



REPUBLIC OF KENYA



**Arusei & another v Tabut & 3 others (Environment & Land Case
E004 of 2023) [2023] KEELC 21643 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E004 OF 2023**

**MN MWANYALE, J
NOVEMBER 16, 2023**

BETWEEN

ROSA ARUSEI 1ST PLAINTIFF

SILVIA JEPCHIRCHIR 2ND PLAINTIFF

AND

SHADRACK KIMELI TABUT 1ST DEFENDANT

GEOFFREY KIPTOO RUTO 2ND DEFENDANT

SARAH JEPTOO 3RD DEFENDANT

JULIUS CHERUIYOT BETT 4TH DEFENDANT

RULING

1. This Ruling relates to the Notice of Motion application dated 21st August 2023, which seeks committal of Shadrack Kimeli Tabut, Geoffrey Kiptoo Ruto, Sarah Cheptoo and Julius Cheruiyot Bett, the Defendants/Respondents to civil jail for disobeying and defying the orders of this Honourable Court made on 15/8/2023.
2. The application further seeks that the Defendant/Respondents to purge the contempt by removing the illegal structures erected on the suit land and removing the fence they have put around a portion of the suit land and by fully obeying injunctive orders of status quo.
3. The Applicant further seeks restoration of the status quo which the Honourable Court had directed to be maintained by the orders dated 15th August 2023, and the assistance of the Officer Commanding Station (OCS) Ndalat.
4. The application is premised on grounds *inter alia* that; -



- i) The Honourable Court issued orders on the 15/8/2023 which directing the Defendant that the status quo with respect to the suit land Nandi/ndalat/584 And Nandi/ndalat/584 585 and thus restraining the Defendants from trespassing thereunto and undertaking illegal developments, the Defendants in blatant disregard of the said Court orders have refused to obey and//or ignored the said orders and have unlawfully encroached onto the suit land despite being dully served and being fully aware of the existence of those Court orders and have unlawful erected a fence around a portion of the subject land parcel and engaged in activities which have fundamentally upset the status quo.
5. In support of the application the Applicant has deponed a supporting affidavit, reiterating the grounds in support of the application and has annexed copies of the said Court orders and an affidavit of service in respect thereof, photographs of the poles and fencing around.
6. In opposition to the application now under consideration, a replying affidavit of Shadrack Kimeli Tabut was filed.
7. In the replying affidavit, the 1st Defendant/Respondent depones that Mr. Mitei Advocate with the conduct of the matter on behalf of the 1st Plaintiff/Applicant who had filed the applications giving rise to the orders allegedly breached by the Respondents hence the present application for contempt was by virtue of Section 38 and 48 of the Advocates Act not entitled to practice before Court.
8. That the issue of whether the orders ought to have been issued on 15/8/2023 ought to have been heard prior to or along with the contempt proceedings.
The deponent depones that Mr. Mitei Advocate is listed as inactive as at 19/09/2023, and has annexed that confirmation as annexure SKTI.
9. It is the Respondents further deposition that the current application does not comply with Section 5 of the Judicature Act and that the first application dated 31/7/2023 sought for an order to restrain disposal of the said lands, which they have not done, that the alleged fencing off, had been done long before the orders of status quo was issued.
10. That the parcel had not been fenced off and neither had it been sold and annexures SKT3.
11. That the order complained of was issued on 15/08/2023, and in the certificate of urgency fencing off was allegedly done on 10/8/2023.
12. That the application before Court is not specific as the illegal erection of the fence is not clearly stated as from when, where and by who disobeyed the Court orders.
13. That the Applicants claim had muted from Nandi/ndalat/587 to a complaint over Nand/ndalat/585 and Nandi/ndalat/584 hence it is difficult to understand, the Applicants claim.
14. The Applicant further denied service of the orders together with the co-respondents.
Leave was granted to the Applicant to file a supplementary affidavit; which affidavit was filed and was deponed by Irine Jepkemboi Advocate. In the said affidavit, the deponent stated that the Respondent planted sugarcane and continued building illegal structures.
15. The deponent equally depones on the fact that she had personally conduct of the suit and not the two other Advocates in the firm of Arap Mitei & Co. Advocates.
16. The Court directed the application to be canvassed by way of filing written submissions, both parties did file their submissions.



