



REPUBLIC OF KENYA



**Nderitu v Attorney General & 12 others (Environment & Land Petition  
4 of 2022) [2023] KEELC 16553 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16553 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND PETITION 4 OF 2022**

**YM ANGIMA, J**

**MARCH 23, 2023**

**IN THE MATTER OF ARTICLES 20, 21 & 23 OF THE CONSTITUTIONAL RIGHTS AND  
FREEDOMS UNDER ARTICLES 2, 3, 10, 40 & 259 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**VINCENT NYINGI NDERITU ..... PETITIONER**

**AND**

**HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF, NYAKEO LOCATION ..... 2<sup>ND</sup> RESPONDENT**

**DISTRICT OFFICER, KINANGOP DIVISION ..... 3<sup>RD</sup> RESPONDENT**

**OFFICER COMMANDING STATION HARAKA POLICE STATION .... 4<sup>TH</sup>  
RESPONDENT**

**JOSEPH NDERU WANGECHU ..... 5<sup>TH</sup> RESPONDENT**

**GRACE WAIRIMU ..... 6<sup>TH</sup> RESPONDENT**

**NGARUIYA KIRIKA ..... 7<sup>TH</sup> RESPONDENT**

**GACHERU KANYARA ..... 8<sup>TH</sup> RESPONDENT**

**KABURA MUTUABU ..... 9<sup>TH</sup> RESPONDENT**

**HANNAH WAMBUI ..... 10<sup>TH</sup> RESPONDENT**

**NGURE MUTHINJI SAMUEL ..... 11<sup>TH</sup> RESPONDENT**

**KARIUKI MUCHIRI ..... 12<sup>TH</sup> RESPONDENT**

**MARIA WANJIKU MUCHAI ..... 13<sup>TH</sup> RESPONDENT**



## RULING

### A. Introduction

1. By a petition dated September 25, 2012 the petitioner sought the following reliefs against the respondents:
  - a. A declaration that the petitioner's right to land title number Nyandarua/Njabini/656 is protected by article 40 of the Constitution of Kenya.
  - b. An order requiring the District Land Registrar and the District Land Surveyor responsible for Kinangop District to visit the land title number Nyandarua/Njabini/656 and reinstate the beacons marking the boundaries of the said parcel of land.
  - c. An order directing the 5<sup>th</sup> to 13<sup>th</sup> respondents to forthwith vacate any portion of land title number Nyandarua/Njabini/656 that they currently unlawfully occupy.
  - d. An order restraining the 5<sup>th</sup> – 13<sup>th</sup> respondents and all persons claiming either under them or at par with them from entering, remaining on or in any other manner trespassing to or interfering with the petitioner's ownership, and exclusive, quiet enjoyment and enjoyment of all that parcel of land known as land title number Nyandarua/Njabini/656.
  - e. An order directing the 1<sup>st</sup> to 4<sup>th</sup> respondents to ensure compliance with orders (c) and (d) above.
  - f. An order directing the respondents jointly and severally to pay the petitioner general and exemplary damages to be assessed by this court for violation of the petitioner's right to property as protected by article 40 of the Constitution and also for violating the petitioner's rights to dignity and security of the person as protected by articles 28 and 29 of the Constitution of Kenya.
  - g. An order directing the 5<sup>th</sup> to 13<sup>th</sup> respondents to pay damages in the nature of mesne profits for the number of years that they have used the petitioner's parcel of land from 1972 till the time of vacation.
  - h. An order directing the 5<sup>th</sup> to 13<sup>th</sup> respondents to pay damages for the dent in the reputation of the petitioner as a result of their libeling him as a land grabber.
  - i. Costs of this petition.
2. The petitioner pleaded that the 5<sup>th</sup> – 13<sup>th</sup> respondents had forcibly invaded and occupied his parcel No Nyandarua/Njabini/656 (the suit property) thereby depriving him of the use and enjoyment thereof. It was further pleaded that the 1<sup>st</sup> – 4<sup>th</sup> respondents had refused to intervene and restore the suit property to him in spite of a decree declaring his entitlement to the suit property in Nairobi HCCC No 2766 of 1976. He therefore contended that the respondents' actions were in violation of articles 2, 3, 10, 20, 21, 28, 29 and 40 of the Constitution of Kenya.



