



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ngoru & 3 others v Unganga & 34 others (Environment and Land Case Civil Suit 393 of 2014) [2022] KEELC 13396 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13396 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 393 OF 2014**

**MD MWANGI, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**AMBUI A MBARI YA NGORU ..... 1<sup>ST</sup> PLAINTIFF  
JOHN MWAURA KINYANJUI ..... 2<sup>ND</sup> PLAINTIFF  
JOSEPH GACHERU KARIUKI ..... 3<sup>RD</sup> PLAINTIFF  
LUCY NJERI NJUGUNA ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**JEREMIAH GITANGU UNGANGA ..... 1<sup>ST</sup> DEFENDANT  
FRANCIS KIBATHI NJENGA ..... 2<sup>ND</sup> DEFENDANT  
HURUMA NGEI (II) SELF HELP GROUP ..... 3<sup>RD</sup> DEFENDANT  
EDWARD KIMANI MBURU ..... 4<sup>TH</sup> DEFENDANT  
FREDRICK ONYANCHA ..... 5<sup>TH</sup> DEFENDANT  
NICHOLAS GAKURU CHEGE ..... 6<sup>TH</sup> DEFENDANT  
HARON MBURU KAMAU ..... 7<sup>TH</sup> DEFENDANT  
SOLOMON KAMAU ..... 8<sup>TH</sup> DEFENDANT  
SOLOMON NJOROGE ..... 9<sup>TH</sup> DEFENDANT  
PATRICK MAINA ..... 10<sup>TH</sup> DEFENDANT  
GRACE NYAMBURA CHEGE ..... 11<sup>TH</sup> DEFENDANT  
IBRAHIM GAKURU ..... 12<sup>TH</sup> DEFENDANT  
JOHN GITAU ..... 13<sup>TH</sup> DEFENDANT  
MICHAEL MUNYUA ..... 14<sup>TH</sup> DEFENDANT**



JOHN NGANGA .....	15 <sup>TH</sup> DEFENDANT
PAUL KAROR .....	16 <sup>TH</sup> DEFENDANT
JANE WANJA .....	17 <sup>TH</sup> DEFENDANT
SAMUEL THUITA GATEI .....	18 <sup>TH</sup> DEFENDANT
JOSEPH WAWERU RUTHONGU .....	19 <sup>TH</sup> DEFENDANT
SAMUEL NJOROGE .....	20 <sup>TH</sup> DEFENDANT
ALICE WANJIRU KAMAU .....	21 <sup>ST</sup> DEFENDANT
STEPHEN THIONGÓ .....	22 <sup>ND</sup> DEFENDANT
MERCY MUMBI MAINA .....	23 <sup>RD</sup> DEFENDANT
ELIZABETH MBITHE .....	24 <sup>TH</sup> DEFENDANT
BEATRICE MAINA .....	25 <sup>TH</sup> DEFENDANT
ALICE NYAKIANDA KAMAU .....	26 <sup>TH</sup> DEFENDANT
JOHN OTIENO OKONGO .....	27 <sup>TH</sup> DEFENDANT
SAMUEL NDIRANGU .....	28 <sup>TH</sup> DEFENDANT
PATRICK WAGUCHE .....	29 <sup>TH</sup> DEFENDANT
PETER KARIUKI NGIGI .....	30 <sup>TH</sup> DEFENDANT
JANE MUTHONI NGOCHI .....	31 <sup>ST</sup> DEFENDANT
OSTINE NJERI .....	32 <sup>ND</sup> DEFENDANT
PATRCK MAINA GACHAHU .....	33 <sup>RD</sup> DEFENDANT
BEN KHUNDA WAMBUA .....	34 <sup>TH</sup> DEFENDANT
JOSHUA EICHANA .....	35 <sup>TH</sup> DEFENDANT

*(In respect of the Notice of Motion Application dated the 2nd February, 2022 brought under the provisions of Section 3A of the Civil Procedure Act, Order 3 rule 5(1), 3(6) of the Civil Procedure Rules, Article 40(1) of the Constitution)*

## RULING

### Background

1. Before this court for determination is the 3rd plaintiff's application dated the February 15, 2022 seeking for orders that;
  - a. The honourable court do grant leave to the applicant to join the intended 4th to 35th defendant/respondents to this suit for illegally entering, trespassing and put-up illegal structures in the suit land Number Nairobi Block 126/2017.



