



**Ogle alias Rahma Hussein v Sheikh & 6 others (Environment and Land Appeal E051 of 2023) [2025] KEELC 3476 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3476 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E051 OF 2023**

**JG KEMEI, J  
APRIL 29, 2025**

**BETWEEN**

**KATRA ABDI OGLE ALIAS RAHMA HUSSEIN ..... APPELLANT**

**AND**

**ABDI AHMEND SHEIKH ..... 1<sup>ST</sup> RESPONDENT**

**HASSAN ABDI IBRAHIM ..... 2<sup>ND</sup> RESPONDENT**

**HUSSEIN ABDULLAHI BRAHIM ..... 3<sup>RD</sup> RESPONDENT**

**HASSAN ISSAK HACHE (EX-CHAIRMAN, BOARD OF MANAGEMENT,  
AINSWORTH PRIMARY SCHOOL) ..... 4<sup>TH</sup> RESPONDENT**

**ALI JUMA (HEADMASTER AINSWORTH PRIMARY SCHOOL) .... 5<sup>TH</sup>  
RESPONDENT**

**CHAIRPERSON (BOARD OF MANAGEMENT, AINSWORTH PRIMARY  
SCHOOL) ..... 6<sup>TH</sup> RESPONDENT**

**STAREHE SUB-COUNTY DIRECTOR OOF EDUCATION ... 7<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Ruling of Hon Becky Cheloti Mulemia, Principal  
Magistrate delivered on 7/11/23 in Milimani MCELC/E438/2022)*

**RULING**

1. On 17/12/22 the 1<sup>st</sup> – 4<sup>th</sup> Respondents (plaintiffs) filed suit against the Appellant (defendant) and the 4<sup>th</sup> – 7<sup>th</sup> Respondents (interested parties) in MCELC No E438 of 2022 seeking in the main general and special damages. It was averred by the Plaintiffs that the interested parties are the owners/trustees/custodians of Ainsworth Primary School assets which include school land located on an open space along the perimeter wall of the school that is to say land known as IR No 209/6846 adjacent to



Muratina street while the plaintiffs are the lawful tenants licence holders and or lessees of the suit property. That in the month of May 2022, the Defendant forcefully occupied the suit property and begun erecting illegal structures without the knowledge and consent of the interested parties. The Plaintiffs accuse the defendant of fraud, particulars of which have been itemised under para 7 of the Plaint. That as a result of the defendant's fraudulent activities, the Plaintiffs have been unable to set up their intended businesses and have suffered loss and damage.

2. Simultaneous to the filing of the plaint, the Plaintiffs filed an application of even date seeking interalia an order of injunction restraining the defendant from in any manner interfering with the suit property.
3. On the 10/1/23 the Court issued interlocutory orders as follows;

“That pending the hearing and determination of this application temporary orders be and is hereby granted of injunction prohibiting the defendant/Respondent whether by herself her agents and or servants from occupying using trespassing into selling charging subletting leasing transferring dealing in wasting disposing of constructing on or in any other way interfering with the interested parties and the plaintiffs/applicants ownership possession use and occupation of all that space of land located on the adjacent and or next to LR No 209/6846 ( i.e all the land and /or space of land located next and along Ainsworth Primary school , along Muratina Street Nairobi.)

That the application be served for hearing interpartes on 14/2/23.”

4. As the Notice of 17/12/22 was pending interpartes hearing, the Plaintiffs filed the notice of motion dated the 8/2/23 seeking interalia; a declaration that the defendant is in contempt of the orders issued on 10/2/22(?); warrants of arrest against the Defendant and her agents who are in wilful disobedience of the Court orders issued on 10/1/22; the defendant and all her agents be jailed for being in contempt of the Court ; an eviction order be issued evicting the Defendant from the suit land and the OCS Pangani Police Station to ensure compliance of the said orders and costs of the application.
5. Further the Court on 12/5/23 granted the orders in the following terms;

“That Katra Abdi Ogle alias Rahma Hussein by herself personal representatives and agents and assigns are in contempt of the orders of 10/1/22.

That Katra Abdi Ogle do comply with the orders issued on 10/1/22 forthwith.

The OCPD Pangani Police station be ordered to execute and enforce the orders issued and ensure compliance with the orders of 10/1/22

Costs be borne by the defendant.”

