



**Gitau & another v Mwangi (Environment and Land Appeal
E050 of 2024) [2025] KEELC 4249 (KLR) (3 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E050 OF 2024**

MN GICHERU, J

JUNE 3, 2025

BETWEEN

SAMUEL MBURU GITAU 1ST APPELLANT

JOSEPH NGANGA GITAU 2ND APPELLANT

AND

ROBERT BENSON MWANGI RESPONDENT

RULING

1. This ruling is on the notice of motion dated 5-12-2024. The motion which is by the Appellants is brought under Sections 1A, 1B, 3A, 38, 40, 42(1) and 43 of the *Civil Procedure Act*, Orders 22 rules 33(1) and 42, 51 rule 1 of the Civil Procedure Rules, Section 31 of the *Contempt of Court Act*, Articles 21(3), 40, 48, 50, 57, 159(2) and 260 of *the Constitution* of Kenya and all other enabling provisions of the law.
2. The motion seeks the following residual orders.
 4. That further proceedings in Kigumo SPMC ELC No. 11 of 2019, Robert Benson Mwangi vs. Samuel Mburu Gitau and Joseph Ng'ang'a Gitau be and are hereby stayed pending the hearing and determination of this appeal.
 5. That the costs of this application be in the cause.

Orders 2 and 3 were allowed on 16/12/2024. Order 2 was for the release of the Appellants from civil jail on cash bail or other terms pending the inter partes hearing while Order 3 was for stay of the proceedings in the lower court case pending the inter partes hearing.



3. The motion is based on 18 grounds and two supporting affidavits dated 5-12-2024 and 4-2-2025. The gist of the above material is as follows. One, on 11-7-24, the learned trial magistrate ordered that the Appellants be committed to civil jail for a period of six(6) months and issued warrants of their committal to civil jail. Two, on 5-12-2024, the same trial magistrate declined to stay execution of the order committing the Appellants to civil jail. Three, the decree issued on 25-9-2023 was for the transfer of 1.675 acres of L.R. No. Loc.7/Kaharo/7 to the Respondent and the Respondent had already transferred the land to himself. Four, the acts complained of in the motion dated 28-2-24 to the effect that the Appellants had disobeyed a non-existent decree issued on 24-8-23 by cultivating L.R. No. 7/Kaharo/2104 measuring 1.675 acres have not continued and never happened. Five, the case against the Appellants proceeded ex parte on the hearing date as the Appellants did not attend the hearing owing to a mistake made by their former advocate. The Appellants were therefore condemned unheard. Six, the Appellants are aged 69 and 81 respectively thus falling in the category of vulnerable members of society. Seven, they suffer chronic ailments like hypertension, dementia, kidney disease and diabetes. They require special medical attention and confining them to jail will cause serious or fatal decline in their health. Eight, the decree of the lower Court not being a money decree, the order of committal to civil jail exceeds the maximum period in deserving cases which is a maximum of six(6) weeks. Nine, the lower court suit was slated for mention on 6-2-2025 for filing of submissions in respect of the Appellant's application dated 12-11-2024. Nine, unless the motion is allowed, the substance of this appeal will be rendered nugatory. Ten, the Appellants have an arguable appeal and are likely to suffer substantial loss if the orders sought are not granted. Finally, the Appellants are willing to provide security for the due performance of the decree in the event that the appeal fails.
4. The motion is opposed by the Respondent who has sworn a replying affidavit dated 20-12-2024 and a supplementary affidavit dated 10-2-2025. He replies as follows. One, the motion is a mischievous attempt to delay the timeous disposal of the suit because execution of the decree is complete. The Respondent has already obtained title to the suit land known as Loc.7/Kaharo/2104. Two, there is no evidence that the Applicants suffer from dementia since no medical evidence has been attached. If they have dementia, they have no capacity to swear the affidavits in support of their application. Three, there is inordinate delay in filing this application because the order of committal to jail for contempt was made on 24-8-2023 and this application is dated 12-11-2024. Four, the Applicants have not purged their contempt and they should not be given audience by this court until they purge the contempt. Five, the Applicants are vexatious litigants and this application is scandalous. Six, this is not an appeal against the judgment of the lower court because time for filing any appeal lapsed. Seven, the Applicants hands are soiled as they have blatantly committed other acts of contempt and therefore, they cannot get equitable relief. For these and other reasons, the Respondent prays for the dismissal of the motion.
5. Counsel for the parties filed written submissions dated 24-3-25 and 24-2-25 respectively. The Appellant's counsel identified the following issues for determination.
 - a. Whether Joseph Ng'ang'a Gitau is competent to swear the affidavit in support of the current application.
 - b. Whether the Appellant's should be released from jail pending the determination of the appeal.
 - c. Whether stay of proceedings in Kigumo SPMC ELC Case No.11 of 2019 should issue pending the determination of this appeal.
6. I have carefully considered the motion in its entirety including the grounds, the four affidavits and the annexures. I have also considered the written submissions by learned counsel for the parties. I find that



there are other issues raised in the grounds by the Applicants which are not captured in the written submissions.

