



**Muinde v Kathyuka (Environmental and Land Originating Summons  
E005 of 2021) [2025] KEELC 6055 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6055 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2021  
EO OBAGA, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**ANNASTACIA KALEWA MUINDE ..... APPLICANT**

**AND**

**GRACE MBELE KATHYUKA ..... RESPONDENT**

**RULING**

1. Before this Court for determination is the Notice of Motion dated 4<sup>th</sup> October, 2024. It is brought under the provisions of Section 5 (1) of the Judicature Act, Sections 1A, 1B and 3A of the Civil Procedure Act in addition to Order 51 Rules 1 and 2 of the Civil Procedure Rules.
2. The Applicant seeks the following orders: -
  1. [Spent]
  2. That the Honourable court be pleased to cite the Applicant/Respondent for contempt of court.
  3. That further to paragraph 2 above, the Honourable court be pleased to fine the Applicant/Respondent Kshs. 100,000/= for contempt of court.
  4. That further to paragraph 3 above, the Honourable court be pleased to jail the Applicant/Respondent each for a period as the court deems fit.
  5. That the OCS Kithumani Police Station be ordered to enforce the court orders issued pursuant to this application.
  6. That the costs of this application be in the cause.
3. The application is premised on the grounds appearing on its face. It is also supported by the affidavit of Grace Mbele Kathukya sworn on even date. The Applicant averred that the Hon. Lady Justice



- T. Murigi issued an order of status quo to preserve the trees on the suit property. That whereas the Respondent was aware of the said court order, she has disregarded the same by cutting down trees on the suit property.
4. The Applicant contended that the actions of the Respondent are not only contemptuous in nature but also frustrating to the hearing of this case. It was also added that the authority of this court has been undermined as a result of the Respondent's disobedience of the aforesaid orders. The Applicant averred that she continues to suffer loss and damage as a result of the Respondent's actions and that the orders sought should be granted.
  5. The Respondent swore a replying affidavit on 24<sup>th</sup> October, 2024. She denied cutting trees or sending anybody to cut trees in the suit property under her instructions. She stated that the pictures annexed to the application and marked as Exhibit "GMK2" do not show any image of herself or her agents in order to conclude that it was the Respondent who cut the trees. The Respondent also averred that upon being served with the application, she had gone to the suit property upon which she did not find any trees which had been cut.
  6. Parties agreed to canvass the application by way of written submissions.
  7. In the Applicant's submissions dated 14<sup>th</sup> March, 2025, Counsel submitted that the threshold for an application of contempt of court was laid down in the case of *Kristen Carla Burchell v Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005 as follows:-
    - a. The terms of the order;
    - b. Knowledge of these terms by the Respondent;
    - c. Failure by the Respondent to comply with the terms of the order.
  8. Counsel submitted that the Respondent was aware of the Court order dated 22/11/2023 by virtue of the fact that both parties were represented by their advocates when the order was issued. Relying on the case of *Mose v Kirwa ((Being Sued in Her Own Capacity & as the Personal Representative of the Estate of Salem Kiprono Kirwa)) (Environment & Land Case 91 of 2016) [2024] KEELC 5143 (KLR)*, Counsel argued that the Respondent is presumed to have been aware of the orders issued and that she had not averred otherwise in her replying affidavit.
  9. Counsel contended that the Applicant had annexed photos evidence the cutting down of trees by the Respondent thus demonstrating disobedience with the court order dated 22/11/2023.
  10. Counsel submitted that the court is vested with the authority to punish those who disobey court orders pursuant to the provisions of Order 40 Rule 3 (1) of the Civil Procedure Rules and Section 29 of the [\*Environment and Land Court Act\*](#).
  11. In the Respondent's submissions dated 30<sup>th</sup> April, 2025 Counsel identified the following issues for determination: -
    - a. Whether the Applicant has proven the allegation of contempt of court by the Respondent?
    - b. Who should bear the costs of the application?
  12. Submitting on the first issue, Counsel argued that the standard of proof for contempt of court is higher than on a balance of probabilities albeit not beyond reasonable doubt. Counsel maintained that the photographs that were annexed to the application do not demonstrate that it was the Respondent who cut down trees in the suit property. Counsel went on to add that the photographs are not dated and



thus it is unknown when the trees were allegedly cut down. Counsel submitted that the Applicant had not proved contempt of court.

13. Submitting on the second issue, Counsel opined that since the application is not merited, it should be dismissed with costs to the Respondent in line with the principle that costs follow the event.
14. The sole issue for determination is whether the Applicant has demonstrated that the Respondent deliberately breached the terms of the Court order dated 22<sup>nd</sup> November, 2023 in order to cite the Respondent liable for contempt of court.
15. The instant application has been brought under the provisions of Section 5 of the *Judicature Act* Cap 8 Laws of Kenya which 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.
16. The test which an Applicant must pass in an application for contempt was laid out in the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR, where Mativo J. (as he then was) observed as follows: -

“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 willfulness 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.”

17. An excerpt from the judgment of the Court of Appeal in *Gatharia K Mutitika and Two others v Baharini Farm Limited* [1982-88] 1 KAR 863 at 867, with regards to the standard of proof required in contempt of court proceedings is particularly insightful. The Court aptly held as follows: -

“In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature.

The principle propounded in *Re Maria Annie Davies* [1889] 21 QBD 236, and 239, that

“Recourse ought not to be had to [the] process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the late Master of the Rolls in the case of *Clement, Re* (supra) seem much in point. ‘It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be fairly prosecuted. To a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men’s rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction.’ [emphasis added]

18. Whereas the Applicant alleged that the Respondent had cut down trees in the suit property in contravention of the order of status quo, she only annexed a photograph depicting a couple of tree stumps which was marked as Exhibit “GMK2”. The said photograph cannot ascertain that the Respondent was the person responsible for the damage to the trees nor does the photograph bear out information of when and where it was taken. It is of no probative value to the offence which the Applicant claims was committed.

19. Section 107 (1) and (2) of the *Evidence Act* outlines as follows: -

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.’



20. The Court In re Estate of Francis Waita Mbaki (Deceased) [2018] eKLR aptly observed as follows: -

“As Lord Nicholls explained in the House of Lords decision in H (Minors), Re (1996) A.C 563 while considering the standard of proof in fraud cases:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. .... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighting the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be evidence that it did occur before, on the balance of probability, its occurrence will be established.”

21. From the evidence presented before this court, it is uncertain that the Respondent is responsible for the damage caused to the trees in the suit property in violation of the court order dated 22<sup>nd</sup> November, 2023. Accordingly, the Applicant has failed to demonstrate breach or wilful disobedience of the status quo order by the Respondent.

22. The upshot is that the instant application is devoid of merit and is dismissed with costs.

.....

**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

In the Presence of:

Mr. Odero for Mr. Makau for Applicant.

Court assistant – Steve Musyoki

