



REPUBLIC OF KENYA



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**Jacob v M’Nchebere & 4 others (Environment and Land Appeal
E010 of 2023) [2025] KEELC 6036 (KLR) (15 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6036 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E010 OF 2023
BM EBOSO, J
SEPTEMBER 15, 2025**

BETWEEN

IBRAHIM GITONGA JACOB APPELLANT

AND

HENRY M’NCHEBERE 1ST RESPONDENT

RUTH M’NCHEBERE 2ND RESPONDENT

ZIPPORAH M’NCHEBERE 3RD RESPONDENT

MWENDWA M’NCHEBERE 4TH RESPONDENT

YUSUF MUNGATHIA M’MITHIANO 5TH RESPONDENT

*(Being an appeal against the Ruling of the Chief Magistrate court
at Maua [Hon. Tito Gesora] rendered on 27/7/2023 in Maua Chief
Magistrate Court Environment and Land Case Number 57 of 2020)*

JUDGMENT

Introduction

1. This appeal challenges the ruling of the Maua Chief Magistrate Court (Hon. Tito Gesora, CM), rendered on 27th July, 2023 in Maua CMC E & L Case No. 57 of 2020. Through the impugned ruling, the Lower Court dismissed the appellant’s application dated 19th February, 2021, through which the appellant sought an order citing the respondent for contempt for disobeying the order issued by the Lower Court on 21st January, 2021. The key question to be answered in this Judgment is whether the Lower Court exercised its jurisdiction properly in declining to grant the contempt order that was sought by the appellant against the respondent. I will outline a brief background to the appeal and summarize the parties’ respective cases in the appeal before I dispose the above issue.



Background

2. Through a plaint dated 16th July, 2020 the appellant filed a suit in the Lower Court against the respondents, seeking a permanent injunction restraining the respondents and their agents against trespassing on, encroaching on or interfering with the appellant's possession of land parcel number Nyambane/Antubetwe- Njoune/48 [hereinafter referred to as "the suit land"]. He also sought an order awarding him costs of the suit. His case was that he was the registered proprietor of the suit land and that the respondents were his neighbours. He contended that on 7th July, 2020, the respondents trespassed onto the suit land and purported to excise ½ of an acre out of the suit land.
3. The appellant subsequently filed an affidavit of service sworn on 18th July, 2020 by David Mwenda Kanyamu in which the deponent stated that he had served pleadings and summons on all the respondents on 17th July, 2020. On 30th July, 2020, all the respondents appeared in person before the Lower Court [Hon. Gesora]. On that day, the appellant's counsel [Muchiri] informed the Lower Court that the offending fence had been removed and the respondents were seeking a settlement. The record of the Lower Court does not bear any indication suggesting that the application dated 16th July, 2020 was canvassed on that day. The Lower Court nevertheless proceeded to grant the application in the following verbatim terms:

“ Court: Application is allowed in terms of prayer c. Parties to file replies and do compliance”.

4. Subsequent to that, on 31st August, 2020, at the formal request of the appellant, dated 24th August, 2020, the Lower Court entered interlocutory judgment against the respondents. On 8th October, 2020, the Lower Court Registry fixed the case for formal proof on 21st January, 2021. Subsequently, an expert formal-proof hearing of the case was conducted by the Lower Court on 21st January, 2021 and an exparte final judgment was rendered against the respondents on the same day.
5. What followed was an application by the appellant, dated 19th February, 2021, seeking an order citing the respondents for contempt in relation to the ex-parte orders [judgment] dated 21st January, 2021. On 17th March, 2021 the respondents filed an application dated 16th March, 2021, seeking an order setting aside the ex-parte judgment. They also sought leave to file a defence in the suit.
6. The appellant's application for contempt orders was subsequently canvassed through written submissions and disposed through a ruling rendered on 27th July, 2023 in which the Lower Court rejected the application in the following verbatim terms: -

This is the ruling with respect to the application dated 19/02/2021 seeking that the defendants be cited for contempt for disobeying a lawful decree of court.

From the pleadings and various affidavits, at the heart of this matter is a boundary issue and who owns what.

