County Land Surveyor and Registrar conduct a site visit of Plot No 1508 and Plot No 1182 and determine their boundaries and whether any of the plots had encroached on the other. The County Land Surveyor and Registrar were to file their report in court within 60 days from October 17, 2018.



4. The County Land Surveyor and Registrar conducted a site visit on June 24, 2019 and prepared a report dated June 27, 2019 that was filed in court sometime in July 2019. In the report, the County Land Surveyor and Registrar stated among others that the plaintiff and the defendant were “claiming the same position on the ground i.e each party claiming the right location of his parcel of land and another land parcel in this suit in totality”. In their recommendation, the County Land Surveyor and Registrar stated that they had re-established the common boundary of the two plots and put some markings on the ground and urged the parties to observe and obey the re-established boundary.
5. No sketch map was attached to the said report to show the position of the two plots and the boundary that was re-established. The County Land Surveyor and Registrar did not also indicate whether any of the parties had encroached on the other’s plot on the ground.
6. The said survey appears not to have settled the dispute between the parties. This to me is because the dispute is not over the boundary of the two plots but over a portion of land that the defendant claims to have been the lake frontage of Plot No 1182 which was illegally curved out and included as part of Plot No 1508 when the same was created. It is the said portion of land that the plaintiff claims to be part of Plot No 1508 and the defendant claims to be part of Plot No 1182 that brought about the filing of this suit.
7. The defendant has contended that when he acquired Plot No 1182, the same enjoyed lake frontage and he has produced survey records to support that contention. The defendant has contended that Plot No 1508 has its origin in Title No Kisumu/ Nyalenda “B”/564(Plot No 564) which measured 0.15 hectares. The defendant has contended that Plot No 564 was subdivided to give rise to Title No Kisumu/ Nyalenda “B”/1467 and 1468(Plot No 1467 and Plot No 1468) and that Plot No 1467 was subsequently subdivided to give rise to Title No Kisumu/ Nyalenda “B”/1507 and 1508(Plot No 1507 and Plot No 1508). The defendant has contended that Plot No 1507 measures 0.26 hectares while Plot No 1508 owned by the plaintiff measures 0.48 hectares. The defendant has wondered how Plot No 1508 could have a measurement larger than its parent Plot No 564 which measured 0.15 hectares only. The defendant has contended that through manipulation of survey maps and records, the measurement of Plot No 564 was increased from 0.15 hectares to 0.8 hectares in the process of which a portion of Plot No 1182 in dispute was annexed as part of Plot No 564 and made to form part of its subdivisions mainly Plot No 1508 owned by the plaintiff.
8. The plaintiff on the other hand has contended that the manner in which the title to Plot No 1508 was created is irrelevant and that what is important is that according to the current survey maps, the disputed portion of land falls within Plot No 1508.
9. When the plaintiff filed this suit, he filed together with the plaint an application by way of notice of motion dated November 15, 2016 seeking a temporary injunction restraining the defendant from “trespassing onto, presenting themselves as the proprietors of, dealing with, evicting and or interfering with quiet possession, use and occupation of in (sic) all that piece of land known as Kisumu/Nyalenda “B”/1508 by the plaintiff or to restrain the defendant from dealing with the suit property aforesaid in any manner adverse to the plaintiff’s proprietary rights, pending the hearing and determination of the suit herein.”
10. The court granted the plaintiff’s application as prayed on April 11, 2017. In his application, the plaintiff annexed 3 photographs of the portion of land in dispute to show the activities that the defendant was carrying out on the same. From the photographs, one can see what looks like construction/demolition waste being used for backfilling what appears to be a depression. It can also be seen in the same photographs the existence of a temporary structure made of iron sheets. The photographs show the



status of the disputed portion of land as at the time this suit was brought and before the said order of April 11, 2017 was issued by the court.

