



REPUBLIC OF KENYA



**Mwarika v Mlaji & 2 others (Environment & Land Case
47 of 2022) [2025] KEELC 1316 (KLR) (11 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 47 OF 2022**

**LL NAIKUNI, J
MARCH 11, 2025**

BETWEEN

CHIBUNDA RIKA MWARIKA PLAINTIFF

AND

MKULU MLAJI 1ST DEFENDANT

SHUWEYA BAKARI 2ND DEFENDANT

GRACE RITARA 3RD DEFENDANT

RULING

I. Introduction

1. The Honourable Court was tasked to make a determination onto the Notice of Motion application dated 16th January, 2025. It was brought by the Respondents/Applicants mkulu mlaji shuweya bakari and grace ritara pursuant to the provisions of Section 5 [1] of the *Judicature Act* Cap 8 laws of Kenya, Sections 3, 4[1] [a], 5, 28 and 34 of the *Contempt of Court Act* No. 46 of 2016 of Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A and 3A of the *Civil Procedure Act* Cap. 21 of the Laws of Kenya and all other enabling provisions of the law.
2. From the records, although the application was unopposed, the Honourable Court still proceeded to deliberate and make a determination on its own merit whatsoever.

II. Defendants/Applicants Case

3. The Defendants/Applicants sought from court to be granted the following orders: -
 - a. That an order of committal be made against one Chibunda Rika Mwarika the Plaintiff/Respondent herein to prison for such a period as this honourable court may deem fit and just for disobeying court orders made by this honourable court on the 21st of December 2022



- b. Any other order deemed expedient in the circumstances.
4. The application is premised upon the grounds, testimonial facts and the averments made out from the 19 Paragraphed Supporting Affidavit of SHUWEYA BAKARI together with the five (5) annexures marked as “MSG – 1 to 5” annexed hereto. He averred as follows that: -
- a. He was the 2nd Defendant/Applicant herein and hence duly authorised to make and swear this affidavit.
 - b. The Plaintiff/Respondent herein filed a Notice of Motion application dated 25th October 2022 seeking injunctive orders against the Defendants/Applicants herein.
 - c. The application was heard ex - parte on 2nd November 2022 and orders were granted in terms of status quo on the suit property.
 - d. The Defendants were then served with the orders issued.
 - e. On 8th December 2022 the matter came up for hearing whereby by consent of the parties the application was compromised and that that the status quo orders were to be maintained until determination of the suit.
 - f. The Plaintiff/Respondent was ordered to refrain from erecting new structures of whatever nature in the suit premises.
 - g. It was stated that prior to the status quo orders, the Respondent lived on the suit property with the permission of the 1st Defendant and had put up temporary structures but no new structure had been erected.
 - h. Despite of the orders being granted by the court and the Respondent being aware of the same and the penal consequences thereto, he proceeded to construct a semi-permanent house on the suit premise in blatant breach of the court order.
 - i. The issue was raised in court on 30th November 2023 in the presence of the Respondent’s Counsel and the Respondent was given a stern warning by the court to cease from further developing the suit property in any way.
 - j. The Court having pronounced the order, the Plaintiff/Respondent was compelled to adhere with the said court orders failure to which the Plaintiff/Respondent was in contempt and should be held as such.
 - k. Despite of the stern warning, the Respondent had proceeded and continued with roofing the house in blatant disobedience of the court orders issued on 30th November 2023 as evidenced by the photographs attached to the affidavit.
 - l. It is in the interest of justice that the application be allowed as prayed.

III. The Plaintiff/Respondent’s Case

5. Despite service of the application upon the Plaintiff/Respondent as the application is unopposed. The court is convinced of service upon the Plaintiff/Respondent having been effected as evidenced by the affidavit of service sworn by Abdurahman O. Aminga Advocate who is in conduct of this suit on behalf of the Defendants/Applicants. At paragraph 4 of the affidavit, it is stated as follows;

“That on 8th October 2024 at around 10:00am I drove to Shimoni and met the village elder one Gonyu Masoud of phone no 0700*536 who led me to the homestead of the Plaintiff



[Chibunda Rika Mwarika] and upon introducing myself and the purpose of my visit I proceeded to serve him with the application herein dated 16th January 2024 returned duly signed and served”.

IV. Submissions

6. On 21st January 2025, directions were issued by this court to have the matter dispensed by way of written submissions within the set timelines. The Respondent was also given time limit within which to file a response to the application. At the time of preparing this ruling, none of the parties had filed any written submissions. Nonetheless, the court will however proceed to render its verdict on the application.

V. Analysis and Determination

7. I have keenly assessed the filed pleadings by the Defendant/Applicant on the subject matter, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
8. In order to reach an informed, fair and reasonable decision, the Court has framed the following two (2) issues for its determination namely: -
 - a. Whether the Notice of Motion application dated 16th January, 2025 by the Respondents/Applicants has any merit whatsoever.
 - b. Who bears the costs of the application?

IssueNo. a). Whether the Notice of Motion application dated 16th January, 2025 by the Respondents/Applicants has any merit whatsoever.

9. Under this sub – title, the main substratum from the filed application is punishing through committal of a party to Civil jail for being in breach of the Court order. From the very onset, the court wishes to make an observation from the Learned Justices of Appeal in the case of “Shimmers Plaza Limited v National Bank of Kenya Limited *CA No 33 of 2012* when it quoted Theodore Roosevelt, the 26th President of the United States who once said;

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour.”