3. By a judgment dated February 11, 2015 the court (Hon Justice A. Ombwayo) allowed the petition and entered judgment for the petitioner in the following terms:
- a. The claim for adverse possession by the 5<sup>th</sup> to 13<sup>th</sup> respondents is not valid because they have not been in open and quiet possession of the suit property, being land title number Nyandarua/Njabini/656, as the whole claim has been characterized by dispute after dispute.
  - b. The 5<sup>th</sup> to 13<sup>th</sup> respondents have been in illegal possession of the petitioner's land being land title number Nyandarua/Njabini/656 and have no reason whatsoever to remain on the said parcel of land.
  - c. A declaration is hereby made that the petitioner's right to land being land title number Nyandarua/Njabini/656 is protected by article 40 of the Constitution of Kenya.
  - d. The District Land Registrar and the District Land Surveyor, Kinangop District is hereby ordered to visit the suit land and reinstate the beacons marking the boundaries of the said land being land title number Nyandarua/Njabini/656.
  - e. An order is hereby made directing the 5<sup>th</sup> to 13<sup>th</sup> respondents to forthwith vacate any portion of land being land title number Nyandarua/Njabini/656 that they currently unlawfully occupy.
  - f. The 5<sup>th</sup> to 13<sup>th</sup> respondents and all persons claiming under them or at par with them are hereby restrained from entering, remaining on or in any other manner trespassing to or interfering with the petitioner's ownership, and exclusive quiet occupation and enjoyment of all that parcel of land known as land title number Nyandarua/Njabini/656.
  - g. An order is hereby issued directing the 1<sup>st</sup> to 4<sup>th</sup> respondents to ensure compliance with the above orders.
  - h. The court declines to grant an order directing the respondents jointly and severally to pay the petitioner general or exemplary damages as claimed due to the fact that the violator of rights and freedoms envisaged under article 40 of the Constitution is the state and not individuals.
  - i. An order is hereby made directing the 5<sup>th</sup> to 13<sup>th</sup> respondents to pay damages in the nature of mesne profits at 12% of the value of the property for the number of years that they have used the petitioner's parcel of land from 1972 till the time of vacation.
  - j. The prayer for an order directing the 5<sup>th</sup> to 13<sup>th</sup> respondents to pay damages for the dent in reputation of the petitioner as a result of their libeling him as a land grabber is rejected as the same was not proved to the satisfaction of the court.
  - k. Costs of this petition are awarded to the petitioner.



## **B. The Petitioner's Instant Application**

4. By a notice of motion dated September 30, 2020 grounded upon section 5 of the Judicature Act, sections 1A, 1B, & 3A of the Civil Procedure Act (cap 21) and all other enabling provisions of the law the petitioner sought the following orders:
  - a. Spent;
  - b. That the court be pleased to cite the following persons for contempt of this honourable court's order issued on February 19, 2015 by Hon Lady Justice Lucy Waitaha on behalf of Hon Mr Justice A. Ombwayo, and further to order that they be committed to civil jail for a term not exceeding six (6) months, that is to say:
    - i. The District Land Registrar, Nyandarua
    - ii. Joseph Nderu Wangeche
    - iii. Grace Wairimu
    - iv. Ngaruiya Kirika
    - v. Gacheru Kanyara
    - vi. Kaburia Mutuabu
    - vii. Hannah Wambui
    - viii. Ngure Muthinji Samuel
    - ix. Kariuki Muchiri
    - x. Maria Wanjiku Muchai
  - c. That this court be pleased to grant any other or further orders for the purposes of protecting the dignity and authority of the court.
  - d. That the costs of this application be provided for.
5. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the petitioner, Vincent Nyingi Nderitu on September 30, 2020 and the exhibits thereto. It was contended that the respondents had failed to obey the decree of the court in favour of the petitioner and despite being served with the judgment, decree and notice of intention to institute contempt of court proceedings. In particular, it was contended that the 5<sup>th</sup> – 13<sup>th</sup> respondents had continued with illegal possession of the suit property and that the District Land Registrar – Nyandarua had failed to visit the suit property and reinstate beacons marking the boundaries thereof.
6. The petitioner further asserted that the 5<sup>th</sup> – 13<sup>th</sup> respondents had failed to pay mesne profile awarded by the court and that all the respondents had failed to pay costs of the petition as required by the decree. He, therefore, prayed that the District Registrar and the 5<sup>th</sup> – 13<sup>th</sup> respondents be committed to civil jail for disobedience of the decree.



### **C. The Respondents' Responses**

7. The record shows that the 5<sup>th</sup> – 13<sup>th</sup> respondents filed grounds of opposition dated January 24, 2022 objecting to the application on the following grounds:
  - a. That the application is misconceived, inept and/or incompetent.
  - b. That there is no evidence at all of the respondents' alleged continued occupation of the suit land.
  - c. That the procedure of execution for costs of suit and decretal amounts is provided for under order 22 of the *Civil Procedure Rules, 2010* and not by way of application for contempt of court.
  - d. The applicant has not demonstrated the assessed decretal sum and costs have ever been served upon the respondents.
8. There is, however, no indication on record of the Attorney General having filed any response to the application on behalf of the District Land Registrar-Nyandarua.

