



**Mboroki (Suing on his Behalf and as the Legal Representative of the Estate of Salome Stephen Mboroki - Deceased) v Mboroki (Environment & Land Case 44 of 2019) [2024] KEELC 600 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 600 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 44 OF 2019  
CK NZILI, J  
FEBRUARY 7, 2024**

**BETWEEN**

**JOHN GIKUNDA MBOROKI (SUING ON HIS BEHALF AND AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SALOME STEPHEN MBOROKI - DECEASED) ..... PLAINTIFF**

**AND**

**ISAAC KIRIMI MBOROKI ..... DEFENDANT**

**RULING**

1. By an application dated 5.10.2023, the court is asked to cite and punish the defendant, a wife, and a son for contempt of court. Further, the court to issue orders to implement and enforce the decree dated 25.1.2023.
2. The grounds are set on the face of the application and affidavit of John Gikunda Mboroki, sworn on 5<sup>th</sup> and 26<sup>th</sup> October 2023 respectively. In the judgment dated 25.1.2023, the applicant avers the court decreed that L.R No. Nyaki/Kithoka/1674 be registered in equal shares between the parties. He says the title of the suit land after which was changed, and the district land surveyor requested parties to be present as he visited the locus in quo on 28.7.2023 to mark out the portions on the ground.
3. The applicant avers that on the material day, the citees denied the land surveyor access to carry out his duties and instead chased him away, for which he wherefore the applicant sought and obtained an order for the O.C.S. Meru to provide security during the subsequent visit by the District Land Surveyor on 7.8.2023. The applicant avers that on 7.8.2023, the land was surveyed into two equal portions, and beacons were placed on the boundary dividing the two parcels of land.



4. The applicant says that after the land surveyor left, the citees uprooted the beacons. Similarly, he says that he went to work on his land on 31.8.2023 and the citees stopped or confronted him while armed with pangas. He therefore made a report at Kithoka police post, in O.B no. 0631/8/2023.
5. Additionally, the applicant attached copies of the judgment, a decree, a certificate of the official search, a copy of a letter dated 31.7.2023, the application and order for security, mutation form, O.B. extract, demand letters, and response as annexures marked J.G.M. 1-14, respectively. The applicant further avers he witnessed the events of 7.8.2023, 28.7.2023, and 31.8.2023 were witnessed by him in the company of the District Land Surveyor and his family, members. He termed the acts by the respondents as willful disobedience of a valid court decree.
6. The application was opposed through replying affidavits by Isaack Kirimi Mboroki, Janet Kangai Kirimi, and Stephen Gitonga Kirimi hereinafter the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> citees.
7. On his part, the 1<sup>st</sup> citee denied that he was in contempt of the court's decree, given that, as correctly admitted by the applicant, the subject land has since been registered under their joint names. He denied obstructing the work of the land surveyor on the alleged dates since he was visiting a daughter at Pangani Estate Nairobi with his wife while his son was at a road construction site in Kiambu County on the material day.
8. The 1<sup>st</sup> citee averred his farm hand, Mr. Kinoti, called him saying that the applicant had come with strangers to their land vowing to evict them. Further, the 1<sup>st</sup> citee averred he immediately notified his lawyers on record, who set the record straight by writing the letter dated 31.7.2023, marked as annexure 1KM "2", imploring the applicant's counsel to advise his client to desist from trespassing onto the suit land since there was a pending appeal.
9. Further the 1<sup>st</sup> citee averred that they were never served with the land surveyor's letter dated 14.7.2023. He vehemently denied chasing, obstructing, or interfering with the work of the land surveyor on the locus in quo on 28.7.2023; otherwise, he would have been reported to the police or a protest letter written to his lawyers on record.
10. The 1<sup>st</sup> citee averred he has been living on the suit land with his family since 1980, which the applicant had never utilized or sought an eviction or permanent injunction in the primary suit. Further, the 1<sup>st</sup> citee denied service with the application dated 31.7.2023 or any order of 3.8.2023, including the land surveyor's letter dated 1.8.2023. The 1<sup>st</sup> citee denied that the land was subdivided on 7.8.2023. He also disputed the fact that beacons were picked and erected on the ground and or a mutation form prepared to that effect over the suit land.
11. In addition, the 1<sup>st</sup> citee termed the documents and the letters attached to the supporting affidavit suspicious, fake, and or tailor-made to delude the court. As to the O.B. report, the 1<sup>st</sup> citee averred it was craftily obtained to beguile the court to grant the applicant underserved orders. He denied cutting any boundary, uprooting beacons, threatening anybody, or committing any alleged criminal offences. The 1<sup>st</sup> citee said the application was an attempt by the applicant to put him behind bars so that he could access and or evict him from the suit property.
12. The 1<sup>st</sup> citee also averred that his family was law-abiding and peace-loving who have not breached the decree, and were in the Court of Appeal in pursuit of justice. The 1<sup>st</sup> citee said his brother had too much vendetta against him to the extent of attempting to forcefully and illegally evict him and take over his life investment on the suit land. He attached a copy of the plaint dated 14.8.2019, a letter dated 28.7.2023 an affidavit by his son, the 3<sup>rd</sup> citee, a screenshot of the WhatsApp messages, photographs



