Kisotu (Suing as the Legal Representative of the Late Gichuki Wanguyo Deceased) & another v Nchuul & 3 others (Environment and Land Appeal E006 of 2024) [2025] KEELC 3553 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3553 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND APPEAL E006 OF 2024

LN GACHERU, J

APRIL 30, 2025

BETWEEN

HENRY KISOTU (SUING AS THE LEGAL REPRESENTATIVE OF THE LATE GICHUKI WANGUYO DECEASED) ..... 1ST APPELLANT

SAMMY CHIRA NG'ANG'A ..... 2ND APPELLANT

AND

KOILEKEN NCHUUL ..... 1ST RESPONDENT

GEORGE SANANKA OLE KATUMPE ..... 2ND RESPONDENT

ONORO KEREMPE NCHOOL ..... 3RD RESPONDENT

DENIS SARUNI KIRANTU ..... 4TH RESPONDENT

(Being an appeal from a Ruling and subsequent Orders of C. M. Hon. H. M. Nyaberi on 14th May, 2024 in Narok Chief Magistrate ELC Civil Case No.95 of 2019 (Henry Kisotu & another vs Koileken Nchuul & others))

JUDGMENT

1. The Appeal herein is filed vide a Memorandum of Appeal dated 10th June 2024, wherein the Appellants have challenged the Ruling of the trial court which was delivered on 14th May 2024, in Narok CMCELC No. 95 of 2019. The Appellants herein were the Plaintiffs in the above referred suit wherein vide an Application dated 4th July, 2023, they sought for committal of the Defendants to civil jail for a period of not less than 6 months for disobeying the orders of the said court that were issued on 9th September 2019.

2. In its Ruling of 14th May 2024, the trial court dismissed the said application, and also made an observation that the said Orders issued on 9th September 2019, had lapsed by operation of law. The court relied on the provisions of Order 40 Rule 6 of the Civil Procedure Rules which provides; -

> "Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

3. The appellants were aggrieved by the said Ruling and filed this Appeal wherein they sought for the instant appeal to be allowed entirely with costs to the Appellants, and the Ruling of the trial court dated 14th May 2024, be set aside, paving way for reinstatement of the orders of 9th September 2019.

4. Before the trial court, the Appellants filed Narok CMELC No.95 of 2019, initially against Koileken Nchuul, wherein they sought for permanent injunction to restrain the said Defendant, by himself, his servants, agents and/or employees from trespassing, leasing or in any way whatsoever from dealing and/ or interfering with Land Parcels Nos Cis-Mara/Nairagie-Enkare/X4 and XX7, and for vacant possession of the two parcels of land among other prayers.

5. Simultaneously, the Appellants as the Plaintiffs filed a Notice of Motion Application dated 22nd July, 2019, wherein they sought for temporary Orders of injunction to restrain the Defendant and/ or his servants or employees from interfering with the said parcels of land in whatever manner until the final determination of the suit.

6. Vide an Order of 9th September 2019, the trial court issued temporary orders of injunction restraining the then Defendant Koileken Nchuul, from dealing and/ or interfering with the two parcels of land, until the final determination of the suit.

7. However, the Plaint was later amended vide an Application dated 4th November 2022, which application was allowed on 14th February, 2023. In the said Amended Plaint, the 2nd to 4th Defendants were joined in this suit as parties thereof. Thereafter the Plaintiffs filed the Notice of Motion Application dated 4th July 2023, for contempt of the court orders issued on 9th September 2019.

8. The said application for contempt was against all the four Defendants thereon. The Defendants as intended contemnors opposed the said application for contempt of court orders, vide a Replying Affidavit sworn by George Katumpe, wherein they denied that they were in contempt of the orders of the court.

9. The Defendants/ Respondents alleged that the said orders of injunction were against the 1st Defendant/ Respondent thereon over Land Parcels Nos Cis-Mara/Nairagie –Enkare/X4 and 2X7, and not land parcel No Cis-Mara Nairagie-Enkare/1XX6, owned by the deponent. The Respondents urged the court to dismiss the said Application for contempt.

