



REPUBLIC OF KENYA



KENYA LAW

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Mutiso & another (Suing as the Legal Representatives of the Estate of Mutiso Mumo Kalai) v Musuu & 4 others (Environment & Land Case 72 of 2008) [2023] KEELC 20845 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20845 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 72 OF 2008
A NYUKURI, J
OCTOBER 18, 2023

BETWEEN

FREDRICK MUTUA MUTISO 1ST PLAINTIFF

ALEX KYALO MUTISO 2ND PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MUTISO
MUMO KALAI**

AND

NDONYE MUSUU 1ST DEFENDANT

SAMMY NDUNDA 2ND DEFENDANT

MUMBUA MWILU 3RD DEFENDANT

MUSUU MUASYA 4TH DEFENDANT

KIMUYU MUASYA 5TH DEFENDANT

RULING

1. Before court is a Notice of Motion application dated 7th March 2022 filed by the Defendants seeking the following orders;
 - a. Spent
 - b. That this court be pleased to summon the Plaintiffs/Respondents to show cause why they should not be found in contempt of this honourable court for disregarding and disobeying this honourable court's ruling delivered on 20th February 2021 and orders issued on 20th December 2021.



- c. That the Defendants/Respondents be found in contempt of this honourable court for disregarding and disobeying this honourable court's ruling delivered on 19th February 2021 and orders issued on 20th December 2021.
 - d. That costs of this Application be provided for.
2. The Application was based on grounds on the face of it and supported by the affidavit of Sammy Ndunda, the second Defendant. He deposed that on 19th February 2021, this Honourable Court issued orders of stay of execution pending appeal; that the Respondents were aware of the said orders and were also served with the same on 20th December 2021; and that the Respondents disobeyed the said orders of the court by cultivating the suit property and planting maize thereon during the rainy season. Further that on incitement by the area chief, on 24th February 2022, the Respondents in the company of a group of people carrying pangas, slashers and jembes proceeded to subdivide the suit property and planted sisal to demarcate the property; and that the Respondents burnt down the property, cleared it and are now patrolling it to ensure the Applicants do not access it, thus, they have been unable to farm for the two seasons. He stated that when the applicants send someone to take photographs of what was happening, the person was chased away. They prayed that this court stamps its authority and finds the Respondents in contempt of express orders of the court and punishes them.
 3. The Application is opposed. The Respondents filed a replying affidavit dated 25th May 2022 sworn by Fredrick Mutua Mutiso, the 2nd Plaintiff/Respondent. It was his averment that the order dated 19th February 2021 had not been served upon them as the firm of Cheloti & Etole Advocates had ceased acting for them. He also stated that Mr. Etole had ceased being a partner in that firm and that if any documents were served on his former firm, he was not made aware.
 4. He further deposed that it was the Applicants' advocates who were responsible for the current state of affairs for serving the court documents to a non-existing firm, despite having written a letter to the Respondents' advocates on 3rd February 2020 indicating that they were aware of the address.
 5. He further deposed that the Applicants having filed an appeal against the judgment of this Honourable Court, being Civil Appeal No. 249 of 2019 ought to have filed the instant application in the Court of Appeal as it is the court with jurisdiction to hear this matter as this court is functus officio. He stated that he is not literate and had the orders been properly served, his advocates would have explained to him the contents. He averred that he had no intentions of disobeying the orders of the court and denied committing the acts complained of by the Applicants.
 6. The application was canvassed by way of written submissions. On record are the Applicants' submissions filed on 4th November 2022 and the Respondents' submissions filed on 7th March 2023.

Applicants' submissions

7. Counsel for the Applicants referred to Section 4(1)(a) of the [Contempt of Court Act](#) on the definition of contempt. Counsel relied on the case of Samuel M. N. Mweru & Others vs National Land Commission [2020] in regard to elements for civil contempt of a court order, which include the existence of clear terms of the order, the respondent's knowledge of the order and failure of the respondent to comply with the terms of the order. Counsel argued that the application met the threshold for granting the orders sought.
8. It was their contention that the Respondents were served with the court orders in person as shown in the affidavit on record. They also argued that the Applicants first wrote a letter to the current



Respondent's advocates on 3rd December 2022 about an attempt to disobey the orders of the court, which according to them indicated knowledge of the correct address.

Respondents' submissions

9. Counsel for the Respondents submitted that their advocates on record were not served with the orders alleged to have been violated. They took the view that the instant application ought to have been filed before the Court of Appeal since the Applicants already filed an appeal against the judgment of this court.
10. Further, counsel argued that as the ruling of 19th February 2021 only stayed the execution of this court's judgment, it did not specifically stop the Respondents from interfering with any specific right of the applicants or ploughing any particular part of the land. Counsel observed that the orders of stay of execution did not specifically stop the Respondents from what the Applicants were complaining about and that therefore the elements of contempt had not been proved against the Respondents. They cited the case of *Re Breamblevale Ltd (1969) 3ALL ER 1062* as quoted in *Mutikika vs Baharini Farm Ltd (1985) KLR 227* where the court stated that contempt of court is an offence of a criminal character and one could go to prison hence it should be satisfactorily proved.

