



REPUBLIC OF KENYA



**Nderitu v Attorney General & 12 others (Environment & Land Petition
2 of 2023) [2023] KEELC 22123 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22123 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND PETITION 2 OF 2023**

YM ANGIMA, J

DECEMBER 7, 2023

**IN THE MATTER OF ARTICLES 20, 21 & 23 OF THE CONSTITUTIONAL RIGHTS AND
FREEDOMS UNDER ARTICLES 2, 3, 10, 40 & 259 OF THE CONSTITUTION OF KENYA**

BETWEEN

VINCENT NYINGI NDERITU PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

CHIEF, NYAKEO LOCATION 2ND RESPONDENT

DISTRICT OFFICER, KINANGOP DIVISION 3RD RESPONDENT

**OFFICER COMMANDING STATION HARAKA POLICE STATION 4TH
RESPONDENT**

JOSEPH NDERU WANGECHU 5TH RESPONDENT

GRACE WAIRIMU 6TH RESPONDENT

NGARUIYA KIRIKA 7TH RESPONDENT

GACHERU KANYARA 8TH RESPONDENT

KABURA MUTUABU 9TH RESPONDENT

HANNAH WAMBUI 10TH RESPONDENT

NGURE MUTHINJI SAMUEL 11TH RESPONDENT

KARIUKI MUCHIRI 12TH RESPONDENT

MARIA WANJIKU MUCHAI 13TH RESPONDENT



RULING

A. Petitioner's Application

1. By a notice of motion dated 24.07.2023 brought under section 5 of the *Judicature Act* (Cap. 8), sections 1A, 1B & 3A of the *Civil Procedure Act* (Cap.21), and all other enabling provisions of the law the Petitioner sought the following orders:
 - a. ...Spent;
 - b. That the 2nd Respondent, Chief Nyakeo Location as the government officer on the ground fully aware of the happenings on this suit property be summoned to attend court and to explain to the court the status of compliance with the orders issued on 19.02.2015 in this matter.
 - c. That the 4th Respondent, the OCS, Kwa Haraka Police Station, be summoned to attend court to be examined on the status of implementation of the orders issued on 19.02.2015 and on 31.05.2023 in this matter.
 - d. That the court be pleased to cite the following persons for contempt of this honourable court's order issued on 19.02.2015 by Hon Lady Justice Lucy Waithaka on behalf of Hon, Mr. Justice A. Ombwayo and further to order that they be committed to civil jail for a term not exceeding six (6) months, that is to say:
 1. Joseph Nderu Wangeche
 2. Grace Wairimu
 3. Ngaruiya Kirika
 4. Gacheru Kanyara
 5. Kabura Mutuabu
 6. Hannah Wambui
 7. Ngure Muthinji Samuel
 8. Kariuki Muchiri
 9. Maria Wanjiku Muchai
 - e. That this honourable court be pleased to cite the 4th Respondent, OCS Haraka Police Station for contempt of this court's courts issued on 19.02.2015 and the further orders issued on 31.05.2023 by failing to enforce compliance of the court orders and to direct that he attends court personally to show cause why he should not be punished for contempt of this court and thereafter for this court to mete out punishment as it is appropriate against him.
 - f. That the court directs the 4th Respondents, the OCS, Kwa Haraka Police Station, to ensure compliance with the orders of court issued on 19.02.2015 within such time as the court shall direct failing which he be visited with further sanctions of the court.
 - g. That this court be pleased to grant any other or further orders, for the purpose of protecting the dignity and authority of the court.
 - h. That the costs of this application be provided for



2. The application was based upon the various grounds set out in the body of the motion and the contents of the supporting affidavit sworn by the petitioner, Vincent Nyingi Nderitu sworn on 27.07.2023 and the exhibits thereto. The Petitioner contended that the Respondents were in violation of the judgment and decree of the court dated 19.02.2015. In particular, the 2nd – 4th Respondents were accused of failing to ensure compliance with the terms of the decree by the 5th – 13th Respondents. The 5th – 13th Respondents were accused of having failed to vacate the suit property as decreed by the court and they were further accused of having uprooted the beacons which were fixed by the District Land Registrar and District Surveyor on the suit property. They were further accused of having destroyed the Petitioner's fence on the suit property.
3. The Petitioner stated that the removal of the beacons and destruction of the fence was reported to the 4th Respondent severally but he failed to take any legal action against the 5th – 13th Respondents who were responsible for those actions. It was thus the Petitioner's case that he was constrained to file the instant application for contempt of court since the Respondents were frustrating the execution of the terms of the decree dated 19.02.2015. He exhibited photos of the destruction allegedly done by the 5th – 13th Respondents and copies of the O.B. numbers of the reports made to Haraka Police Station.

