



Mariera & another v Ongwacho & 2 others (Environment & Land Case 305 of 2016) [2025] KEELC 3151 (KLR) (2 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3151 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 305 OF 2016**

M SILA, J

APRIL 2, 2025

BETWEEN

ISAAC ONWONGA MARIERA 1ST PLAINTIFF

ISAAC ONWONGA MARIERA (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE PASTOR SOSPETER MARIERA OONGO) 2ND PLAINTIFF

AND

ABEL MORANGA ONGWACHO 1ST DEFENDANT

LAND REGISTRAR, KISII COUNTY 2ND DEFENDANT

HONOURABLE ATTORNEY GENERAL 3RD DEFENDANT

RULING

(Application seeking to have 1st respondent committed to civil jail for failure to perform the decree; decree given for vacant possession of land and some monetary award in damages; affidavit sworn by the advocate; contention that the affidavit is incompetent; advocates should only swear affidavits in restricted situations; in this instance it is the decree holder to say whether the decree has been performed or why he has opted for the mode of execution in the application; court persuaded that the advocate should not have sworn the affidavit; affidavit struck out and with it the application is also struck out)

1. This ruling is in respect of the application dated 18 December 2025 filed by the plaintiffs. In the said application, the plaintiffs seek an order to have the 1st defendant committed to civil jail for failure to comply with the terms of the judgment despite being served with it and despite demands for him to comply. The application is opposed by the 1st defendant/respondent.



2. By way of background, through a plaint filed on 9 August 2012, the plaintiffs asserted ownership of the land parcel Kisii Municipality/Block III/240 and contended that the 1st defendant had illegally caused himself to be registered as the proprietor thereof. In the suit, they sought a declaration of ownership of the suit property, cancellation of the title of the 1st defendant, a permanent injunction to restrain him from dealing with the title of the suit land, a mandatory injunction to compel the 1st defendant to remove a fence that he had erected around the property, general damages for trespass, costs and interest. The 1st defendant filed defence and asserted that it was him who was the rightful owner of the suit property. I heard the case and delivered judgment on 9 November 2023. I entered judgment for the plaintiffs. Within that judgment I observed that after the case was filed, the plaintiffs applied for an order of injunction to stop the 1st defendant from continuing to erect a fence which by then was the only development taking place at the time. On 22 November 2013, the court ordered that the status quo be maintained. Despite the order the 1st defendant continued to develop the property and built a hotel. In my judgment I issued an order of permanent injunction against the 1st defendant and his servants/agents and/or any person claiming under him from entering, being upon, utilizing or in any way disturb the possession of the plaintiffs on the suit land. I ordered that from the date of the judgment the plaintiffs were at liberty to take possession of the suit land. I gave liberty to the plaintiffs to either receive and take the property as it is, or if they wish, demand through correspondence, that the 1st defendant removes whatever he has put up on the land. On the claim for general damages, I awarded the plaintiffs general damages in the sum of Kshs. 5,000,000/= together with costs of the suit.
3. The supporting affidavit to the subject application is sworn by Kelvin Mogeni who is also counsel on record for the plaintiffs. He has deposed that he is instructed by the plaintiffs to swear the affidavit and is fully conversant with the facts and circumstances of the case. He has deposed that despite the judgment and decree the 1st defendant/respondent has refused to comply which is causing significant prejudice to the plaintiffs. He has deposed that he personally served the 1st defendant with a copy of the judgment at the premises and later with the decree. He has annexed the affidavits of service. He avers that the continued defiance of the court's orders is a blatant disregard to the authority of the court.
4. On 21 February 2025, a notice of appointment of advocates was filed by M/s John & Jumba Advocates, to act for the 1st defendant/respondent. There was also filed a replying affidavit sworn by the 1st defendant/respondent. He raised issue that the application is supported by an affidavit of the advocate and not the applicants which he urged to be irregular as it deposes to matters of fact which are not within his knowledge. He has also deposed that he was served with the application after 48 days despite the court order made on 20 December 2024 when the application came under certificate of urgency directing that the application be served within 10 days. He has deposed that the judgment was delivered without notice to himself or his advocates thus in their absence. He deposes that he was not aware of the judgment until he was served with the application. He disputes that he was served as claimed in the supporting affidavit and reserved the right to call the deponent for cross-examination. He has added that non-compliance was exacerbated by mistakes of his advocate on record who at some point threatened to withdraw from handling the matter which resulted in him missing