11. In the application before the court, the plaintiff alleged that in breach of the said order made by the court on April 11, 2017, the defendant had commenced development on the suit property. In his affidavit in support of the application, the plaintiff annexed a photograph of a temporary structure made of iron sheet which he claimed was being put up by the defendant in breach of the said court order.
12. The application was opposed by the defendant through a replying affidavit sworn on October 17, 2022. The defendant denied that he had trespassed on and put up a structure on Plot No 1508. The defendant contended that the iron sheet structure complained of by the plaintiff was on Plot No 1182 and that the same was in place as at the time of the filing of this suit and issuance of the said court order. The defendant stated that he had no intention of carrying out any development on the disputed portion of land before the hearing and determination of this suit.
13. The plaintiff filed a supplementary affidavit sworn on November 11, 2022 in which he stated that the temporary structure which prompted his application was put up in 2022 and that the same had not been in place for several years as claimed by the defendant. The plaintiff averred further that the structure was on Plot No 1508 and not on Plot No 1182 as claimed by the defendant.
14. The application was heard on November 16, 2022. The plaintiff's advocate relied entirely on the plaintiff's affidavit and supplementary affidavit filed in support of the application. On his part, the defendant who appeared in person submitted that he was not in contempt of court. He reiterated that the structure complained of by the plaintiff was in place when the court order said to have been breached was issued.
15. I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the affidavit filed by the defendant/alleged contemnor in opposition to the application. Finally, I have considered the submissions by the parties. The issues arising for determination in the application before me are, whether the defendant breached the order that was made herein on April 11, 2017 and if so, whether he should be punished for that breach.
16. In *Hardkinson v Hardkinson* [1952] ALL ER 567, the court stated that:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”

In *Mutitika v Baharini Farm Ltd* [1985] KLR 227 it was held that:

- i. “A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.
- ii. The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.
- iii. The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.”



17. In *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR the Court of Appeal set out the law on contempt as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the *Contempt of Court Act* and the ruling of the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* (supra). Secondly, as this court emphasized in *Jihan Freighters Ltd v Hardware & General Stores Ltd* and in *AB & Another v RB* [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutitika v Baharini Farm (supra) and *Republic v Ahmad Abolfathi Mohammed & Another* (supra).”

18. In *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, the court stated as follows:

“We now revisit the issue of service. Was there service of the order said to have been disobeyed on the respondent? There is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect. In that respect, this case can be distinguished from *Justus Kariuki Mate & Another v Hon Martin Wambora* (Wambora case) supra cited by learned counsel for the applicant. On the other hand however, this court has slowly and gradually moved from the position that the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra). Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of *Basil Criticos v Attorney General and 8 Others* [2012] eKLR pronounced himself as follows:-

“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a court order; the strict requirement that personal service must be proved is rendered unnecessary”

This position has been affirmed by this court in several other cases including the Wambora case (supra). It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty.”

19. It is on the foregoing principles that the plaintiff's application falls for consideration. I am not satisfied that the plaintiff has established the acts of contempt alleged against the defendant in respect of the order made herein on April 11, 2017. It is common ground that the said order was issued by the court. The terms of the said order and service thereof upon the defendant are not disputed. What is in dispute is whether the defendant disobeyed the same. The order of April 11, 2017 restrained the defendant from “trespassing onto, presenting themselves as the proprietors of, dealing with, evicting and or interfering with quiet possession, use and occupation of in the plaintiff in all that piece of land known as Kisumu/Nyalenda “B”/1508 by the plaintiff and to restrain the defendant from dealing



with the suit property aforesaid in any manner adverse to the plaintiff's proprietary rights, pending the hearing and determination of the suit herein.”

20. As mentioned earlier in the ruling, the plaintiff's contempt application was prompted by what he claimed to be a temporary structure that the defendant had constructed on Plot No 1508. As I have stated earlier in my analysis of the parties' respective cases, it is not yet settled whether the portion of land in dispute between the parties is on Plot No 1508 owned by the plaintiff or Plot No 1182 owned by the defendant. The defendant has contended that the structure in contention is on Plot No 1182 and that it was put up prior to the filing of this suit and as such the construction of the same could not amount to a breach of the court order of April 11, 2017.
21. I have mentioned earlier that the photographs that were annexed to the plaintiff's application for injunction pursuant to which the order of April 11, 2017 was issued showed the existence of an iron sheet structure on the disputed portion of land. The said iron sheet structure was said to have been put up by the defendant. I am persuaded that the temporary iron sheet structure complained of by the plaintiff was in place as at the time the order of April 11, 2017 was issued. Even if the same was put up after April 11, 2017, there is no evidence before the court showing that the structure is on Plot No 1508. In the circumstances, it is my finding that the plaintiff has not proved the act of contempt alleged against the defendant.
22. In the final analysis, I find no merit in the notice of motion application dated August 6, 2022. The application is dismissed with costs to be in the cause. It is my hope that the parties will now take steps to set down this old matter for hearing. Dated and delivered at Kisumu on this January 26, 2023.

S OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr Oriwa for the plaintiff

The Defendant in person

Ms J Omondi -Court Assistant

