



**Kariuki v John (Environment & Land Case E149 of 2020)
[2024] KEELC 569 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E149 OF 2020**

**JO MBOYA, J
FEBRUARY 8, 2024**

BETWEEN

SARAH WAMBUI KARIUKI APPLICANT

AND

PETER KAHAMA JOHN RESPONDENT

RULING

Introduction and Background

1. The Defendant/Applicant herein has approached the Honorable court vide Notice of Motion Application dated the 17th October 2023, brought pursuant to, inter-alia, the provisions of Order 40 Rule 1 of the Civil Procedure Rules and Sections 3, 3A and 63(e) of the Civil Procedure Act, and in respect of which same has sought for a plethora of reliefs, namely;
 - i.Spent.
 - ii. That the Honorable court grants Leave for the firm of M/s Mburu Machua & Company Advocates to come on Record for the Applicant after Judgment has been entered.
 - iii. That the Honorable court be pleased to find that the Respondent is in Contempt of the Court order issued on 19th December 2022.
 - iv. That the Honorable court be pleased to order that the orders in the Decree be adhered to by all the Beneficiaries of the Estate.
 - v. That the Honorable court be pleased to declare that the Respondent and the signatories appointed against the court order are in total contempt of the orders issued by the court on 19th December 2022.



- vi. That the Honorable court be pleased to issue an order compelling the Respondent and the signatories appointed against the order of the court to give a detailed account of the Bank Account opened against the Court order and Absa Bank Account No. 075354280.
 - vii. That a Land Valuer be appointed to give the value of the Property.
 - viii. That the Court be pleased to issue an order directing that the property be disposed.
 - ix. That in the alternative, the Honourable Court be pleased to issue an order that the Applicant be given her share of the property upon valuation.
 - x. That the Honorable court be pleased to issue an order compelling the Respondent to produce Minutes of the Meeting held from the Month of December 2022 to date.
 - xi. That Costs of this Application be provided for.
2. The instant Application is premised and predicated on various grounds which have been enumerated in the body of the Application. Furthermore, the Application is supported by the affidavit of Sarah Wambui Kariuki, who is the Applicant herein.
 3. On the other hand, upon being served with the instant Application, the Plaintiff/Respondent proceeded to and filed a Replying Affidavit sworn on the 22nd November 2023; and in respect of which same has denied the allegations alluded to at the foot of the Application.
 4. Be that as it may, the instant Application first came up for hearing on the 7th November 2023, when the Honourable court implored the Parties to engage in negotiations and endeavor to settle the issues at the foot of the Application.
 5. Nevertheless, despite latitude and opportunity being afforded to the Parties to pursue an out of court settlement, taking into account the fact that the Parties herein are brother and sister in law, respectively, the Parties were unable to reach a compromise.
 6. First forward, on the 19th December 2023, the matter came up for mention and upon confirming that the Parties herein had failed to reach a compromise/ Settlement, the court proceeded to and issued directions pertaining to and concerning the hearing and disposal of the Application. For coherence, the court ordered and directed that the subject Application be canvassed by way of written submissions, to be filed and exchanged within set timelines.
 7. Suffice it to point out that thereafter the Applicant proceeded to and filed written submissions dated the 15th December 2023, [clearly filed before the directions to file and exchange written submissions], whereas the Plaintiff/Respondent filed written submissions dated the 26th January 2024.
 8. Both sets of written submissions form part of the record of the court.

Parties' Submissions:

a. Applicant's Submissions:

9. The Applicant herein filed written submissions dated the 15th December 2023; and in respect of which same has adopted and reiterated the grounds at the foot of the Application, as well as the averments alluded to in the body of the supporting affidavit.
10. Furthermore, Learned counsel for the Applicant has thereafter raised, highlighted and canvassed two [2] salient issues for consideration by the Honourable court.