10. The application for contempt was canvassed by way of written submissions, and the parties did file their respective submissions before the trial court. After consideration of the said Application and rival written submissions, the trial court dismissed the application for contempt and also held that the injunctive orders issued on 9th September 2019, had lapsed by dint of the provisions of order 40 rule 6 of the Civil Procedure Rules.

11. It is on the above background that the Appellants filed the Instant Appeal, and relied on the nine grounds which are enumerated in the Memo of Appeal to support their Appeal. Among the grounds of Appeal is that the trial court erred in law and fact in dismissing the Appellants application on the basis that the interlocutory injunction had lapsed, without considering the strict wording of the orders

of the trial court to the effect that the injunction was to remain in force until the final determination of the suit.

12. The Appeal was canvassed by way of written submissions. The Appellants filed their written submissions dated 17th February 2025, through C. K. Langat & Co Advocates, and urged the court to allow the Appeal.

13. The Appellants set out two issues for determination and emphasized that the trial court erred in law and fact in finding that the injunctive orders dated 9th September 2019, had lapsed since the trial court had indicated that these orders would remain in force until the suit is heard and determined.

14. Further the Appellants submitted that the trial court failed to delve into the question of contempt of court since the validity of the order of the court was not in question. They relied on the case of Econet Wireless Ltd vs Minister for Information & Communication of Kenya and Samuel M. N. Mweru & Others vs NLC & 2 Others [2020]eklr, on submissions that the Respondents were aware of the said Orders of the court, and they ought to have obeyed them.

15. Consequently, the Appellants urged the court to allow the instant Appeal with costs and for this, they relied on the case of R. vs Rosemary Wairimu Munene Ex-parte Applicant vs Ihururu Dairy Farmers Cooperative Society Ltd, wherein the court held; -

> " The issue of costs is at the discretion of the court as provided under the above section. The basic rule on the arbitration of costs follows the event... it is well recognised that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case"

16. The 1st and 2nd Respondents filed their written submissions dated 18th February 2025, through S. Mogere& Co. Advocates and submitted that this Appeal is not merited and should be dismissed entirely with costs. The 1st and 2nd Respondents relied on various decided cases among them; Barclays Bank of Kenya Ltd vs Henry Ndungu & Another [2018]eKLR, Erick Kimingich Wapang'ana & Another vs Equity Bank [2015]eKLR, Peter K. Yego & Others vs Pauline Nekesa Kode, where the court held that contempt of court being a quasi-criminal in nature, it must be proved that one actually disobeyed the order of the court.

17. Further they relied on the case of Samuel M. N. Mweru & Others vs National Land Commission & Others [2020]eKLR, where the court held that the principles to be established in an application for contempt of the court orders are; -

    i. The terms of the order were clear, unambiguous and binding on the cities;

    ii. The cities had knowledge of or proper notice of the terms of the order;

    iii. The cities acted in breach of the terms of the order;

    iv. The conduct was wilful and deliberate.

18. Therefore, the 1st and 2nd Respondents urged the court to dismiss the instant Appeal with costs.

19. The court has considered the instant Appeal, the Record of Appeal and the rival written submissions and finds the issues for determination are; -

    i. Whether the Appeal herein is merited?

    ii. Who should bear costs of the Appeal?

i. Whether the Appeal herein is merited?

20. This being a first Appeal, the court is guided by the provisions of Section78 of the *Civil Procedure Act* and the various decided cases. Section 78 of the *Civil Procedure Act* provides; -

> "(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
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> (a) to determine a case finally;
>
> (b) to remand a case;
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> (c) to frame issues and refer them for trial;
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> (d) to take additional evidence or to require the evidence to be taken;
>
> (e) to order a new trial.
>
> (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."

21. Further, in the case of Selle & Another vs Associated Motor Boat Co. Ltd 7 others (1968) EA 123, the court held as follows:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect..."

22. These principles were further buttressed by the Court of Appeal in the case of Peter M. Kariuki vs. Attorney-General [2014] eKLR, where court stated that;

> "We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui v Republic, (1984) KLR 729 and Susan Munyi v Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported)."