B. 2nd – 4th Respondents' Responses

4. The 4th Respondent filed a replying affidavit sworn by Chief Inspector Geoffrey Waigwa Machomba on 25.09.2023 in opposition to the application. He stated that upon being served with a copy of the court order dated 31.05.2023 he duly provided security to the Land Registrar – Nyandarua County to enable her implement the terms of the judgment dated 19.02.2015 including placement of beacons on the suit property.
5. He stated that later in the month of June, 2023 he received reports from the Petitioner on alleged trespass and malicious damage to property on the part of the 5th – 13th Respondents whereby it was alleged that they had removed the beacons fixed by the Land Registrar and also destroyed the fence around the suit property. It was further stated that more reports were received from the Petitioner in subsequent months and that in some of the cases suspects had been arraigned in court whereas other matters were pending under investigation.
6. The 4th Respondent denied any inaction on his part or deliberate violation of the decree dated 19.05.2015 or any other order. It was contended that he had fully complied with previous orders and that any reported cases were still under investigation and that necessary action shall be taken upon conclusion of investigations. The court was consequently urged to dismiss the application dated 24.07.2023.
7. The court has noted, however, that no response was filed by the 2nd Respondent against whom a summons was sought for him to be examined on the status of implementation of the decree dated 19.02.2015.

C. 5th – 13th Respondents' Responses

8. The 5th – 13th Respondents filed a replying affidavit sworn by the 6th Respondent, Grace Wairimu, on 23.08.2023 on her own behalf and on behalf of the rest of the Respondents in opposition to the application on several grounds. First, it was contended that the court had no jurisdiction to grant the orders sought. Second, that they had not declined to remove their crops from the suit property as they required more time to do so. Third, that the Petitioner was illegally harvesting their trees without the requisite statutory licences from the Kenya Forest Service. Fourth, that the Petitioner was using his



power and the police to intimidate them to remove their crops and properties from the suit property. Fifth, that the Petitioner had not followed the lengthy and elaborate procedures set out in section 152 B, E & G of the Land Act to evict them from the suit property. Sixth, that there was no evidence that the Petitioner's fence was destroyed or damaged. They consequently prayed for dismissal of the Petitioner's application.

D. Directions on Submissions

9. When the application was set down for inter partes hearing it was directed that the application shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their written submissions. The record shows that the Petitioner's submissions were filed on 10.11.2023 whereas the Attorney General filed his submissions for the 1st – 4th Respondents on 27.11.2023. The 5th -13th Respondents' submissions were filed on or about 21.11.2023.

E. Issues for Determination

10. The court has perused the Petitioner's notice of motion dated 24.07.2023, the 4th Respondent's replying affidavit and the 5th – 13th Respondents' replying affidavit in opposition to the application. The court has also perused the Petitioner's supplementary affidavit as well as the material on record. The court is thus of the opinion that the following issues arise for determination herein:
 - a. Whether summons should issue to the 2nd and 4th Respondents to attend court to explain the status of implementation of the decree dated 19.02.2015.
 - b. Whether the 4th – 13th Respondents should be cited for contempt of court for disobedience of the decree dated 19.02.2015.
 - c. Whether the 5th Respondent should be directed to ensure compliance with the terms of the decree dated 19.02.2015.
 - d. Who shall bear costs of the application.

F. Analysis and Determination

a. Whether summons should issue to the 2nd and 4th Respondents to attend court to explain the status of implementation of the decree dated 19.02.2015

11. The court has considered the material on record on this issue. It is not clear from the judgment and the submissions of the parties what specific role the Chief was expected to play in the implementation of the decree. As a national government administration official, the Court finds no legal justification for summoning the Chief to attend court personally to explain the status of the implementation or execution of the decree. The court is of the opinion that should any status report be required then the court may call for a written report to be prepared and filed in the normal manner.
12. The court has considered the material on record in so far as the prayer for summons against the 4th Respondent is concerned. The court has noted that the OCS has filed a comprehensive replying affidavit on the status of implementation of the terms of the decree dated 19.02.2015. He has explained the steps which were taken to provide security to the land registrar and surveyor to reinstate the beacons on the suit property. He has explained the reports which were made to his station on alleged destruction of the beacons and the fence on the suit property. He has explained the steps which were taken pursuant to the reports and that some of the reported incidents are still pending investigation.