11. Firstly, learned counsel for the Applicant has submitted that upon the filing of the instant suit, both the Applicant and the Respondent agreed to have the suit/dispute referred to mediation through Court annexed mediation process, which mediation culminated into mediation agreement.
12. On the other hand, learned counsel for the Applicant averred and submitted that upon arriving at and reaching an agreement before the appointed court mediator, the Parties thereafter crafted, executed and filed a Consent Letter dated the 1st December 2020, which contained the details and the terms that had been duly agreed upon.
13. Other than the foregoing, learned counsel for the Applicant invited the court to find and hold that the consent letter was subsequently adopted and ratified by the court culminating into the decree issued on the 19th December 2022, whose terms are well within the knowledge of the parties.
14. Nevertheless, learned counsel for the Applicant has contended that despite being privy to and knowledgeable of the court orders, the Respondent herein has continued to act contrary to and in contravention of the clear and explicit terms of the court order in particular, learned counsel has submitted that the Respondent herein, who was/is a principal Party has colluded with other signatories, [whose names are captured at the foot of the court order], to exclude the Applicant from the management of the bank account wherein the rental proceeds from the suit property are being deposited.
15. Additionally, learned counsel for the Applicant has also submitted that the Respondent herein has similarly manipulated the other signatories and same has proceeded to and opened a separate and distinct bank account, wherein the rental proceeds are being deposited, contrary to and in contravention of the terms of the lawful court order.
16. Besides, learned counsel for the Applicant has also submitted that the Respondent has also excluded the Applicant from the management and affairs of the suit property and thus the Applicant has been deprived of her lawful entitlement to a portion of the rental proceeds/income derivable from the suit property.
17. In short, learned counsel for the Applicant has invited the Honourable court to find and hold that the impugned actions by and on behalf of the Respondent constitutes gross disobedience and willful disregard of lawful court orders.
18. Secondly, learned counsel for the Applicant has submitted that the Respondent herein has failed to account for and/or avail any reasonable explanation for failure to comply with and/or abide by the terms of the court order, [whose details are well within the knowledge of the Respondent].
19. Furthermore, learned counsel for the Applicant has contended that even though the Respondent has heard the opportunity to avail a reasonable explanation for the offensive actions, same has not complied or at all.
20. In any event, learned counsel for the Applicant has submitted that instead of the Respondent endeavoring to offer an explanation, the Respondent has merely resorted to canvassing issues that had hitherto been heard and determined by the court including whether the Applicant had the Locus standi to mount and maintain the suit and whether the Applicant has the capacity to file the instant Application for contempt
21. In support of the foregoing submissions, learned counsel for the Applicant has cited and relied on inter-alia Hadkinson vs Hadiknson (1952) ALL ER page 285, Julius Macharia Ndugire & 12 Others vs Arch. Bishop Nzimbi & 5 Others (2002)eKLR, Econet Wireless Ltd vs Minister For Information &



Communication of Kenya & Another (2005)eKLR and Sam Nyamweya & 3 Others vs Kenya Premier League Ltd & 2 Others (2015)eKLR, respectively.

22. Premised on the foregoing, learned counsel for the Applicant has therefore invited the court to find and hold that the Respondent has indeed disobeyed and disregarded lawful orders of the court issued on the 19th December 2022; and hence same ought to be cited and punished for contempt.

b. Respondent's Submissions:

