



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kainamia & another v Munyao & 4 others (Environment & Land Case  
245 of 2017) [2022] KEELC 12708 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12708 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 245 OF 2017  
YM ANGIMA, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**PETER NGUGI KAINAMIA ..... 1<sup>ST</sup> APPLICANT**

**JOHN MURAYA KAINAMIA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**TABITHA WAMBUI MUNYAO ..... 1<sup>ST</sup> RESPONDENT**

**GREGORY KANIA MUNYAO ..... 2<sup>ND</sup> RESPONDENT**

**ISAAC NJENGA MUNYAO ..... 3<sup>RD</sup> RESPONDENT**

**PETER GITHINJI MUNYAO ..... 4<sup>TH</sup> RESPONDENT**

**STEPHEN MUNYAO KANIA ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**A. APPLICANTS' APPLICATION**

1. By a notice of motion dated March 21, 2022 expressed to be based upon article 2 of *the Constitution* of Kenya 2010, order 51 of the *Civil Procedure Rules, 2010 (the Rules)*, sections 3 & 3A of the *Civil Procedure Act* (cap.21) sections 3 & 4 of the *Contempt of Court Act*, and all enabling provisions of the law, the applicants sought the following orders:
  - a. Spent;
  - b. Spent;
  - c. That this honorable court be pleased to punish the respondents herein by detaining them in prison for a term not exceeding six months for contempt of court for disobeying orders issued



by this Honorable court in the judgment dated December 10, 2019 and decree issued on July 7, 2021.

- d. That this honorable court be pleased to make such further orders as is just in the circumstances.
  - e. That costs of this application be borne by the respondents herein.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 2<sup>nd</sup> applicant John Muraya Kainamia, on March 21, 2022. The applicants contended that the respondents were in blatant violation of the order of permanent injunction granted against them *vide* the judgment dated December 10, 2019 whereby they were restrained, *inter alia*, from entering the suit property (parcel 1698), cutting down trees, cultivating or in any manner whatsoever interfering with the suit property. It was further contended that the said order was made in their presence and that of their advocates.
  3. The applicant contended that despite the existence of the said injunction the respondents had continued to enter the suit property and to cut trees thereon. They had also ploughed the suit property and interfered with the suit property by chasing away the applicants' servants or agents therefrom. It was further contended that the respondents alleged invasion and destruction of trees was reported to the Kenya Police Service in consequence whereof the respondents were arrested and charged with the offence of forcible detainer. The applicants contended that the respondents' said actions were deliberate and calculated to undermine the dignity and authority of the court hence the application.

## **B. THE RESPONDENTS' RESPONSE**

4. The 1<sup>st</sup> respondent filed a replying affidavit sworn on April 27, 2022 in opposition to the application. She stated that she was the mother of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in the matter. She stated that she and her family member had resided on the suit property since 1965 and that she intended to challenge the judicial decisions which conferred ownership of parcel 1698 upon the applicants. She stated that she had filed an application in Milimani ELC Misc No E060 of 2022 to set aside the judgment in Nairobi HCCC No 1994 of 1979 which had influenced subsequent judicial decisions on disputes over the suit property. The respondents consequently prayed for a stay of the instant proceedings pending the hearing and determination of her pending application in Milimani ELC Misc E060 of 2022 and NBI HCCC No 1994 of 1979.
5. The respondents did not, however, deny entering the suit property after delivery of judgment and cutting down trees thereon. They did not also deny ploughing the suit property or chasing away the applicant's servants or agents therefrom. They did not deny knowledge of the permanent injunction nor did they claim that its terms were unclear or unambiguous. The only issue they responded to directly was that they were acquitted in the criminal case concerning forcible detainer.

## **C. DIRECTIONS ON SUBMISSIONS**

6. When the application was listed for *inter partes* hearing the parties were directed to canvass it through written submissions. The parties were granted 28 days to file and exchange their respective submissions. The record shows that the applicants filed theirs on August 4, 2022 whereas the respondents filed theirs on September 1, 2022.



## D. THE ISSUES FOR DETERMINATION

7. The court has considered the notice of motion dated March 21, 2022, the respondents' replying affidavit sworn on April 27, 2022 as well as the material on record. The court is of the opinion that the following two issues arise for determination:
  - a. Whether the proceedings herein should be stayed.
  - b. Whether the applicants have demonstrated the contempt alleged against the respondents.
  - c. If the answer to (b) above is in the affirmative, what is the appropriate sanction to apply.

