



REPUBLIC OF KENYA



**Kiangi v Mailu & 7 others (Environment & Land Case E002 of 2023)
[2023] KEELC 16308 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16308 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E002 OF 2023**

TW MURIGI, J

MARCH 15, 2023

BETWEEN

WILSON NDUULU KIANGI PLAINTIFF

AND

PETER MUTHIANI MAILU 1ST DEFENDANT

CHRISTOPHER NDAMBUKI MBOLU 2ND DEFENDANT

CATHERINE WAMBUA 3RD DEFENDANT

PHOEBE MUTUNGA 4TH DEFENDANT

MWANGANGI MASILA 5TH DEFENDANT

COSMAS MASAVU MUALUKO 6TH DEFENDANT

COSMAS NGATI MULUNGU 7TH DEFENDANT

JOSEPH KIMEI NDUULU 8TH DEFENDANT

RULING

1. By Notice of Motion dated 15th February, 2023 brought pursuant to the provisions of Sections 1A, 1B, 3A and 3B of the *Civil Procedure Act*, Section 5 of the *Judicature Act* and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, the Applicant seeks the following orders: -
 - 1) Spent.
 - 2) That this Honourable Court be pleased to find the Respondents in contempt of the Court orders issued on February 8, 2023 restraining the Respondents either by themselves, their agents, servants, personal representatives and/or people under their direction from in any way trespassing onto the Plaintiff's parcel of land Plot no 1174 situated within land Parcel no



Makindu/Kisingo/Block 1/2 and the borehole sunk therein and in any way interfering and/or maliciously damaging the said borehole.

- 3) That this Honourable Court be pleased to commit the Respondents to civil jail for a period of six months for being in contempt of court.
 - 4) That pending the hearing and determination of this application, this Honourable Court do issue an order compelling the Respondents to unlock the pump house, return the books of account and the pump starter handle and meet the cost of repairing the vandalised water pipes.
 - 5) That this Honourable Court be pleased to direct the Officer Commanding Station (OCS) Makindu Police Station to ensure compliance with prayer (4) above.
 - 6) That the costs of this application be borne by the Respondents.
2. The application is premised on grounds appearing on its face together with the supporting affidavit of Wilson Nduulu Kiangi sworn on 15th February, 2023.

The Applicant's Case

3. The Applicant averred that this Court issued a temporary injunction against the Respondents vide the order dated 08/02/2023.
4. He further averred that the Respondents were informed of the existence of the Court orders as their Counsel was present in Court when order was issued.
5. That on 11/02/2023, a process server from the firm of B.M. Mung'ata & co. Advocates effected personal service of the Court order upon each of the Respondents.
6. It was further averred that after the Court order was served upon the Respondents, they locked the pump house and went away with the keys, they vandalised the water pipes, they carried away books of account and the pump starter handle.
7. In addition, the Applicant averred that the Respondents threatened him and his family with physical harm and as a result the Applicant made a report at Makindu Police Station. That due to the illegalities committed by the Respondents, the Deputy County Commissioner intervened and wrote a letter to that effect.
8. The Applicant further averred that the Respondents' actions amount to deliberate disobedience of Court orders and appropriate punishment ought to be meted out. The Applicant contended that the Respondents have frustrated all his attempts at accessing his borehole.
9. The Applicant further averred that he is living in constant fear as the Respondents have sworn to harm anyone who dares to set foot at the borehole.
10. The Applicant averred that the contemptuous actions of the Respondents are still ongoing and it is for the said reasons that the Applicant prays that the instant application be allowed.

The Respondents' Case

11. Opposing the application, the Respondents filed a replying affidavit sworn on 22/02/2023 by the 8th Respondent on his behalf and that of his Co-Respondents. He deponed that the allegations being made of disobedience of the Order of this Court were untrue. He admitted that their Advocates advised them to comply with the Court order after it was served upon them.