23. The Respondent herein filed written submissions dated the 26th January 2024; and in respect of which same has canvassed three [3] pertinent issues for due consideration and determination by the Honourable court.
24. First and foremost, learned counsel for the Respondent has submitted that the Respondent herein has neither disobeyed nor disregarded the orders of the court (sic) issued on the 2nd December 2020.
25. On the other hand, learned counsel for the Respondent has thereafter extensively reproduced the terms of the orders captured at the foot of the consent dated the 1st December 2020; and additionally the terms of the orders which were adopted at the foot of the orders issued on the 21st September 2022.
26. Be that as it may, after reproducing the elaborate details of the terms of the orders which were duly adopted and endorsed by the court on the 21st September 2022; and which essentially underpinned the decree extracted and sealed on the 19th December 2022, learned counsel for the Respondent has thereafter contended that the Applicant has neither proved nor demonstrated any scintilla of disobedience.
27. Based on the foregoing, learned counsel for the Respondent has thereafter invited the court to find and hold that in the absence of proof of disobedience and or contempt of the court orders, the Application by the Applicant herein is devoid of merits and hence ought to be dismissed.
28. Furthermore, learned counsel for the Respondent has submitted that contempt of Court is a quasi-criminal charge and whenever same is adverted to, then it behooves the Applicant to tender before the court, credible evidence and not mere allegations.
29. Besides, learned counsel has submitted that a charge of contempt ought to be proved to the requisite standard, which in any event, has been submitted to be the standard above the balance of probabilities.
30. In support of the submissions touching on and concerning the standard of proof applicable to a charge of contempt, learned counsel for the Respondent has cited and relied on various decisions, inter-alia Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others (2014)eKLR, Kenya National Human Rights Commission vs Attorney General & Another (2018)eKLR and Samuel M.N Mweru & Others vs National Land Commission & 2 Others (2020)eKLR, respectively.
31. Secondly, Learned counsel for the Respondent has submitted that the Respondent herein has neither disobeyed, nor disregarded the lawful orders of the court, either as alleged or at all.
32. Thirdly, learned counsel for the Respondent has submitted that the Applicant herein is devoid and divested of the requisite locus standi to originate the subject Application. In any event, learned counsel for the Respondent has ventured forward and contended that even though the Applicant has mounted the current Application, the Applicant herself is guilty of the disobedience of the same court orders.
33. It is the further submissions by learned counsel for the Respondent that the Applicant herein was ordered and/or directed to deposit the sum of Kes.291, 750 /= only, in the designated account at Absa Bank Ltd, but same has failed to comply with the said limb of the court order.



34. On the other hand, learned counsel for the Respondent has also contended that the Applicant herein has also not demonstrated the requisite capacity/authority to manage the property (sic) on behalf of her co-wife, namely, Damaris Waithira Kariuki or at all.
35. Based on the foregoing, learned counsel for the Respondent has therefore implored the Honourable Court to find and hold that the instant Application is informed and/or inspired with mala fides, on the part of the Applicant, who is merely intent on prosecuting the Plaintiff/Respondent.
36. Consequently and in the premises, learned counsel for the Respondent has submitted that the Application beforehand, is devoid of merits and thus deserves to be dismissed with costs to the Respondent.

Issues for Determination:

37. Having reviewed the Application and the Response thereto, and having taken into account the written submissions filed on behalf of the respective Parties, the following issues do arise and are therefore worthy of determination;
 - i. Whether the orders at the foot of the Decree extracted on the 19th December 2022, were clear, explicit and unequivocal.
 - ii. Whether the orders extracted on the 19th December 2022, are within the knowledge of the Respondent or otherwise.
 - iii. Whether the Respondent herein has disobeyed and/or disregarded the terms of the orders of the court and if so, whether such disregard, amounts to willful disobedience.

Analysis and Determination:

Issue Number 1 Whether the Orders at the foot of the Decree extracted on the 19th December 2022, were clear, explicit and unequivocal.

38. Before venturing into interrogating and analyzing the issue herein before mentioned, it is instructive to point out that the instant suit was filed by and on behalf of the Plaintiff/Respondent, who sought for a plethora of reliefs as against the Defendant/Applicant.
39. Nevertheless, before the matter could proceed to full hearing, the Plaintiff and the Defendant, who are brother and sister in law, respectively, agreed to have the dispute referred to mediation. For coherence, the dispute was indeed referred to court annexed mediation.
40. Arising from the reference to the court annexed mediation, the Parties reached and arrived at a compromise, which was thereafter reduced into a consent dated the 1st Defendant 2020. Instructively, the consent dated the 1st December 2020; was thereafter presented to the court and same was ultimately adopted as an order of the court culminating into the decree extracted and sealed on the 19th December 2022.
41. To the extent that the consent culminating into the decree under reference, arose from a mutual understanding and agreement between the Plaintiff and the Defendant, it is worthy to underscore that both Parties were therefore privy to and knowledgeable of the import and tenor of the orders that had been agreed upon.
42. Furthermore, it is not lost on the court that the advocates for the respective Parties, [who are the duly recognized agents of the Parties], appeared before the court on the 21st September 2022; and indeed



intimated to the court the terms of the agreement which had been arrived at and reached before the mediator.