- b. That the honourable court do find that the defendants and the intended defendants/respondents are in contempt of court order dated June 15, 2009.
  - c. That the honourable court do grant an order that the defendants/respondents and the intended defendants/respondents are in contempt of Court orders dated June 15, 2009 which restrained any one from carrying any activities including entering, constructing or disposing the land registration number Nairobi/Block 126/127.
  - d. Costs of this application be borne by the defendants/respondents and intended defendants/respondents.
2. The application is premised on the grounds on the face of it and further supported by the affidavit of Joseph Gacheru Kariuki sworn on the February 15, 2022. He avers that although the court issued an order dated June 15, 2009 restraining any constructions and activities of whatsoever nature on the suit land, the respondents are currently selling the disputed land. The applicant avers that the defendants are aware of the said court order but are deliberately acting in breach of it.
  3. The deponent further deposes that the plaintiffs never consented to the purported sale of the land. The 1<sup>st</sup> plaintiff being a society, no resolution has ever been made authorizing sale of land to the defendants as individuals. The beneficiaries of the disputed land did not participate in the illegal acquisition of their land. The defendants illegally grabbed the land and are forcefully putting up illegal structures therein in breach of the court order issued in the year 2009.

#### **Court's direction**

4. The 1<sup>st</sup> prayer in the application to join the 4<sup>th</sup> to the 35<sup>th</sup> defendants was allowed by the consent of the parties.
5. It is the prayers seeking that the defendants be found in contempt of the court order dated 15th June, 2009 that this court has to consider. The application was not opposed. The applicant on his part too did not file any submissions.

#### **Issues for Determination**

6. Even as proceed to frame the issues for determination, I must emphasize that it is not automatic that for an unopposed application, the court will as a matter of course, grant the orders sought. It behooves the court to satisfy itself that the application before it is merited and that the prayers sought may be lawfully granted.
7. In the case of *Gichinga Kibutha v Caroline Nduku* (2018) eKLR Justice Kemei reiterated the point and held that;
 

“ .....It is not automatic that in instances where the evidence is not controverted, the claimant shall have his way in court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
8. I will therefore proceed to determine the application on its merit under the applicable laws.
9. The issues for determination in this court's opinion are as follows; -
  - a. Whether the orders sought can be granted under the cited provisions.



- b. Whether the orders sought in the application dated February 15, 2022 can be granted under section 5 of the Judicature Act;

## Analysis and Determination

### A. Whether the orders sought can be granted under the cited provisions

10. The 3rd plaintiff's application has been brought under the provisions of section 3 & 3A of the Civil Procedure Act and order 3 rule 5(1), & 3(6) of the Civil Procedure Rules and article 40(1) of the Constitution.
11. The cited provisions do not give this court jurisdiction to grant the prayers sought save for the joinder of claims against the added defendants. Section 5 of the Judicature Act is the law under which contempt of court in Kenya is dealt with. Section 3A of the Civil Procedure Act which has been cited by the applicant reserves the court's inherent powers and is not a substantive provision. It is to be invoked only where there are no clear provisions of law upon which relief sought may be anchored.
12. Bosire J (as he then was) in the case of *Muchiri v Attorney General & 3 others* (1991) KLR 516 stated at page 530 that: -
- “Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice.”
13. In the case of *Mumias Out Growers Company (1998) Ltd v Mumias Sugar Company Ltd* NRB HCCC No 414 of 2008 too, the court held that:
- ‘The applicants has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed.’
14. The 3<sup>rd</sup> plaintiff's application has not been brought under the relevant provisions of the law. It cannot be granted under the provisions under which it has been brought. Nonetheless, I will proceed to determine the second issue that the court has identified.

