



REPUBLIC OF KENYA



**Ngunguru & another v Njanja (Environment & Land Case E007 of 2022)  
[2023] KEELC 22560 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22560 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE E007 OF 2022  
A KANIARU, J  
NOVEMBER 30, 2023**

**BETWEEN**

**ABISAGI MBANDI NGUNGURU ..... 1<sup>ST</sup> PLAINTIFF**

**MBUYA NYAGA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOHNSON NGARI NJANJA ..... RESPONDENT**

**RULING**

1. The application under consideration is a Notice of Motion dated January 4, 2023 and filed on January 6, 2023. It's expressed to be brought under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 40 Rule 3 of the *Civil Procedure Rules* 2010, Section 29 of the *Environment & Land Court Act* and all other enabling provisions of law. The applicant – Johnson Ngari Njanja – is the Defendant in the suit and the Respondents – Abisagi Mbandi Ngunguru & Mbuya Nyaga - are the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs. The application is seeking the following prayers:

1. That the Plaintiffs/Respondents contemnors be committed to civil jail for such a period as this Honorable Court may deem fit for disobeying the orders issued by this Honourable court on April 19, 2022 and extended on September 22, 2022 which directed that status quo be maintained until the hearing and determination of this suit.
2. That the Plaintiffs/Respondents be fined for disobedience and/or breach of the orders issued on April 19, 2022 and extended on September 22, 2022.
3. That in the alternative the Honourable court be pleased to vacate the Orders issued on September 22, 2022 extending the Orders of April 19, 2022.
4. That the costs of this Application be borne by the Respondents.



2. The application is premised on the grounds set out on its face and the Supporting Affidavit sworn by the Applicant - Johnson Ngari Njanja - on January 4, 2023 stating inter alia; that the court issued orders of maintenance of status quo on the suit land until the suit herein is heard and determined on September 22, 2022; that sometime in the month of November, the applicant was called by a close friend of his who informed him that the Respondent's had started digging large ditches on the suit land; that he went physically to the land and confirmed that the Respondent's had dug ditches and planted khat 'miraa' on land parcel No. Embu/Gangara/4586 despite the orders of this court; that on December 8, 2022 he proceeded to report the illegal actions at Siakago police station and was issued with OB No. 14/8/12/2022; that he believes that the action of developing the land despite a court order is an offence punishable under Section 29 of the *Environment & Land Court Act*; that the Respondent's intend to frustrate him in court by demonstrating that they had earlier developed the land; that the Respondent's actions amount to contempt and since the orders were issued in the court's discretion, the court has the same discretion to vacate them. He prays that the Respondent's be found in contempt of court and be liable to imprisonment for a period of six months or in the alternative the court do vacate the said orders.
3. The application was responded to vide a replying affidavit by the Respondent's sworn on March 28, 2023. They denied the said contempt of the court orders dated September 22, 2022; they deponed that they have maintained the status quo on the suit properties and utilized the portions which were under use at the time of making the said orders; that they have neither individually nor jointly made any new developments on the suit properties; and that the alleged miraa/khat were in situ at the time when the court was making its orders; that besides making plain accusations that they have been in contempt of the court orders, the Applicant has not demonstrated the actual contempt that they have committed; that since the date of the said orders, they have not made any new developments on the suit properties; that all their activities were restrained within the parcels of land where they had made developments before the court orders were made, including land parcel No. Embu/Gangara/4586, the subject land herein, where they had earlier dug and planted miraa seedlings.
4. They deponed further that they believe that the present application has been brought in spite and malice and with the intention to delay the hearing of this case knowing that the 1<sup>st</sup> Respondent is of advanced age; that the Applicant has not demonstrated any act of contempt and the present application lacks merit and ought to be dismissed.
5. The application was canvassed through written submissions. The applicant's submissions were filed on October 4, 2023. He submitted that the issue for determination is whether the present application has merit. He gave an outline of his application and further restated his position that the Respondents herein knew the terms of the court orders and they went ahead to breach the same. That they were in contempt of court and given that the court orders were issued on discretion, the court should exercise the same discretion and vacate the orders. It was his submission that the law guiding his application is Order 40 Rule 3(1) of the *Civil Procedure Rules* and Section 29 of the *Environment and Land Court Act*.
6. To support his position he cited the cases of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828; *Purity Muthoni Plein v County Government of Laikipia & Anor* (2018) eKLR; *Richard Otieno & 9 Others v Michael Otieno Wagude & Anor* (2022) eKLR where the court while relying on the case of *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjobi* (2016) eKLR stated as follows;

“Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:- 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.”