43. Arising from the foregoing, the court proceeded to and adopted the consent whose terms were clear, explicit and unequivocal.
44. Further and in any event, there is no gainsaying that even the learned counsel for the Respondent has duly confirmed that the terms of the decree, which underpin the current application, were truly explicit and unequivocal.
45. On the other hand, it is also worth mentioning that learned counsel for the Respondent has in the body of the submissions filed, dedicated five out of the 21 pages of the written submissions, to the various limbs of the court order, which underpinned the decree extracted on the 19th December 2022.
46. In view of the foregoing, my answer to issue Number one [1] is to the effect that the terms and import of the decree that was extracted and sealed on the 19th December 2022, are indeed explicit and unequivocal. Consequently, there cannot be any debate as to the construction and/or comprehension of the meaning of the orders of the court.

Issue Number 2: Whether the Orders Extracted on the 19th December 2022, are within the knowledge of the Respondent or otherwise.

47. In the course of addressing issue number one [1] herein before, the court has highlighted the fact that the orders at the foot of the decree extracted on the 19th December 2022, arose from the terms of a consent executed by the Parties.
48. Furthermore, the Honourable court has also confirmed that subsequent to the Parties arriving at the mutual understanding/agreement before the mediator, the advocates appointed for the respective Parties duly appeared before the court on the 21st September 2022; and thereafter intimated to the court the terms and details of the orders that had been agreed upon by the Parties.
49. From the foregoing, there is no gainsaying that the import and tenor of the orders, which underpin the decree extracted and sealed on the 19th December 2022, were and are indeed within the knowledge of the Plaintiff/Respondent.
50. For good measure, neither the Plaintiff/Respondent himself nor his legal counsel, has disputed knowledge of the terms of the court order.
51. Suffice it to point out that under the obtaining Jurisprudence, service of a court order is no longer a mandatory requirement, provided that the Claimant can demonstrate that the contemnor, in this case the Respondent, was knowledgeable of the terms of the court order, either by being physically present in Court, or where same was represented by an Advocate.
52. To buttress the foregoing exposition, it suffices to take cognizance of the holding in the case of The County Executive Committee, Kisii County Government & 2 Others versus Masosa Construction Company Ltd (2020)eKLR, where the C Of Appeal ourt stated and held thus;

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- “ 19. In Justus Kariuki Mate –v- Martin Nyaga Wambora, [2014] eKLR this Court acknowledged the move from the position that an order endorsed with a penal notice must be personally served on a person before contempt can be proved. Lenaola, J (as he then was) in the case of Basil Criticos -v- Attorney



General [2012] eKLR perceived an additional ground for dispensation with the requirement for personal service; "...where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary". Similarly, the requirement of notice of the prohibitory judgement or order would also be satisfied where a party is represented counsel who was present in court when the orders were made.

Therefore, knowledge of the judgment or order by an alleged contemnor's advocate suffices for contempt proceedings.

There is a presumption that when an advocate appears in court on instructions of a party, it behoves him to report back to the client all that transpired in court that has a bearing on the client's case. This presumption is in line with the dicta of the Canadian Supreme Court in the case of *Bhatnager - v- Canada, (Minister of Employment and Immigration 1990]* 2 SCR 217 where it was held that a finding of knowledge on the part of the client may be inferred from the fact that the solicitor was informed.

53. Simply put, the fact that the terms of the decree, which is the subject of the Contempt proceedings herein, arose from a consent and whose terms were presented to the court by the advocates for the Parties, it is evident that the terms of the order are therefore within the knowledge of the Respondent.

