



Githaiga & another (Suing as the legal representative of the Estate of the Late James Githaiga Kuria) v Karanja; Murigi (Interested Party) (Environment & Land Case E059 of 2021) [2023] KEELC 21069 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21069 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E059 OF 2021
JO MBOYA, J
OCTOBER 19, 2023**

BETWEEN

GRACE WANJIRU GITHAIGA 1ST PLAINTIFF

PAUL KURIA GITHAIGA 2ND PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
JAMES GITHAIGA KURIA**

AND

JOHNSON GITHII KARANJA DEFENDANT

AND

ALICE WANJIKU MURIGI INTERESTED PARTY

RULING

1. The Defendant/Applicant has filed and/or mounted the current Application and in respect of which same seeks various reliefs, whose details are as hereunder; [verbatim]
 - i. spent
 - ii. spent
 - iii. That this Honorable Court do find that the 1st and 2nd Plaintiffs to be in Contempt of Court for disobeying the orders and Decree of this Court issued by the Honorable Mr. Justice Oguttu Mboya on 9TH February 2023.
 - iv. The Respondents be committed to Civil jail for a period of not more than six [6] month's jail term for the said contempt of Court or be punished in any other manner that the Court finds just.



- v. That costs of this Application be paid by the Plaintiffs.
2. The instant Application is anchored on various grounds, whose details have been enumerated at the foot of the Application. Further and in addition, the Application is supported by the affidavit of Johnson Githii Karanja, namely, the Defendant/Applicant; sworn on the 18th July 2023, and to which the Deponent has annexed inter-alia a copy of the decree issued on the 9th February 2023.
3. Upon being served with the subject Application, the Plaintiffs/Respondents responded thereto vide Replying affidavit sworn on the 7th September 2023. For good measure, the Replying affidavit has been sworn by the 1st Plaintiff/Respondent.
4. Suffice it to point out that the instant Application came up for hearing on the 18th September 2023; whereupon the advocates for the respective Parties covenanted to canvass and ventilate the Application by way of written submissions. In this respect, the court proceeded to and indeed granted timelines for the filing of the written submissions.
5. Moreover, it is imperative to state and underscore that thereafter the Defendant/Applicant filed written submissions dated the 22nd September 2023, whereas the Plaintiffs/Respondents filed written submissions dated the 28th September 2023.

Parties' Submissions:

Applicant's Submissions:

6. The Applicant herein has adopted the grounds enumerated in the body of the Application, as well as the contents of the supporting affidavit attached to the subject Application. Furthermore, Learned counsel for the Applicant has thereafter raised, highlighted and canvassed two salient issues for consideration by the Honourable court.
7. Firstly, Learned counsel for the Applicant has submitted that the court herein delivered and handed over a Judgment on the 9th February 2023, whereupon the court found and held that the Defendant/Applicant was entitled to vacant possession over and in respect of the suit property.
8. Be that as it may, Learned counsel for the Applicant has further contended that despite finding and holding that the Applicant was entitled to vacant possession over and in respect of the suit property, the court proceeded to and granted the Plaintiff/Respondent a 90-day window, within which to vacate and hand over vacant possession of the suit property.
9. Nevertheless, it has been submitted that despite having been granted the duration within which to vacate and hand over vacant possession of the suit property, the Plaintiffs/Respondents herein have failed, neglected and/or otherwise refused to vacate and hand over vacant possession of the suit property to date.
10. Secondly, Learned counsel for the Applicant has submitted that the failure and/or refusal by the Plaintiffs/Respondents to vacate and hand over vacant possession of the suit property, constitutes contempt of lawful court orders and therefore the Plaintiffs/Respondents are stated to be in contempt of the court.
11. Furthermore, Learned counsel for the Applicant has submitted that to the extent that the Plaintiffs/Respondents have disregarded lawful court orders, it is therefore appropriate and mete to cite and punish the Plaintiffs/Respondents for contempt of court.



12. In support of the submissions that the Plaintiffs/Respondents are guilty of contempt, Learned counsel for the Applicant has cited and relied on inter-alia, the case of Salome Munuthi vs Mohamed Swazuri & 2 Others; Emanuel Busera (interested Party); Kabale Tache Arero (Contemnor) (2019)eKLR; Mututika vs Baharini Firm Ltd (1985) KLR 229; Shimmers Plaza Ltd vs National Bank of Kenya Ltd (2015)eKLR; Kenya National of Human Rights Commission vs Attorney General & Another (2018)eKLR and Samuel M. N Mweru & Others vs National Land Commission & 2 Others (2018)eKLR, respectively.
13. In view of the foregoing, Learned counsel for the Applicant has thus contended that the application beforehand is meritorious and thus ought to be granted.

