



Kiambuthi v Gitonga & 4 others; Kiambuthi (Interested Party) (Environment & Land Case 3 of 2020) [2023] KEELC 789 (KLR) (13 February 2023) (Ruling)

Neutral citation: [2023] KEELC 789 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 3 OF 2020
JG KEMEI, J
FEBRUARY 13, 2023**

BETWEEN

SAMUEL NG'ANG'A KIAMBUTHI PLAINTIFF

AND

ERIC MUNENE GITONGA 1ST DEFENDANT

CLEMENT GICHOHI KUNGU 2ND DEFENDANT

CHRISTOPHER WARUINGI 3RD DEFENDANT

WILSON MBUKI 4TH DEFENDANT

SAMUEL MACHARIA 5TH DEFENDANT

AND

NAOMI KIBARA KIAMBUTHI INTERESTED PARTY

RULING

1. The plaintiff has filed two applications before this court dated the February 15, 2021 and January 27, 2022.
The notice of motion dated the February 15, 2021
2. In this application the plaintiff sought the following orders;
 - a. Leave to amend the plaint in terms of the annexed draft plaint within 7 days from the date of the orders of the court.
 - b. The defendants be and are hereby granted corresponding leave to amend the statement of defence if necessary within 7 days of service of the amended plaint.



- c. The draft amended plaint attached to this application be deemed as duly filed and served.
 - d. Costs of the application.
3. The application is premised on the annexed supporting affidavit of the applicant on grounds *inter alia* that; the suit relates to Ruiru/Ruiru East block2/2049 (mother title); at the time of filing the suit the subdivision of the mother title had commenced but at no mistake fraud illegality or contempt by the applicant as he did not anticipate that the process would be concluded before the hearing of the suit. That the subdivision is now complete yielding subplots namely 35050; 35042; 35043; 35052; 35041 and 35051 all registered in his name as shown in the annexed copies of titles. That the defendants continue to trespass on the subplots as follows;
- a. Parcel 35050 - 4th defendant
 - b. Parcel 35042 - 3rd defendant
 - c. Parcel 35043 - 2nd defendant
 - d. Parcel 35052 - 1st defendant
 - e. Parcel 35041 - 5th defendant
 - f. Parcel 35051 - 1st defendant
4. Further the applicant avers that he has now established that the property is within the jurisdiction of Juja police station and not Ruiru police station which information he became privy to after the interim orders were issued on the October 1, 2020. That no prejudice will be visited upon the defendants but the amendment shall be in the best interest of justice so as to aid the determination of the real issues in controversy between the parties.
5. The application is opposed by the respondents through the replying affidavit of Eric Munene Gitonga, the 1st respondent who swore the affidavit on his behalf and with authority of the respondents. He deponed that during the pendency of the ruling with respect to the notice of motion dated the October 15, 2020 the applicant altered the subject matter of the suit by subdividing the land in the months of May -June 2021 without the leave of the court or notice to the respondents and obtained 16 new titles as shown in the copies of green card marked EMG1. That the injunctive orders issued on the October 1, 2020 against the mother title necessitating them to file an Application seeking orders to strike out the suit on account of the alteration/subdivision of the mother title and this application is being made in reaction to the said application. The respondents aver that it is not possible for them to defend themselves in the manner in which the suit is being proposed to be amended as the subject matter will be differently occupied by each respondent as alleged by the applicant.
6. The interested party did not oppose the application but associated herself with the written submissions of the respondents which as per the record were not filed. I have read and considered the submissions of the applicant.
7. Despite directions have been taken to canvass the application by way of written submissions, neither the respondents nor the interested party complied.
8. The key issue is whether the applicant is entitled to leave to amend the suit.



