



Malei & another (suing on behalf of the estate of Oltokokoi Merit Katiyu (deceased)) v Gitari and 168 others (Environment & Land Case 27 of 2020) [2022] KEELC 14764 (KLR) (16 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14764 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 27 OF 2020
MN GICHERU, J
NOVEMBER 16, 2022**

BETWEEN

**ENASO ENE PARISUE MALEI 1ST PLAINTIFF
ROTIKEN OLE MERIT OLTOKOKOI 2ND PLAINTIFF
SUING ON BEHALF OF THE ESTATE OF OLTOKOKOI MERIT KATIYU
(DECEASED)**

AND

JOSEPH BRADLEY WAWERU GITARI AND 168 OTHERS DEFENDANT

RULING

1. This ruling is on the notice of motion dated April 8, 2022. It seeks one main prayer which is as follows.
 - (a) The court be pleased to hold the plaintiffs together with the 1st, 2nd, 3rd and 4th defendants to the counterclaim in contempt of court and commit them to jail for six (6) months or for such period as the court may deem fit for breach of the orders issued on October 8, 2020.
2. The motion which is under articles 22, 23(3), (b) and (c), 40, 162 (2) (b) and 259 (1) of the *Constitution* of Kenya 2010, sections 13(7) (a), (b) and 14 of the *Environment and Land Court Act*, 24 of *National Police Service Act*, 1A, 1B and 3A of the *Civil Procedure Act* and order 40 rule 1 of the *Civil Procedure Rules* is premised on eight grounds, and supporting affidavit by one Ephantus Kariuki Wagaiyu and two annexures.
3. In a nutshell, the applicants are saying that in a ruling dated October 8, 2020, the court issued an order restraining the respondents, their agents, servants, employees, whomever from entering upon or trespassing, constructing any structures, occupying, cutting down trees, disposing off, charging, subdividing, dealing, alienating, letting or otherwise using, or representing to any person that they



are owners of or any way whatsoever from interfering with the 1st and 2nd defendant's proprietary rights including the right to quiet possession and enjoyment over all those parcels of land known as Kajiado/Kaputiei/ North - 43967 and Kajiado/Kaputiei- North/64760 – 65103 pending the hearing and determination of this suit as well as the counterclaim.

4. Despite the above order, the respondents through their relatives, agents or assignees have continued to mutinously disturb the quiet enjoyment and possession by the 2nd to 167th defendants of their respective parcels of land by bringing down fencing posts, cutting down trees, erecting structures, farming and harvesting in the restricted area, the latest act of impunity being the threatening to maim or kill the innocent parties who have attempted to access or beneficially utilize their plots.

Currently, a visit to the property will reveal a lot of destruction and prohibited activity on the plots.

5. The application is opposed by Enaso Ene Parisue Malei, the first plaintiff in an affidavit dated May 9, 2022 in which she denies any form of destruction because the applicants never had any development on the land because it was open grazing land with no improvements.

She adds that the application lacks tangible evidence of who did what and when as well as images of the destroyed property.

6. Joseph Bradley Waweru Gitari the first defendant in the suit and the plaintiff in the counterclaim has sworn a replying affidavit dated May 16, 2022 which has one annexure which is the order issued by this court on June 23, 2022.

In summary, the deponent supports the application dated April 8, 2022 because the annexed order restrained the respondents from entering the suit property.

7. Only the counsel for the 2nd to 167th defendants filed written submissions on November 9, 2022 which was outside the deadline of September 18, 2022. All the same, I have considered the said submissions.
8. I have carefully considered the application in its entirety including the affidavits, grounds, annexures and the submissions filed herein. I make the following findings.

Firstly, this court has power to punish for contempt under section 29 of the [Environment and Land Court Act](#) (Act No 19 of 2011) which provides as follows;

“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”.

Secondly, in contempt of court proceedings, it has been held that three elements must be proved namely;

- (i) The applicant must demonstrate terms of the orders;
- (ii) The applicant must demonstrate knowledge of the terms of the respondent and
- (iii) The applicant must demonstrate failure of the respondent to comply with the court order.

See [Charity Mpano Ntiyione v China Communications Construction Company Limited and NEMA \[2017\] eKLR](#) (Kajiado ELC).



In addition to the above, the court of appeal in the case of *Nyamodi Ochieng Nyamogo and another v Kenya Post and Telecommunications Corporation [1994] eKLR* (Nairobi Court of Appeal), held that the personal service of orders is a requirement in contempt of court proceedings.

Thirdly, in contempt of court proceedings, the threshold of proof is higher than that in civil cases, and committal to civil jail or other penalty is on the basis of evidentiary proof that leaves no doubt as to the contemnors culpability.

This was the holding in the case of *Mwangi HC Wangonde v Nairobi City Commission Civil Appeal No 95 of 1998 (Nairobi)*.

9. Applying the above principles of law to this case, I find that the notice of motion dated April 8, 2022 has not met the above criteria for the following reasons.

Firstly at paragraph 5 of the supporting affidavit by Ephantus Kariuki Wagaiyu, it is deposed that the parties have acted through their relatives, agents and assignees. The names of those relatives, agents and assignees are not given. It is also not stated if they have been served with the court orders.

Simply, it has not been proved that the prerequisites set out in the case of *Charity Mpano Ntiyione* were complied with by the applicants.

Secondly, the affidavit by the applicants' representative does not commit the deponent on the date or dates the disobedience of the court order happened or any documentary evidence to prove the damage.

Thirdly, it is not clear to me if the plaintiffs were already in occupation of the suit premises when the orders were made. This is critical because the order issued on October 8, 2020 was not mandatory in nature.

It did not specifically say that the respondents be evicted. I do not think that it would have said that they be evicted before they were heard.

For the above stated reasons, I dismiss the application dated April 8, 2022. I hasten to add, however, that if indeed the respondents are in occupation, they should not carry out any improvements on the land and they must not threaten the applicants.

I direct that since this case is partly heard, we fix a date for the defendants' case today.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16TH DAY OF NOVEMBER, 2022.

M N GICHERU

JUDGE