23. Being guided as above, the court will re-consider and re-evaluate the available evidence before the trial court and then comes up with its own independent conclusion, while taking into account that it does not have the advantage of first hand evidence as did the trial court. The court too will give deference to the decision of the trial court, given that the said trial court derives its discretion to issue determinations from both *the Constitution* and the statues, just like this court.

24. Therefore, this court will simply not set aside and /or overturn the decision of the trial court just because it has been moved through an Appeal. See the case of Mbogo & Another vs. Shah [1968] E.A. 93, where the court held; -

> "[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter

and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice."

25. What is not in doubt herein is that on 9th September 2019, the trial court issued injunctive orders against the Defendant thereon, who by then was Koileken Nchuul, the 1st Defendant/Respondent. The said orders were to the effect that they would remain in place or in force until the final determination of the suit. The said orders were against of the 1st Defendant herein, who was the only Defendant/ Respondent, and he had a duty to obey or adhere to them.

26. As has been held by variously, Court orders are not mere suggestions, but are directives which are supposed to be obeyed and adhered to. In the case of *Teachers Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013*: the court held as follows;

> " A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."

27. It is evident that courts do not issue orders in vain and such orders that are issued by courts must at all times be obeyed and complied with. The Court of Appeal in the case of Shimmers Plaza Ltd vs National Bank of Kenya Ltd [2015]eKLR held as follows: -

> " 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."

28. It is also trite that contempt proceedings are quasi-criminal in nature due to the expected consequences that they attract. For that reasons, the standard of proof in such proceedings is higher than the balance of probabilities in civil cases, though not as high as beyond reasonable doubt. See the decision of Supreme Court in the case of R vs Ahmed Abolgathi Mohammed & another [2018]eKLR, where the court held.

> " We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:
>
> 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...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 an offence which can be said to be quasi-criminal in nature."

29. The said court went further and held;

> " The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct

was deliberate, in the sense that he or she wilfully acted in a manner that flouted the Court Order.

30. Given the quasi-criminal nature of contempt of court proceedings, the applicant must prove that;

    i. The terms of the order were clear, unambiguous and bounding on the Respondents.

    ii. Knowledge of the terms by the Respondent

    iii. Failure by the Respondent to comply with the terms of the order.

    iv. Deliberate conduct by the Respondent.

(see also the case of R vs A.G & another exparte Mike Maina Kamau [2020]eKLR.)

31. Therefore, for the Appellants to have succeeded in his application for contempt before the trial court, he ought to have proved or established the above principles. As was held in the case of Gathara K. Mutikika vs Baharini Farm Ltd [1985] KLR 227;

> " A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time– honoured phrase, it must be proved beyond reasonable doubt"

32. The Appellants had alleged that the Respondents disobeyed the court order of 9th September 2019. Therefore, the Appellants ought to have established that it was clear and evident that the Respondents were aware of the court order which was allegedly disobeyed. Further even with the knowledge of the terms of the said court, the Respondents failed to comply.

33. From the court record, it is not in doubt that when the court order allegedly disobeyed was issued, only the 1st Respondent was a party to the suit (as a defendant). The 2nd, 3rd and 4th Respondents were only joined in the suit in the year 2023, and were not parties to the suit when the said order was issued. Therefore, it is evident that they were not aware of said court orders of 9th September 2019, when it was issued, and there was no evidence that they had knowledge of the said court orders. If the said Respondents were not aware of the court orders, were they bound by them?

34. Further, the Appellants alleged that the trial court did not delve into the question of contempt of court orders as sought by the Appellants. However, the court has re-evaluated and re-considered the said ruling of the trial court, and it is evident that the trial court did delve into the question of contempt, when it held that that the appellants as applicants in the said application needed to prove the principles set out in the case of Samuel M. N Mweru & Another vs NLC(Supra), and further went to hold that at the time of issuance of the said orders, the 2nd , 3rd and 4th Respondents were not parties , and were not aware of the terms of the said orders, and thus knowledge of the terms was not proved.