13. The court finds no justification for issuing summons to the OCS Haraka Police Station to explain things which can be done in writing either through a report or a sworn affidavit. If the 5th – 13th Respondents have violated the terms of the decree by continuing to occupy, graze and cultivate parts of the suit property then the primary remedy should lie against those Respondents in the first instance. The material on record shows that the OCS has not been sitting idly and doing nothing about the various violations alleged against the 5th – 13th Respondents. The Petitioner should pursue the primary offenders in the first instance and he has taken the right step by citing them for contempt of court.

b. Whether the 4th -13th Respondents should be cited for contempt of court for disobedience of the decree dated 19.02.2015

14. The court has considered the material and submissions on record on this issue. It would appear from the submissions on record that the elements to be proved against the alleged contemnors are agreed amongst the parties. They all cited the case of *Samuel M.N. Mweru & Others v National Land Commission & 2 Others* [2020] eKLR in which it was held, *inter alia*, that:

“ 40. It is an established principle of law that^[45] in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.^[46] Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*^[47] 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.

15. As to the applicable standard of proof in contempt of court proceedings the 5th – 13th Respondents referred to the case *Mutitika v Baharini Farm Limited* [1985] KLR 229 where the Court of Appeal held, *inter alia*, 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.”

The court fully agrees with the Respondents that this is the correct standard of proof in contempt of court proceedings.

16. The court shall deal with the 4th Respondent first. The court finds no evidence on record to demonstrate that he willfully disobeyed or violated the terms of the decree dated 19.02.2015. As indicated in the ruling dated 23.03.2023 on the Petitioner’s earlier application for contempt of court dated 30.09.2020, the first actors were to be the land registrar and the district surveyor. There is no way the rest of the Respondents would be expected to comply with the terms of the decree in the absence of determination of the boundaries of the suit property and the placement of beacons.
17. The material on record shows that the land registrar reinstated the boundaries of the suit property on 12.06.2023 and filed a report in court to that effect on 20.06.2023. The 4th Respondent’s replying affidavit clearly details the various steps the office has taken pursuant to reports of destruction of beacons, destruction of the fence on the suit property, and the felling of trees on the suit property. The affidavit indicates that at least one criminal case is active in court whereas others are pending under investigation. The court is thus unable to accept the Petitioner’s contention that the OCS has at all material times refused to take action on the reported cases.
18. The liability of the 5th – 13th Respondents shall similarly be considered with effect from 12.06.2023 when the beacons of the suit property were reinstated by the land registrar. The court has considered the Petitioner’s supporting affidavit as well as the photographs annexed thereto. The court has also considered the 5th – 13th Respondents’ replying affidavit as well as the photographs and other exhibits annexed thereto.
19. It is clear from the terms of the decree that the 5th – 13th Respondents were affected by two critical orders. The first one required them to vacate the Petitioner’s Title No Nyandarua/Njabini/656. The second was an injunction restraining them and all persons claiming under them from entering, remaining, trespassing, or interfering with the Petitioner’s enjoyment of the suit property. Those are the main terms in so far as this application is concerned even though there were additional orders in the judgment such as payment of mesne profits.
20. The court is satisfied that the terms of the first order of vacating the suit property were clear and unambiguous. The boundaries of the suit property were reinstated by the land registrar on 12.06.2023 and a report to that effect filed in court. The report indicates that the beacons were concreted by the Petitioner immediately they were pointed to him. Although the beacons were later on destroyed, the concrete was still left on the ground and is clearly visible to the naked eye as is evident from the Petitioner’s exhibits. The court finds no ambiguity on the meaning of vacating from the suit property. The issue of asking for more time to harvest or remove their crops from the suit property is clear evidence of violation of the order requiring the 5th – 13th Respondents to vacate the property.
21. There is no doubt from the material on record and the previous application for review that the 5th – 13th Respondents were at material times aware of the terms of the decree. They even resisted the reinstatement of the beacons of the suit property in their application for review. They were of the view that before the beacons of the suit property could be reinstated, their own parcels should be re-surveyed as well to confirm their size and acreage and to eliminate any risk of reduction in their acreage. The material on record shows that they had even sought to challenge the decree dated 19.02.2015 through judicial review proceedings without success.