6. Unrelenting, the Plaintiffs filed another motion dated the 17/8/23 seeking a declaration that Katra Abdi Ogle was in contempt of the Court orders on the 10/1/23 and 12/5/23 and that warrants of arrest be issued for the disobedience of the two orders aforesated and that she and her agents, hired goons, assigns and personal representatives be jailed for 6 months for contempt of Court. They also sought orders directing that all the containers erected on the suit land (21 shops, car washes and hotel) be closed forthwith, locked up and sealed in the presence of all parties and the serial numbers of the seals used be submitted to the Court.
7. On the 7/11/23 the Court allowed the application vide its ruling of even date.
8. Dissatisfied with the said ruling the defendant/Appellant has proffered this appeal dated the 21/11/23 on the following grounds;



- a. The trial Court failed to evaluate the evidence tendered in support and against the application dated the 17/8/23 judiciously before arriving at her findings.
  - b. The trial Court erred in committing the Appellant to jail for 6 months without affording her the opportunity to be heard on sentencing, mitigation, the option of a fine, the opportunity to purge the contempt, if any, whether the 1<sup>st</sup> -3<sup>rd</sup> Respondents are willing to pay for the care and subsistence for the civil jail term and the opportunity to show cause before adverse orders were meted against her.
  - c. The trial Court erred in failing to consider the provisions of Order 21 rule 4 of the CPR with respect to the contents of ruling in defended cases; order 5 Rule 15 of the CPR on service and with respect to contents of affidavit of service, section 7 of the CPR with respect to resjudicata and abuse of the process of the Court , the standard of proof in contempt proceedings and the admissibility of electronic evidence as set out in Section 106B(4) and 78A of the Evidence Act.
  - d. The trial Court erred in failing to afford the Appellant a fair hearing contrary to the provisions of Art 27, 50 & 159(2) (d) of the Constitution
9. Subsequently, the Appellant urged the Court to set aside the Ruling by dismissing the notice of motion dated the 17/8/23 and in the alternative make its own finding on the facts and the law and or direct the motion dated the 17/8/23 be heard de novo before another magistrate other than Hon Becky Cheloti Mulemia PM.
  10. The appeal was canvassed by way of written submissions. They are dated 21/2/25 and 17/3/25 in favour of the Appellant and the Respondents respectively.

### **The Appellants submissions**

11. Counsel for the Appellant submitted that the trial Magistrate failed to give the concise statement of the case, the issues for determination and the reasons for the decision thus occasioning a miscarriage. Further that the Appellant was convicted against the rules of natural justice which dictates that a party should be afforded fair hearing.
12. Further counsel submitted that committing the Appellant to civil jail for a maximum 6 months is harsh without being heard on mitigation on sentencing, option of a fine, the opportunity of a fine and or purge the contempt.
13. Counsel for the Appellant pointed out to the Court that the Respondents sought general and special damages in the plaint and therefore the order of injunction was issued in a vacuum, there being no final prayer for injunction in the plaint dated the 17/12/22. That parties being bound by their pleadings the Court ought not have issued the orders of injunction.
14. It was the case of the Appellant that the suit as against the 4<sup>th</sup> -7<sup>th</sup> Respondents has abated in the absence of summons having not been served within the stipulated time.
15. That the motion of 17/8/23 was but resjudicata in view of the similarity of prayers sought and allowed in the one of 8/2/23.
16. Counsel for the Appellant argued that the Appellant was not served with the orders of 10/1/2023 and 12/5/23. That the alleged service of the said orders has been disputed by the Appellant and the Court was referred to Replying affidavit of the Appellant in respect to the motion dated the 17/8/23 appearing pages 38- 40 of the Record of Appeal where the Appellant explained in detail how she was not served.



## The Respondent's submissions

17. Counsel for the Respondents submitted one issue for determination by the Court which is whether the Appellant is in contempt of the Court orders previously issued and if in the affirmative whether she was procedurally convicted to serve the jail term of 6 months.
18. It was submitted that despite the service of the orders of 10/1/23 upon the appellant, she continued to occupy use trespass and construct the suit land contrary to the said orders necessitating the Respondents to file the second application of 8/2/23 seeking orders to cite the Appellant for contempt of Court. The Court then directed the Appellant to comply with the orders of 10/1/23 and the OCPD to ensure compliance of the said orders. Further non-compliance led to the filing of the motion of 17/8/23 seeking warrants of arrest and committal to civil jail against the appellant.
19. As to the validity of the orders and whether there was breach by the appellant, Counsel for the Respondent submitted that the Appellant was aware of the orders and that personal service was not necessary. See the case of *Kenya Tea Growers Association Vs Francis Atwoli & others* (2012); *Shimmers Plaza Limited Vs National Bank of Kenya* (2015) eKLR where the Court stated that;

