



**Musha v Kweyu & 2 others (Environment & Land Case 337 of 2013)  
[2023] KEELC 22067 (KLR) (6 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22067 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 337 OF 2013  
DO OHUNGO, J  
DECEMBER 6, 2023**

**BETWEEN**

**ELIAB IMBIAKHA MUSHA ..... PLAINTIFF**

**AND**

**RODGERS ORATA KWEYU ..... 1<sup>ST</sup> DEFENDANT**

**ERNEST OLUMU WAMACHE ..... 2<sup>ND</sup> DEFENDANT**

**HARRISON MASSANGA MUTOBERA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Judgment was delivered in this matter on 27<sup>th</sup> June 2019. The court ordered that the “County Land Registrar and County Surveyor to visit Land Parcel No Butsotso/Shikoti/1814, Land Parcel No. Butsotso/Shikoti/5147, Butsotso/Shikoti/5146 and Butsotso/Shikoti/1767 to establish the boundaries and reopen the access road and file their report in court within the next 60 days.” Each party was ordered to bear own costs.
2. Following delivery of the judgment, the First Defendant filed Notice of Motion dated 19<sup>th</sup> April 2022 through which he sought an order directing the OCS Kakamega Police Station to provide security during the survey ordered in the judgment. The application was allowed on 16<sup>th</sup> May 2022.
3. The First Defendant later filed Notice of Motion dated 27<sup>th</sup> April 2023, which is the subject of this ruling. The following orders are sought in the application:
  1. [Spent]
  2. That the honourable court be pleased to issue an order directing the county surveyor and county land registrar, Kakamega to visit land parcel No. Butsotso/Shikoti/1814, 1767, 5146 and 5147 and survey the said parcels of land to establish the rightful boundaries where the



original boundary has been interfered with and file a report in court within 30 days from the date of exercise.

3. The county surveyor and land registrar to re-open the road of access leading to land parcel No. Butso/5147 and fix beacons marking the road.
  4. The Deputy Registrar, ELC to supervise the exercise and provide a report.
  5. The OCS, Kakamega Central police station to provide security and ensure compliance.
  6. The Plaintiff/Respondent together with his children be cited for contempt for violently or in any other manner interfering with court process.
  7. Costs be provided for.
4. The application is supported by an affidavit sworn by the First Defendant. He deposed that the Plaintiff blocked the road of access and annexed a portion of the First Defendant's land since the year 2014 and that attempts by the Land Registrar and the District Surveyor to resolve the dispute had been in vain due to violence from the Plaintiff and his sons.
  5. The Plaintiff opposed it through his replying affidavit sworn on 16<sup>th</sup> May 2023. He deposed that the Provincial Surveyor carried out surveys on 25<sup>th</sup> and 26<sup>th</sup> September 2013 while the Land Registrar and the District Surveyor carried out surveys on 18<sup>th</sup> September 2019 and on 1<sup>st</sup> August 2022. That the surveys were peaceful and that the First Defendant is misleading the court. He added that the dispute had been determined and that litigation must end.
  6. The parties relied entirely on the material on record and urged the court to render a ruling. I have considered the application and the affidavits.
  7. I quoted at the first paragraph of this ruling, the orders that were made in the judgment. This court granted further orders on 16<sup>th</sup> May 2022 with a view to facilitating implementation of the decree. The decree was specific on what needed to be done. A perusal of the orders sought in the present application shows an attempt to re-open the litigation. That cannot be permitted and, in any case, there is no jurisdiction to reconsider that which has been heard and determined. The decree should be enforced.
  8. The First Defendant has also prayed that the Plaintiff together with his children be cited for contempt for violently interfering with court process. To succeed in an application for contempt, the applicant must demonstrate wilful disobedience and the order said to have been disobeyed must be clear enough to leave no doubt as what is to be done or refrained from. See *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR.
  9. An allegation of contempt of court is a serious matter since it puts the liberty and or property of the contemnor at grave risk. It is for that reason that the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See *Mutitika vs. Babarini Farm Limited* [1985] KLR 229 and *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR.
  10. Beyond the general claim that the Plaintiff and his children have violently interfered with court process, the First Defendant has not offered specific evidence to meet the higher standard of proof in contempt proceedings.
  11. I find no merit in Notice of Motion dated 27<sup>th</sup> April 2023. I dismiss the application with costs to the plaintiff.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 6<sup>TH</sup> DAY OF DECEMBER 2023.**



**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Mango for the Plaintiff

Mr Mondia holding brief for Mr Munyendo for the Defendants

