



**Paul v Mutua (Environment and Land Appeal E013 of 2022)
[2023] KEELC 18889 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E013 OF 2022**

**LG KIMANI, J
JULY 13, 2023**

BETWEEN

PETER KYENE PAUL APPELLANT

AND

GABRIEL MUNYOKI MUTUA RESPONDENT

*(Being an Appeal against the ruling of the Chief Magistrate Court in Kitui delivered
by Honourable M. Kasera SPM on 18th January 2022 in CMCC No.198 of 2011)*

JUDGMENT

1. This is an Appeal from the ruling of the Chief Magistrate Court in Kitui delivered by Honourable M Kasera SPM on January 18, 2022 in KITUI CMCC No 198 of 2011 on the following grounds set out in their Memorandum of Appeal dated July 13, 2022:
 1. THAT the Learned Trial Magistrate erred in law and in fact in proceeding to find the Appellant in contempt of the Decree of the Court dated September 12, 2013 and issued in November 30, 2020 and making consequential orders in this regard when there was no such evidence to support this finding.
 2. THAT the Learned Trial Magistrate erred in failing to appreciate that the Respondent's application being a contempt application required the Respondent to prove the elements of contempt beyond reasonable doubt and at least higher than the standard in civil cases which the Respondents failed to do.
 3. THAT the Learned Trial Magistrate erred in failing to give any consideration at all to the Appellants uncontroverted evidence to the effect that the property in which the Appellant was constructing was in fact entirely different from the suit property thereby negating any assertion of contempt on the part of the Appellant at all.



4. THAT the Learned Trial Magistrate erred in failing to render a complete determination of the issues raised by the parties for determination.
 5. THAT the Learned Trial Magistrate erred in delivering the Ruling without any notice for delivery thereof to the parties.
 6. THAT the Learned Trial Magistrate erred in allowing the Respondent's Application dated February 25, 2021.
2. The Appellant prays:
- a. THAT this Appeal against the ruling of the subordinate court delivered on January 18, 2022 in Kitui CMCC Number 198 of 2011 be and is hereby allowed.
 - b. THAT the Respondent's Application dated February 25, 2021 filed before the subordinate court be and is hereby dismissed with costs to the Appellant.
 - c. That the costs of this appeal be awarded to the Appellant.
3. The genesis of the appeal herein is Kitui CMCC No 198 of 2011 where the Respondent filed a suit as plaintiff against the Appellant herein as defendant and one Robert Mwendwa Musyoka claiming he had purchased from the 1st Defendant Plot No 4096/R 302(76) at a consideration of Kshs. 350,000.00 which states that he paid and took vacant possession thereof.
4. The suit proceeded for hearing and judgement was entered in favour of the Plaintiff against the defendants on September 12, 2013 and a decree issued on November 30, 2020. The terms of the decree were that;
- I. That the Plot No 4096/R 302(76) Zone 03 is the property of the Plaintiff by virtue of purchase.
 - II. That a permanent injunction is issued against the defendants as per prayer (b) of the plaint.
 - III. That the plaintiff is awarded costs and interests of the suit.
5. Arising from the above decree the Plaintiff filed an application dated February 25, 2021 seeking to have the defendant found to be in contempt of the decree dated September 12, 2013 and for him to be put in vacant possession of the suit property. In support of the application the plaintiff filed an affidavit sworn on the same date stating that the 2nd defendant was served with a copy of the court decree and a letter imploring him to comply with the same but he had ignored and refused to comply and continued using and developing the suit plot to his detriment. He stated that he was entitled to exclusive occupation and possession of the suit plot while the 2nd defendant continued trespassing, developing and taking possession without consent nor any colour of right. The plaintiff relied on some photographs attached to the application which he stated showed the defendant carrying on acts of trespass contrary to the court order.
6. In response thereof, the 2nd defendant/respondent in that application filed a Replying Affidavit stating that he filed an appeal against the judgement of the trial court dated September 12, 2013 being Machakos High Court Civil Appeal No 192 of 2013 but the same was transferred to Kitui High Court becoming Kitui HCCA No 151 of 2015. He stated that the said file was missing from the court registry despite efforts to trace it. He further stated that while the appeal was at the High Court at Machakos the parties recorded a consent to maintain the status quo with regard to the suit plot No 4096/R 302(76) Zone 03 and the same had been maintained to the date of the application since the status quo consent order was still in force. That in view of the orders he stated that he had not carried out any development on the suit plot.