of his investment on the land, a letter dated 21.8.2023, a reply dated 25.8.2023 and 7.9.2023 and the copy of the email for the Court of Appeal hearing all marked as annexures 1 KM. 1-11 respectively.

13. The 2<sup>nd</sup> citee, Janet K. Kirimi, opposed the motion by her affidavit sworn on 30.10.2023 as her evidence in chief. She denied obstructing the execution of the decree as alleged or at all. The 2<sup>nd</sup> citee said she did not witness anything on the land on the alleged days in the supporting affidavit and more so on 28.7.2023 since she was in Pangani Nairobi. She averred that all she gathered from the caretaker was that her brother-in-law was out to share and sell their land. The 2<sup>nd</sup> citee, however, confirmed she was at home on 7.8.2023, undertaking her daily routines of pruning coffee and cutting grass for her cows. She denied that any beacons were fixed on the suit land. The 2<sup>nd</sup> citee said she was unaware of any court decree favoring her brother-in-law regarding the suit land. She said there was no eviction order against them. The 2<sup>nd</sup> citee adopted her replying affidavit sworn on 30.10.2023 as her evidence in chief.
14. The 3<sup>rd</sup> citee, Stephen Gitonga Kirimi, opposed the application by a replying affidavit sworn on 30.10.2023. He averred that on 28.7.2023, his parents were visiting his sister at Pangani Nairobi while he was undertaking road construction in Kiambu county. He averred one Mr. Kinoti, their caretaker was the one who was at home that day. The 3<sup>rd</sup> citee denied any goons were on the land. Further, he denied that any land surveyor in the company of the applicant came to the land that day and were chased away as alleged or at all. Further, the 3<sup>rd</sup> citee denied the allegations over the events of 31.8.2023.
15. The 3<sup>rd</sup> citee averred his parents have been in exclusive occupation of the property, which they have extensively developed. Again, the 3<sup>rd</sup> citee averred that no subdivision exercise or the placing of beacons, between the applicant's share and their land occurred on 7.8.2023. He denied uprooting the beacons as alleged or at all. The 3<sup>rd</sup> citee averred the applicant was out to ensure that they were jailed forcibly take over the land.
16. In a supplementary affidavit dated 26.10.2023, the applicant averred that on 28.7.2023, the District land surveyor, in the presence of the chief Kithoka Location Mr. Murithi and were prevented by armed goons from carrying out the survey works. He reiterated that the goons who had been ferried to the land by the 3<sup>rd</sup> citee aboard motor vehicle KBR 817M, a probox. The applicant averred the district land surveyor's report dated 29.9.2023 before the court had captured what transpired on 28.7.2023. He attached the same as annexure J.G.M. "15".
17. The applicant averred that Stephen Gitonga called the said goons via his mobile phone and boasted to the respondent's counsel on how he had instructed them to dis allow anybody from accessing the land. He confirmed that the citees were all present on 28.7.2023.
18. Further the applicant averred that the land surveyor's report was clear that the suit land was partitioned and beacons erected on 7.8.2023, under the superintendence of the O.C.S. Meru police station.
19. The applicant averred that from the affidavit of the 1<sup>st</sup> citee, it was apparent that he had barred him from taking possession and use of half of the land as decreed by the court.
20. Following directions issued on 17.10.2023, the citees appeared in person during the hearing of the application on 31.10.2023. Mr. Mwirigi Kaburu prosecuted the application through written and oral submissions. Counsel submitted that in paragraphs 7, 13, 14, 15, 16, 25, 27 & 29 of the replying affidavits by the 1<sup>st</sup> & 3<sup>rd</sup> citees there was no doubt that to them, the applicant was a trespasser who wanted to evict the respondent from the entire land. Counsel submitted that the citees were resisting any entry by his client into the decreed land.



