



**Abdirahman & another v Kaburu & another (Environment & Land
Case 48 of 2014) [2024] KEELC 590 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 48 OF 2014
EK MAKORI, J
FEBRUARY 8, 2024**

BETWEEN

ALI JUMA ABDIRAHMAN 1ST APPLICANT

REHEMA CHARO MUNGUMBA 2ND APPLICANT

AND

WINNIE KINYUA KABURU 1ST RESPONDENT

STEPHEN MACHOKA NYABIRO 2ND RESPONDENT

RULING

1. The applicants herein had filed a plaint in this matter against the 1st defendant, seeking permanent injunction restraining the 1st respondent from interfering with land parcel Gede/Mijomboni/888. The injunction was issued by this Court – Angote J. It extended to bind not only the 1st respondent but also her servants, agents, or any other person, from constructing, interfering, disposing of, entering, or in any other way dealing with the suit land. An appeal was preferred to the Court of Appeal in Civil Appeal No. 95 of 2017 which affirmed the findings of this Court.
2. The decisions of the Court were well brought within the knowledge of the 1st respondent. Despite those orders, under the instructions or directions of the 1st respondent, have invaded the land, trespassed thereon, and are carrying on farming well oblivious of the judgment of this Court. This action has rendered it impossible for the applicants to enjoy the fruits of the judgment in their favour that is still subsisting.

Application dated 3rd July 2023 now seeks to have the respondents cited for contempt. The applicants averred that the judgment was well known to the 1st applicant and the 2nd respondent who claims to have entered the land in question at the behest of the 1st respondent.



3. The applicants cited Order 40 Rule 3 of the Civil Procedure Rules as giving this Court powers to direct as appropriate on disobedience of Court orders.
4. The applicants cited the case of Samuel M. N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR, enunciating the conditions to be met before one is cited for contempt, the conditions include, knowledge of the orders, terms of the orders and failure to obey on the part of the respondent. Upon proof of these conditions, one is presumed to have disobeyed the orders unless the contrary was provided by the respondent.
5. In rebuttal the 2nd respondent contended and submitted that he was not a party to the judgment which is the subject of the current application and cannot be joined late in the day to answer to allegations on matters well not litigated against him. Several authorities are cited – Rubina Ahmed and 3 Others v Guardian Bank (Sued in its capacity as a successor in Title to the First National Finance Bank Ltd [2019] eKLR. That leave of the Court has to be obtained before the joinder. He was not accorded a hearing as provided under Article 50 of *the Constitution* and the principle set in the case of Samuel M. N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR, on the conditions and principles upon which a Court can cite for contempt.
6. The 2nd respondent finally stated that the 1st applicant had no authority from the 2nd respondent to swear on her behalf in these proceedings. The case of Savala & Another v Ndanyi [2021] eKLR is cited.
7. The issue for the determination of this Court is whether the applicants have set ought grounds upon which to cite the respondents for contempt. Who should bear the costs of the current application?
8. It is not in dispute that the applicants litigated against the 1st respondent and obtained a judgment from this Court, which was appealed against and the Court of Appeal affirmed the said judgment from this Court.
9. The dispute here is whether the applicants have proved the elements that can lead to the respondents being cited for contempt. As correctly submitted, for this Court to cite one for contempt as held in Samuel M. N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR:

“It is an established principle of law that^[45] 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.^[46] Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand^[47] 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.

41. It is the last test in paragraph (d) above that warrants detailed consideration. Unfortunately, the applicant's counsel never addressed it at all. On the face of our transformative constitution with an expanded Bill of Rights, a pertinent question warrants consideration. Do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, a high standard of proof applies whenever committal to prison for contempt is sought because contempt of Court is quasi-criminal in nature.
42. Two principals emerge. The first is liberty: - it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order if reasonable doubt exists about the essentials. In this regard, I am not satisfied that wilful disregard of the court order has been established.
43. The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. In the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.
44. Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.
45. It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: once the three requisites mentioned earlier have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established. And as O'Regan J pointed out, the power to imprison for coercive and non-punitive purposes is 'an extraordinary one': -

'The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of *the Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for



the exercise of the power to be accompanied by a high standard of procedural fairness.^{148]}

46. 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.^{149]}
10. The applicants herein obtained a judgment against the 1st respondent sometimes on 5th October 2017. An appeal was preferred by the 1st respondent her appeal was dismissed on 20th September 2018. It has not been shown that she remains on the suit property but instead, it is alleged the 2nd respondent – who has been brought to the proceedings without the leave of the Court and christened the 2nd respondent, with her consent entered the land to the disadvantage of the applicants who cannot enjoy the fruits of the judgment obtained in this litigation. It is not shown the specific dates when he entered the land and under whose authority or colour of right and whether he is aware of the orders of this Court, now that he was not a party to the current proceedings.
11. To me looking at the whole litigation whether the 2nd respondent was improperly joined or not, what remains is whether the applicants have attempted to enforce the judgment of this Court in their favour and what hardships have been encountered. The applicants admit they have not taken out execution proceedings. Perhaps when that is done, the presence of the 2nd respondent will come to light. If he is an agent or servant of the 1st respondent as here – it has not been proved yet.
12. My take will then be – let the applicants execute the judgment of the Court by having the suit property registered in their names and evicting any a person illegally standing or residing on the suit land. Therefore, application dated 3rd July 2023 is hereby dismissed with costs. The applicants to execute the judgment of this Court any hardship that may be encountered in the process, then the court can be moved. This is to avoid further relitigating the case afresh as can be seen in this application.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 8TH DAY OF FEBRUARY 2024.

E. K. MAKORI

JUDGE

In the Presence of

Mr. Makworo for the 2nd Respondent

Court Clerk: Happy

In the Absence of:

Mr. Mwandilo for the Applicant