It's my considered view that this can only be done in a full hearing with evidence tested by cross- examination and with full appreciation of the surveyor's report.

Contempt proceedings are quasi- criminal and proof must be beyond reasonable doubt since there is a question on ownership of the suit land. I am not convinced that this has been proved beyond reasonable doubt.

The more prudent thing to do is to go for a full hearing. Application is dismissed no orders as to costs.



Appeal

7. Aggrieved by the ruling of the Lower Court, the appellant brought this appeal through a memorandum of appeal dated 3rd August, 2023, in which he advanced the following four (4) verbatim grounds of appeal:
 1. The Learned Magistrate erred in law and in facts in delivering a ruling without perusing the court record and as a result he arrived at a shoddy finding without any factual basis.
 2. That Learned Magistrate erred in law and in facts in failing to find that the suit is finalized in favour of the appellant and the only thing pending was the implementation/execution of the judgement/decreed of the court and the only executing the decree was by citing the respondent for contempt which in the application which he has dismissed (sic).
 3. The Learned Magistrate erred in law in purporting to sit on appeal on his own judgment when he purports the ownership of the suit property is in dispute when there is a judgment that has declined the appellant as the absolute proprietor of L.R No. Nyambane/Antubetwe Njoun/48 and issued a permanent injunction against the respondents (sic).
 4. The Learned Magistrate erred in law and in the facts in declining the contempt application against the law and weight of evidence.”
8. The appellant urged this court to allow the appeal. He prayed for costs of the appeal.

Appellant’s Submissions.

9. The appeal was canvassed through written submissions dated 23rd October, 2024, filed by M/s. L. Kimathi & Co. Advocates. Counsel argued that the reasons given by the Lower Court in refusing to grant the plea for an order of contempt were trivial, adding that the Lower Court “had no grasp of the proceedings” in the file. Counsel argued that the only way the judgment of the Lower Court could be executed was by way of citing the respondents for contempt. Counsel contended that once cited, the respondents would either purge the contempt by vacating the appellant’s land or be jailed. Counsel faulted the lower court for failing to grant the contempt orders and urged this court to allow the appeal.

Respondent’s Submissions.

10. The respondents filed written submissions dated 3rd March, 2025 through M/s. Munyoki Maheli & Co. Advocates. Counsel for the respondents pointed out that the appellant failed to identify the elements of triviality in the ruling of the Lower Court. Counsel argued that the appellant sought contempt orders without placing before the court necessary evidence.
11. Counsel for the respondents further argued that the ex-parte orders of 21st January, 2021 were overtaken by events when the trial court directed the surveyor to visit the locus – in-quo and fix the boundaries. The respondents urged the court to reject the appeal.

Analysis and Determination

12. The court has read and considered the original record of the Lower Court; the record filed in this appeal; the grounds of appeal; and the parties’ respective submissions in the appeal. The court has also considered the relevant legal frameworks and jurisprudence. As observed in the opening paragraph of this judgment, the single issue that falls for determination in this appeal is whether the Lower Court exercised its discretionary jurisdiction properly in declining to issue contempt orders. Before I



dispose the issue, I will outline the principle that guides this court when exercising jurisdiction as a first appellate court.

13. This is a first appeal. The task of a first appellant court was summarized by the Court of Appeal in the case *Susan Munyi v. Keshar Shiani* (2013) eKLR as follows:

“As a first appellant court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

14. The principle was similarly outlined in *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR as follows: -

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyses the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

15. Did the Lower Court exercise its discretionary jurisdiction properly? In Kenya’s legal system, contempt of court is generally regarded as conduct that defies the authority or dignity of the court. Contempt of court is considered to be a serious aggression against the rule of law and against the administration of justice. A finding of contempt attracts severe sanctions by the court.

16. In the case of *Econet wireless Kenya Limited v Minister for Information and Communication of Kenya Authority* [2005] eKLR, the court stated the following on contempt of court:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.”