9. The provisions of order 8 rule 3 of the [Civil Procedure Rules](#) provides *inter alia*:-

- “ 1) Subject to order 1, rules 9 and 10, order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
- 2) Where an application to the court for leave to make an amendment such as is mentioned in sub - rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub - rule if it thinks just so to do.
- 3) An amendment to correct the name of a party may be allowed under sub - rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
- 4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- 5) An amendment may be allowed under sub - rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

10. Order 8 rule 5 of the [Civil Procedure Rules](#) gives the court a very wide discretion as far as amendment of pleadings is concerned. The rule states that :-

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

11. It is trite law that an amendment should be allowed freely at any stage of the proceedings as long as the amendment does not cause prejudice or injustice to the opposing side which cannot be remedied by costs. The factors to be taken into account in the exercise of the court’s discretion were summarized in the case of [Kassam v Bank of Baroda \(Kenya\) Limited](#) [2002] 1 KLR 294. They are:-

- a) The party applying is not acting mala fides;
- b) The amendment will not cause some injury to the other side which cannot be compensated by costs;
- c) The amendment is not a device to abuse the court process;



- d) The amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;
 - e) And that the amendment will not alter the character of the suit.
12. It is trite that the court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per Bullen and Leake & Jacob's *Precedents of Pleading*, 12th edition, which provides as follows concerning amendment of pleadings:
- “ ... power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action ...”
13. Similarly, in *Halsbury's Laws of England*, 4th Ed (re-issue), Vol 36(1) at paragraph 76, state the following about amendments of pleadings: -
- “...the purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. the person applying for amendment must be acting in good faith. amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”
14. In this case the amendment is being sought to capture the resultant subdivisions of the land which subdivisions are all registered in the name of the applicant. The respondents have expressed their apprehension that they shall face difficulties in defending themselves if the amendments are allowed. No particulars of these difficulties were specified. I note that the respondents are yet to file any defence to the suit and even if they had filed they would be accorded the opportunity to so amend their defence so as to rebut to the claims of the applicant.
15. I am persuaded that the respondents have not established any prejudice or inconvenience that they will suffer if the plaint is amended as proposed by the applicant.
16. I find that this is an application for granting and it is so allowed in its entirety in the following terms;
- a. Leave to amend the plaint in terms of the annexed draft plaint within 7 days from the date of the orders of the court.
 - b. The defendants be and are hereby granted corresponding leave to amend the statement of defence, (if necessary), within 7 days of service of the amended plaint.
 - c. The draft amended plaint attached to this application be deemed as duly filed and served.
 - d. Thereafter parties to comply with order 11 within a period of 30 days and fix the matter for hearing.
 - e. Costs of the application shall be in the cause.



The plaintiffs notice of motion dated the January 27, 2022.

