



REPUBLIC OF KENYA



**KENYA LAW**  
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**Zibu & 9 others v Munguti & 10 others (Environment & Land Case  
78 of 2017) [2022] KEELC 15505 (KLR) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15505 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 78 OF 2017**

**CG MBOGO, J**

**DECEMBER 22, 2022**

**BETWEEN**

**CYRUS ROBBERT SALA ZIBU ..... 1<sup>ST</sup> PLAINTIFF**  
**DR. KLAUS HERBERT RICHTER ..... 2<sup>ND</sup> PLAINTIFF**  
**STEVEN MAKAU ..... 3<sup>RD</sup> PLAINTIFF**  
**PETER KIMEU MWANGANI ..... 4<sup>TH</sup> PLAINTIFF**  
**LILIAN KATUNGE MUEMA ..... 5<sup>TH</sup> PLAINTIFF**  
**PETER MANG'ALA ..... 6<sup>TH</sup> PLAINTIFF**  
**GIDEON KIOKO KIVANGULI ..... 7<sup>TH</sup> PLAINTIFF**  
**PETER MUSAU ..... 8<sup>TH</sup> PLAINTIFF**  
**JUMA OLIVER MASILA ..... 9<sup>TH</sup> PLAINTIFF**  
**MUTUKU KATALA ..... 10<sup>TH</sup> PLAINTIFF**

**AND**

**HENRY MULI MUNGUTI ..... 1<sup>ST</sup> DEFENDANT**  
**HENRY MWAKE ..... 2<sup>ND</sup> DEFENDANT**  
**DAVID NYUNGU ..... 3<sup>RD</sup> DEFENDANT**  
**MICHAEL KIOKO ..... 4<sup>TH</sup> DEFENDANT**  
**PENINA MUMBE ..... 5<sup>TH</sup> DEFENDANT**  
**ALICE WANGECI ..... 6<sup>TH</sup> DEFENDANT**  
**NATIONAL LAND COMMISSION ..... 7<sup>TH</sup> DEFENDANT**  
**GOVERNMENT OF THE MAKUENI COUNTY ..... 8<sup>TH</sup> DEFENDANT**



REGISTRAR OF SOCIETIES ..... 9<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 10<sup>TH</sup> DEFENDANT  
GOOD HOPE REHABILITATION CENTRE ..... 11<sup>TH</sup> DEFENDANT

## RULING

1. The plaintiffs/applicants filed the notice of motion dated November 9, 2020 under certificate of urgency of even date. It is brought under sections 1A, 1B, 3A and 34 (1) and (3) of the [Civil Procedure Act](#) in addition to order 42 rule 6 (1) and order 51 rule (1) of the [Civil Procedure Rules, 2010](#).
2. The applicants seek the following orders:
  - i) [spent]
  - ii) That there be stay of proceedings of Makindu E015 of 2020 Good Hope Children’s Home Foundation alias Good Hope Children’s Home v John Mutungi & others, pending the hearing and determination of this application.
  - iii) That filing a new suit by a party in this suit to defeat the decree of this court is an issue relating to execution of the decree under section 34 of the [Civil Procedure Act](#) to be determined by this court.
  - iv) That Makindu E015 of 2020 Good Hope Children’s Home Foundation alias Good Hope Children’s Home v John Mutungi & others be struck out for being *res judicata* and an attempt to set aside the decree herein through the backdoor.
  - v) that Henry Muli Munguti be punished for contempt.
  - vi) That the officer commanding station Mtito Andei police station should enforce the status quo order contained in the Court of Appeal in civil appeal No 260 of 2018.
  - vii) That costs of this application be provided for.
3. The application is premised on the grounds on the face it and the supporting affidavit of Steve Nzive Makau sworn on November 9, 2020. The applicant averred that the defendants have been filing duplicate suits on the same subject matter since finalization of the suit herein. That some of the said suits include Nairobi civil appeal No 260 of 2018, civil appeal (application) No 199 of 2018, Makindu Misc case No 1 of 2019 and civil case No 20 of 2018. That unless an order of stay of proceedings is issued, the different cases filed may issue conflicting decisions. That Nairobi civil appeal No 260 of 2018 is ongoing wherein the appellants are seeking for orders to set aside the judgment and decree of June 20, 2018 in ELC case No 78 of 2018.
4. It was further deponed that the 1<sup>st</sup> – 11<sup>th</sup> defendants filed civil case No 20 of 2018 seeking among other orders that one John Mutungi, an employee of the 11<sup>th</sup> defendant be restrained from evicting them from plot No 3762 and from interfering with their quiet enjoyment and management and affairs of the plaintiff/applicant. That the said suit was struck out after John Mutungi raised a preliminary objection based on a defence of *res judicata* that the issues therein had been resolved in ELC suit No 78 of 2017.
5. It was also argued that the Court of Appeal certified the appeal as ready for hearing and issued a status quo order with regards to plot Nos 3762 and 3792. That the rehabilitation centre was also supposed



to continue running as before as part of maintaining the status quo. That however, the 1<sup>st</sup> defendant herein has continuously defied those orders.

