



Mutunga & 6 others v Munguti (Environment & Land Miscellaneous Case E012 of 2022) [2023] KEELC 22610 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22610 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND MISCELLANEOUS CASE E012 OF 2022
TW MURIGI, J
NOVEMBER 22, 2023**

BETWEEN

**FRANCIS KIETI MUTUNGA 1ST APPLICANT
JOHN MUISYO MUTUNGI 2ND APPLICANT
PETER MANGALA 3RD APPLICANT
CYRUS SALA NZIBU 4TH APPLICANT
STEVE NZIVE MAKAU 5TH APPLICANT
OLIVER JUMA MASILA 6TH APPLICANT
GOOD HOPE RAHABILITATION CENTRE 7TH APPLICANT**

AND

HENRY MULI MUNGUTI RESPONDENT

RULING

1. By a Notice of Motion dated 25th November, 2022 brought under Section 5 of the [Judicature Act](#) Cap 8 Laws of Kenya Part 81 (Applications and proceedings in relation to contempt of court) of the Civil Procedure (Amendment No. 2) Rules, 2012 of England Rule 81.4 and Section 3A of the [Civil Procedure Act](#) Cap 21 Laws of Kenya and Article 159(1) of [the Constitution](#) of Kenya, the Applicants seek the following orders:-
 1. That the Respondent Henry Muli Munguti be punished for contempt of court by imprisonment for a period not exceeding six(6) months or on terms set by the court for breach of court decree dated 20th June 2018 in ELC NO. 78 Of 2017 Makueni Cyrus Robert Sala Zibu & 9 Others Versus Henry Muli Munguti & 10 Others.
 2. That the cost of the application be provided for.



2. The application is premised on the grounds appearing on the statement together with the supporting affidavit of Steve Nzive Makau sworn on his behalf and on behalf of his co- Applicants on even date.

The Applicants Case

3. It is the Applicants case that together with other parties, they instituted ELC Case No. 78 of 2017(formerly Machakos HCCC No. 13 of 2014) in which they sought for a declaratory order to seize control of the leadership of the 7th Applicant from the Respondent herein and for Plot No. 3792 Mangelete Settlement Scheme to be declared as the property of the Plaintiffs and be registered in the name of the 7th Applicant.
4. The deponent averred that after considering the matter on its merits, the court vide the judgment and decree issued on 20th June, 2018 vested the ownership of Plot No. 3792 Mangelete Settlement Scheme on the 7th Applicant. That being dissatisfied with the said decision, the Respondent herein filed Appeal No. 260 of 2018 which was eventually dismissed by the Court of Appeal vide the judgment delivered on 7th July, 2022.
5. He further averred that the Applicants were elected as officials of the 7th Applicant in a public Baraza held in August 2022 and were thereafter registered as the officials by the Registrar of Business. He further averred that the Applicants took possession of Plot No. 3792 Mangelete Settlement Scheme from the Respondent as well as the management of the rehabilitation centre.
6. The deponent averred that on 9th November 2022, they came to learn that the Respondent had made reports at Mtito Andei police station alleging that he was being threatened with physical harm by the agents of the 7th Applicant and demanded for their arrest, prosecution and eviction from Plot No. 3792 Mangelete Settlement Scheme.
7. That on 10th November 2022, John Muisyo Mutungi the Assistant Chairman of the 7th Applicant and the 2nd Applicant herein were summoned by the Deputy County Commissioner Kibwezi and ordered to vacate Plot No. 3792 Mangelete Settlement Scheme.
8. That on 11/11/2022, John Muisyo Mutungi was summoned by the OCS Mtito Andei police station where he met the Respondent who demanded that the Applicants and their agents should vacate the Plot No. 3792 Mangelete Settlement Scheme. He averred that the OCS Mtito Andei Police Station ordered the Applicants to vacate Plot No. 3792 Mangelete Settlement Scheme.
9. That on 13/11/2022 the Respondent entered Plot No. 3792 Mangelete Settlement Scheme with his security and goons and violently chased away the 7th Applicant's employees and took possession of the plot. He averred that the Respondent has refused to hand over vacant possession of the manager's house erected on Plot No. 3792 Mangelete Settlement Scheme.
10. He went on to state that during the pendency of Civil Appeal No. 260 of 2018, the Respondent instigated criminal charges to be preferred against the Applicants and their members which necessitated the Applicants to file Constitutional Petition No. E01 of 2020 where the court granted conservatory orders barring the police from charging the affected members. The Applicants contended that the orders are still valid and urged the court to allow the application as prayed.