“Kenya’s growing jurisprudence right from the High Court has reiterated that knowledge of a Court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings”.
20. It was further submitted that where a party acts and shows that she had knowledge of the Court order, the strict requirement that personal service must be proved is rendered unnecessary. The Court was pointed to the decision of the Court in *Basil Criticos Vs Attorney General and 8 others* (2012) eKLR.
21. Counsel for the Respondents submitted that it is the very knowledge and awareness of the existence of the Court orders that led to the Appellant positioning goons on the suit property to defeat the orders of the Court. She also filed an appeal in ELCA E059 of 2023- *Katra Abdi Ogle alias Rabma Hussein vs Abdi Ahmed Sheikh & 2 others* dated 9/6/23 seeking stay of execution of the orders of the Court issued on 12/5/23 but was denied the orders vide the Ruling of the Court delivered on 28/9/23. The Court was urged to dismiss the appeal and uphold the decision of the trial Court.
22. As to whether the Court orders of 7/11/23 were proper and the appellant was procedurally convicted to serve the jail term of 6 months, Counsel submitted that the trial Court stated that it did not take lightly the open disobedience of its orders hence the issuance of the warrants of arrest and the appellant and its agents be committed to 6 months jail. That the stern orders of the Court were justified to command compliance on the part of the appellant given the conduct of disobedience of Court orders exhibited by the appellant.
23. Further counsel submitted that contempt is usually punishable by fine or imprisonment. See the case of *Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Anor* (2013) eKLR. That the trial Court was proper in condemning the appellant to civil jail. That Court was entreated to dismiss the appeal with costs.

## Analysis and determination.

24. Having considered the appeal, the submissions and the whole record of appeal I find the key issue for determination is whether the appeal is merited. Under this main heading the Court will inquire whether the right procedure was followed by the Court in holding the Appellant in contempt; whether



- the Appellant was served with the Court orders; whether the Appellant was accorded the opportunity to mitigate on the contempt before she was sentenced.
25. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the [Civil Procedure Act](#) which espouses the role of a first appellate Court which is to: ‘..... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.’ See also *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123
  26. To start with the Court would like to highlight the relevance of Court orders. Fundamentally contempt of Court exists for the smooth operation of the rule of law and the administration of justice, anything else will lead to anarchy in society. It is for that reason that every person against whom a Court order is made against has an unqualified obligation to obey the order however unpalatable the order maybe. See the case of *James Muchina Wandutu v County Government of Murang’a & 5 others* [2019] eKLR. Equally the Court in *Teachers Service Commission v Simon P. Kamau & 19 others* [2015] eKLR reiterated that Courts have been given the powers to punish for contempt, in order to uphold the dignity of the Courts.
  27. Section 29 of the [Environment and Land Court Act](#) provides 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.
  28. Section 63 (c) of the [Civil Procedure Act](#) provides as follows; -
    - “In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed—
    - a. ...
    - b. ...
    - (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”
  29. Order 40 rule 3 of the [Civil Procedure Rules](#) provides the consequences of contempt which includes in case of disobedience or breach of any terms of Court Order, an order for 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 6 months. This goes to show that the punishment for contempt is not light seeing that other than attachment of the property of the guilty contemnor, the liberty of the contemnor is also at stake.
  30. Under the [Magistrates Act](#) Cap 9 of the Laws of Kenya Magistrates have power to punish for contempt of Court under section 10 of the said Act. This Court finds that despite the [Contempt of Court Act](#) 2016 having been declared unconstitutional, the Magistrate Courts have jurisdiction based on the forgoing legal framework to punish for contempt. The applications dated the 8/2/23 and the 17/8/23 were brought inter alia under Art 23(1) of the [CoK](#), Section 63 c and e of the [CPA](#) and all other enabling provisions of the law.
  31. The standard of proving contempt of Court was aptly discussed in the case of *Gatharia K. Mutikika Vs Babarini Farm Limited* [1985] KLR 227 where it was held that contempt of Court is in the nature of



criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is so because liberty of the alleged contemnor is usually at stake and the Applicant must prove wilful and deliberate disobedience of the Court order, if he were to succeed.

