



**Muchelesi & 2 others v Zakali (Environment and Land Appeal
22 of 2018) [2023] KEELC 16573 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 22 OF 2018**

EC CHERONO, J

MARCH 23, 2023

BETWEEN

RASOA MUCHELESI 1ST APPLICANT

JOHN JUMA MUCHELESI 2ND APPLICANT

WANYONYI MUCHELESI 3RD APPLICANT

AND

PHILIP SIMIYU ZAKALI RESPONDENT

RULING

(The respondent herein having been cited for contempt of an order of injunction; legal principles applicable; section 63(c) of the *Civil Procedure Act*; order 40 rule 3 *Civil Procedure Rules*; section 29 *Environment and Land Act*; whether only sentence would be a prison sentence; principles in sentencing in criminal matters capable of being considered; not in all instances that a prison sentence would be applicable; respondent sentenced to a fine and in default a jail term)

Background

- 1 A brief background of this case is that the respondent, Philip Simiyu Zakali had instituted a suit, against the applicants Raso Muchelesi, John Muchelesi Wanyonyi and Emma Mayabi at Kimilili Magistrate Court *vide* a plaint dated November 21, 2007 seeking a substantive order of eviction from land parcel No E Bukusu/s Nalondo/1915 (hereinafter referred to as the suit property). The respondent had also sought an order for costs and interest
- 2 From the record of appeal, the former suit came for hearing before the trial magistrate Hon Kyambia, resident magistrate on May 8, 2008 and proceeded ex-parte in the absence of the appellants who had been duly served. Judgment was delivered the same day granting the respondent the orders prayed for



in the plaint. A decree was issued on July 2, 2008 and on July 3, 2008, the court bailiff, Bungoma court was directed to ensure that the appellants are evicted from the suit land.

- 3 The appellants approached the trial court with two applications. The first application was by the 4th appellant dated February 20, 2008 in which the applicant was seeking for orders *inter-alia* that the *ex-parte* orders and proceedings issued against him be set aside and leave be granted to defend the suit. That application was opposed *vide* a replying affidavit dated August 13, 2008
- 4 The 1st, 2nd & 3rd respondents filed another application dated July 18, 2008 where they were seeking orders *inter-alia* that the judgment and all consequential orders be set aside and that they be granted leave to defend the suit. The application was also opposed by the respondent *vide* a replying affidavit dated October 3, 2008. Both applications fell for hearing before Hon F Kyambia who dismissed them with costs *vide* a ruling delivered on June 4, 2009. That ruling aggrieved the applicants who preferred the present appeal. When this appeal was placed before this honourable court for directions on July 6, 2022, my brother Justice B N Olao directed that the appeal be canvassed by way of written submissions. By a notice of motion application dated July 18, 2022 and filed the same date, the 1st, 2nd and 3rd applicants sought the following orders;
1. The respondent be cited and punished for contempt of court.
 2. The respondent do purge the contempt of court
 3. Without prejudice to 1 & 2 herein the court secure the suit properties pending hearing and determination of the appeal by issuing a conservatory order.
 4. Costs be provided for.
- 5 That application was opposed by the respondent *vide* a replying affidavit dated August 3, 2022. After considering the said application, the rival arguments and the submissions by their advocates, this court rendered itself on February 14, 2023 by finding Philip Simiyu Zakali, the respondent herein in contempt of the orders issued on December 18, 2018.
- 6 When this matter was placed for directions on February 27, 2023, the parties through their advocates agreed to file written submissions. The respondent was also given an opportunity to mitigate before sentence.

Applicants'/appellants' Submissions

- 7 The applicants/appellants through Mr Waswa Advocate, instructed by the firm of Wabwile & Company Advocates submitted that contempt of court must be frowned on by all courts much more the superior courts as it will definitely lead to breakdown of law and order. He submitted that this honourable court is called upon to meet sentence upon the respondent, Philip Simiyu Zakali as per the case of *Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & another*, CA Civil Appl No 39 of 1990(U/R)
- 8 The learned counsel also submitted that this honourable court deals sternly with the contemnor before it pursuant to the decision in the case of *Republic v Tony Gachoka & another* (1999) eKLR

Respondent's Submissions

- 9 The respondent through Mr Kundu Advocate instructed by the firm of Situma & Co Advocates also submitted that under rule 4 of the English *Civil Procedure Rules (Amendment No 3) Rules 2020* provides for the requirement of a contempt application and provides that;



- a). That if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by fine or imprisonment
- b). That if the defendant admits the contempt and wishes to apologize to the court that is likely to reduce the seriousness of the punishment by the court. He further submitted that the power to punish for contempt is discretionary power and should be used sparingly. He submitted that the respondent is a family man and the bread winner working as lieutenant colonel at the Kenya Army and prayed that he should not be so condemned, even an option of a fine will greatly suffice. He submitted that the respondent never and had no intention to go against the orders by Muchelule J since he obeyed court orders across the pleadings and only slipped on this one.

Mitigation By The Respondent/Contemnor

- 10 Philip Simiyu Zakari who is the respondent and also the contemnor herein stated in mitigation that they have had a protracted dispute over a parcel of land belonging to him. He stated that the dispute was taking long and that there was a family need as his father was ailing and needed medical treatment. He stated that he was aware that contempt of court is a serious offence and asked for leniency. He asked this honourable to order for a reasonable fine.
- 11 I have considered the submission by counsels for both the applicants and the respondent and the authorities referred in support thereto. I have also considered the statutory provisions applicable and the mitigation by the respondent. It is regrettable that the dispute between the parties both in the trial court at Kimilili and on appeal before this honourable court took long. That much has also been observed by Hon BN Olao in the contempt of court proceedings. However, the delay in the determination of the dispute cannot be a reason to disobey a court order.
- 12 It is now settled that sentence in contempt of a court order is a discretionary power which is exercised on case to case basis as was held In the case of *Benard Kimani Gacheru v Republic* (2002) Eklr where the court held;
“It is now settled law, following several authorities by this court and by High Court that sentence is a matter that rests in the discretion of the trial court.”
- 13 Again in the case of *Miguna Miguna v Fred Matiang’I & 8 others* (2018) KLR, the court found the respondents guilty of violating an order of the Odunga J (as he then was) sentenced the respondents to a fine of Kshs 200,000/=
- 14 Having considered the aforementioned matters as well as the mitigation by the respondent, I hereby sentence the respondent to pay a fine of Kenya shillings two hundred and fifty thousand (Kshs 250,000/= in default six (6) months imprisonment
Right of appeal 14 days
- 15 Orders accordingly

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 23/03/2023.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Kundu for Respondent

Mr. Waswa for Applicants



Joy, C/A