## E. ANALYSIS AND DETERMINATION

### (a) Whether the proceedings herein should be stayed

8. The court has considered the material and submissions on record on this issue. The respondents contended that they should be allowed time to challenge the judgment and decree in NBI HCC No 1994 of 1979. In their written submissions they contended that they had filed an appeal against the judgment of this court dated December 10, 2019 hence they should be granted time to pursue it to its logical conclusion without the risk of punishment for contempt of court.
9. It is evident from the material on record that the respondents had sought and obtained a conditional stay of execution of the decree herein pending the filing, hearing and determination of their intended appeal to the Court of Appeal. It is evident from the material on record that the conditional stay lapsed on account of their failure to satisfy the conditions set for the stay. The material on record further shows that the respondents sought a review and setting aside of the said judgment in 2021 but their application was unsuccessful.
10. The material on record further reveals that vide an application dated April 27, 2022 and amended on June 30, 2022 the respondents sought a stay of execution of the decree herein pending the hearing and determination of NBI ELC Misc No E060 of 2022 and Nyahururu HC JR No E005 of 2022. The said application was heard and ultimately dismissed by this court on July 28, 2022. In the absence of a stay from either the Court of Appeal or this court, the court finds no legal basis upon which the instant proceedings for contempt of court should be stayed or suspended. Accordingly, the first issue is answered in the negative.

### b. Whether the Applicants have demonstrated the contempt alleged against the Respondents

11. The court has considered the material and submissions on record on this issue. The elements of contempt of court in civil cases were summarized in the case of *Katsuri Limited v Kapurch and Debar Shab [2016] eKLR* as follows:

“There are essentially four elements that must be proved to make a 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 binding on the respondent.
- b. The respondent had knowledge of or proper notice of the terms of the order.
- c. The respondent had acted in breach of the terms of the order; and



d. The respondent's conduct was deliberate.”

12. Although the applicants set out in clear terms that the respondents had entered the suit property, cut down trees, ploughed it and chased away the applicants' servants, the respondents did not dispute those allegations in their replying affidavit. They did not deny that their actions were reported to the police service or that they were arrested as a result thereof. The only response they gave was that they were acquitted by the trial court at Engineer Law Courts.
13. The court has noted that in their written submissions the respondents have suggested that the terms of the permanent injunction were somehow unclear in that the property mentioned therein was parcel 1698 whereas what the respondents occupied was parcel 174. The court is unable to accept the respondent's contention on the alleged ambiguity in the judgment. The judgment was rendered on December 10, 2019 which is about 3 years back. The respondents were evicted from the suit property in August, 2021 about one year ago. They have never claimed that they were evicted by court bailiffs from the wrong parcel of land. They have never filed any application for clarification on the parcel number the subject of the suit and judgment.
14. The respondents did not allege that they were not aware of the permanent injunction. The material on record shows beyond peradventure that they were fully aware of the judgment hence the reason why they filed a notice of appeal and an application for stay of execution. It is because they were aware of the judgment that they filed an application for review and setting aside thereof, albeit without any success. The court is thus satisfied that the respondents were fully aware of the terms of the judgment.
15. In the absence of a credible explanation for the disobedience of the decree by the respondents, the court is entitled to hold that such disobedience was wilful and deliberate and intended to undermine the authority of the court. It is evident from the respondents' replying affidavit that they were not remorseful for what they did in violation of a subsisting decree. Despite having lost the suit, the respondents have persisted in exercising proprietary rights over the suit property without obtaining an order of stay of execution from either this court or the Court of Appeal. The court is thus satisfied that the applicants have proved contempt of court on the part of the respondents to the required standard.

**b. If the answer to (b) above is in the affirmative, what is the appropriate sanction to apply**

16. The court is aware that the *Contempt of Court Act* was declared unconstitutional by the High Court hence it is no longer in operation. The court has to revert to English Law which applied to Kenya prior to the enactment of the said legislation. The applicants have asked the court to imprison the respondents for six (6) months each without the option of a fine. The court is of the opinion that under section 5 of the *Judicature Act* and the applicable English Law the court is empowered to impose a fine, a prison term or both against proved contemnors.
17. However, before the respondents can be punished for contempt of court, they should be accorded an opportunity to tender their mitigation. Accordingly, the 1 – 5 respondents are hereby convicted of contempt of court for disobeying the permanent injunction made on December 10, 2019. The sentencing is deferred until September 29, 2022 for them to attend court personally to offer mitigation.

It is so ordered.

**RULING DATED AND SIGNED AT NYAHURURU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Ndichu for the Applicants



Elizabeth Ngugi for the Respondents

C/A - Carol

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Y. M. ANGIMA