### **D. Directions on Submissions**

9. The record shows that the parties were granted timelines by the ELC judge at Nyeri to file and exchange their respective submissions. The record shows that the petitioner filed his submissions on February 15, 2022 Whereas the 5<sup>th</sup> – 13<sup>th</sup> respondents filed theirs on April 25, 2022. There is, however, no indication of the Attorney General having filed any submissions despite being granted 14 days to do so on June 23, 2022.

### **E. The Issues for Determination**

10. The court has perused the petitioner's notice of motion dated September 30, 2020, the 5<sup>th</sup> – 13<sup>th</sup> respondents' grounds of opposition as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
  - a. Whether the petitioner can enforce payment of mesne profits and costs of the petition through the instant application.
  - b. Whether the petitioner has proved contempt of court against the alleged contemnors.
  - c. Who shall bear costs of the application.

### **F. Analysis and Determination**

#### **Whether the petitioner can enforce payment of mesne profits and costs of the petition through the instant application**

11. The court has considered the material and submissions on record on this issue. It is evident from the material on record that the petition filed herein was of a civil nature which sought to vindicate the petitioner's constitutional rights over the suit property. It would thus follow that the petitioner should first employ the civil court process for execution of decrees in so far as recovery of mesne profits and costs of the suit is concerned.



12. The court is thus of the opinion that the petitioner should employ the provisions of section 38 of the *Civil Procedure Act* (cap21) and order 22 of the *Civil Procedure Rules, 2010* (the rules) to enforce payment of mesne profits and costs. Section 38 of the *Civil Procedure Act* stipulates that:

“Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree:

- a. by delivery of any property specifically decreed.
- b. by attachment and sale, or by sale without attachment, of any property.
- c. by attachment of debts;
- d. by arrest and detention in prison of any person;
- e. by appointing a receiver; or
- f. in such other manner as the nature of the relief granted may require:

Provided that where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the court, for reasons to be recorded in writing, is satisfied:

- a. that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree;
  - i. is likely to abscond or leave the local limits of the jurisdiction of the court; or
  - ii. has after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or
- b. that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree, or some substantial part thereof, and refuses or neglects, or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which, by or under any law, or custom having the force of law, for the time being in force, is exempt from attachment in execution of the decree; or
- c. that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.”

13. On the other hand, order 22 rule 6 of the rules on applications for execution stipulates as follows:

“Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with form No 14 of appendix A:

Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days notice of the entry of judgment has been given to him either at his address



for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.”

14. The court finds no justification for the petitioner to seek enforcement of a monetary award through contempt of court proceedings which are quasi – criminal in nature. Moreover, should the petitioner seek to recover costs from the Government of Kenya as well, he should comply with the provisions of order 29 of the rules and the Government Proceedings Act (cap 40) and other relevant laws before resorting to contempt of court proceedings.
15. The court has further noted that there is no indication on record of the mesne profits awarded to the petitioner having been assessed or quantified by the court and there is no indication on record of the costs awarded having been taxed and certified by the taxing officer of the court. The petitioner’s application for enforcement of mesne profits and costs is therefore a non – starter, in any event.

### **Whether the petitioner has proved contempt of court against the alleged contemnors**

16. The court has considered the material and submissions on record on this issue. There is no doubt that every party against whom an order or decree is passed is bound to obey or observe it. There is also no doubt that a court of law is empowered and duty bound to punish all proved contemnors who disobey such order or decree without lawful justification or excuse. See Econet Wireless Kenya Ltd v Minister for Information and Communication & another [2005] 1 KLR 828.
17. Since contempt of court proceedings are quasi – criminal in nature and may result in criminal sanctions and loss of liberty of the alleged contemnor, the standard of proof is higher than on a balance of probabilities. In the case of Mutitika v Babarini Farm Limited [1985] KLR 227 the Court of Appeal considered the standard of proof in contempt of court proceedings as follows:

