



**Sunyai & another v Nguru (Environment and Land Appeal
E002 of 2023) [2023] KEELC 22027 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22027 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E002 OF 2023
LL NAIKUNI, J
DECEMBER 5, 2023**

BETWEEN

RACHAEL CHERONO SUNYAI 1ST APPELLANT

ELEGANT INVESTMENTS LTD 2ND APPELLANT

AND

SOPHIA WANJIKU NGURU RESPONDENT

RULING

I. Introduction

1. The Respondent herein - Sophia Wanjiku Nguru, moved this Honorable Court for its determination through filing a Notice of Motion application dated 18th July, 2023 against the 1st and 2nd Appellants herein, Rachael Cheron Sunyai and Elegant Investment Limited. It was brought under the dint of Sections 1A, 1B, 3A, 63 (c) of the Civil Procedure Act, Cap 21 Laws of Kenya Order 40 Rule 3(1) and (3), of the Civil Procedure Rules, 2010, Article 159 (1) and (2) of Constitution of Kenya, 2010.
2. Pursuant to that, upon service, during the proceedings, the Respondents indicated that they opposed the application although they lamented for having been served late. Thus, the Honourable Court directed that the Notice of Motion application dated 18th July, 2023 be canvassed by way of written submissions.

II. The Respondent's case

3. The Respondent sought the following orders:-
 - a) Spent.
 - b) Spent



- c) That the Honourable Court be pleased to cite the 1st Appellant/Respondent for contempt of Court orders granted by this Honourable Court on 20th February 2023 and commit the 1st Appellant/Respondent to civil jail for a period of six (6) months or such time as the court shall please.
 - d) That the Honourable Court do issue an injunction restraining the appellants jointly and severally, their agents, servants and/or employees from selling, disposing, demolishing, evicting and/or interfering with houses on property known as Plot No.[particulars withheld] pending the hearing and determination of this appeal.
 - e) That the 1st Appellant/Respondent be ordered to immediately pay the applicant damages and/or refund the rent and deposit collected over the said portion which has been demolished.
 - f) That the Honourable Court do hereby direct that all rental income being collected on property known as Plot [particulars withheld] be collected in a joint interest earning account in the name of Messers. Wandai Matheka & Co. and Messer H& K Law Advocates pending the hearing and determination of this appeal.
 - g) That the cost of this application be borne by the 1st Appellant/Respondent.
4. The Application is based on the grounds, testimonial facts and the averments made out under a 16 Paragraphed Supporting Affidavit sworn by Sophia Wanjiku Nguru and dated 18th July, 2023 together with three (3) annexures annexed thereto. The Respondent averred:
- a) To begin with, the Appellants jointly and severally filed an application dated 27th January 2023 seeking orders for stay of execution and stay of proceedings inter-alia other orders.
 - b) Subsequently on 20th February 2023, parties took directions on the disposal of the above application. The Honourable Court ordered that the status quo to be maintained pending the hearing and determination of the said application.
 - c) On or about 7th July 2023, the 1st Appellant without any reasonable cause demolished some structures on the property known as Plot No. [particulars withheld], which was generating rental income.
 - d) The actions by the 1st Appellant/Respondent has wasted away the property at the prejudice of the Applicant, who claimed the benefit of rental income from the said property.
 - e) Pursuant to the said directions, it was agreed that the rental income would be collected in a joint interest earning account in the name of Advocates for the Appellants and the Respondent. But to date the Appellants' Advocate had refused to co - operate with the Respondents' Counsel and secure the collection of rental income.
 - f) The 1st Appellant perpetually threatened the life of the Applicant because of issues in dispute in this suit/appeal.(annexed and marked as '3' was a copy of his statement lodged at the Mikindani Police Station).
 - g) The actions by the 1st Appellant portrayed bad faith, malice and disregard for court orders, thus the court ought to cite them in contempt.
 - h) There was great fear that the 1st Appellant was desirous of wasting away the property at the prejudice of the Applicant.



- i) It was necessary for the Court to grant the prayers sought herein. Failure to do so, the Applicant shall suffer grave risk and this appeal would be rendered nugatory/an academic process.
- j) This application ought to be granted in the interest of equity and justice.

III. Submissions

- 5. On 25th July, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 27th January, 2023 be disposed of by way of written submissions. However, despite of this, for unclear reasons, by the time the Court was penning down the Ruling, none of the parties had obliged. Hence, on the Honourable Court will proceed to deliver the Ruling on its own merit.