6. The applicant averred that in Makindu Misc case No 1 of 2019, the 1<sup>st</sup> – 11<sup>th</sup> defendants filed a notice of motion seeking the committal of John Mutungi to civil jail for contempt. However, after John Mutungi raised a preliminary objection that the court lacked jurisdiction, the said applicants filed a notice of withdrawal of the application which the court allowed.
7. It was further averred that the 1<sup>st</sup> defendant is a vexatious litigant who files multiple suits once a matter is not decided in his favour. That the defendants should be barred from filing new suits over the same subject matter pending hearing and determination of the appeal. That the plaintiffs and their representatives incur a great deal of legal costs and other expenses in defending the said suits. That the defendants will suffer no prejudice if the application is allowed.
8. On December 4, 2020 the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 11<sup>th</sup> defendants filed grounds of opposition to the application. It was contended that the court became *functus officio* on June 20, 2018 when judgment was delivered. That the court does not have jurisdiction to entertain the application or to issue orders for stay of proceedings. That the applicants had not demonstrated how the issues in Makindu E015 of 2020 Good Hope Children’s Home Foundation Alias Good Hope Children’s Home v John Mutungi & others are similar to civil appeal 260 of 2018 Henry Muli Munguti & others v Cyrus Robert Sala Zibu & others. That the application was frivolous and an abuse of the court process and as such it should be dismissed with costs.
9. The parties elected to dispose of the application by way of written submissions. On February 3, 2021, the respondents filed their written submissions. The counsel for the respondents submitted that the role of this court is *functus officio* because it delivered its judgment on June 20, 2018 and hence cannot render a valid decision on the application. It was also submitted that this court is not the right forum to hear the instant application. That in the event a new point of law arises or there is a change in circumstances, the appellate court is the proper forum and that the concept of finality of litigation must always be upheld.
10. The respondents further submitted that filing this application when civil appeal No 260 of 2018 Henry Muli Munguti & others v Cyrus Robert Sala Zibu & others is pending before a court of competent jurisdiction is an abuse of the court process. That it would amount to usurping the role of the Court of Appeal. It was also argued that the applicants had not attached a copy of the pleadings of Makindu E015 of 2020 Good Hope Children’s Home Foundation Alias Good Hope Children’s Home v John Mutungi & others to demonstrate that the matter is *res judicata*.
11. Lastly, the counsel for the respondents argued that the applicants had failed to adhere to the mandatory legal requirements that apply to contempt proceedings. That the application is a non-starter, that it is bad in law and ought to be dismissed with costs. To buttress their submissions, the respondents relied on the authorities annexed to their list of authorities dated February 2, 2021. The authorities are:-
  - a. [\*In re Estate of Jonathan M’Itambu M’Mugambi\(deceased\)\*](#) (2019)Eklr
  - b. [\*Dickson Muricho Muriuki v Timothy Kangondu Muriuki & 6 others\*](#) (2013)eKLR
  - c. [\*Akithii Ranching \(Directed Agricultural\) Company Limited v District Land Adjudication and Settlements Officer Tigania Districts & 2 others\*](#) (2014)eKLR.
  - d. [\*Njue Ngai v Ephantus Njiru Ngai & another\*](#) (2016)eKLR



- e. *Beatrice Wambui Mathenge & 2 others v CS, Ministry of Industrialization & Enterprise Development & 2 others* (2015)eKLR.
12. The applicants filed their submissions on February 25, 2021. On their behalf the counsel submitted that prayers 1 and 2 of the application are spent. The applicants identified three issues for determination namely: -
- i) Whether this court has the jurisdiction to entertain this application;
  - ii) Whether the 1<sup>st</sup> defendant/respondent herein is in contempt of court orders issued by this court on July 12, 2018; and
  - iii) Whether the applicants are entitled to the costs of this motion.
13. The counsel for the applicants argued that the doctrine of *functus officio* does not apply to contempt proceedings and this court has the jurisdiction to entertain procedural applications to review the judgment or punish a contemnor for contempt of court. That this court has the authority to punish anyone who refuses to obey a court order under section 29 of the *Environment and Land Court Act*. It was also submitted that shortly after issuance of this court's decree dated July 12, 2018, the 1<sup>st</sup> defendant hurriedly filed Makindu ELC No 20 of 2018 on July 17, 2018. That the said case was determined after a preliminary objection was raised and the court noted that the said suit was filed after the issue of ownership of the suit property had been determined by this court.
14. It was further submitted that the 1<sup>st</sup> defendant/respondent herein has filed Makindu ELC E015 of 2020 and obtained ex parte orders. That the said orders violate the status quo orders issued by the Court of Appeal in civil application No 199 of 2018. Lastly, it was submitted that the applicants had demonstrated contempt of court orders by the 1<sup>st</sup> respondent to the required standard of proof. It was prayed that this court ought to grant prayers 5 and 7 of the application.
15. I have considered the pleadings and submissions of learned counsel. The applicants have conceded that prayers 1 and of the application are spent. Therefore, the only apparent issues for determination are as follows: -
- i) Whether the applicants have demonstrated contempt of this court's decree dated July 12, 2018.
  - ii) Whether the applicants are entitled to costs herein.
16. The first port of call with respect to the procedure for institution contempt of court proceedings in this country is section 5 of the *Judicature Act* cap 8 Laws of Kenya. That section provides as follows: -
- (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 subordinate courts.
  - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
17. Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR. In that case the court recognised that the only statutory basis for contempt