They include the following.

- i. Whether in non money decrees, committal to civil jail should be for a maximum of six weeks.
 - ii. Whether there is finality in the lower court to enable this court assume jurisdiction.
 - iii. Whether there is inordinate delay in the filing of the current application.
 - iv. Whether the Applicants have purged their contempt.
7. On the 1st issue, I find that it is the Applicants themselves who said that they have dementia. This is vide paragraph 12 of the affidavit dated 5-12-24 sworn by the 2nd Applicant. Senile dementia according to Black's Law Dictionary, "is characterized by slowness and weakness of the mental processes and general physical degeneration, verging on or passing into imbecility, indicating the breaking down of the mental powers in advance of bodily decay." Aging is a process. It does not set in suddenly and with it comes dementia. Even though it is the Applicants themselves who said that they have dementia, I do not think that they have senile dementia so as to be incapable of swearing the two affidavits on record. I agree with their counsel that there is no specific finding by this Court or any other court that the Applicants are of unsound mind. No inquiry has been carried out as required by Order 32 of the Civil Procedure Rules to enable us reach that finding of their unsoundness of mind.
8. The Applicants were found to be in contempt of Court for cultivating L.R. No. Loc. 7/Kaharo/2104 measuring 1.675 hectares for four(4) days until 24-2-24 when they cut down a tree growing on the portion and sawed timber and harvested avocados from the land. Even though the warrant may be wrongly worded, it is not in doubt why the Applicants were committed to civil jail. It is also not in doubt that there is no option of a fine given to them. As to whether they should be released from jail, let me defer that to the conclusion.
9. I find that it is not prudent to stay the proceedings of the lower court. The Applicants should only come to this court when there is finality in the lower court. I do not fault them for coming to this court to set aside their committal to civil jail but since the suit in the lower court is concluded and all that remains is the pending application, let the court make a final determination. Even though this court found that the intended appeal was filed out of time, under Order 43 rule 1(k), if the lower court were to dismiss the application pending before it, the Applicants have a right of appeal against that dismissal.
10. In ground 'm' of the motion dated 5-12-2024, the Applicants' counsel posited as follows.

"The decree in the lower court not being a money decree, the court's committal of the Appellants to jail for 6 months is unlawful as the jail term (even in deserving cases not being money decree) the maximum term is six weeks."

In the written submissions dated 24-3-25, counsel has not given his authority for the above proposition. I find no good basis for the proposition. Section 42(1) (b) of the [Civil Procedure Act](#) as well as the whole of Section 42 relates to execution of decrees. It has nothing to do with contempt of Court.

Under Section 28(1) of the Law of Contempt Act (Cap 8F Laws of Kenya) it was provided as follows.

"save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both."



The Act was declared unconstitutional for lack of public participation on November 9, 2018 in the case of Kenya Human Rights Commission vs The Attorney General and Another.

Order 40 rule 3(1) of the Civil Procedure Rules provides as follows.

“In cases of disobedience...

may order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.”

Section 10 of the magistrate’s court Act does not provide for any sentence except where contempt is in the face of the court. The trial magistrate was within her powers to order that the Applicants serve a sentence of six(6) months which is in conformity with other provisions of the Civil Procedure Act when it comes to contempt of court.

11. I find that the current motion was brought on time because it was only on 5-12-2024 when the learned trial magistrate declined to issue an order of stay of execution. The application is dated the same day.
12. On purging their contempt, I find that the Respondents have not done so. There is no evidence on record to show that the Applicants have apologized to the Court or to the Respondent. This is not to say that I find that the Applicants guilty of contempt . This was upon the learned trial magistrate to do so.
13. In the final analysis, I find that the trial magistrate should consider the age of the Applicants, their health conditions, the fact that the Respondent is already the registered owner of the land and that the two old men will not appeal against the judgment and decree dated 24-8-2023 as per the ruling of this Court dated 31-7-2024. All these are difficult circumstances weighing against the Respondents. Owing to these circumstances a non custodial sentence is well deserved and appropriate.
14. For the above state reasons, I order as follows.
 - a. The Applicants released on cash bail of Kshs. 10,000/= each pending the conclusion of the lower court case.
 - b. Proceedings in Kigumo SPMC ELC No.11 of 2019 to continue to their final conclusion.
 - c. Mention within 7 days of the conclusion of Kigumo SPMC ELC No.11 of 2019.
 - d. Costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 3RD DAY OF JUNE, 2025.

M.N. GICHERU

JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Appellant’s Counsel – Mr Ochieng

Respondent’s Counsel – Mr. T.M. Njoroge