12. The Respondents contended that the photographs annexed to the Plaintiff's application are not supported by a certificate of electronic evidence as required under Sections 106A and 106B of the *Evidence Act* and thus the Plaintiff cannot verify that indeed the Defendants committed the alleged acts.
13. The Respondents further argued that the Plaintiff has completely lost his vision and as such he cannot confirm the allegations without relying on hearsay evidence. He argued that the Plaintiff's pleadings are a scheme to delay the hearing and determination of ELC Case no 9 of 2022. That the ownership of the borehole was pleaded in the Defendants' application dated 14/02/2023 and it would therefore be prejudicial to the Defendants for this Court to make a ruling in this application before the issue of ownership of the land and the borehole has been ascertained.
14. In a supplementary affidavit sworn on 27/02/2023, the 8th Respondent averred that he was surprised to have been sued by the Plaintiff who is his father, yet he never attends meetings in Mikululo. He further averred that due to an illness he is suffering, he was not in Makindu when the process server allegedly served him with the Court Order.
15. He maintains that the borehole which is the subject of these proceedings is not private property because it was drilled using contributions made by members of the Company and as such, the Plaintiff is enforcing a right to property which he does not have.
16. The Respondents averred that this suit is a ploy by the Plaintiff to steal a march on the part of the Defendants and other members of Mikululo Ranching Company. Lastly, the Respondents averred that the application is incompetent, an abuse of the Court process and that it is made in bad faith. They urged the Court to dismiss the application with costs.
17. The application was canvassed on 28/02/2023 by way of oral submissions.

The Applicant's Submissions

18. Counsel for the Applicant submitted that the replying affidavit and the supplementary affidavit sworn by the 8th Respondent on 22/02/2023 and 27/02/2023 respectively ought to be struck out as the deponent did not have authority to swear on behalf of the other Respondents.
19. Counsel further submitted that the power of the Court to punish contempt is governed by Section 5 of the *Judicature Act*. In defining contempt of court, Counsel cited the case of *Sam Nyamweya & 3 Others v Kenya Premier League Limited & 2 Others* [2015] eKLR.
20. Counsel placed further reliance on the case of *Gatharia K. Mutikika v Babarini Farm Ltd* [1985] KLR 227 for the standard of proof required in contempt of court proceedings.
21. Counsel submitted that in civil contempt proceeding, the Applicant must prove three requirements as held in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR which were listed as follows: -
 - i. The terms of the order;
 - ii. Knowledge of these terms by the Respondent; and
 - iii. Failure by the Respondents to comply with the terms of the order.
22. Counsel contended that the Court order issued on 08/02/2023 was clear and unambiguous as the import of the said Order is not in question. Counsel further contended that a detailed affidavit of service was attached to the supporting affidavit. In addition, Counsel submitted that the Respondents



admitted that they were notified of the Court order by their Advocates in addition to filing an application dated 14/02/2023 seeking to set aside the said Order.

23. Counsel submitted that the three requirements in contempt proceedings had been proved and that the Respondents had not denied committing the actions complained about. Counsel prayed that the application be allowed in terms of prayers 2-5.

The Respondents' Submissions

24. Counsel for the Respondents submitted that in civil contempt proceedings, the Applicant must demonstrate proof of contempt. Counsel contended that the Respondents at paragraph 8 of the Replying affidavit denied that they had vandalized the borehole. Counsel argued that the OB Report produced by the Applicant alluded to issues of threatening and not on vandalization, while the invoices annexed to the supporting affidavit do not state whom they were being issued to.
25. On the standard of proof required in contempt of court proceedings, Counsel relied on the case of *Sheila Cassatt Issenberg & Another v Antony Machatba Kinyanjui* [2021] eKLR. Counsel argued that the photographs produced by the Applicant do not meet the threshold set out under Section 106A of the *Evidence Act*. Counsel contended that the freedom of the Applicants should be jealously protected by virtue of Article 29 of the *Constitution*. Placing further reliance on the case of *Alfred Mutua v Boniface Mwangi* [2022] eKLR, Counsel urged the Court to dismiss the application with costs.