7. The 2nd defendant further deposed that he was the legal owner of another plot known as Plot 4096/328 Kitui Municipality which was converted into number Kitui/Block 1/298 which he has been developing and that the Plaintiff was erroneously under the impression that he was developing the suit property which is Plot 4096 R302(76) Zone 03.
8. In answer to the 2nd defendant's replying affidavit, the Appellant filed a supplementary affidavit sworn on July 21, 2021 and restated his position that he was not in doubt as to which plot was the suit plot and that the plot the Respondent was constructing on was the subject of the suit herein. He further stated that throughout the proceedings there was never any question of there being another plot in dispute. He confirmed that the photographs attached to the supporting affidavit were of the work being carried out by the 2nd defendant on the suit plot and that he had visited the plot and seen the activities going on and that the Respondent did not contest that there was work going on.
9. The Respondent further stated that the appeal against the judgement of the court had been dismissed on September 26, 2017 by Justice Angote at Machakos and he attached handwritten copies of the orders of the ELC court at Machakos.
10. In delivering her ruling on January 18, 2022, Hon. M. Kasera Senior Principal Magistrate found that since a previous appeal against the court's judgment had been dismissed for want of prosecution, then the judgment entered on September 12, 2013 remained unchallenged. She thus allowed the prayers in the application. It is from this ruling that the instant appeal arises.

The Appellants' Submissions

11. The Appellant filed written submissions stating that the suit before the trial court proceeded without his participation leading to him filing Machakos High Court Civil Appeal No 192 of 2013. Parties entered into a consent which was adopted as an Order so maintain status quo on the suit property while the appeal was still pending hearing. The Appellant contends that he has not undertaken any developments on the suit property but is the legal owner and proprietor of Plot 4096/328 Kitui municipality which is close by. It is the Appellant's submission that the construction on his land Plot 4096/328 Kitui municipality was misconstrued to be the suit property, Plot No 4096/R. 302(76) Zone 03 Kitui Municipality. The Appellant seeks to clarify that they are two distinct properties which are not related to each other.
12. Counsel for the appellant submits that the Court ought to have taken the Appellant's invitation to visit the site or order for the Director of Survey to furnish the court with a report on whether the two properties are the same but instead chose not to address this issue.
13. This matter being before a first appellate court, the Appellant relied on the decision in the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira & Co. Advocates* (2013) eKLR on the duty to re-evaluate, re-assess and reanalyze the record.
14. Counsel for the Appellant submitted that they did not commit the act of contempt of court as defined by the Black's Law Dictionary as there was no Court order issued against the Appellant as pertains to Plot No 4096/328 Kitui Municipality (now known as Kitui/Block 1/298) to warrant the allegations of contempt of Court orders. Further, the Appellant submits that the onus to prove an alleged acts of contempt rests upon the Applicant, citing the case of *Katsuri Limited v. Kapurchand Depar Shar* (2016)eKLR.



The Respondent's Submissions

15. Counsel for the Respondent submitted that the Appellant's contention that he is developing another property different from the suit property is a provable fact and that the Appellant did not produce any evidence to prove the issue with certainty to the court in rebuttal. It is the Respondent's submission that it was the Appellant's duty to prove it in law as per Section 107 and 109 of the Evidence Act Cap 80.
16. While submitting that the burden of proof lies with the one who alleges, the Respondent cited the case of Mumbi M'nabea v David M. Wachira(2016)eKLR. They further highlighted that the Appellant never applied for a site visit by the Court. In addition to this, the Appellant did not opt to cross-examine the Respondent about the photos or any other issue.
17. The Appellant accused the Respondent of indolence after the original and appellate court files mysteriously disappeared and states that the Appellant has failed to prove that the trial court did not exercise its discretion well and insist that the Appellant is developing the decreed property in contempt of the trial court's orders.