Issue Number 3 Whether the Respondent herein has Disobeyed and/or Disregarded the terms of the orders of the Honourable court and if so, whether such disregard, amounts to willful disobedience.

54. The Applicant herein complains that the Respondent and the rest of the signatories who were enumerated in the body of the decree extracted and issued on the 19th December 2022, have acted contrary to and in contravention of the decree of the court.
55. Furthermore, the Applicant has proceeded to and itemized various aspects in respect of which the Respondent and the rest of the signatories have acted contrary to and in contravention of the court order. For coherence, the Applicant has pointed out that the Respondent herein has connived with other signatories and opened/operationalized a separate and distinct bank account, wherein the rental proceeds are now being diverted to.
56. On the other hand, the Applicant has also contended that arising from the opening and operationalization of the separate account, all the rental proceeds are now being diverted and paid out into the said separate account, without due regard to the terms of the decree, which inter-alia directed that the rental proceeds shall be paid directly into Account Number 075354280 at Absa Bank Ltd, Murang'a Branch.
57. Other than the foregoing, the Applicant herein has also pointed out that the Respondent and the rest of the signatories have also registered a business name/entity, namely, M/s Muthiria Kagaa Partners, which has now taken over the running and management of the affairs of the suit property as well as the collection of the rental proceeds therefrom.
58. Lastly, the Applicant has contended that the various activities which have been complained against have been carried out and undertaken without her involvement participation and blessings. Consequently, the Applicant avers that same has therefore been divested of her legitimate rights and interests arising from and attendant to the decree issued on the 19th December 2022.



59. Confronted with the averments by and on behalf of the Applicant, the Respondent herein filed a Replying affidavit on the 22nd November 2023; and wherein same made various averments. Instructively, the contents of paragraphs 6, 7 and 8 are paramount and worthy of due consideration.

60. Owing to the foregoing, it is thus appropriate to reproduce the contents of the named paragraphs.

61. For the ease of reference, same are reproduced as hereunder;

Paragraph 6

That I am an elderly and aged 85 years and reside in Murang'a and as such I am not able to take part in the management of the property as the same is situate in Eastleigh, Nairobi and the property is managed by other signatories.

Paragraph 7

That I am informed that an agent by the name Great Mwanzo Properties and Management Valuers Ltd was appointed towards maintenance of the property and collecting rental proceeds, whilst the property is being managed by other signatories and thus making the situation difficult for the rest of the signatories.

Paragraph 8

That I am informed that the property was registered in the names of M/s Muthiria Kagaa Partners for purposes of remitting returns but the signatories were advised by KRA officials that the same was not feasible and thus the business name is not operational.

62. From the contents of the paragraphs, [whose details have been reproduced herein before] , various perspectives do arise and thus merits a short address.

63. Firstly, the Respondent herein who was himself a Principal Party and thus player in the instant proceedings is confirming and conceding that a management agent has since been constituted/ appointed to take over the management of the suit property as well as the collection of thee rental proceeds.

64. Despite making the foregoing admission, the Respondent herein does not advert to whether the management agent, whose appointment, same (Respondent) is privy to, is indeed remitting the rental income to the designated bank account alluded to at the foot of the Decree extracted on the 19th December 2022.

65. Secondly, despite also confirming that rental proceeds are now being collected by the appointed management agent, the Respondent herein does not venture forward to supply details as pertains to where the rental proceeds are being channeled and or deposited.

66. Thirdly, the Respondent who confirms that same is privy to the appointment of the management agent, contrary to the orders of the court, has also not adverted to whether the Defendant/Applicant was consulted, involved and/or made aware of the appointment of the management agent, which now collects the rental proceeds, albeit without due regard to the terms of the court order.

67. Fourthly, there is also the concession that the suit property, which was the subject of the decree of the court has been registered in the name of M/s Muthiria Kagaa Partners, yet again without due regard to the terms and tenor of the decree of the Honourable court.