Applicants Submission: -

17. The Applicant has submitted on the contempt of Court generally and has cited the decision in the case of *Kenya Tea Growers Association v Francis Atwoli and 5 others* (2012) eKLR. where the Court held inter alia,

“I need to cite authority for the proposition that is of high importance that orders of the Courts should be obeyed, willful disobedience to an order of the Court is punishable as a contempt of Court; and I feel no doubt that such disobedience may properly be described as being illegal even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.....”
18. It is the Applicant’s further submissions while placing reliance on the decision in the case of *Basil Criticos v Attorney General and 8 others* (2012) eKLR that knowledge of the orders supersedes personal service.
19. On standard of proof, the Applicant submits that the proof is higher than balance of probabilities, but not exactly beyond reasonable doubt; and have cited the case of *Mutitika v Baharini Farm Limited* (1985) KLR 229.
20. On the strength of the above submissions the Applicant urges the Court to allow the application.

Respondents Submissions: -

21. In their submissions the Respondents submit that Mr. Christopher Arap Mitei Advocate is an unqualified person within the meaning of Section 9,38 and 48 of the *Advocates Act* and that the pleadings ought to be struck off. Towards this end the 1st Respondent has cited the Court of Appeal Decision in the case of *National Bank of Kenya v Ayah* (2019) KLR.
22. The 1st Respondent submits that the order herein was not properly effected, under this head the 1st Respondent submits that the affidavit of the Process Server a one Mr. Vincent Ogutu is contradictory at paragraphs 2 and 4 thereof as to how the process server got to know the 1st Respondent.
23. The 1st Respondent further submits that no order was contravened as at 9/8/2023, as the alleged date of entry, yet the orders were issued on 15/8/2023. The 1st Respondent submits that the fencing had been done before issuance of the orders on 15/8/2023.
24. The 1st Respondent further submits that from the application the specific contemnor was not identified, thus the 1st Respondent submits there is nothing specific attributable to any specific Respondents.
25. The Respondent submits that the standard of proof in contempt is beyond reasonable doubt, and submits that the application dated 21/8/2023 be dismissed.
26. Before turning into the issues for determination, a number of issues have been settled by the affidavits on record and the Court needs to point out the same.
27. It is common ground, that the Applicants filed this suit vide the Originating Summons on 31st July 2023 and simultaneous with filing the Originating Summons a chamber summons application filed under a Certificate of Urgency was filed and placed before the Duty Judge Hon. Dr. Iur Nyagaka J and no interim reliefs were issued pursuant to the said application.