22. The court is also satisfied that the terms of the injunction restraining the 5th – 13th Respondents from entering, remaining, trespassing or interfering with the Petitioner’s use and enjoyment of the suit property were also clear enough. The terms employed in the judgment were ordinary words and quite straightforward. They did not require any interpretation to make them obeyable. In any event, the 5th – 13th Respondents’ advocates have never filed any application for interpretation of the terms of the decree and they have never indicated which part of the injunction order was unclear or ambiguous.
23. The court is further satisfied that the 3rd – 15th Respondents have actually been in violation of the terms of the decree dated 19.02.2015 in that they have conceded cultivating crops and having some properties on the suit property for which they were asking for more time to remove. The material on record further shows that they have since destroyed the beacons which were fixed on the suit. The court is satisfied on the basis of the material on record that the 5th – 13th Respondents, their agents and family members were the ones responsible for removal of the beacons and destruction of part of the fence on the suit property. It is inconceivable that strangers to the dispute would embark on removal of the beacons and destruction of the Petitioner’s newly erected fence on the suit property.
24. The history of the dispute among the parties shows that the 5th - 13th Respondents have never accepted the Petitioner’s ownership of the suit property. The history shows that they have never accepted having lost all previous cases against the Petitioner beginning with Nairobi HCCC No. 2766 of 1976. They have always held the position that even the decree in this suit is illegal and of no legal consequence. In their letter dated 09.08.2023 addressed to various government officers their advocates stated as follows:
- “As a matter of fact, relying on the illegal judgment which we intend to have reviewed and in a bid to circumvent the law, the Petitioner has instead instituted contempt of court proceedings...”
25. The court finds that the 5th – 13th Respondents’ contempt to be deliberate and aggravated. By their letter dated 09.08.2023, which is on record, they were resisting and protesting their removal from the suit property. They were protesting the removal of their crops from the suit property in spite of clear terms of the decree dated 19.02.2015 which had not been varied, set aside or revived at the time. They were asserting that the instant application for contempt of court was simply intended to circumvent the law. In short, the Respondents wanted to be allowed a free hand to violate the decree of the court with impunity.
26. The court does not find any of the grounds raised in the 5th – 13th Respondents’ replying affidavit as justifying or excusing compliance with the terms of the decree. The allegation of the Petitioner harvesting trees from his own land without a licence or permit can only be an issue between the Petitioner and the Kenya Forest Service. The removal or destruction of some of their crops from the suit property would not justify their refusal to abide by the decree especially after the reinstatement of beacons. The alleged intimidation by the police for them to remove their crops and properties is merely a red herring. For one may ask, what were the Respondents’ crops and properties doing on the Petitioner’s property in the first place? The same applies to the alleged failure to follow the provisions of section 152 B, E & G of the Land Act in their alleged eviction.
27. The court is thus satisfied that the 5th – 13th Respondents at all material times had full knowledge of the terms of the decree. The court is satisfied that the terms of the decree were clear and unambiguous and that they deliberately flouted the same with impunity. They continue to do so to date and they have not even offered to purge the contempt. In the premises, the 5th – 13th Respondents are hereby found guilty of contempt of court and convicted accordingly. They shall, however, be accorded a chance to tender their mitigation before sentencing on a date to be fixed by the court.



c. Whether the 4th Respondent should be directed to ensure compliance with the terms of the decree dated 19.02.2015

28. It is not clear from the application why the Petitioner is seeking this order for a second time. This is one of the orders sought in his petition and the same was granted vide the judgment dated 19.02.2015. It is thus not clear why a similar order should be made in the instant application. Since the court finds no legal justification for the order it is not inclined to grant the same.

d. Who shall bear costs of the application

29. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful Petitioner should not be awarded costs of the application. As a result, the Petitioner shall be awarded costs of the application to be borne by the 5th – 13th Respondents only.

G. Conclusion and Disposal Order

30. The upshot of the foregoing is that the court finds that the contempt alleged against the 4th Respondent has not been proved whereas the contempt alleged against the 5th – 13th Respondents has been proved to the required standard. As a consequence, the court makes the following orders for disposal of the Petitioner’s notice of motion dated 24.07.2023:

- a. The prayer for citation of the 4th Respondent for contempt of court is hereby dismissed.
- b. The prayer for summons to issue against the 2nd and 4th Respondents is hereby declined.
- c. The court finds that the prayer for citation of the 5th – 13th Respondents for contempt of court for violating the decree dated 19.02.2015 adequately proved and they are accordingly convicted of contempt of court.
- d. The matter shall be mentioned on 12.02.2024 for mitigation and sentencing when the 5th – 13th Respondents shall attend court personally.
- e. Summons to issue to the 5th – 13th Respondents to attend court physically for mitigation and sentencing on 12.02.2024.
- f. The Petitioner is hereby awarded costs of the application to be borne by the 5th – 13th Respondents jointly and severally.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA AND DELIVERED THIS 7TH DAY OF DECEMBER, 2023 VIA MICROSOFT TEAMS.

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Y. M. ANGIMA
JUDGE

In the presence of:

Mr. Ongoya for the Petitioner



Mr. Rotich for the Attorney General for the 1st – 4th Respondents

Ms. Muyoka for the 5th – 13th Respondents

C/A - Carol