10. In the course of time, the Courts have stated on an umpteenth time that Court orders are not a formality nor cosmetics. The said orders are never issued in vain. They have to be obeyed at all costs. Should anyone be aggrieved with the said order the remedy is to get it varied or reviewed or set aside. The law that governs the issue on committal proceedings are founded under the provision of Section 5 (1) of the *Judicature Act*, Cap. 8 grants the High Court and the Court of Appeal the power to punish for contempt. It provides: -

“(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.



11. Additionally, the law with regard to disobedience of an injunctive order is found in Order 40 Rule 3 (1) of the Civil Procedure Rules, of 2010 and states as follows: -

“In cases of disobedience or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release”

Mativo J. restated the test for establishing contempt in his decision in the case of: - “Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR” where he stated: –

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“40. 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.

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. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book “Contempt in Modern New Zealand” who succinctly 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.”

12. Furthermore, from the said decision, it summarised the nature and purpose of contempt proceedings was summarised inter alia: -

“Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest”.



13. The Constitutional Court of South Africa in the case of “Kristen Carla Burchell v Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005 stated as follows: -

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

14. From the instant case, the Court has been tasked with making a determination on whether the Plaintiff/Respondent wilfully disobeyed the orders of the court made on 21st December 2022. It was the argument by the Defendant/Applicant that the Plaintiff/Respondent wilfully disobeyed injunctive orders issued by the court by continuing with putting up structures on the suit property. In order to support this allegation, my attention has been drawn to a set of photographs attached to the affidavit in support of the application before court. The same are annexed as “MSG - 4[a] to [f]”. A further bundle of photographs marked as “MSG - 5 [a] to [d]” have been also attached to the affidavit under paragraph 11. At paragraph 13, the 2nd Defendant/Applicant, the deponent in the said affidavit informed the court that the photographs were taken by him.
15. Critically speaking, I have noted the existence of obvious challenges inherent in confirming that the photographs were those of from the suit property, what has been presented before court are two sets of photographs one allegedly before the orders for status quo were issued and the other bundle after. Apparently, the difference is the roofing part. But what is the certainty that these photographs were taken on the suit property? The provisions of Sections 78A and 106A to 106G of the *Evidence Act*, Cap. 80 demands for fulfilment of certain fundamentals of electronic material including making of Certificate of Production. Section 78A provides that: -
- (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
 - (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
 - (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
 - (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
 - (c) the manner in which the originator of the electronic and digital evidence was identified; and
 - (d) any other relevant factor.
18. From the record, the court is not convinced that there is reliability in how the evidence was generated. The manner in which the evidence was identified has not been satisfactorily explained and proved. With that it is this court’s finding that it has not found any tangible evidence tendered in proof of



allegations that despite the injunction orders being served upon the Respondent, he has continued with making development of structures on the suit property. Odunga J (as he then was) in the case of:- “Alfred Mutua v Boniface Mwangi [2022] eKLR held that:-

“ 22. In my view, considering the seriousness with which the Court takes contempt of court proceedings, every stage of the hearing must be expressly clear to the Defendant and any ambiguity must be resolved in favour of the Defendant since such proceedings are quasi-criminal in nature, otherwise, a benefit of doubt would inure to the benefit of the Defendant.”

19. Further in the case of:- “Augustine Marete Rukunga v Agnes Njeri Ndungire & Anor, HCCC 2160 the court was emphatic when it stated that;

“The consequence of a finding of contempt is penal. The standard of proof is beyond reasonable doubt. The applicant therefore had to prove service beyond reasonable doubt and I must be satisfied that the respondents disobeyed the court order made on the 9th December 1998 and that they did so wilfully or intentionally”

19. Based on the afore - going and the doctrine of the burden of proof, I discern that the Defendant/ Applicant has not succeeded in causing this Honourable Court to consider and issuing orders for committal of the Plaintiff/Applicant to civil jail for allegedly being breach of Court order. Thus, the application must fail.

IssueNo. b). Who bears the costs of the application?

20. It is now well established that the issue of costs is at the discretion of the Court. Costs mean an award that is granted to a party at the conclusion of any legal action or proceedings in any litigation. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 provides that costs follow the event. By event it means the result or outcome of the afore stated legal action or proceedings.

21. In the instant case, although the Defendant/Applicant has failed to demonstrate any justifiable cause why the Plaintiff/Applicant should be committed for allegedly disobedience of Court order, the Honourable Court finds it unreasonable to award any costs and particularly taking that the application was unopposed after all thus not entitled to costs.

VI. Conclusion & disposition

22. In the long run, having caused an in-depth analysis of the farmed issues herein, the Honourable Court based on the principles of Preponderance of Probabilities and the balance of convenience, the court is inclined to giving the Plaintiff/Respondent a benefit of doubt. The current status of the suit property shall remain as it is pending the hearing and determination of the suit. Consequently, the court proceeds to grant the following orders: -

a. That the Notice of Motion application dated 16th January 2025 be and is hereby dismissed for lack of merit.

b. That in order to continue preserving the suit property pending the hearing of the suit the status quo to be maintained meaning the situation to remain as it was prior to filing of the suit.

c. That for expediency sake the matter to be mentioned on 12th June, 2025 for purposes of conducting Pre – Trial Conference and pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010. There be a hearing of the matter on 24th September, 2025



d. That there be no orders as to costs.

It Is Ordered Accordingly.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED
AND DATED AT KWALE THIS 11TH DAY OF, MARCH 2025**

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**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT AT KWALE**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. Mr. A. O Amunga Advocate for the Defendant/Applicant.
- c. No appearance for the Plaintiff/Respondent.