The Respondent's Case

11. In opposing the application, the Respondent vide his replying affidavit averred that the application is incompetent, bad in law and a waste of judicial time. He averred that the judgment delivered on 20th June 2018 in ELC Case No. 78 of 2017 granted a mandatory injunction directed at the National



Land Commission to register Plot No. 3792 Mangelete Settlement Scheme in the name of the 11th Defendant.

12. The Respondent averred that he has not disobeyed the court orders in any way since the orders were not directed against him. He insisted that the orders granted by Hon Mbogo in ELC Case No. 78 of 2017 were declaratory in nature and do not amount to an order of eviction against him from Plot No. 3792 Mangelete Settlement Scheme.
13. He argued that for an eviction order to issue, the matter must be heard and determined on its merits. He further averred that the Applicants have not proved that he was using the National police force to frustrate their process of acquiring Plot No. 3792.
14. The parties were directed to canvass the application by way of written submissions.

The Applicants Submissions

15. The Applicants submissions were filed on 3rd March, 2023.
16. On their behalf, Counsel reiterated the contents of the Applicants supporting affidavit. In defining contempt, Counsel relied on the book 'Contempt in Modern New Zealand' which sets out the elements of civil contempt as follows:-
 - i. The terms of the decree were clear and unambiguous and were binding on the Respondent.
 - ii. The Respondent had knowledge of the decree.
 - iii. The Respondent has acted in breach of the terms of the decree and
 - iv. The Respondent conduct was deliberate.
17. In addition, Counsel submitted that the Respondent was represented by Counsel in ELC No. 78 of 2017 when Plot No. 3792 Mangelete Settlement Scheme was decreed as belonging to the Applicants in the name of the 7th Applicant. Counsel further submitted that the Appeal lodged by the Respondent clearly shows that the terms of the decree were clear and unambiguous and therefore binding on the Respondent.
18. Counsel further submitted that the Respondent acted in breach of the Decree of the court. It was submitted that the Respondent was bound to give vacant possession of Plot No. 3792 Mangelete Settlement Scheme but has continued to occupy the same despite having knowledge that the enforcement of the decree involves evicting him from the said plot for the Applicants to take possession. To buttress this point, Counsel relied on the case of Moses P.N. Njoroge & Others Vs Reverend Musa Njuguna & Another cited in the case of Republic Vs County Government of Kajiado & 3 Others Ex-Parte Environmental Combustion Consultants Limited (2018) eKLR.
19. It was submitted that despite being aware of the decree, the Respondent with the assistance of the National Police Force evicted the Applicants from plot No. 3782 Mangelete Settlement Scheme.
20. Counsel contended that the orders issued in ELC Case No. 78 of 2017 are not made in vain and are meant to be complied with. It was submitted that the Respondent has wilfully and deliberately refused to comply with the court's Decree. The Applicants urged the court to allow the application as prayed.
21. To buttress his submissions Counsel relied on the following authorities:-
 - a. Republic Vs County Government of Kajiado & 3 Others vs Ex Parte Environmental & Combustion Consultants Limited (2018) eKLR.



- b. A B & Another vs R.B (2018) eKLR.

The Respondents Submissions

22. The Respondents submissions were filed on 31st May, 2023.
23. On his behalf, Counsel identified the following issues for the court's determination:-
- i. Whether the Respondent herein is in contempt of the court's Decree dated 20th June, 2028 in ELC No. 78 Of 2017 Makueni Cyrus Robert Sala Zibu & 9 Others Versus Henry Muli Munguti & 10 Others.
 - ii. Whether the Applicants can get eviction orders against the Respondent through a Miscellaneous application.
24. In defining contempt of court Counsel relied on Black's Law Dictionary 9th Edition which defines contempt as follows:-
- “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.”
25. Counsel submitted that Section 5 of the *Judicature Act* confers jurisdiction on the superior courts to punish contempt of court.
26. According to Counsel, contempt proceedings are criminal in nature and as such, proof is higher than that of balance of probability. Counsel submitted that the Respondent is aware of the orders issued by Hon. Justice Mbogo on 20th June, 2018 in Makueni ELC Case No. 78 Of 2017.
27. Counsel contended that the Applicants have not met the standard of proof required in contempt of court proceedings since the allegations raised are based on unsubstantiated affidavit evidence of the Applicants. It was submitted that the Respondent has not disobeyed the order issue on 20th June 2018 so as to be cited for contempt. Counsel argued that the Applicants have not stated the orders which the Respondent has wilfully and deliberately failed to comply with.
28. On the second issue, Counsel submitted that it is trite law that an order of eviction must be anchored in a suit in line with the provisions of the *Civil Procedure Act* and Section 152A-152H of the *Land Act*. To buttress this point Counsel relied on the case of Tatecoh Housing and Co-op Sacco Limited Vs Qwetu Sacco Limited (2021) eKLR. It was submitted that the orders issued in ELC Case No. 78 of 2017 are declaratory in nature and do not amount to an eviction order.
29. Lastly, it was submitted that the Applicants have not demonstrated that the Respondent has disobeyed any orders, since the orders were directed at the National Land Commission and not against the Respondent. Counsel maintains that the Respondent has not wilfully disobeyed the court orders and cannot therefore be cited for contempt of court.
30. To buttress his submissions, Counsel relied on the authorities attached to the Respondents submissions.