### B. Whether the orders sought in the application dated 15th February, 2022 can be granted under section 5 of the Judicature Act.

15. Section 5 of the Judicature Act is the law under which contempt of court is to be dealt with in Kenya. This is after the Contempt of Court Act, No 46 of 2016, was nullified in the case of *Kenya Human Rights Commission v Attorney General & another* (2018) eKLR.
16. Section 5 of the Judicature Act provides that:
- “(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 the subordinate courts.”
17. In the case of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR, the Court of Appeal held that,
- “by dint of section 5 of the Judicature Act, the procedure of instituting contempt of court proceedings in Kenya is set out in part 81 of the Civil Procedure of the UK which entirely



replaced order 52 of the Rules of the Supreme Court England (RSC) through the Civil Procedure (Amendment No.2) Rules of 2012.”

18. The Court of Appeal observed that the repealing of the said order 52 brought certain changes in the procedure for bringing contempt applications. Part 81 of the *Civil Procedure (Amendment No 2) Rules of 2012 (applications and Proceedings in Relation to Contempt of Court)* provides different procedures for four different forms of violations.

Rules 81.4 relates to committal for "breach of a judgement, order or undertaking to do or abstain from doing an act."

Rule 81.11- Committal for "interference with the due administration of justice" (applicable only in criminal proceedings)

Rule 81.16- Committal for contempt "in the face of the court"), and

Rule 81.17- Committal for "making false statement of truth or disclosure statement."

19. An application under rule 81.4 (breach of judgement, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for making the application now under consideration before this court. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

20. Further, it is an established principle of law that 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.

21. Upon proof of these requirements the presence of wilfulness 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. The elements of civil contempt were stated by the authors in '*Contempt in Modern New Zealand*' who 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

22. Turning to the instant application, the order subject of the proceedings herein was issued by Honourable Lady Justice Lesiit (as she then was) by a ruling dated May 22, 2009 in the following terms;

1. “That an injunction be and is hereby issued restraining the defendants both jointly and severally and by their agents, servants, employees, workmen or anyone claiming through them from interfering, entering, constructing or disposing by way of sale or otherwise land parcel reference No LR No Nairobi/Block 126/217 until the full and final determination of this suit and or until further orders of this honourable court.



2. That the costs of this application be on cause.”
23. The applicant has not set out fully the grounds upon which his application is grounded. He has actually not identified ‘separately and numerically’, each alleged act of contempt by each of the defendants in his supporting affidavit.
24. The applicant has annexed photographs of two buildings, one at the construction stage, while the other building is complete. However, the photographs do not show when the alleged construction was undertaken.
25. I am keen on the photographs because the applicant had relied on similar photographs in an earlier application before this court dated October 29, 2019 while seeking a warrant of arrest against the 1st, 2nd and 3rd defendants. A ruling was delivered on the December 3, 2020 by Hon Lady Justice Komingoi, in which the 1st, 2nd and 3rd defendants were found to be in contempt of court order and directed to pay a penalty of Kshs 200,000/=, in default to serve four (4) months imprisonment. The applicant has not distinguished and/or differentiated these photographs from the ones used in the previous application.
26. The next issue is whether contempt orders can be issued against persons who are not party to the proceedings before the court.
27. The general rule is that a non-party to legal proceedings is not bound with the decision emanating therefrom. See Sakina Sote *Kaitany and Anor v Mary Wamaitha* Civil Appeal No 108 of 1995.
28. However, court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly Ojwang, J (as he then was) in *B v Attorney General* [2004] 1 KLR 431 stated that:

“The court does not, and ought not to be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”
29. It is for this reason that courts no longer entertain the failure to comply with their orders on the ground of non-service the order accompanied by a penal notice. The requirement for service is only meant to bring to the attention of those concerned the existence of the court order and is not a pre-requisite to the obedience of a court order.
30. Knowledge of the court order supersedes personal service and once proven, a party cannot not claim failure of personal service.
31. In the case of *Basil Criticos v Attorney General & 4 others* [2012] eKLR, *Republic v Minister of Medical Services* Misc Civil application No 316 of 2010 Lenaola J (as he then was) stated that:

“...the law has changed and so as it stands today, knowledge supersedes personal service and for good reason...where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”
32. The 4th to the 35th defendants, were only joined in these proceedings on the June 30, 2022, when the first prayer in the application was allowed. Evidently, they were not parties to the proceedings at the time the orders were issued by Lady Justice Lesiit way back in May 2009. The applicant was therefore required to prove the four elements of civil contempt in order for the court to find the defendants



- liable. The applicant has not particularly proved that they had knowledge of the orders and that they willingly breached the said orders.
33. It is settled in law that although contempt of court proceedings are civil in nature, the standard of proof is higher than in ordinary civil cases. It was therefore incumbent upon the applicant to prove that the defendants conduct was deliberate in the sense that they have deliberately or willfully acted in a manner that breached the order of the court. This was stated by Mativo J in the case of *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR.
34. No evidence has been adduced in the supporting affidavit on how each of the 4th to 35th defendants, despite knowing the existence of the orders, abrogated them. No proof of service of the orders has been adduced. Further, although the applicants argue that the respondents are selling the disputed land, no evidence has been adduced to prove the alleged sale. The applicant took a rather lacklustre approach in the prosecution of this application.
35. There is another issue that I find necessary to consider and comment on. The order that the applicant seeks to enforce is an order of interim injunction issued on 15.6.2009 (over 13 years ago). The order restrained the defendants/respondents (then) from carrying on any activities including entering, constructing or disposing the Land registration number Nairobi/Block126/127.
36. Order 40 rule 6 of the *Civil Procedure Rules, 2010* provides that: -
- “Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of 12 months from the date of grant, the injunction shall lapse unless for any sufficient reasons the court orders otherwise.”
37. Allen Waiyaki Gichuhi, in his book titled, ‘Litigation, the art of strategy and practice’ rightly observes that before the amendment of the *Civil Procedure Rules, 2010*, once a litigant obtained an injunction he would either sit back and go into legal hibernation for more than a year or actively seek to frustrate the active prosecution of the suit by any means possible with the aim of prolonging litigation on the flimsiest of grounds, as he continued enjoying the interim injunction. To cure this, rule 6 of the *Civil Procedure Rules, 2010* was introduced imposing a one (1) year limit for the life of an interlocutory injunction order.
38. The import of the rule is that, after one year, the injunction automatically lapses. The court may extend the same however, (off course before it lapses) where sufficient reason is shown.
39. This rule is in line with the overriding objective of the *Civil Procedure Act*: the facilitation of just expeditious, proportionate and affordable resolution of Civil Procedure disputes.
40. I am in agreement with the position taken by the courts in the case of *Kitangila Ltd v Kezia Mumbi Paul & 5 others* (2014) eKLR and *Michael N Muiga Kenyatta & another v Barclays Bank of Kenya & others* in regard to the application of order 40 rule 6.
41. It is my holding therefore that in this case, there is no valid order in force to be enforced by this court. The order issued on June 15, 2009 lapsed after one (1) year. It is therefore non-existent. The defendants cannot be liable for contempt of a court order that does not exist.
42. Accordingly, I dismiss the applicant’s application dated February 15, 2022 but with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTMBER 2022**



**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Wakiaga for the plaintiff/applicant.

No appearance for the defendants.

Court Assistant Hilda.

**M.D. MWANGI**

**JUDGE**