Respondents' Submissions:

14. The Respondents herein filed written submissions dated the 28th September 2023; and in respect of which same have similarly raised, highlighted and canvassed two pertinent issues for due consideration by the court.
15. First and foremost, Learned counsel for the Respondents has submitted that even though A Judgment was rendered and/or delivered in respect of the instant matter, it is contended that the Judgment of the court was self-contained and that it behooved the Applicant herein to take out and undertake Eviction proceedings, in the event that the Plaintiffs/Respondents failed to vacate and/or hand over vacant possession of the suit property within the circumscribed timeline.
16. However, Learned counsel has submitted that despite the limb of the Judgment which allowed the Applicant to levy eviction, the Applicant herein has failed and/or neglected to enforce the Judgment in the prescribed manner.
17. Based on the foregoing position, Learned counsel for the Respondents has thus submitted that the Respondents herein cannot therefore be contended to be in contempt or willful disobedience of the lawful orders of the court.
18. Secondly, Learned counsel for the Respondents has submitted that if the court were to find to the contrary, namely, that the Respondents are in contempt of the Judgment of the court; it is contended that contempt proceedings should not be deployed and/or resorted to as a Port of first instance.
19. Additionally, it has been submitted that given its nature, contempt proceedings should only be resorted to and applied as a last resort in endeavoring to achieve compliance with the orders of the court.
20. In support of the foregoing submissions, namely, that contempt proceedings ought to be resorted to as a last resort, Learned counsel for the Respondents has cited and relied on inter-alia, the case of Katsuri Ltd vs Kapurchand Debar Shah (2016)eKLR, Sheila Cassat Issenberg & Another vs Anthony Machaka Kinyanjui (2021)eKLR, Benson Ogina Ogalo vs Samson Omwombo Odido (2021)eKLR, respectively.
21. Consequently and in view of the foregoing, Learned counsel for the Respondents has thus invited the court to find and hold that the instant application is not only premature, but same is misconceived.
22. In a nutshell, the Respondents herein have thus impressed upon the court to find and hold that the Application is devoid of merits; and thus dismiss the application with costs to the Respondents.



Issues For Determination

23. Having reviewed the Application beforehand and the Response filed thereto; and upon taking into consideration the written submission filed by and on behalf of the Parties; the following issues do arise and are thus worthy of determination;
 - i. Whether the Plaintiffs/Respondents are knowledgeable of the terms of the decree of the court and if so, whether same have complied therewith.
 - ii. Whether the Plaintiffs/Respondents are in contempt of the orders of the court and if so; whether same ought to be cited for contempt of court.
 - iii. What reliefs, if any, ought to be granted in the circumstances.

Analysis And Determination

Whether the Plaintiffs/Respondents are knowledgeable of the terms of the Decree of the court and if so, whether same have complied therewith.

24. Before venturing to address the issue under reference, it is appropriate to mention that the instant suit was filed and/or commenced by the Plaintiffs herein and wherein same sought for a plethora of reliefs pertaining to and concerning the suit property.
25. Furthermore, upon being served with the Plaint and summons to enter appearance, the Defendant/Applicant herein duly entered appearance and thereafter filed a statement of defense and counterclaim. Instructively, the Defendant herein sought for inter-alia orders of vacant possession and/or eviction of the Plaintiffs of the suit property.
26. Subsequently, the subject matter was set down for hearing, whereupon the respective Parties tendered their evidence and also called their witnesses. Further and in addition, the matter was thereafter disposed of vide Judgment rendered on the 9th February 2023.
27. Pursuant to and by dint of the Judgment rendered on the 9th February 2023; the court found and held that the Plaintiffs herein had not proved their claim to and in respect of the suit property. Consequently and in the premises, the suit by and on behalf of the Plaintiffs' was dismissed with costs.
28. On the other hand, the Honourable court found and held that the Defendant herein had established and proved his counterclaim and hence the court entered Judgment in favor of the Defendant.
29. Suffice it to point out that the court ordered and decreed that the Plaintiffs herein shall vacate and hand over vacant possession of the suit property within 90 days from the date of delivery of the Judgment.
30. Additionally, it is common ground that the court also directed that in default by the Plaintiffs to vacate and hand over vacant possession of the suit property, the Defendant was at liberty to levy Eviction.
31. On the other hand, it suffices to observe that the Judgment of the court, (whose details have been alluded to in the preceding paragraph), was delivered in the presence of the advocates for the respective Parties. Consequently and in this regard, there is no gainsaying that the advocates and the Parties represented by same, were aware of the terms of the Judgment of the court.
32. Nevertheless, despite being aware of the terms of the Judgment, the Plaintiffs herein have remained adamant and continued to operate in the suit property, as though no Judgment has been delivered or at all.