Analysis and determination

11. The court has considered the application, the response thereto and the rival submissions by the parties. Two issues arise for determination namely;
 - a. Whether this application is properly before this court or it ought to have been filed at the Court of Appeal.
 - b. Whether the Applicant has met the threshold for contempt.
12. Contempt of court is the conduct or action that defies or disrespects authority of court. *Black's Law Dictionary 11th Edition*, defines contempt as:

The act or state of despising; the quality, state or condition of being despised; Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable, usually by fine or imprisonment.
13. The power of this court to punish for contempt if provided for in Section 5 of the *Judicature Act* which provides as follows;

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.
14. In *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014]* eKLR, the Court expressed itself as follows: -

..... the only statutory basis of contempt of court law in so far as the Court of Appeal and the High Court are concerned is Section 5 of the *Judicature Act*. In addition, Section 63 (c) of the *Civil Procedure Act* provides that a disobedience of an order of temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor's property.



15. Therefore, in view of the law governing contempt in Kenya, there is no requirement that an application for contempt in respect of an order issued before a superior trial court, must be heard by the Court of Appeal. The argument that this court is functus officio is a baseless since a court can only be deemed to be functus officio in a matter where the court has already performed its mandate to conclusion and has no further authority to determine the same as its duties and functions have been fully accomplished in the dispute. (See definition of functus officio in the *Black's Law Dictionary* 11th Edition).
16. Having considered the Respondents' argument that this court lacks jurisdiction on account of being functus officio, I have not been shown any justification for that conclusion by the Respondents. As the order alleged to have been breached is an order that was issued by this court, my view is that it is this court with the jurisdiction to determine the application for contempt and the question of being functus officio does not arise. I therefore find that this court has jurisdiction to hear and determine the instant application.
17. Obedience of court orders is important and necessary for the administration of justice, as disobedience of court orders erode the rule of law and order, which are the cornerstone of a democratic society. Consequently, it is the duty of the court to punish proved contemnors.
18. In the case of *Gadavarman Thiru Mulpad v Ashok Khot & Another* [2006] 5 SCC, the Supreme Court of India also emphasized on the dangers of disobeying Court orders as follows:

Disobedience of this Court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court's orders are to be followed and complied with.

19. Similarly, in the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] KLR 828, the court emphasized the importance of obeying court orders, in the following terms;

It is essential for the maintenance of the rule of law and order that the authority and the 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 whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void.

20. Contempt of court proceedings are of a special nature since the consequences thereof may impact on the rights of the contemnor as their liberty is at stake. A proved contemnor may be sent to jail. Therefore, the standard of proof for contempt is higher than that of the balance of probability but below the standard required in criminal cases of beyond reasonable doubt.
21. To prove contempt, the applicant must show that there exists a court order with clear unambiguous terms; that the Respondent was aware of the court order; and that they deliberately breached the court order.



22. In the case of *Cecil Miller v. Jackson Njeru & Another [2017]* eKLR the court outlined the ingredients for contempt of court orders as follows:-
- a. The terms of the order/or injunction or undertaking, were clear and unambiguous and were binding on the defendants;
 - b. The Defendant has knowledge of or proper notice of the terms of the order;
 - c. The Defendant has acted in breach of terms of the order and;
 - d. The Defendant's conduct was deliberate.
24. On whether the Applicant has met the threshold for the granting the orders sought, the Applicant stated that the Respondents breached the order staying execution of judgment by cultivating and subdividing the suit property. I have considered the order in issue and the same stated that execution of judgment is stayed. The Applicant did attach a copy of the Judgment or state the terms of the judgment that were stayed. There is no extracted decree availed to court by the Applicant.
24. As the Applicants were obligated to demonstrate that there exists clear terms of an order that required the Respondents to do specific acts restrained the Respondents from doing specific acts, it was upon them not just to attach the order for stay of execution of judgment alleged to have been violated, but also to demonstrate that the acts of the Respondents amounted to execution of the judgment, which had been stayed vide the order in issue. From the material placed before me, it is not clear what stay of execution meant in light of what is alleged to have been committed by the Respondents. As the Applicants failed to prove the clarity of what the Respondents were required to do or not to do, I find and hold that the Applicants have failed to prove contempt as against the Respondents.
24. In the premises, I find the application dated 7th March 2022 to be unmeritorious and the same is hereby dismissed with no order as to costs.
24. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms. Kaloki holding brief for Mr. Masika for Defendants

Mr. Mutua Mutiso 2nd Plaintiff - present

No appearance for the Plaintiff

Abdisalam - Court Assistant