68. Arising from the foregoing, there is no debate that the Respondent herein has been privy to and knowledgeable of the schemes that have been undertaken with a view to circumventing and/or defeating the lawful orders of the court.
69. Other than the foregoing, it is not lost on this court that whilst dealing with a previous Application for, inter-alia, orders of contempt, the court reminded the advocates for the Parties that it behooves all and sundry to comply with the terms of the court order. [See paragraph 86 of the Ruling rendered on the 28th September 2023].
70. Be that as it may, it is also imperative to underscore that upon the filing of the instant Application, the court implored the Parties to engage in honest negotiation with a view to addressing the aspect of disobedience.
71. However, despite due latitude and timelines, coupled with the plea of the Court, it appears that the Parties were not keen to address the stalemate.
72. Having pointed out the foregoing, I beg to state that the totality of the evidence that has been placed before the Honourable court, demonstrates a clear, conscious and deliberate act of disregard and willful disobedience of lawful court orders by the Plaintiff/Respondent.
73. Furthermore, the nature, extent and scope of disobedience is so brazen to the extent that the Plaintiff/Respondent seems to imagine that the court cannot take any remedial action towards enforcing and/or implementing the terms of the decree of the court.
74. To my mind, it behooves all and sundry, the Respondent not excepted, to comply with court orders, until and unless same are varied, reviewed and/or set aside. In any event, where a Party is not happy with the Orders of the Court, there are several ways of expressing displeasure, i.e Appeal or Review. However, disobedience is not one of them.
75. Nevertheless, the nature of the obligation that inheres on Parties towards compliance with and obedience to lawful court orders was explained and elaborated upon in the case of *Hadkinson vs Hadkinson*(1952) ALL ER 352; in which their Lordships Justices Somervell and Romer held as follows:

“it was the unqualified obligation of every person against, or in respect of whom, an order had been made by court of competent jurisdiction, to obey it unless and until that order(s) was discharged”.
76. Before departing from the issue herein it is worth stating that whereas the standard of proof in respect of a charge of contempt is beyond the preponderance of probability, however, same does not rise to the standard beyond reasonable doubt. In this regard, I disagree with the contention by learned counsel for the Respondent that the averments alluded to by the Applicant have not proven the charge of contempt to the requisite standard. [See the decision in the case of *Mututika vs Baharini Farm Ltd* (1985)eKLR].
77. Conversely, I have adverted to the specific averments by and on behalf of the Applicant and the responses by the Respondent, which clearly demonstrate beyond peradventure, that the nuances bespeaking willful disregard, have been duly established and proved.
78. Arising from the foregoing, my answer to issue number three [3] is to the effect that the Applicant herein has duly proved and established the charge of willful disobedience of lawful court orders by the Respondent.



Final Disposition:

79. From the analysis, [whose details have been espoused in the foregoing paragraphs], it is crystal clear, that the Applicant herein has duly established and proved the charge of willful disobedience and contempt of lawful court orders.
80. Consequently and in the premises, the court finds and holds that the Application dated the 17th October 2023; is meritorious and thus worthy of being allowed.
81. In a nutshell, the Application dated the 17th October 2023; be and is hereby allowed on the following terms;
- i. The Respondent herein be and is hereby found to have willfully disregarded and/or disobeyed the terms of the decree issued on the 19th December 2022.
 - ii. Consequently and arising from willful disobedience, the Respondent herein be and is hereby cited for contempt.
 - iii. The Respondent shall attend court on a date to be set upon the delivery of the Ruling, with a view to partaking of an opportunity to offer mitigation prior to and before an appropriate sentence can be meted out.
 - iv. Nevertheless and in any event, the intended mention date shall be set within a period not exceeding 14 days from the date of the delivery of the Ruling.
 - v. The Costs of the Application assessed and certified in the sum of Kes.30, 000/= only be and are hereby awarded to the Applicant.
82. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2024.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Travis - Court Assistant.

*Ms. Ndichu h/b for Mr. Mburu Machua for the Defendant/Applicant.

Ms Muthee h/d for Mr. Kabiru for the Plaintiff/Respondent.