17. The applicant moved this court under the provisions of section 5 of the Judicature Act cap 8 Laws of Kenya, The Contempt of Court Act 1981 and part 81 of the Civil Procedure (amendment No 2) Rules 2012 both of England, order 40 rule 3 of the Civil Procedure Rules 2010, section 3A of the Civil Procedure Act and all enabling provisions of the law seeking orders against the 1st and 4th respondents that;
 - a. Eric Munene Gitonga and Wilson Mbuki, the 1st and 4th defendants be held in contempt and committed to civil jail for such term as the honourable court shall deem fair and just for disobeying the order of the court issued on the October 1, 2020.
 - b. The cost of the application be met by the said contemnors.
18. The application is supported by the affidavit of the applicant sworn on the January 27, 2022 wherein he deponed that the court issued injunctive orders against the respondents on the October 1, 2020 restraining them from interalia wasting, building, depositing any building materials on the land or interfering with the applicant's property known as Ruiru/Ruiru East Block2/2029. That the 1st and 4th respondents are aware of the ruling of the court given that they were represented by the firm of Kiarie Njuguna & Co Advocates all throughout the proceedings. Further their attempt to set aside the said orders is evident of their knowledge on the same. That the orders are still in force the same having not been set aside, appealed and or reviewed.
19. The applicant avers that the 1st respondent has deposited sand and construction materials being building blocks on the land as shown in the photographs annexed and dated the October 20, 2021 and marked SNM1 while the 4th respondent is constructing on the suit land. See SNM2. That the actions of the 1st and 4th respondents are in disobedience of the court orders issued on the October 1, 2020 and urged the court to find them in contempt and commit them to civil jail for such term as is fit and just.
20. In his replying affidavit dated the February 21, 2022 the 1st respondent opposed the application and contended that he has not constructed on the land since 2018 and refuted the claims of the applicant. That following the subdivision of the mother title he does not know which parcel he occupies and that as far as he is concerned the orders issued on the October 1, 2020 were in respect to land that does not exist and that the orders issued on the October 1, 2020 lapsed on the September 30, 2021.
21. The 4th respondent too opposed the application vide his replying affidavit sworn on the February 21, 2022 where he deponed that he has never been served with the said orders issued on the October 1, 2020. He conceded that he is in possession of the suit land since 2016 and that he has constructed a house which he did not complete when the suit was filed and that he has continued to reside in the said incomplete house while halting construction awaiting the determination of the suit. Further that the title upon which the orders were issued has ceased to exist following the subdivision of the same. He refuted any contempt given that he is not constructing anymore and that the materials appearing in the photographs have been there since 2016.
22. The interested party did not oppose the application.
23. Though parties elected to canvass the application by written submissions, the 1st and 4th respondents, the proposed contemnors, did not comply. The written submissions of the applicant were filed through the firm of Kivuva Omuga & Co Advocates. I have read and considered the same.
24. The key issue for determination is whether the court is satisfied that the 1st and 4th respondents are in contempt of the court orders issued on the October 1, 2020 which were as follows;



1. That the orders of this honourable court be enforced by the OCS Ruiru police station.
 2. That an order of injunction be and is hereby issued, restraining the defendants/respondents their agents, servants, employees and/or nominees or whosoever from trespassing, harassing, wasting, depositing any materials, constructing or in any other way from interfering with the plaintiff's/applicant's property known as Ruiru/Ruiru East Block 2/2049 situated in Ha Tom area Murera in Kiambu county.
 3. That costs of this application be borne by the respondents/defendants.
25. It is noted that the respondents' application dated the October 6, 2020 seeking orders to set aside the orders issued on the October 1, 2022 were dismissed with reasons. As at now the said orders therefore are in force.
26. It is not disputed that the mother title was subdivided during the pendency of the suit and the resultant subdivisions are registered in the name of the applicant. This formed a contested issue raised by the respondents in the aforesaid application. The court in arriving at its ruling supra stated that ;

“In its ruling delivered on the October 1, 2020 the court found that the plaintiff herein has established the threshold for grant of the said order and went ahead to grant injunctive orders to preserve the suit property. The question that the court then asks itself is whether if the evidence that the suit property had been sub divided and new numbers issued would have been brought before it, would it have found otherwise? Have the circumstances of this case changed?

The court notes that all the facts remains constant save for the new numbers issued on the suit property. The suit property is not different as the plaintiff still remains the registered owner and therefore would still have established a prima facie case. Therefore, the court finds and holds that the new evidence produced before it does not change the circumstances of the case for it to exercise its discretion and review its ruling.

The court being cognizant of the fact that at the time of filing of the instant application, the said land was in existence and further the plaintiff/respondent has sought to amend his plaint to reflect the new numbers, which in any event remain the same suit property.

The defendants/applicants have also sought for the striking out of the suit indicating that the substratum of the case has changed. This again is because of the change of the numbers. As noted above, the court notes that the plaintiff/respondent has sought to amend his plaint to include the new numbers and unless the said application is determined, it would be premature to strike out the suit.”