35. The trial court had also relied on the definition of contempt as provided for in the Black's Law Dictionary as follows; -

> " Contempt is a disregard of, disobedience to, the rules, or orders to a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

36. This court has considered the principles to be established in a case of contempt of court orders and it finds that none of them was established and the court order in issue was also issued long before

the 2nd, 3rd and 4th Respondents were parties to the suit, and the holding in the case of Shimmers Plaza(Supra) cannot apply herein. The principle of natural justice is applicable herein, and the 2nd, 3rd and 4th Respondents cannot be condemned for alleged disregard of court orders that were issued before they were parties to this suit.

37. Further, the Appellants argued that the said court orders of 9th September 2019, when issued were to run until the suit was heard and finalized. However, by the time of filing the contempt proceedings, the Appellants were still enjoying the said injunctive orders. The law is very clear in Order 40 Rules 6 of the Civil Procedure Rules which provides;

> "Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

38. Legally, injunctive orders are meant to remain in force for a period of 12 months and the said interlocutory injunction would automatically lapse by operation of law after 12 months. The injunctive orders allegedly disobeyed were issued on 9th September, 2019. So, were the said injunctive orders still in force?

39. Section 1A of the *Civil Procedure Act* provides for the overriding objective of the said Act, which mandates courts to expeditiously resolve disputes before them. The trial court was of a considered view that the injunctive orders had lapsed long before the Application for contempt was filed and that the Defendants/Respondents therein were served with the said order long after they had lapsed and the 1st and 2nd Respondents were not parties to the suit at the time of issue.

40. The trial court used its discretion to dismiss the Application for contempt of court and held that the existing injunctive orders which are equitable remedies granted at the discretion of the court had lapsed. See the case of: Agnes Nyang'anyi Omwamba v Samuel Bosire Nyaruna [2022] eKLR, where the court held;

> "Before delving into the merits or otherwise of the Application, it is important that to indicate at this point that the remedy for injunction being an equitable remedy is a discretionary to any court. The discretion must be exercised judiciously. This is what every court should bear in mind, and there is an abundance of authorities that support that position. For instance, in the case of Kahoho v Secretary General, EACJ Application No. 5 of 2012 it was states as much. Also, in Daniel Kipkemoi Siele v Kapsasian Primary School & 2 others [2016]eKLR; the court stated as follows: "... the grant or not of an order of injunction is upon the discretion of the court. However, like all other discretions, the same must be exercised judiciously." In Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR, the Court of Appeal repeated the same position and went on to state that it means that it is doe "...without caprice or whim and on sound reasoning."

41. This Court has considered the whole proceedings herein and the impugned Ruling and finds no reasons to fault the trial court's use of its discretion. Consequently, the court finds and holds that the trial court did not err in holding and observing that the injunctive orders which were in force for about 5 years by the time the said ruling was delivered had lapsed.

42. As the court had stated earlier, it cannot just fault the trial court's conclusion just because it has been moved in an appeal or does not concur with the evaluation of facts by the trial court. The law is very

clear on when injunctive order is supposed to lapse. See the case Peters vs Sunday Post Limited [1958] EA 424, where the court rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

43. Consequently, this court finds and holds that the trial court's holding and finding in its ruling of 14th May 2024, was sound and the said trial court did not err in its use of discretion in dismissing the entire application and also observed that the injunctive orders had lapsed by operation of law. Therefore, the court in its appellate jurisdiction upholds the said holding and determination of the trial court. This court finds no reason to upset/ and or set aside the said ruling of 14th May 2024.

44. On the issue of costs, the court finds that costs ordinarily are awarded at the discretion of the court, and the do follow the event. The 1st and 2nd Respondents are the successful litigants herein and are thus awarded costs of this Appeal.

45. Ultimately, this court finds and holds that the main instant Appeal is not merited and consequently the court proceeds to dismiss the instant Appeal with costs to the 1st and 2nd Respondents herein.

46. Let the Appellants proceed with the hearing of the suit before the trial court expeditiously so that the issues in dispute can be resolved once and for all, and any aggrieved party will thereafter have right of appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 30TH DAY OF APRIL, 2025.

L. GACHERU

JUDGE

30/4/2025

Delivered online in the presence of

Meyoki – Court Assistant

Mr. Langat for the Appellants

Ms Mongere for 1st and 2nd Respondents

N/A for 3rd & 4th Respondents

L. GACHERU

JUDGE

30/4/2025