32. In the case of *Republic Vs Attorney General & another Ex parte Mike Maina Kamau* [2020] eKLR the Court citing with approval the High Court case of South Africa in the case of *Kristen Carla Burchell Vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005 case of outlined the ingredients for proving contempt of Court that an Applicant for contempt of Court should prove that the terms of the order were clear and unambiguous and binding on the Defendant; that the Defendant had knowledge or proper notice of the orders; that he acted in breach of the terms of the order and that his conduct was deliberate.
33. In this case it is not in dispute that the Court issued temporary orders on 10/1/23 restraining the Appellant from interfering with the suit land. It is important to note that these orders were issued pending the hearing and determination of the application of 17/12/22. Though the orders were exparte, they were determinable upon the hearing of the application. This is clear from the reading of the order which commences as;
- “ pending the hearing and determination of this application temporary orders be and are hereby granted .....”
34. Was the appellant aware and or notified of the orders of 10/1/23 and 12/5/23? The appellant has argued that she was not served with the orders. The respondents on the other hand insist that she was served by a process server and adduced the affidavit of service in support. I have perused the affidavit of service sworn by one Noel M. N. Muniyithya. A close perusal of the said affidavit leaves no doubt that the appellant was served.
35. Further in the absence of any challenge to the above return of service, the court finds that the appellant was served. Having said that even if for argument sake service was not effected, I agree with the decision in *Shimmers Plaza Limited Vs National Bank of Kenya* (2015 that as long as it can be proven that the contemnor had knowledge of the orders service is unnecessary. Moreover, I have perused the orders issued on 12/5/2023 and note that the same ruling was read in the presence of Mr Kiline, Advocate for the appellant. It is trite that where the orders are issued in the presence of counsel for the party, a party cannot be heard to complain that he was not aware of the said orders. In any event a counsel has a duty to his client which includes updating him of the ongoings in Court. Anything else would amount to a derogation of the duty on the part of counsel. The Court finds that the appellant was served/aware of the Court orders.
36. The next issue is whether there were valid orders free from any ambiguity on record? To start with, the case of the Respondents is captured under para 4 of the Plaintiff as thus;
- “ That on or about May 2022 the defendant forcefully occupied the suit property and began erecting illegal structures therein without the knowledge, involvement approval and or authorisation of the Interested parties who are the custodians in trust of all the assets belonging to Ainsworth Primary school.”
37. Evidently by the time the suit was filed in December 2022 the appellant was already in possession of the suit property. The effect of the orders issued by the court on 10/1/23 amounted to an eviction of the appellant at the interlocutory stage before the main application/suit is heard and determined. It is trite that at the interlocutory stage a court must refrain from holding a mini trial over the suit so as not



to embarrass the court that will finally hear the main suit. The probable order to grant at the nascent stage of the proceedings is an order of status quo for the preservation of the suit property.

38. I have also perused the reliefs sought in the plaint and it is obvious that the Respondents sought for special and general damages. That being the case it is doubtful if a plea for interlocutory temporary orders can be anchored in the pleadings, the nature of which are on record. I say no more. It is a general rule in determining an application for temporary injunction that where damages are ascertainable, quantifiable and measurable an interlocutory injunction should not be granted.
39. I find that the orders granted by the court are in complete departure with the pleadings of the respondents and the legal principles cited above.
40. The Trial Court has been impugned for failing to afford the Appellant the opportunity to mitigation before sentencing. In the case of *Muruatetu & another -Vs- Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC2 (KLR) (14 December 2017) the Supreme Court stated as follows:

“Mitigation was an important congruent element of a fair trial. The fact that mitigation was not expressly mentioned as a right in the *Constitution* did not deprive it of its necessity and essence in the fair trial process. The rights pertaining to the fair trial of an accused pursuant to Article 50(2) of the *Constitution* were not exhaustive.

The right to fair trial was not just a fundamental right. It was one of the inalienable rights enshrined in Article 10 of the *Universal Declaration of Human Rights*, and in the same vein Article 25(c) of the *Constitution* elevated it to a non-derogable right which could not be limited or taken away from a litigant. The right to fair trial was one of the cornerstones of a just and democratic society, without which the rule of law and public faith in the justice system would inevitably collapse”.

41. I cannot agree more. I find that the trial Court missed this fundamental step before sentencing the appellant thus condemning her unheard on her defence. Contempt proceedings being quasi -criminal proceedings, the right to fair trial cannot be taken away casually.

### **Final orders for disposal**

42. For the above reasons, I find that the appeal succeeds and I make the following orders;
- a. The orders of the trial court issued on the 10/1/23, 12/5/23 and 7/11/23 be and are hereby set aside in their entirety.
  - b. The main suit and the application dated the 17/12/22 be heard afresh by another Magistrate other than Hon Betty Cheloti Mulemia, Principal Magistrate.
  - c. Each party to meet their costs.
43. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF APRIL, 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**  
**JUDGE**

Delivered Online in the presence of:



1. Mr. Kivuva for the Appellant
2. Mr. Orlando for the 1<sup>st</sup> – 7<sup>th</sup> Respondents
3. CA – Ms. Yvette