crucial court sessions and resulted in judgment being entered in his absence. He has contended that the application is premature as the plaintiffs have never commenced any execution proceedings and that he has also never filed a bill of costs for taxation. He avers that the orders to compel him to comply with the judgment can only be issued by way of an application for judicial review whereas the process to commit him to jail should be initiated through a notice to show cause under Order 22 Rule 6. He contends that the plaintiffs have not demonstrated the standards required by Section 38 of the *Civil Procedure Act* to warrant committal to civil jail i.e that he is likely to abscond or has dishonestly transferred, concealed, or removed any party of his property or committed any other act of bad faith in relation to his properties. He urges that committal to civil jail is a last resort against a non-cooperating judgment debtor.

5. The application was heard on 18 March 2025 and I have considered the submissions made by counsel.
6. The application of course seeks to execute the judgment by way of committal to civil jail. It has been raised that the application is incompetent for being supported by an affidavit of counsel. In his rejoinder, Mr. Mogeni, learned counsel for the plaintiffs and the deponent of the supporting affidavit, argued that the affidavit contains facts that are fully within his knowledge and he is therefore competent to swear the affidavit.
7. My view is that an advocate should refrain from swearing affidavits unless he is deposing to facts that are strictly within his knowledge and which cannot be within the knowledge of his client. It should be a last resort for an advocate to place himself in a situation where he will be called upon to be a witness, for there can be a challenge to the depositions made in the affidavit, and you would wish to avoid the unsavoury scenario where the advocate is in the dock, when he is supposed to be at the bar arguing the case of his client. It should really be in cases where the client is incompetent to swear the affidavit that counsel should weigh in, and even then, it should be on facts that can only squarely be within the advocate's special knowledge.
8. In our case, the issue before me is the selection of the mode of execution. I would have thought that the selection of the mode of execution is a selection made by the litigant after considering many factors, and therefore it is the litigant who is to depose the affidavit thereof, and elaborate why he/she has chosen that particular mode of execution. In a monetary decree, it would be the litigant to say if he/she has been paid the money. In a case for vacant possession, it should be the litigant to say if he/she has received vacant possession, or if not, the difficulty that he has encountered in obtaining vacant possession. He can also say why he is opting for one mode of execution and not another. In our instance there is no such affidavit from the client. Mr. Mogeni does not explain why he is the one swearing the affidavit to support the application to have the 1st defendant committed to civil jail and not his clients. I however have no problem with the affidavit of service that he swore, for it is sworn by Mr. Mogeni in his capacity as the person who served the judgment and decree as he has indicated therein. In other words, he acted as the process server, and thus it is only him who could swear the affidavit of service.
9. The issue I have is with Mr. Mogeni swearing an affidavit to support a mode of execution which, as I have elaborated above, should be one to be supported by the litigant and which, as it has turned out, is hotly contested and needs justification. Indeed, a certain factual state of affairs needs to exist when a party is applying for



execution, which the party needs to elaborate for consideration by the court. I therefore agree with the 1st defendant that the application is supported by an incompetent affidavit that ought to be struck out. It is hereby struck out. Having struck out the affidavit the application remains unsupported and I have no option but to strike it out.

10. I am however unable to bring myself to award costs to the 1st defendant since it is apparent that to date he has yet to comply with the judgment. The application is therefore struck out with no orders as to costs. For the avoidance of doubt, I have not considered the merits or demerits thereof.
11. Orders accordingly.

DATED AND DELIVERED THIS 2ND DAY OF APRIL 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

****AT KISII**

Delivered in the presence of :

Mr. Kelvin Mogeni for the plaintiffs/applicants

Mr. J.M Mokaya for the 1st defendant/respondent

Ms. Osebe h/b for Mr. Wabwire for the 2nd & 3rd defendants

Court Assistant – Michael Oyuko