21. Moreso counsel submitted the respondent, and the citees attitude was that the court did nothing in the absence of an eviction order.
22. Additionally, counsel submitted that there was nothing more evident for the court to establish than such an open defiance of its decree. Further, counsel submitted that the question before the court was whether the citees were ready to cede the land to the applicant, and if the answer was yes, then the next issue should be ready to purge the contempt, and if the answer was no, then the court under section 29 of the *Environment and Land Court Act* had to punish them for contempt of court.
23. Taking the witness stand, the 1<sup>st</sup> citee denied disobeying the court decree in the manner described in the application. He relied on his replying affidavits sworn on 16.10.2023 as his evidence in chief. He also relied on the annexures thereto. As to the supplementary affidavit dated 30.10.2023, the 1<sup>st</sup> citee said he was unaware that Chief Mureithi of Kithoka Location came to the land with the land surveyor. He said that the chief had never told him about the site visit in the first instance or the need for the implementation of the decree. The 1<sup>st</sup> citee said he was unaware of any execution proceedings taken against him, nor was he aware that his son, the 3<sup>rd</sup> citee, had allegedly brought any goons to the land during the visit by the land surveyor, using a motor vehicle. He said no official search certificate was produced before the court to ascertain the motor vehicle identity or ownership.
24. As to the land surveyor's report, the 1<sup>st</sup> citee said he was unaware of its contents, for it was never shared with him or brought to his knowledge by the land surveyor.
25. In cross-examination by Mr. Mwirigi Kaburu, advocate, the 1<sup>st</sup> citee said he never saw the area chief at his land on 28.7.2023 at his land. Regarding the letter attached as L.K.M. "2," the 1<sup>st</sup> citee said it was written under his instructions by his lawyers on record acknowledging a visit by the applicant to the land on 28.7.2023. Regarding summons allegedly issued by the land surveyor through the area chief, the 1<sup>st</sup> citee denied receipt of the same. He insisted that he could not have been comfortable with the site visit without service of the summons upon him. As to the 2<sup>nd</sup> summons to visit the land by the land surveyor, the 1<sup>st</sup> citee did not comment. He was silent on whether or not beacons were effected on the land as per the land surveyor's report.
26. In re-examination, the 1<sup>st</sup> citee even though he was at home on 7.8.2023, he denied witnessing the events alleged by the applicant. The 1<sup>st</sup> citee said he did not obstruct the land surveyor in carrying out what had been directed in the court's decree.
27. The 1<sup>st</sup> citee observed that the land surveyor's report was silent on the number and the features of the beacons fixed on the land. He insisted that the farm worker did not inform him if the area chief and the land surveyor were present on his land.
28. Further, the 3<sup>rd</sup> citee adopted his replying affidavit sworn on 30.10.2023 as his evidence in chief. He said he was a supervisor of Pamco Builders, a road construction company based in Kiambu County, where he had worked between 7.8.2023, 28.7.2023, and 30.8.2023. The 3<sup>rd</sup> citee denied obstructing the work of the land surveyor and later on, uprooting the beacons. Further, he refuted claims that the area chief and land surveyor came to the land or that he ferried goons using a probox vehicle to stop the survey work.
29. The 3<sup>rd</sup> citee said he was aware of the court decree whose effect was that his father cedes half of their land to his brother, the applicant. The 3<sup>rd</sup> citee said he went to Kiambu County on 5.7.2023 until October 2023 and therefore he was not present on the three dates as alleged by the applicant.