33. Arising from the foregoing, there is no difficulty in finding and holding that the Plaintiffs' herein are truly knowledgeable of and conversant with the terms of the Judgment of the court.
34. Furthermore, it is imperative to underscore that what is essential and paramount is knowledge of the court order and hence, every Party who is knowledgeable of a court order, is called upon to comply with and/or adhere to the terms of the court order, until and unless same has been stayed; set aside and/ or varied.
35. Furthermore, it suffices to observe that it is immaterial whether or not the concerned Party is happy with the decision of the court or otherwise. For coherence, the obligation and/or duty to comply with the orders of the court is absolute and unqualified.
36. To underscore the nature of the Duty, it is appropriate to cite and adopt the dictum in the case of *Hadkinson vs Hadkinson*(1952) ALL ER in which their Lordship Justices Somervell and Romer held as follows:

“it was the unqualified obligation of every person against, or in respect of whom, an order had been made by court of competent jurisdiction, to obey it unless and until that order(s) was discharged”.
37. Arising from the foregoing, my answer to issue number one is to the effect that the Plaintiffs/ Respondents have been knowledgeable of the terms of the Judgment of the court, insofar as same were duly represented at the time of the delivery thereof.
38. Additionally, it is also worth stating that the Plaintiffs/Respondents herein had even endeavored to procure further stay of the Judgment vide an application made before this court, but which application was dismissed.
39. Consequently and in this respect, there is no doubt in my mind that the Plaintiffs are truly aware of the import, meaning and tenor of the decree of the court rendered on the 9th February 2023.

Whether the Plaintiffs/Respondents are in contempt of the orders of the court and if so; whether same ought to be cited for contempt of court.

40. Having found and held that the Plaintiffs/Respondents are duly knowledgeable of and conversant with the terms of the Judgment delivered on the 9th February 2023, the next issue to be addressed relates to whether there is any lawful and reasonable hindrance to comply with the lawful court orders.
41. Instructively, upon the delivery of the Judgment, which is the subject of the current application, the Plaintiffs/Respondents felt aggrieved and dissatisfied and same proceeded to and lodge d a Notice of Appeal evidencing their intention to appeal to the Honourable Court of Appeal.
42. Furthermore, it is also worthy to recall that the Plaintiffs herein similarly took out and filed an application for stay of execution of the Judgment and the resultant Decree before the Court of Appeal. However, despite being filed under certificate of urgency, the Honorable Court of Appeal neither certified same as urgent nor granted any stay orders.
43. Other than the foregoing, it is also not lost on this court that the Plaintiffs/Respondents herein after failing to procure and obtain an order of stay of execution before the Court of Appeal, reverted to this court with a view to procuring an order of stay of execution of the Judgment pending the hearing and determination of the Application before the Court of Appeal.



44. Be that as it may, the Application which filed before this Honourable court was dismissed for, inter-alia, being Sub-judice and an abuse of the Due process of the court.
45. Suffice it, the Plaintiffs/Respondents have since filed an appeal to the Court of Appeal; as well as an application for stay of execution, but is imperative to underscore that the existence of the appeal or an application for stay of execution of the decree; does not per se constitute or amounts to stay of execution of such a Judgment or decree.
46. To this end, it is appropriate to take cognizance of the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules, 2010.
47. For coherence, same state as hereunder;

Stay in case of appeal [Order 42, rule 6.]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
48. Given the clear and explicit terms of the foregoing provisions, the question that needs to be answered is whether the Plaintiffs herein have any lawful basis and/or excuse to continue to remain in the suit property, despite the clear terms of the Court Order.
49. Put differently, the question that the court needs to grapple with is whether the failure and/or neglect to vacate and hand over vacant possession of the suit property is informed by willful disobedience and thus contempt of court.
50. To my mind, the Plaintiffs/Respondents are privy to and/or knowledgeable of the terms of the Orders of the court. Furthermore, same have endeavored to stay the Judgment of the court, albeit to no avail.
51. Surely, where there is no order of stay of the Judgment and decree by a court of competent Jurisdiction (like the one beforehand), can a Party who is bound by such decree; act in disregard thereof or in willful disobedience to same?
52. In my humble view, it behooves all and sundry, the Plaintiffs/Respondents, not excepted, to abide by and comply with the terms of the orders of the court. For good measure, there is no gainsaying that the obligation is absolute and unqualified.
53. To the extent that the Plaintiffs herein are aware of and conversant with the terms of the Judgment of the court; and to the extent that same have failed to comply with the terms of the said Judgment, it is my finding and holding that the conduct of the Plaintiffs/Respondents constitutes and amounts to willful disobedience.
54. Suffice it to point out, that there is no other reasonable and sensible way that one can explain the conduct of the Plaintiffs herein other than contempt of court and disregard of the Rule of Law.