The Applicant's Reply

26. In countering the Respondent's submissions, Counsel for the Applicant reiterated that none of the Respondents had denied service of the Court order. On proof of contempt, Counsel submitted that the Respondents had installed a watchman at the borehole. Counsel argued that the Respondents had not provided photographic evidence to counter the Applicant's photographs of the borehole pump house and the vandalized pipes. Counsel relied on the provisions of Order 40 Rule 3 of the *Civil Procedure Rules*, 2010 which outlines the consequences of breach of an order of a temporary injunction.

Analysis and Determination

27. Having considered the application, the affidavits and the rival submissions, I find that the issue that arises for determination is whether the Respondents are in contempt of the Court order issued on 8th February, 2023.
28. The Black's Law Dictionary 9th Edition defines contempt of court as;
- “conduct that defies the authority or dignity of the court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
29. The Applicant cited the provisions of Section 5 of the *Judicature Act* which confers jurisdiction on the superior Courts to punish for contempt and provides that;
- (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
 - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.



30. The law guiding the present application is Order 40 Rule 3(1) of the *Civil Procedure Rules* which provides as follows;

In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order 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 six months unless in the meantime the court directs his release.

31. The High Court of South Africa in the case of *Carla Burchell v Barry Grant Burchell Eastern Cape Division Case no 364 of 2005* held that in order to succeed in civil contempt proceedings, an Applicant has to prove;

- i. The terms of the order,
- ii. Knowledge of these terms by the Respondent,
- iii. Failure by the Respondents to comply with the terms of the order.

32. Back home, in the case of *Samuel M.N. Mweru & Others v National Land Commission & 2 Others (2020) eKLR* the Court set out the elements to be proved in an application for contempt of court as follows;

“Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated “there are essentially four elements that must be proved to make the 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 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. The first issue for determination is whether the terms of the order were clear and unambiguous. It is not in dispute that on 8th February, 2023, the Court pursuant to the application dated 6th January, 2023 issued an order of temporary injunction restraining the 1st- 8th Respondents from either by themselves or through their agents, servants, personal representatives and/or people under their direction from in any way trespassing into the Plaintiff’s/Applicant’s parcel of land plot no 1174 situated within land parcel no Makindu/Kisingo Block 1/2 and the borehole sank therein and in any way interfering and/or maliciously damaging the said borehole pending the hearing and determination of the application.

34. The order was unambiguous as it restrained the 1st-8th Respondents from trespassing into the Plaintiff’s parcel of land Plot no 1174 situated within land parcel no Makindu/Kisingo/Block ½ or interfering and/or damaging the borehole sank therein. To this end I find that the order issued on the 08/02/2023 was clear and unambiguous.

35. The next issue for determination is whether the Respondents were served or had proper notice of the order. The Applicant in his supporting affidavit averred that the order was issued on 08/03/2023 in the presence of the Respondents Advocate. In addition, the Applicant attached an affidavit of service



sworn by Alex Muthenya Wambua a court process server who gave details on how he effected personal service upon the Respondents. It is not in dispute that the order was issued in the presence of Counsel for the Respondents. The Respondents in the replying affidavit admitted that they were notified by their Advocates on the import of the order and advised to comply with the same.

36. From the record it clear that the Respondents upon receipt of the order filed an application dated 14/02/2023 seeking to set aside the orders issued on 8th December, 2022. It is crystal clear that the Respondents were served with the Court order issued on 8th February 2023. I am therefore satisfied that the Respondents were aware of the terms of the order. I also find that the terms of the order were clear in terms of the parcel number and the order of temporary of injunction.
37. On the issue whether the Respondents have deliberately breached the Court order, the Applicant has a duty to prove his case beyond the balance of probabilities. This is because Contempt of Court is in the nature of criminal proceedings and the liberty of the subject is usually at stake.
38. The Applicant must prove wilful and deliberate disobedience of the Court Order if he were to succeed as was held in the case of *Gatharia K. Mutitika v Baharini farm Ltd* (1985) KLR where the court held that;

“A contempt of court is an offence of a criminal nature. A man may be sent to prison. It must be proved satisfactorily.....It must be higher than prove 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 criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal nature.”