30. The citees relied on written submissions dated 30.10.2023 and isolated four issues for determination. On whether contempt has been proved, the citees submitted that the applicant has failed to discharge the burden, which is higher than proof on a balance of probability.
31. Further, the citees submitted that a land surveyor couldn't visit the land alone or undertake the work without an assistant. The citees submitted that their alibi had not been rebutted and that they had no burden to prove their innocence, unlike the applicant who, under section 107-112 of the *Evidence Act*, had to prove all the ingredients of contempt of court.
32. The citees submitted that no letter was produced to show that the land surveyor had notified the respondent of the intended visit. On proof of survey works or fixing of boundaries, the citees submitted no corroborative documents were produced to challenge their affidavits or evidence. Unlike the applicant, the citees submitted corroborative evidence of 4 people was weightier and more believable.
33. As to the land surveyor's letter dated 1.8.2023, it was submitted that the same was suspect and unbelievable for it was neither addressed to them nor their advocates on record. Further, it was submitted that the mutation form, had no Registry Index Map Sheet Number, the time of the visit, signatures or mark sheet number, the date and the names of the District land surveyor especially on its leaf numbers 1 - 5. It was submitted that given these identified inconsistencies, discrepancies, gaps, or lacunas and lack of an affidavit by the land surveyor or the area chief, the court should find no survey works or exercise took place on 7.8.2023 as alleged or at all.
34. On the evidence of uprooting beacons, the citees submitted that since there was no evidence of fixing beacons, the date, number, type, time and a witness to the uprooting, source of the information and a report made to the police the court should find the evidence uncorroborated, imaginary, speculative and unbelievable.
35. The citees submitted under section 21 (1) of the *Land Registration Act*, it was a criminal offence to remove a boundary feature or part of it without authority, and since no action was taken against them the allegations were baseless.
36. As to the issue of an eviction order and given the annexures L.K.M. "6" & "10" showing extensive developments on the land, it was incumbent upon the applicant to comply with Sections 152A & 152 1 of the *Land Act*. Reliance was placed on *Jiban Freighters Ltd v Hardware & General Stores Ltd* (2015) eKLR. Besides the citees submitted, there was a pending application at the Court of Appeal now awaiting delivery of a ruling on 24.11.2023. Reliance was placed on *Michael Sistu Mwaura Kamau v Director of Public Prosecution* (2018) eKLR, on the standard of proof in contempt proceedings.
37. There is no dispute that an application for a stay of execution and adduction of new evidence was dismissed by this court on 10.5.2023. In an application dated 11.5.2023, the respondent was allowed to be represented by the firm of C.P Mbaabu & Co. Advocates, who filed a notice of change of advocates dated 25.5.2023. The decree dated 13.2.2023 is not subject to any pending appeal since a notice of appeal that has been brought to this court's attention. Indeed, from the certificate of search for L.R No. Nyaki/Kithoka/1674, the decree was effected at the title register. The suit land is now jointly owned by the parties in equal shares.
38. The judgment debtor does not refute the averments that the applicant is a co-land owner with attendant legal rights to use, access, and utilize the suit land as a co-proprietor. If then the applicant is co-owner, and the respondent has not objected to the entries in the copy of the register and the decree of this court that the land was to be partitioned in equal shares, the question is, can the oral and documentary evidence availed by the citees be justified that they did not obstruct the cause of justice? Can the citees be heard to say that the action of the applicant and land surveyor who came to effect