55. Based on the foregoing, I come to the conclusion that the Applicant herein has duly established and demonstrated that the Plaintiffs herein are guilty of willful disobedience of lawful court orders and are thus in contempt of the court.
56. In arriving at the foregoing conclusion, I am privy to and conversant with the established position that contempt of court is a quasi-criminal offence and thus same ought to be proved to a standard beyond balance of probabilities, but not beyond reasonable doubt.
57. Simply put, the Standard of proof is otherwise referred to as the “intermediate” standard.
58. To this end, it suffices to cite and reiterate the holding in the case of *Mutitika v Baharini Farm Ltd* (1985) KLR 227, where the court held thus;

“With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined.

We agree with Mr. Khaminwa’s submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. 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 offence which can be said to be quasi – criminal in nature *Winn LJ* on page 1064 was in our view right in saying that the guilt has to be proved with such strictness of proof ... as is consistent with the gravity of the charge ...”

59. Additionally, the Standard of proof required as pertains to a claim of contempt of court was also adverted to and elaborated upon in the case of *Katsuri Limited versus Kapurchand Devar Shah* [2016] eKLR, where the court held as hereunder;

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.

60. Without belaboring the point, it is my finding and holding that the conduct of the Plaintiffs/ Respondents, namely, acting in disregard of the terms of the Judgment rendered on the 9th February 2023, constitutes willful disobedience of lawful court orders.

What Reliefs, if any, ought to be granted in the circumstances

61. It is important to underscore that Parties who approach the seat of Justice, the Plaintiffs/ Respondents herein not excepted, are obligated to abide by and/or comply with the decisions of the court, irrespective of whether such decisions are in their favor or otherwise.
62. Premised on the foregoing, it suffices to reiterate that the Plaintiffs/ Respondents herein are under a duty not only to obey the orders of the court, but also to respect the dignity and integrity of the Honourable court.



63. Moreover, there is no gainsaying that it is by respecting the dignity and integrity of the Court that the Rule of law is fostered, inspired and upheld. For good measure, it suffices to underscore that the Rule of Law is one of the National Values and Principles of Governance as entrenched in Article 10(2) of *the Constitution*, 2010.
64. Additionally, it is also not lost on this court that by dint of Article 10(1) of *the Constitution*, 2010; all State Organs, Bodies and Persons, the Plaintiffs/Respondents not excepted, are bound by the provisions of *the Constitution*, inter-alia, upholding the Rule of Law.
65. However, despite the hallowed obligation on the part of the Plaintiffs/Respondents herein same have taken it upon themselves to disregard the court order. Indeed, the Plaintiffs herein are and appear very happy celebrating their disregard and disobedience of the lawful court order.
66. Surely, the conduct of the Plaintiffs/Respondents herein if not reigned upon is bound to bring into disrepute and/or ridicule, the Rule of Law. For coherence, the Court of Appeal in the case of Shimmers Plaza Ltd versus National Bank of Kenya (2015)eKLR, had occasion to speak to a similar circumstance and wherein the court stated thus;

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”.

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by *the Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy .We think we have said enough to send this important message across.

67. Arising from the foregoing, I come to the conclusion that the Plaintiffs/Respondents herein are guilty of contempt and worthy of citation. Consequently and in this regard, same be and are hereby cited for contempt of court and shall be liable to punishment, albeit subject to mitigation.

Final Disposition:

68. From the foregoing analysis, it is crystal clear that the court has found and held that the Plaintiffs/ Respondents have acted in a manner contrary to and in contravention of the Judgment of the court, whose terms are explicit and beyond peradventure.
69. Having come to the foregoing conclusion, what now remains outstanding are the final orders that are just, expedient, appropriate and mete, taking into account the circumstances of the matter before the court; and coupled with the fact that it is the unqualified obligation of all and sundry, to obey and respect the orders of the court.



70. In view of the foregoing, I now proceed to and Do hereby make the following orders;

- i. The Application dated the 18th July 2023; be and is hereby allowed.
- ii. The Plaintiffs/Respondents be and are hereby found guilty of contempt and are cited accordingly.
- iii. Consequently, the Plaintiffs/Respondents shall be entitled to an opportunity to mitigate, prior to and before meting out the requisite punishment.
- iv. Nevertheless and before being afforded an opportunity to mitigate, the Plaintiffs/Respondents are hereby granted a duration of 30 days within which to vacate and hand over vacant possession of the suit properties as a measure of purging the contempt.
- v. In the event of default to comply with clause (iv), the Plaintiffs/Respondents shall be brought to court and in this regard a warrant of arrest shall issue and same shall be executed by the officer Commanding Central Police Division, Nairobi.
- vi. The return date shall be set and/or agreed upon delivery of the Ruling.
- vii. Costs of the Application herein be and are hereby awarded to the Defendant/Applicant.
- viii. Either Party is at liberty to apply.

71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2023.

OGUTTU MBOYA

JUDGE