“In our view, the standard of proof in contempt proceedings 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, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi – criminal in nature...”
18. The court has noted from the record that neither the District Land Registrar nor the 5<sup>th</sup> – 13<sup>th</sup> respondents filed a replying affidavit to the application. The 5<sup>th</sup> – 13<sup>th</sup> respondents filed only grounds of opposition and written submissions whereas the Attorney General did not file any response or submissions on behalf of the Land Registrar. In spite of the failure by the alleged contemnors to file any replying affidavit, the court is of the opinion that the petitioner is still required to prove the alleged contempt against them to the required standard.
19. There is no doubt from the material on record that the 5<sup>th</sup> - 13<sup>th</sup> respondents were directed to vacate from any portion of the suit property they were unlawfully occupying. The District Land Registrar and the Land Surveyor were also directed to visit the suit property and re-instate the beacons marking the boundaries thereof. It would appear that by the time of filing the petition and at the time of delivery of judgment it was still necessary to reinstate the beacons of the suit property.
20. The court is of the opinion that without the re-statement and restoration of the beacons of the suit property it would be difficult to establish with certainty that any portion of land still in the occupation of the 5<sup>th</sup> – 13<sup>th</sup> respondents forms part and parcel of the suit property to which the petitioner is entitled. In the premises, the District Land Registrar and the District Land Surveyor ought to restore the beacons of the suit property before the 5<sup>th</sup> – 13<sup>th</sup> respondents can be called upon to answer the contempt of court charges.



21. That is not to say that the 5<sup>th</sup> – 13<sup>th</sup> respondents are entirely innocent in the violation of the petitioner’s right to property. The material on record shows that they had sought adverse possession of the suit property which claim was declined by the court. There is no way the 5<sup>th</sup> – 13<sup>th</sup> respondents could have claimed for adverse possession of the suit property unless they knew its location, extent and even boundaries. The court is, however, unable to hold them liable for contempt of court because of the higher standard of proof required in such proceedings.
22. The court is thus not satisfied that the contempt alleged against the 5<sup>th</sup> – 13<sup>th</sup> respondents has been proved to the required standard in the absence of restoration of the beacons marking the boundaries of the suit property. However, with respect to the District Land Registrar, the court is satisfied that the contempt against him has been proved to the required standard. There is affidavit evidence on record to the effect that the registrar visited the suit property in 2017 with a view to marking the boundaries of the suit property but he could not fix beacons due to rainfall. He reportedly promised to resume the exercise the following day but he has never returned to date.
23. It is noteworthy that the registrar did not file any affidavit to dispute the factual foundation of the petitioner’s application. He did not file any affidavit explaining reasons for non-compliance with the terms of the decree passed on May 11, 2012. In the circumstances, the court is satisfied that the contempt alleged against the land registrar has been proved to the required standard.
24. In the case of *Kasturi Limited v Kapurch and Depar Shah* [2016] eKLR the elements of civil contempt were summarized as follows:

“There are essentially four elements that must be proved to make a case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and binding on the respondent.
- b. The respondent had knowledge of or proper notice of the terms of the order.
- c. The respondent had acted in breach of the terms of the order; and
- d. The respondent’s conduct was deliberate.”

The court is satisfied that all the four elements have been proved in relation to the land registrar. Accordingly, he is convicted of contempt of court.

25. Since the Kenyan *Contempt of Court Act* was declared unconstitutional, the court shall revert to the applicable English law for appropriate sanctions. Although the petitioner requested the court to impose a prison term of 6 months, the court is of the opinion that it is empowered to impose a fine, prison term, or both against proved contemnors. However, before the land registrar can be sentenced for contempt of court, he shall be accorded an opportunity to tender his mitigation.

### **Who shall bear costs of the application**

26. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. In this matter, the Petitioner has partly failed and partly succeeded in his application. In the



premises, the court is of the opinion that the appropriate order to make is that there shall be no order as to costs.

### **G. Conclusion and Disposal Order**

27. The upshot of the foregoing is that the court finds and holds that the contempt alleged against the District Land Registrar - Nyandarua has been proved to the required standard. However, the court finds that the contempt alleged against the 5<sup>th</sup> – 13<sup>th</sup> respondents has not been proved to the required standard. Accordingly, the court makes the following orders for disposal of the notice of motion dated September 30, 2020:
- a. The application for contempt of court against the 5<sup>th</sup> – 13<sup>th</sup> respondents is hereby dismissed.
  - b. The District Land Registrar – Nyandarua county is found guilty of contempt of court and is hereby convicted accordingly.
  - c. Summons to issue to the District Land Registrar – Nyandarua county to attend court personally on May 16, 2023 for mitigation and sentencing.
  - d. There shall be no orders as to costs.

Orders accordingly.

**RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED THIS 23<sup>RD</sup> DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.**

In the presence of:

Mr. Kioko holding brief for Mr. Ongoya for the Petitioner

N/A by the Attorney General for the 1<sup>st</sup> – 4<sup>th</sup> Respondents

Mr. Ojare for the 5<sup>th</sup> – 13<sup>th</sup> Respondents

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