7. The Respondents submissions were filed on October 9, 2023. They identified two issues for determination, the same being whether the Applicant has proven any acts of contempt to the orders dated April 19, 2022 and extended on September 22, 2022 and who should bear costs of the application. On this, they submitted that the Applicant has not made available to the court sufficient evidence to demonstrate the actual act of contempt; that the 1<sup>st</sup> Respondent was aged 95 years as at the time of the alleged contempt and that the court has equally seen her, and being so advanced in age, they wonder how she can be said to till land; that the Applicant has not come out clearly on who specifically was responsible for the digging of trenches and planting the alleged miraa plants as there are two Respondents; that from the Applicants statements, he was only called and informed of the alleged activities by a close friend and that he did not witness the same and neither did he call upon the said close friend to make an affidavit in support of the said allegations; and that therefore the said allegations remain hearsay which cannot be admitted by this court.

8. They submitted further that the Respondents have clearly stated that the said miraa plants were in situ at the time when the court orders were being made, which defence has not been controverted by the Applicant while he had a chance of filing a further affidavit; that in contempt applications, the court must place the standard of proof higher than that on a balance of probability; that the standard of proof is placed upon the Applicant to provide evidence of the alleged contempt and this duty of proof is further placed upon the Applicant by the provisions of Section 107(1) of the Evidence Act which provides;

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

9. That in an application intended to curtail the freedom of the Respondents, the Applicant has not met the standard of proof beyond reasonable doubt as has been held by the superior courts. To support this position, they cited the cases EM v KFM & NGK (2020) eKLR; Republic v Ahmad Abolfathi Mohammed & Anor (2018) eKLR.

10. I have considered the application, the responses made to it, and the rival submissions. I find the issue for determination is whether the application has merit.

11. The Respondents had made an application dated February 22, 2022 seeking restraining orders on any dealings whatsoever with Land Parcel No. Embu/gangara/2908 which had been subdivided into other parcels of land including the subject land herein, Embu/gangara/4586, until the suit is heard and determined. The court considered the said application and in an interim ruling dated April 19, 2022 ordered as follows:

“An order of status quo is given as follows: Let the Respondent's continue to occupy the portion of land they are occupying. But the subdivisions already done should remain. No party whether the plaintiff or defendant should undertake any development



on the land. No party should sell or try to sell or transfer the land to anybody. But we give an exception this way: the activity of operating the small petrol station on land parcel Embu/gangara/4585 is to go on. The order covers parcels No.Embu/gangara/4886,4587,4588,4652,465,4654,4655,4656,4657,4658,and 4659. It also covers 4585 except for the activity of operating the petrol station.”

The said orders were extended in a ruling on September 22, 2022 after inter partes hearing of the Application.

12. The Applicant herein contends that in disobedience of this court order, he learnt from a close friend that the Respondents had started digging large ditches on the suit land and planted miraa/khat on land parcel Embu/Gangara/4586. In his Supporting Affidavit, he attached photographs to show the said digging. I have examined the photographs which are in black and white. Quite honestly they are not very clear. It is difficult to determine what is contained in the photos except maybe for one individual seen standing in one of the photos. Everything else is a blur. I see no sign of huge trenches on the land as has been described by the Applicant. I also cannot say that I see any sign of khat/miraa planted on the suit land. There seems to be plantations but since the photos are so unclear it's hard to make out what kind of plantations they are.
13. In my view, this being the only evidence the Applicant has made available to court of the activities he alleges have been going on in the suit land, in this day and age of modern technology, I feel like the Applicant would have definitely made available clearer photos. Again, the Respondent's case is that the said miraa/khat were already in situ as at the time the court issued the orders herein. The Applicant has not countered this in any way. Further, the Applicant intimated that he reported the said violations to the police and attached an OB number in evidence but that cannot be said to be conclusive evidence of his allegations as he only attached a copy of the OB number. The nature of offence reported or its content has not been disclosed and therefore that is not evidence that can help his case.
14. As the parties have rightly captured in their submissions, the burden of proof in cases of contempt is higher than the one in civil cases. It is not beyond reasonable doubt in Kenya but its certainly higher than on a balance of probabilities. The onus of proof also lies on the Applicant to prove that the terms of the orders were unambiguous and binding on the respondents; that the Respondents had proper notice of the orders; and that the Respondents actions are in clear and deliberate violation of the terms of the orders. Also, given that applications for contempt of court and committal to civil jail such as this one are intended to curtail the freedom of Respondents, then the Applicant cannot run away from his duty to prove that despite the Respondents being fully aware of the orders, they chose to disobey and for that reason should be punished. Has the Applicant discharged this duty? In my opinion, he has not.
15. The evidence adduced by the applicant in this case does not lead this court to make a finding that the Respondents are in contempt of the orders issued on April 19, 2021 and extended on September 22, 2022. Since there is no evidence of developments made on land parcel Embu/gangara/4586 as alleged, there is no basis upon which this court can find the Respondents in contempt and commit them to civil jail.
16. The upshot of the above is that I find the application dated January 4, 2023 lacks merit and I hereby dismiss the same.
17. Costs to be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

In the presence of Gitau Kahiga for defendant/applicant and Ndolo K. for respondent/plaintiff



Court assistant: Leadys

Interpretation: English/Kiswahili

**A.K. KANIARU**

**JUDGE**

11.2023