of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the *Judicature Act*.

18. Under rule 81.4 of the *English Civil Procedure Rules (amendment No 3) Rules, 2020* the requirements of a contempt application are as follows: -

- (1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
- (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
  - (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
  - (b) the date and terms of any order allegedly breached or disobeyed;
  - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
  - (d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
  - (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
  - (f) the date and terms of any undertaking allegedly breached;
  - (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
  - (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
    - (i) that the defendant has the right to be legally represented in the contempt proceedings;
    - (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
    - (k) that the defendant may be entitled to the services of an interpreter;
    - (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
    - (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
    - (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
    - (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
    - (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;



- (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
- (r) (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.

19. Rule 81.5 thereof deals with the manner of service of the application and provides that: -

- (1) Unless the court directs otherwise in accordance with part 6 and except as provided in paragraph (2), a contempt application and evidence in support must be served on the defendant personally.
- (2) Where a legal representative for the defendant is on the record in the proceedings in which, or in connection with which, an alleged contempt is committed—
  - (a) the contempt application and evidence in support may be served on the representative for the defendant unless the representative objects in writing within seven days of receipt of the application and evidence in support;
  - (b) if the representative does not object in writing, they must at once provide to the defendant a copy of the contempt application and the evidence supporting it and take all reasonable steps to ensure the defendant understands them;
  - (c) if the representative objects in writing, the issue of service shall be referred to a judge of the court dealing with the contempt application; and the judge shall consider written representations from the parties and determine the issue on the papers, without (unless the judge directs otherwise) an oral hearing.

20. Rule 81.7 deals with directions for hearing of a contempt application and provides that: -

- (1) The court shall give such directions as it thinks fit for the hearing and determination of contempt proceedings, including directions for the attendance of witnesses and oral evidence, as it considers appropriate.
- (2) The court may issue a bench warrant to secure the attendance of the defendant at a directions hearing or at the substantive hearing.
- (3) The court may not give any direction compelling the defendant to give evidence either orally or in writing.

21. Rule 81.8 then deals with hearings of such applications and provides that: -

- (1) In accordance with rule 39.2, all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs.
- (2) Advocates and the judge shall appear robed in all hearings of contempt proceedings, whether or not the court sits in public.
- (3) Before deciding to sit in private for all or part of the hearing, the court shall notify the national print and broadcast media, via the press association.
- (4) The court shall consider any submissions from the parties or media organisations before deciding whether and if so to what extent the hearing should be in private.



- (5) If the court decides to sit in private it shall, before doing so, sit in public to give a reasoned public judgment setting out why it is doing so.
  - (6) At the conclusion of the hearing, whether or not held in private, the court shall sit in public to give a reasoned public judgment stating its findings and any punishment.
  - (7) The court shall inform the defendant of the right to appeal without permission, the time limit for appealing and the court before which any appeal must be brought.
  - (8) The court shall be responsible for ensuring that judgments in contempt proceedings are transcribed and published on the website of the judiciary of England and Wales.
22. Rule 81 (8) provides for the powers of the court in contempt proceedings. It outlines that: -
- (1) If the court finds the defendant in contempt of court, the court may impose a period of imprisonment (an order of committal), a fine, confiscation of assets or other punishment permitted under the law.
23. In this case, it is manifestly clear that the substantive procedure for filing of contempt proceedings has not been complied with. The applicants have invoked various sections of the Civil Procedure Act cap 21 Laws of Kenya without any regard for section 5 of the Judicature Act cap 8 Laws of Kenya. As it stands, this court is divested of jurisdiction to hear and determine the application in respect of prayers 3, 4 and 5 thereof under which, the applicants have alleged contempt of this court's decree produced in the supporting affidavit thereof as annexure 1.
24. Therefore, I will not belabour the point further. The application herein is a non-starter and it is fatally defective. It is hereby struck out with costs to the respondents

**SIGNED, DATED and DELIVERED** at **NAROK** via email this 22<sup>nd</sup> day of December, 2022.

**MBOGO C.G.**

**JUDGE**

22/12/2022

Court Assistant: Chuma