Analysis and Determination

18. A first appellate court's duty was succinctly stated by the Court of Appeal in *Okeno v Republic* (1972) EA 32 as follows: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
19. In the case of Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] e KLR relied upon the Appellant, the same was stated with regard to the duty of the first appellate court:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
20. The court has considered the grounds of appeal as set out in the Memorandum of Appeal, the written submissions by Counsel for the parties and the authorities cited. The grounds of appeal in the courts view can be summarized as hereunder;
 - A. “Whether the trial court erred in finding the Appellant guilty of contempt of the court orders dated September 12, 2013 and issued on November 30, 2020 without proof of the same.”
 - B. “Whether the trial court erred in delivering ruling without any notice for delivery thereof to the parties.”
21. The Appellant contends that he did not commit acts of contempt of court for the reason that the property on which he was constructing was an entirely different parcel of land from the suit property.



His claim is that he owns and is developing a nearby parcel of land known as Plot 4096/328 Kitui Municipality which was converted into Kitui/block 1/298 while the suit property is known as Plot 4096R.302(76) Zone 03.

22. Following the declaration of the *Contempt of Court Act* as unconstitutional the applicable law of contempt of court reverted to the law applicable prior to the enactment of the nullified Act which is section 5 of the *Judicature Act* Cap 8 Laws of Kenya. Section 5 of the *Judicature Act* Cap 8 Laws of Kenya provides:

- “(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 that 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.”

23. Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. Rule 81.4 of the English Civil Procedure Rules (Amendment No 3) Rules, 2020 provides for the requirements of a contempt application stating that:

- “(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
- (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
- (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
 - (b) the date and terms of any order allegedly breached or disobeyed;
 - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
 - (d) if the court dispensed with personal service, the terms and date of the court’s order dispensing with personal service;
 - (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
 - (f) the date and terms of any undertaking allegedly breached;
 - (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
 - (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
 - (i) that the defendant has the right to be legally represented in the contempt proceedings;



- (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
- (k) that the defendant may be entitled to the services of an interpreter;
- (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
- (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
- (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.”

24. Contempt of a court order/decree is a serious offence and is in the nature of criminal proceedings, proof of which is higher than that of balance of probability. This is because the liberty of the subject is usually at stake and the applicant must prove wilful and deliberate disobedience of the court order if he were to succeed. This was aptly stated by the court in the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR where the court cited with approval the case of *Gatharia K Mutikika v Baharini Farm Limited* [1985] KLR 227 also cited by the Petitioners that:

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

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in



aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

25. Similarly, in the case of *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR that was cited by the Appellant, the Court stated that;

“Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, the fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order.”

26. In the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* (Supra) the court broke down the elements necessary for finding a party to be in contempt of Court as they quoted as follows:

“The Cromwell J, writing for the Supreme of Canada in *Carey v Laiken*, 2015 SCC 17 (16th April 2015), expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:

- i) The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
- ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
- iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.” (emphasis)

27. Similarly, In *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR the Court held that:

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove;

- (i) the terms of the order,
- (ii) Knowledge of these terms by the Respondent,



(iii). Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.”

28. In the present case the terms of the Decree that was issued by Hon. B.M Kimemia -Principal Magistrate given on 12th of September 2013 and issued on November 30, 2020 reads as follows:
1. That the plot No 4096/R. 302 Zone 03 is the property of the Plaintiff by virtue of purchase.
 2. That a permanent injunction is issued against the defendants as per prayer (b) of the Plaintiff.
 3. That the plaintiff is awarded costs and interests of the suit.
29. As per the decree, the terms of the injunction order granted were ;
- “A permanent injunction restraining, stopping and/or barring the defendants either by themselves their agents servants employees relatives and/or proxies from entering into building on, developing, constructing, heaping building materials, digging trenches, and or from doing anything whatsoever and whatever nature of kind that is adverse to the rights and/or interests of the plaintiff on the plot No 4096/R. 302 Zone 03.”
30. The question of whether the Appellant had knowledge of the order is not a contested issue since the Appellant did not plead ignorance of the orders issued against him. Indeed, he confirmed that he had lodged an appeal against the said orders and recorded a consent staying execution of the said orders pending appeal.
31. The question of whether there was failure by the Respondent to comply with the terms of the order is what is in contention in this appeal. The onus of proving contempt of court lies on the Applicant alleging that a certain party has committed the said contempt as was held in the precedents cited above. However, the Appellant still had the burden of proving his rebuttal allegation that he was developing a separate parcel of land different from the suit plot.
32. The Respondent attached to his application several photographs and gave further details in the supplementary affidavit which showed particulars of activities that he claimed were being undertaken on the suit plot. He detailed presence of construction bricks, iron sheets and timber and doors being repaired. He further stated that there were fundis on the site undertaking the repairs. Further the Respondent confirmed that he personally went on site and saw the activities being undertaken on the suit plot.
33. It is noted that the Appellant did not deny carrying on the activities detailed by the Respondent but in his defence he stated that the said activities were being carried out on another plot that he owns in the vicinity of the suit plot namely Plot 4096/328 Kitui Municipality which was converted into plot No Kitui/Block 1/298.
34. The court has considered the claim by both the Appellant and the Respondent on the location of the plot where the acts complained of by the Respondent were taking place.
35. The suit before the trial court was filed in the year 2011. According to the attached proceedings the Appellant participated in the suit to the extent that he filed an application to set aside interlocutory judgement and to be granted leave to defend the suit. However, he does not seem to have participated in the hearing of the suit. It has been stated that the Appellant appealed against the judgement of the