28. Whereas the chamber summons dated 31/7/2023 was signed by Irine Jepkemboi Advocate, the person who signed the originating summons was not disclosed but the firm of Arap Mitei Advocates drew the Originating Summons.
29. Another chamber summons application dated 10/8/2023 was filed on 11/8/2023 and was signed by Irine on 11/8/2023 and was signed by Irine Jepkemboi Advocate of the firm of Arap Mitei Advocates, and the said application was placed before Hon. Lady Justice L. A. Ommollo Duty Judge who issued directions and orders of status quo on 15/8/2023.
30. Thus the orders allegedly breached and subject of the contempt of Court application were thus issued on 15/8/2023.
31. I have analyzed the application before Court, the affidavits in support and in opposition, perused the submissions filed and the authorities filed and have framed the following as issues for determinations.
 - i) whether the pleadings and/or Chamber Summons application giving rise to the orders allegedly breached were drawn by an unqualified person.
 - ii) which acts constitute breach of the Court orders to give rise to contempt of Court, and whether there is contempt of Court?
 - iii) Is the application dated 21/8/2023 merited?
 - iv) What reliefs ought to issue?
31. On issue number 1, as has been observed in paragraph 28 and 29 of this Ruling, the Originating Summons was drawn by the firm of Arap Mitei and Co. Advocates, the Chamber Summons application was signed by Irine Jepkemboi Advocate but equally drawn by the firm of Arap Mitei Advocates.
32. The 1st Respondent in his replying affidavit as well as submissions submits that Mr. Christopher Arap Mitei Advocate is not qualified in terms of Section 38 and 48 of the Advocates Act, hence they are no proper pleadings before Court and the 1st Respondent has placed reliance on the decision in the case of National Bank of Kenya v Ndolo Ayah 2019 762.
33. In the supplementary affidavit sworn by Irine Jepkemboi Advocate at paragraph 6 thereof, Ms. Jepkemboi Advocate deponed to the effect that she personally signed the documents relating to (this brief) matter as she has personally conduct of the same.
34. Whereas Mr. Christopher Arap Mitei Advocate has not taken out a practicing certificate, the 1st Respondent did not discharge the burden under Section 107 of the Evidence Act that he Mr. Christopher Arap Mitei Advocate personally signed the pleadings in this matter.
35. On the contrary, Ms. Irine Jepkemboi Advocate signed the Chamber Summons application her name appearing on the face of the said Chamber Summons application and she had also deponed to having signed all the other documents in this matter and the Court finds no reason to doubt the said Advocate on her depositions on oath and accordingly finds the objection relating to the drawing of the documents by an unqualified person as unfounded, and that they are proper pleadings before Court signed by Ms. Irine Jepkemboi Advocate whose qualifications in terms of Section 38 and 48 of the Advocates Act have not been challenged.
36. On issue number 2, the gravamen of the contempt application is that the Respondents unlawfully encroached onto the suit properties and erected a fence on a portion of the suit property hence



fundamentally upsetting the status quo. This is found on ground (b) of the grounds in support of the application.

The said breach is also deponed at paragraph 4 of the supporting of Rose Arusei.

37. In his response the 1st Respondent states that on the face of the Certificate of Urgency dated 10/8/2023, the Applicants Advocates alludes to a forceful entry on 9/8/2023 and fencing off a portion of the suit property thereof.
38. The 1st Respondent submits that since the status quo orders were issued on 15/8/2023, and the fencing having been done before the status quo orders were issued, there is no contempt of Court.
39. This above issue was raised in the Replying Affidavit, but in the Supplementary Affidavit a new issue in terms of breach of the order was introduced, to wit, planting of sugar cane. The issue of fencing off a portion of the suit property was thus abandoned and a new breach of the Court order was introduced.
40. I have looked at the annexures and the record, and I agree with the 1st Defendants Advocates that the fencing was done on or before the 9th August 2023, thus prompting the filing of the application dated 10th August 2023, with the orders been issued on 15/8/2023. Thus, the alleged contempt in terms of the said fencing was done before issuance of the orders on 15/8/2023, and accordingly there have been no Court orders breached by the 1st Respondent necessitating the contempt application before Court.
41. In answer to issue number 2, the actions of fencing having been done before issuance of the orders cannot be said to have breach of the orders and in that regard, the Court finds no contempt to have occurred as pleaded in the application before Court.
42. Having found that the action of fencing the gravamen of the application before Court does not constitute contempt having been done before issuance of the orders, the Court shall not consider issues (iii) and (iv) as the application for contempt is not merited and it is hereby dismissed with costs.
43. The Court notes from the supplementary affidavit of Irine Jepkemboi Advocate, that the Respondents may have planted sugar cane on the disputed property, after the orders of status quo were issued and were in force, and if so, the Applicants is at liberty to file a contempt application based on the issue of planting of sugar cane.
44. The upshot is that the application dated 18th August 2023 is hereby dismissed with costs.

DATED AND DELIVERED AND KAPSABET THIS 16TH DAY OF NOVEMBER 2023.

HON. M. N. MWANYALE,

JUDGE

