



**Waigwa & another v Waigwa (Environment and Land Appeal  
32 of 2019) [2022] KEELC 3318 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3318 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 32 OF 2019**

**JO OLOLA, J  
JUNE 16, 2022**

**BETWEEN**

**LAWRENCE MWANGI WAIGWA ..... 1<sup>ST</sup> APPLICANT**

**PETER MUNYUA WAIGWA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MARY GATHONI WAIGWA ..... RESPONDENT**

**RULING**

1. By the Notice of Motion dated 21<sup>st</sup> June 2021, Lawrence Mwangi Waigwa and Peter Munya Waigwa (the Applicants) pray for orders:
  2. That the Respondent Mary Gathoni Waigwa be cited for contempt of the restraining orders given by this Honourable Court on 13<sup>th</sup> February, 2020;
  3. That the said Respondent be committed to jail for a period not exceeding 6 months or this Honourable Court do mete such other sentence or sanctions as it deems fit to uphold the integrity and dignity of the Court.
  4. That this Honourable Court do issue orders to the Officer Commanding Station, Karatina Police Station to restrain the Respondent from causing further malicious damage to the Applicant's property;
  5. That this Honourable Court do make such other or alternative orders as it deems fit; and
  6. That the Respondent be condemned to pay the costs of the application;
2. The application is supported by an Affidavit sworn by the 1<sup>st</sup> Applicant Lawrence Mwangi Waigwa and is premised on the grounds that:



- (a) On 13<sup>th</sup> February 2020, this Honourable Court gave orders staying the execution of the Judgment and order of the Lower Court given on 25<sup>th</sup> November, 2019. The Court also gave orders for the status quo to be maintained pending the hearing and determination of the Appeal;
  - (b) The orders were given in the presence of Counsels for both Parties;
  - (c) On 6<sup>th</sup> April 2021, the Respondent entered into the Applicant's land numbers Iriaini/Kairia/2243 and 2244 and cut down the Applicant's Avocado trees and uprooted others in contempt of the above mentioned Court order;
  - (d) On 21<sup>st</sup> April 2021, the Respondent entered into the suit properties and uprooted the Applicants' bean crop;
  - (e) On 10<sup>th</sup> June 2021, the Respondent again entered the suit property threatened the Applicant's farm workers with forceful eviction and uprooted the Applicants' fence and caused extensive damage to the Applicants' property;
  - (f) Unless the Respondent is cited for contempt of the said orders and duly punished for it she will continue trespassing onto the suit properties and causing irreparable harm to the Applicants' property and treating this Court's orders with contempt.
3. The Respondent – Mary Gathoni Waigwa did not file any response to the application. I have carefully considered the Appellants' application for contempt and the Affidavit in support thereof.
  4. The two Appellants herein are the sons of the Respondent. By a Complaint dated 24<sup>th</sup> April 2018, as filed at the Chief Magistrates Court in Nyeri, the Respondent had sued her two sons together with the Land Registrar Nyeri accusing them of fraudulently and illegally sub-dividing her parcel of land being LR No. Iriaini/Kairia/1253 into three portions namely Iriaini/Kairai/2242, 2243 and 2244. She also accused the sons of registering the parcel numbers Iriaini/Kairia/2243 and 2244 into their two names without her consent or authority.
  5. The Applicants while admitting that the said LR No. Iriaini/Kairia/1253 belonged to their mother, denied fraudulently sub-dividing the same. It was their case instead that their mother had agreed on her own volition to sub-divide the land to her three sons and herself but when one of their brothers by the name Joseph Wachira Waigwa refused to co-operate, they registered the two portions in their names and left the rest for their brother and the Respondent herein.
  6. After hearing the case and in a Judgment delivered in Nyeri CMCLE Case No. 106 of 2018 on 25<sup>th</sup> November 2019, the Honourable R. Kefa, Senior Resident Magistrate agreed with the Respondent that fraud was committed in the sub-division of the original parcel of land. The Learned Magistrate proceeded to order that the resultant titles Iriaini/Kairia/2242, 2243 and 2244 be cancelled and that the title reverts back to the original number.
  7. Aggrieved by the said decision, the Applicants lodged the present Appeal to this Court. Contemporaneous with the Memorandum of Appeal, the Applicants filed a Notice of Motion application dated 10<sup>th</sup> December, 2019 seeking a stay of execution of the Judgment delivered in the Lower Court on 25<sup>th</sup> November, 2019.
  8. When the said application came up for hearing on 13<sup>th</sup> February, 2020 before the Honourable Justice M.C. Oundo, the Parties agreed by consent that the application be allowed "on condition that the status quo be maintained pending the hearing and determination of the Appeal." That is the order the Applicants accuse the Respondent of violating and for which they want to have her jailed for contempt.



9. As it were, contempt of Court is in the nature of criminal proceedings and therefore, proof of a case against a contemnor is higher than that of a balance of probability. This is so because in an application for contempt, the liberty of an individual is usually at stake. Accordingly, the Applicants must prove willful and deliberate disobedience of the Court order if they were to succeed.
10. In support of their contention that the Respondent had disobeyed the Court orders, the 1<sup>st</sup> Applicant avers as follows at Paragraphs 5, 7 and 9 of the Supporting Affidavit:
  5. That on 6<sup>th</sup> April (sic) the Respondent by herself or through her authorized agents and or servants entered the suit property Land Number Iriaini/Kairia/2243 and Iriaini/Kairia/2244 and cut down 16 mature Avocado trees and applied oil to the remaining stumps. They also uprooted 35 young Avocado trees (attached hereto (are) Photos of the uprooted trees marked “LMW 1”);
  7. That on 21<sup>st</sup> April, 2021 Respondent whether by herself or through her authorized agents and or servants entered the suit property and uprooted my bean crops and planted her own crops; and
  9. On 10<sup>th</sup> June, 2021 the Respondent by herself or through her authorized agents and or servants entered the suit property and completely decimated the hedge fence that surrounded the property and threatened my farm workers when they tried to stop the destruction of the fence (Attached hereto are photos of the damaged fence dated 11<sup>th</sup> June, 2021 marked “LWM 3”).
11. By those very averments, it was evident that the Applicants were not certain whether or not it was their mother or the said agents who committed the acts complained of. There was no eye witness account and the names of the purported authorized agents have not been disclosed or how the Applicants knew they were her authorized agents.
12. A perusal of the Record of Appeal reveals that the 1<sup>st</sup> Applicant had during cross-examination indicated that as at the year 2011 when the sub-division of the original suit land was done, their mother, the Respondent herein, was about 70 years old. That would put the Respondents age as at the time this application was filed at above 80 years and I was unable to see how such an old lady would be able on her own to cut down the 15 mature Avocado trees and to decimate the hedge fence as alleged by the Applicants.
13. At any rate, it was evident to me that the orders issued by the Court on 13<sup>th</sup> February, 2020 were in relation to the cancellation of the title and had nothing to do with the use of the land which the Respondent is said to have gifted her sons. An application for contempt could only succeed if the Respondent had disregarded the orders and proceeded to have the titles cancelled and registered in her name.
14. It follows that I did not find any basis for the application before me dated 21<sup>st</sup> June, 2021. I dismiss the same and exhort the parties herein to go make peace with themselves as a family and to try and resolve the dispute herein amicably.
15. I make no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 16<sup>TH</sup> DAY OF JUNE, 2022.**

**In the presence of:**

No appearance for the Applicant



No appearance for the Respondent

Court assistant – Ndung’u

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**J. O. OLOLA**

**JUDGE**