IV. Analysis and Determination

- 6. I have considered all the pleadings filed in this matter, being the Notice of Motion application dated 18th July, 2023 by the Respondent/Applicant herein and the responses, the appropriate and relevant provisions of Constitution of Kenya, 2010 and the statutes.
- 7. For the Honorable Court to reach an informed, reasonable, a just and fair decision on the subject matter, it has framed the following salient three (3) issues for its determination before this court:-
 - a) Whether the 1st Appellant was in contempt of the Court orders granted by this Honourable Court on 20th February, 2023?
 - b. Whether the Respondent has made out a case for the grant of temporary injunctive orders under Order 40 Rule 3(1) and (3), of the Civil Procedure Rules, 2010.
 - c. Who bears the costs of the application?

Issue No. a). Whether the 1st Appellant was in contempt of the Court orders granted by this Honourable Court on 20th February, 2023

- 8. Under this sub - heading, the Honourable Court has noted that the main substratum of this application are on two issues. Firstly, whether the Plaintiff should be cited for being in contempt of Court orders issued on 20th February, 2023 staying the order of the Chief Magistrate Court pending the hearing and determination of this appeal. Secondly, its on the issue of being granted injunctive orders. To begin with, its instructive to note that, the application herein is anchored under the provision of Order 40 Rule 3(1) of the Civil Procedure Rules, 2010 which states as follows:-

“In cases of disobedience or breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime, the Court directs his release.”

- 9. The Black's Law Dictionary (Ninth Edition) defines contempt of Court as:-

“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”



10. In the case of:- “*Woburn Estate Limited versus Margaret Bashforth* [2016] eKLR” the Court of Appeal held as follows:

‘For many years in the history of the Judiciary of Kenya the Courts have, pursuant to section 5 (1) of the *Judicature Act*, resorted to the prevailing law of England in the exercise of the power to punish for contempt of Court ...

Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when section 5 of the *Judicature Act* was enacted. By Act No.7 of 2011, Article 163 (9) of *the Constitution* was operationalized by the enactment of the *Supreme Court Act* (CAP 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt.

Under Section 29 of the *Environment and Land Court Act*, it is an offence punishable, upon conviction to a fine of not exceeding Kshs.20,000,000 or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the Court given under the Act.

We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of Court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of Court has been expressly clothed with jurisdiction to punish for contempt of Court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of Court Applications’

11. The first port of call with respect to the procedure for institution contempt of Court proceedings in this country was and therefore is Section 5 of the *Judicature Act* Cap 8 Laws of Kenya. That section provides:-
- (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 that 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.
12. Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in “*Christine Wangari Gachege – Versus - Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR”. In that case the Court recognized that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is Section 5 of the *Judicature Act*.
13. Under Rule 81.4 of the English *Civil Procedure Rules* (Amendment No. 3) Rules, 2020 provides for the requirements of a contempt application and provides that:-
- (1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
 - (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—



- (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
- (b) the date and terms of any order allegedly breached or disobeyed;
- (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
- (d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
- (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
- (f) the date and terms of any undertaking allegedly breached;
- (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
- (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
- (i) that the defendant has the right to be legally represented in the contempt proceedings;
- (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
- (k) that the defendant may be entitled to the services of an interpreter;
- (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
- (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
- (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.

14. Section 5 of the Act No. 460 provides as follows:-

“ 5. Every superior court shall have power to -



- a. Punish for contempt of court on the face of the court.
- b. Punish for contempt of court; and
- c. Uphold the dignity and authority of subordinate courts”.

15. In the case of: “*Econet Wireless Kenya Limited – Versus - Minister for Information And Communication Of Kenya Authority* [2005] eKLR” Hon Justice Ibrahim (as he then was) stated as follows: -

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.” (emphasis)

16. Likewise in the case of “*T.N Gadavarman Thiru Mulpad – Versus - Ashok Khot and anor* [2005] 5 SCC”, the Supreme Court of India in emphasizing the dangers of disobeying court orders held as follows:-

“Disobedience of this Court’s order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court’s orders are to be followed and complied with.” (own emphasis)

17. In an application for contempt of Court orders an Applicant has to meet the following requirements;

- i. Whether an order was granted
- ii. Whether service was effected
- iii. Whether the order was clear, unambiguous and unequivocal
- iv. Whether there was disobedience of the said Court order

18. The standard of proof required in cases of contempt is higher than that acquired in an ordinary civil case. Before a finding of contempt can be made, there must a demonstration of willful and deliberate disobedience of a court order.