Analysis And Determination

31. Having considered the application, the affidavits and the rival submissions, the only issue that arises for determination is whether the Respondent is in contempt of the Decree issued on 20/06/2018.



32. 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.”
33. The Applicants relied on 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.
34. The High Court of South Africa in the case of *Carla Burchell Vs 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.
35. Back home, in the case of *Samuel M.N. Mweru & Others Vs 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.”
36. It is not in dispute that the judgment and Decree issued on 20th June, 2018 is clear and unambiguous. It is also not in dispute that the Respondent is aware of the terms of the order. The only issue for determination is whether the Respondent wilfully and deliberately disobeyed the decree of the court.
37. The record shows that the Applicants instituted ELC No. 78 of 2017 against Henry Muli Munguti, Henry Mwake, David Nyungu, Michael Kioko, Penina Mumbe, Alice Wangeci, National Land Commission, Government of the Makueni County, Registrar of Societies, Hon. Attorney General, Good Hope Rehabilitation Centre (Certificate No. 26442). It is not in dispute that ELC Case No.



78 of 2017 was heard and determined vide the judgment delivered on 20th June, 2018 in the following terms:-

- a. A declaration that the relationship between the 2nd Plaintiff and the 1st Respondent starting from the year 1991 up to 2013 resulted in the creation of an implied trust.
 - b. A declaration that the 1st, 2nd, 3rd, 4th, 5th, and 6th Defendants are trustees of the 2nd Plaintiff and the donor friends of the 2nd Plaintiff for all set up systems, documents, entries, funds, movable and immovable assets now registered in the name of the 1st Defendant, the 1st Defendants agents, spouse, servants and/or appointees of the 11th Defendant.
 - c. A declaration that all accounts currently operated in the name of the 11th Defendants and the funds therein are assets of the trust of the 2nd Plaintiff and the donors.
 - d. A declaration that the implied trust between the 2nd Plaintiff and the 1st Defendant graduated to and became a public trust in which the Plaintiffs and the people of Makueni are beneficiaries thereof.
 - e. A mandatory injunction compelling the 7th Defendants to register plot No. 3792 in the name of the 11th Defendant.
 - f. Costs of the suit.
38. On whether the Respondent has deliberately breached the Court order, the Applicants have a duty to prove their 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.
39. The Applicant must prove wilful and deliberate disobedience of the Court Order if he wishes to succeed as was held in the case of *Gatharia K. Mutitika Vs 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 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 nature.”
40. Similarly, in the case of *Peter K Yego & Others Vs 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.”
41. In the present case, the Applicants averred that the Respondent in blatant disregard of the decree issued on 20th of June, 2018 wilfully and deliberately disobeyed the decree by evicting the 7th Applicant’s employees from Plot No. 3792 Mangelete Settlement Scheme. The Applicants contended that the ownership of Plot No. 3792 Mangelete Settlement Scheme was vested on the 7th Applicant vide the judgment delivered on 20th June, 2018.
42. The Applicants did not adduce any evidence to prove the allegations that the Respondent had evicted its employees from Plot No.3792 Mangelete Settlement Scheme.



43. In the case of Mutitika Vs 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.”

44. This Court has carefully read the decree issued by the court on 20th June 2018. The Applicants have not presented any evidence that that the Respondent is in breach of the decree issued by the court.

45. I am not persuaded that the Applicants have demonstrated that the Respondent has wilfully refused to obey the court’s decree.

46. In the end I find that the application dated 25th November, 2022 is devoid of merit and the same is hereby dismissed with costs to the Respondent.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF NOVEMBER, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi.

Muthiani for the Respondents