39. Similarly, in the case of *Peter K Yego & Others v Pauline Wekesa Kode* ACC no 194 of 2014 the Court held that;

“it must be proved that one had actually disobeyed the court order before being cited for contempt.”

40. In the present application, the order of temporary injunction issued by the Court relates to Plot no 1174 situated within land parcel no Makindu/Kisingo/ Block 1/2. The Applicant averred that the Respondent in blatant disregard of the orders issued on 8th of February, 2023 broke into the pump house, vandalized the pipes and carried away the pump starter. The Applicant in his supporting affidavit annexed photographs that depict broken pipes and a locked house. He further annexed a letter from the DCC Makindu Sub County.

41. The Respondents on the other hand stated that the bore hole is community owned and not by the Applicant. They further averred that the ownership of the borehole was in dispute as it was sank using the contribution made by members of Mikulolo Ranching Company. The Respondents urged the court to disregard the photographs as they were not accompanied with the certificate of photographic evidence.

42. In the case of *Mutitika v Baharini Farm Ltd* (1985) eKLR the Court of Appeal held that;

“In our view, the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities but almost not exactly beyond reasonable doubt..... the standard of proof beyond reasonable doubt ought to be left where it belongs, to criminal cases. It is not safe to extend it to an offence which can be said to be quasi criminal in nature.”



43. This Court has examined all the photographs annexed to the Applicant’s supporting affidavit. There is clear evidence of broken pipes and a locked house on the suit land. It is crystal clear that the pipes have been vandalized. Counsel for the Respondents urged this Court to strike out the photographic evidence presented in the application for non-compliance with Sections 106A and 106B of the Evidence Act. The Respondents did not present any evidence to counter the Applicant’s evidence of the locked pump house or the vandalized pipes.

44. The letter by the Deputy County Commissioner Makindu Sub County confirmed that indeed the Respondents had disobeyed the Court Order. The letter states as follows in part:-

“It is with dismay that we found that the orders have not been adhered to causing increased tension.”

The Respondents did not dispute the contents of the letter.

45. In the case of *Commercial Bank of Africa Ltd v Ndiragu* (1992) KLR the court of Appeal held that;

“It is imperative that orders of the court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the courts. A flagrant disobedience of the court order if allowed to go unchecked, will result in the onset of an erosion of judicial authority.”

46. I find that the Respondents were aware of the order issued on 8th of February, 2023 as they acknowledged the same in the replying affidavit. Their Advocate was equally aware of the order as it was issued in his presence. I find that the Respondents wilfully and deliberately defied the orders of the Court despite being aware of the same.

47. Court orders must be obeyed whether a party agrees with its contents or not. As long as the order subsist, it is not open for a person to choose whether or not to comply with or to ignore such orders.

48. This was the holding in the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* (2005) eKLR Ibrahim J (as he then was) stated as follows;

“It is essential for the maintenance of the Rule of Law and order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect to whom an order is made by the court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

49. In the Canadian Case of *Canadian Metal Company Ltd v Canadian Broadcasting Corporation* [1975] 48 Dlr, it was held;

“To allow court orders to be disobeyed would be to tread the road towards anarchy. If orders of the Court can be treated with disrespect, the whole administration of justice is brought into scorn. If the remedies that the courts grant to correct, wrongs can be ignored, then there will be nothing left for each person but to take the Law into his own hands. Loss of confidence in the courts will quickly result in the destruction of our society.”



50. In the end, I find that the application dated 15th of February 2023 is merited. This Court finds and holds that the Respondents are in contempt of the orders of the Court for which they should be punished.
51. The upshot of the foregoing is that Application dated 15th of February, 2023 is allowed in terms of prayer no 2 of the application with costs to the Applicant.
52. The Respondents are directed to appear before this Court on an agreed date for sentencing and/or sanctions against them.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF MARCH, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi.

Ms Ann Munyao for the Applicant.

Mr. Hassan for the Respondents.