19. Further, in the case of:- “*Gatharia K. Mutikika – Versus - Baharini Farm Limited* [1985] KLR 227” it was held that-

“A contempt of court is an offence of a criminal character. 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 in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be heard to process contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject..... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.” (own emphasis)

20. In the instant case, an order had been issued on 20th February, 2023 staying the execution and proceedings in Chief Magistrate Civil Suit No. 1847 of 2021 issued on 6th December, 2022 pending the hearing and final determination of this the appeal filed herein. According to the Respondent, on 7th July, 2023, the 1st Appellant without any reasonable cause demolished some structures on the property known as Plot No. [particulars withheld], which was generating rental income. She further goes ahead to aver that the 1st Appellant perpetually threatens her life because of issues in dispute in this suit/appeal. AS a result of this, she had lodged her statement at Mikindani Police Station.
21. In the light of the gravity of the personal consequences that would ordinarily flow from a finding of contempt, the law requires proof that the order in question was brought to the attention of the alleged contemnor as proof that he/she had personal knowledge of said order. Going through the Court records, the Learned Counsels for the Appellants and the Respondents were in court and the orders were in respect to the application for stay of execution by the Appellants. In other words, all parties have always been aware of the proceedings in this matter taking that they have always actively participated in the process.
22. In the case of: “*Oilfield Movers Limited - Versus - Zahara Oil & Gas Limited* [2020] eKLR” the Court stated: -

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty ...”
23. I reiterate that there can be no doubt that the Appellant was at all times aware of the orders made on 20th February, 2023. Indeed, as clear indication of that knowledge, he Appellants filed an application seeking to stay execution of the ruling by the lower court. Therefore, the issue of being of knowledge of the Court order which is a critical issue does not arise at all.
24. As a matter of moving forward to higher level herein, in order to find a person guilty of contempt there must be proof of willful and intentional disobedience of a court order. In the case of:- “*Mahinderjit*



Singh Bitta – Versus - Union of India & Others 1A No. 100 of 2010” the Supreme Court of India stated as follows: -

“In exercise of its contempt jurisdiction the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution”(own emphasis)

25. The provision of Section 29 of the *Environment and Land Court* is clear to the effect that:-

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.

26. The Respondent in his application stated that the 1st Appellant has gone ahead and demolished the suit property right after the Honourable Court issued an order that the status quo should be maintained pending the hearing and determination of the appeal. I find that having been fully aware of the courts orders and in failing to comply with the same the 1st Appellant is in contempt of court orders.

27. To protect the dignity and authority of the Court of law, this Court, shall be firm on any person who deliberately disobeys Court orders or attempts to scuttle the Court process. This Court has stated the umpteenth times that Court orders are not a formality nor cosmetic. They are to be obeyed at all Costs. Should anyone feel aggrieved by any order or part of it, the only left option would be to come back and move Court to either vary or review or discharge or set aside the said orders. In the instant case, the 1st Appellant should have actually invoked the provision of Order 40 Rule (7) of the *Civil Procedure Rules*, 2010 to wit:-

“Any order for injunction may be discharged or varied or set aside by the Court on application made thereto by any party dissatisfied with such order”

28. Certainly, this is not what the 1st Applicant did in the given circumstances. Being fully aware of the Court order, still proceeded to wilfully disobey the said orders by causing demolition of the property which fetched monthly rental income and a subject to the impugned pending appeal before this Court. This is unacceptable and putting the Court to test on how far it may go. For these reasons, I therefore find the 1st Appellant herein Rachael Cheron Sunyai in contempt of Court orders. She will personally and physically appear before this court for notice to show cause and sentencing thereafter. In the event that she does not bring herself, a warrant of arrest shall issue.

ISSUE No. b). Whether the Respondent has made out a case for the grant of temporary injunctive orders under Order 40 of the Civil Procedure Rules, 2010

29. The principles for grant of temporary injunction pending appeal are settled. In the case of “*Patricia Njeri & 3 Others – Versus - National Museum of Kenya* [2004] eKLR”, the court gave the following principles as governing grant of temporary injunction pending appeal;

- a. An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
- b. The discretion should be refused where it would inflict great hardship than it would avoid.