17. In *Gatharia K. Mutikika v. Baharini Farm Ltd* [1985] KLR 227, the court stated the following about proof and the remedy of contempt:

“Contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, criminal cases. It is not safe to extend it to offences which can be said to be quasi- criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge.... Recourse ought not to be heard to the process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection or arbitrariness and which can be brought to bear upon the subject.... applying the test that the standard of proof



should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

18. In this appeal, it does emerge that in disposing the appellant’s application for contempt orders, the Lower Court proceeded from the premise that the respondents’ application dated 16th March, 2021 in which they sought an order setting aside the ex-parte judgment, had been granted. Indeed, on 21st October, 2021, the Lower Court rendered itself on the matter as follows: -

“There is a decree in this matter requiring that the fence created by the defendants be removed and the land be restored to its original boundaries.

The report of the surveyor has clearly indicated the extent of encroachment yet the defendants are adamant. The application to aside was granted and that’s why the surveyor went to the ground at the request of the defendants. Final hearing is now set for 4th November, 2021”

19. The record of the Lower Court reveals that subsequent to the above observation, the Lower Court listed the case for substantive hearing on 13th January, 2022 and 17th February, 2022. Come 17th February, 2022, the Lower Court decided to focus on disposal of the application dated 19th February, 2021 in which the appellant sought contempt orders.

20. It is also clear from the impugned ruling that the Lower Court disposed the application dated 19th February, 2021 on the premise that the substantive suit was yet to be heard and determined. The Lower Court stated the following:

“From the pleadings and various affidavits, at the heart of this matter is a boundary issue and who owns what.

It’s my considered view that this can be done in a full hearing with evidence tested by cross – examination and with full application of the surveyor’s report...

The more prudent thing to do is to go for a full hearing. Application is dismissed with no orders as to costs”

21. Was the respondent’s application for an order setting aside the ex-parte judgment granted? In its observation made on 21st October, 2021, the Lower Court contradicted itself on this issue. First, the Learned Magistrate observed that there existed a decree in the matter, requiring that the fence created by the respondents be removed and the land be restored to its original boundaries. In sharp contradiction, the Learned Magistrate observed that the respondent’s application seeking the setting aside of the ex-parte judgment was granted, adding that it was on that basis that the surveyor went to the ground at the request of the respondents. I have gone through the typed and certified proceedings of the Lower Court. I have also gone through the original handwritten proceedings of the Lower Court. There is no order setting aside the ex-parte judgment of the Lower Court. Similarly, there is no order disposing the respondent’s application dated 16th March, 2021, in which they sought an order setting aside the ex-parte judgment. What emerges from the record of the Lower Court is that the ex-parte judgment dated 21st January, 2021 subsists. Secondly, the respondent’s application dated 16th March, 2021 seeking an order setting aside the said ex-parte judgment, is yet to be heard and disposed.

22. Consequently, this court agrees with the appellant that the Lower Court misdirected itself on the correct factual position regarding the status of Maua CMC E & L Case No. 57 of 2020 and erroneously



disposed the application dated 19th February, 2021 from the premise that the ex-parte judgment in the said suit had been set aside. It is therefore the finding of this court that the Lower Court misdirected itself in the exercise of its jurisdiction on the application for contempt orders.

23. That was, however, not the only misdirection which the Lower Court committed. The Lower Court was seized of two applications: (i) the appellant's application dated 19th February, 2021 seeking contempt orders in relation to the ex-parte judgement rendered on 21st January, 2021, and (ii) the respondents' application dated 16th March, 2021 seeking an order setting aside the ex-parte judgment dated 21st January, 2021. A proper exercise of jurisdiction would have been to hear and dispose the two related and intertwined applications contemporaneously. The Lower Court did not do that.
24. For the above reasons, this court finds merit in this appeal. The impugned ruling of the Lower Court is hereby set aside and the Lower Court is directed to hear a fresh the appellant's application dated 19th February, 2021 contemporaneously with the respondents' application dated 16th March, 2021.
25. In view of the fact that the error giving rise to this appeal was committed by the Lower Court itself, parties will bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF SEPTEMBER, 2025

B M EBOSO [MR]

ELC JUDGE

In the presence of

Court Assistant – Tupet

Appellant – Ibrahim Gitonga – present in person physically

Respondents - absent