- the partition on the stated dates was unlawfully on the land and were assisting the applicant to take over or forcibly evict the citees and unjustly enjoy the property without an eviction order, notice to visit the land and affect the decree?
39. The consequence of the judgment delivered on 21.1.2023 was to cancel the registration in favor of the respondent. The land was to revert to their two names and be partitioned for each to acquire a title to half of the land. The application for the O.C.S. to accompany the applicant and the land surveyor was allowed on 31.7.2023. It has not been appealed against.
  40. There was no stay of execution as alluded to above or an appeal preferred against the decree when the respondent wrote a letter dated 31.7.2023. He knew the land was under the two names, and the applicant was a co-owner. Nothing was stopping the implementation of the decree. The pendency of an application at the Court of Appeal is and was no bar to the decree's implementation. The issue of an eviction notice could not and does not arise since the applicant was and is a co-owner of the land. There is no evidence that the partition was done so that it took away any developments belonging to the respondent on the suit land. The respondent did not refute the reports that the land registrar filed before this court or any of his letters sent to the respondent through the area chief. Similarly, the respondent knew of the reports and letters but chose not to seek to cross-examine, the area chief or the land surveyor on the veracity, authenticity, and truthfulness of his documents. It was not enough to say that the land surveyor and the area chief did not undertake such visits and survey works or attach the mutation form without basis. The reports form part of the court record, and the court finds no basis to doubt the said reports or documents.
  41. As to the manner of determining if the applicant has met the threshold and proved contempt of court, in *Michael Sistu Mwaura Kamau vs. D.P.P. & others* (*supra*), the court said the test is willful and deliberate disobedience of a court order one is aware of. The order or decree has to be clear and precise leaving no doubts as to what the party was supposed to do or refrain from doing.
  42. In *Jiban Freighters Ltd vs. Hardware & General stores* (*supra*), the court said the order must be unambiguous and easy to understand and that there must be conduct by the citee constituting contempt of court or breach of the order.
  43. In this application, the citees have not denied that a decree of this court was issued and partly implemented at the land registry. The decree was clear and precise that the land be partitioned in equal portions in favor of the two parties.
  44. The judgment debtor has not alleged that the decree was unclear, unprecise, unambiguous, or not understood by him.
  45. The judgment debtor has not said he appealed against it or sought to stay it at the Court of Appeal. The nature of the application at the Court of Appeal has not been stated. The applicant has said that the citees conduct, obstructed, derailed, and rendered the decree's implementation useless. The land surveyor clearly stated how the citees or agents attempted and or frustrated the implementation until the court had to order the O.C.S. Meru Police station to offer security.
  46. The citees have vehemently denied that there was a site visit on three occasions to implement the decree. Indeed, they do admit that the decree-holder and his wife were present on the two occasions in the company of two men whom they did not bother to establish their names or report to the police, if they were intruders on their land. The citees deny even the most basic facts, yet they have admitted, incredibly the 1<sup>st</sup> & 2 and citees, that they were at home on two named dates, yet they purport to deny seeing the respondent, the area chief, and the O.C.S.



47. The citees aver that they were law-abiding and peace-loving people yet they do not admit apparent facts. Further, the citees, especially the respondent, were privy to the judgment and the decree, so the 1<sup>st</sup> citee returned to this court to have it stayed. He cannot, therefore, feign ignorance of its contents and implications.
48. The respondent willfully and deliberately sought to obstruct the decree's implementation and used the 2<sup>nd</sup> and 3<sup>rd</sup> citee to assist him in obstructing, any access to the land by the applicant. The applicant identified the citees on the three named dates. Evidence of alibi has not been substantiated by any independent witnesses or documentary evidence of travel outside the jurisdiction of this court on the material dates.
49. The upshot is that I find contempt of court proved against the three citees, and are put on mitigation before sentencing.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 7<sup>TH</sup> DAY OF FEBRUARY 2024**

In presence of

C.A Kananu

Mr. C.P Mbaabu for the Defendant/respondent

Karanja for the Plaintiff

Citees

**HON. CK NZILI**

**JUDGE**