- c. The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d. The court should also be guided by the principles in *Giella vs. Cassman Brown* [1973] EA 358.”
30. In the case of “*Giella – Versus - Cassman Brown* [1973] EA 358”, the court stated the conditions for grant of interlocutory injunctions as follows:-
- “The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience.”
31. A *prima facie* case was defined in the case of “*Mrao Limited – Versus - First American Bank of Kenya & 2 Others* [2003] eKLR” as follows:-
- “A *prima facie* case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”
32. In this instant case, the Appellants contended that the Respondent’s claim before the Sub - ordinate Court is based on the allegation that the Respondent cohabited with the Deceased proprietor, bore him a child and that she is therefore entitled not only to the rental income but also to the Suit Property. In the Sub - ordinate court the Respondent’s claim was to recover rental income from the suit property. The matter before the lower court related to the process through which the Respondent sought to collect rent on a property that belonged to the 1st Appellant’s deceased husband. According to the Respondent, she was the wife of the Andrew Kipkemei Sunyai (Deceased) who died on 9th June, 2021 and they were blessed with a daughter F.C.S on 1st January, 2005. On 7th July, 2023, the 1st Appellant without any reasonable cause demolished some structures on the property known as Plot No.[particulars withheld], which was generating rental income. The Appellants have faulted the finding of the lower court on the issue as to whether the Applicant had a prima facie case, where the lower court appears to agree with the Applicant in one instant and disagrees with them in another instant in the same ruling. On this issue, I hold that the Respondent has established a *prima facie* case. It is an arguable issue which among other issues should be determined on merit during the appeal.
33. On the issue as to whether the Respondent shall suffer irreparable injury should the temporary injunction not be granted, the Applicant has argued that the 1st Appellant has demolished the suit property which they collected rental income from. I agree with Respondent that the demolition of the suit property and any other destruction thereof will alter the subject matter of the suit which will render the appeal nugatory. Very unfortunate scenario indeed.
34. On the question of the balance of convenience, it tilts to the Respondent as the 1st Appellant is bent on wasting away the suit property at the detriment of the Respondent.
35. This court has considered the rival positions on this matter and notes that it is enjoined by the provision of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 and Section 3 of the *Environment and land Court Act*, No. 19 of 2019 to ensure the ends of justice are met in a manner that is just, expeditious,



proportionate and affordable. Having noted that both the parties in the suit claim ownership of the property in issue, and there are issues yet to be determined conclusively by the sub - ordinate court, it is only just and reasonable that the suit property be preserved before the determination of the dispute herein.

ISSUE No. c). Who will bear the costs of the application?

36. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is given after the conclusion of any legal action, process or proceedings of any litigation. The provision of Section 27(1) of the Civil Procedure Act holds that costs follow the events. By event it means the results or outcome of the said legal action, process or proceedings thereof.
37. In this case the Honourable Court used its discretion to direct that the Costs will be in the cause.

V. Conclusion & Disposition

38. In the long run, after conducting an in-depth and elaborate analysis of the framed issues hereof, the Honourable Court is of the strong view that the Respondent/ Applicant herein has been able to successfully establish their case on preponderance of probability. Thus, in the view of the foregoing and for avoidance of doubt I do order as follows:
- a) That the Notice of Motion application dated 18th July, 2023 by the Respondent/ Applicant herein be and is hereby found to have merit and is hereby allowed in its entirety.
 - b) That the Honourable Court finds the 1st Appellant in contempt of court orders issued on 20th February, 2023 and therein summons her to personally appear before this Court on 18th January, 2024 for notice to Show Cause and sentencing thereof either through payment of fine or serving a Jail term not exceeding six (6) months or both.
 - c) That the Honourable Court do issue an temporary injunction order in favour of the Respondent restraining the Appellants by herself, jointly and severally, her agents, servants and/or employees from selling, disposing, demolishing, evicting and/or interfering with houses on property known as Plot No.[particulars withheld] pending the hearing and determination of the appeal.
 - d) That this Honourable Court orders that the 1st Appellant to immediately pay the Respondent/ Applicant the rent and deposit collected over the said portion which has been demolished as will be assessed by the Learned Counsels for both the parties and subjected to court supervision.
 - e) That costs shall be in the cause.

It is so Ordered accordingly.

RULING DELIVERED THROUGH E - MAIL AS PER THE NOTICES DISPATCHED TO ALL THE PARTIES HEREIN SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF DECEMBER 2023.

HON. MR. JUSTICE L.L. NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT AT MOMBASA.

Copy sent by M/s. Joan Ndwiga (Office Admin) to:



Wandai Matheka &Co. Advocates ; Email: [Particulars Withheld]

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