27. Flowing from the above decision and with respect the 1st and 4th respondents averment that the suit property no longer exists, the statement is not only aimed at misleading this court but in no certain terms untruthful. I need not say any more. The court is satisfied that the said orders are still in force and the description of the suit lands are well known to the parties.
28. *Black's Law Dictionary*, 9th edition at page 360 defines contempt as follows;

“Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”



29. Contempt is necessary for maintenance of law and order and so that the dignity of the courts is upheld. It is trite law that every person against whom a court order is made against has unqualified obligation to obey the order however unpalatable the order may be until or unless the order is discharged or set aside. See *Econet Wireless Kenya Ltd v Minister for information & Communication of Kenya & Another* [2005] 1 KLR 828 .
30. 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 is so prescribed
-
- (a) ...
- (b)
- (c) 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.”
31. Order 40 rule 3 of the *Civil Procedure Rules* provides the consequences of contempt which includes in case of disobedience or breach of any terms of court order, an order for the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding 6 months. This goes to show that the punishment for contempt is not light, other than attachment of the property of the guilty contemnor, the liberty of the contemnor is also at stake.
32. For an application for contempt to succeed the applicant is duly bound to prove the following 4 elements;-
- 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.
33. It is also trite law that the standard of proof in contempt cases is higher than that of civil cases, but lower than the standard of beyond reasonable doubt as required in criminal proceedings.
34. I have perused the terms of the orders issued by this court on the October 1, 2020 which are set out in para 26 of this ruling for emphasis. The respondents have not led evidence to show that there is any aspect of the orders that they did not understand. And in any event if the orders were not clear it is trite that the said orders must be complied first before the affected person moves to court to seek clarification on the same at the earliest instance. I therefore find that the orders were clear unambiguous and bound the 1st and 4th respondents.
35. The 1st and 4th respondents contend that they were not served with the orders of the court issued on the October 1, 2020. I have perused the record of the proceedings of even date which indicate that the impugned ruling was delivered in the presence of Mr Njuguna Kiarie Advocate who was present for the 1st -5th respondents. The ruling having been delivered in the presence of their counsel, the necessity to serve the same upon the respondents may have dissipated. Further it is on record that the respondents filed an application dated the October 6, 2020 seeking to set aside the said ruling delivered on the October 1, 2020. The argument of the respondents that they were not served with the ruling is



not synonymous with knowledge of not only the existence of the orders but that they were bound by the same. Their argument therefore does not hold water. It is rejected.

36. The applicant's complaint is that the 1st respondent has deposited sand and building blocks on the land for construction and that the 4th respondent is constructing a house thereat. The respondents have denied the allegations and for starters the 1st respondent was adamant that he has not constructed since 2018. The 4th respondent stated that he stopped the construction when the suit was filed. I have perused the exhibits SNM1 & 2 – photographs showing building materials and an incomplete structure. The same are dated the October 20, 2021 which clearly shows these are activities post the ruling delivered on the October 1, 2020. The orders of the court clearly prohibited *interalia* the wasting, depositing building materials and construction of any building on the land. The actions of the 1st and 4th respondents therefore in carrying out these activities are in direct and express disobedience of the orders of this court. The Respondents rebuttal that in any event the original suit land does not exist tells a lot and in my view the actions of the said respondents were deliberate and were in breach of the orders of the court issued on the October 1, 2020.
37. For the foregoing reasons I am satisfied that the standard of proof has been attained to show that the 1st and 4th respondent did disobey the court orders issued on October 1, 2022 and I hereby find them in contempt of the court.
38. Final orders and disposal.
- a. The application is allowed and consequently the 1st and 4th respondents are found to be in contempt of the court orders issued on the October 1, 2020.
 - b. The respondents are hereby directed to purge the contempt within the next 15 days from the date hereof by removing the building materials and stopping the construction in compliance of the court order.
 - c. In default of the compliance with b above a notice to show cause will issue against the respondents to appear in person before this court on the March 6, 2023 to confirm that they have purged the contempt or in default to show cause why they should not be committed to civil jail for the disobedience of the court orders issued on the October 1, 2020.
 - d. Costs shall be in favour of the applicant.
39. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of

Kihura for Plaintiff

Njuguna for 1st – 5th Defendants

Njugi for Interested Party

Court Assistant – Esther / Kevin