court to the High Court at Machakos in Appeal No 192 of 2013 but the same was transferred to Kitui High Court becoming Kitui HCCA No 151 of 2015. It appears that the appeal was again transferred to the Environment and Land Court at Machakos where it was eventually dismissed by Judge Angote on September 26, 2017.

36. In the course of the appeal a consent order was recorded on 2nd December 2013 stay of execution of the trial court judgement and/decree pending hearing of the appeal and for the maintenance of the status quo with regard to the suit plot No 4096/R 302 Zone 03.
37. From the record it appears that there was never any controversy over the location of the suit plot. In the court's view it would be correct to presume that there was a meeting of minds between the parties as to which plot was under dispute and the Appellant knew the plot the subject matter of the suit.
38. The claim by the Respondent that the plot he is constructing on is a different plot seems in the courts view untenable because apart from the map he has attached to his affidavit he did not attach any documents of ownership of the said plot. He therefore did not in the court's view show to the court that he owned any other plot in the same area as the one where the suit plot is located.
39. In the courts view the evidence by the Respondent is credible and amounted to proof as required in a case of contempt of court for the reason that he commenced the suit and he has confirmed his knowledge of the plot he claims from the Appellant and that its location is the same one where construction was taking place. Further, perusal of the trial courts proceedings shows that the Appellant and the Respondent had interacted in relation to the suit plot before filing the suit herein. The Respondent while giving evidence stated that the Appellant (2nd defendant before the trial court) had developed a foundation on the land. This indeed seems to be the act that led to the commencement of the suit before the trial court.
40. In the courts view the evidence adduced by the Respondent in support of his application citing the Appellant for contempt met the criteria set out in *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR as proof beyond reasonable doubt or at least higher than the standard in civil cases,
41. The other issue that the Appellant has raised is that he was not served with the Notice for delivery of the impugned ruling. Order 21 rule 1 of the Civil Procedure Rules provides that:

“In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.”
42. Gazette Notice No 189 of 2022 on Practice Directions to Standardize Practice and Procedures in the High Court directs that the Court shall notify Counsels and parties of the date reserved for the delivery of Judgment/Ruling.
43. The court notes that the Counsel for the Decree-Holder/Applicant was present during the delivery of the ruling but there is no indication of how the notice was to be served, since both parties were present in court on the August 26, 2021 when the ruling date of October 21, 2021 was taken but the ruling actually ended up being delivered on January 18, 2022. The presence of Counsel for the Respondent herein at the time when the ruling was delivered seems to suggest that the Appellant was also notified of the date of delivery of the ruling. In any event the court finds that the date of delivery of the ruling did not in any way affect the outcome and substance of the ruling itself.
44. The final finding of the court is that the appeal herein lacks merit and the same is dismissed with costs to the Respondent.



DELIVERED, DATED AND SIGNED AT KITUI THIS 13TH DAY OF JULY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

Judgement read in open court and virtually in the presence of-

Musyoki Court Assistant

Kinuthia for the Appellant

Kilonzi for the Respondent.

