



Keesi & 2 others (Suing as the administrator of the Estate of Jonathan Keesi Ngunzi - Deceased) v Keesi & 9 others (Environment & Land Case 337 of 2017) [2024] KEELC 1372 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1372 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 337 OF 2017**

**TW MURIGI, J
MARCH 6, 2024**

BETWEEN

**ALICE MBESA KEESI 1ST PLAINTIFF
JUSTUS KYALO KEESI 2ND PLAINTIFF
LILIAN NTHAMBI KEESI 3RD PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF JONATHAN KEESI
NGUNZI - DECEASED)**

AND

**BENJAMIN MUTUA KEESI 1ST DEFENDANT
KINYAMBU KEESI 2ND DEFENDANT
KYAMA KEESI 3RD DEFENDANT
IGNATIUS KINYAMBU 4TH DEFENDANT
ROSE NGINA 5TH DEFENDANT
MUSAU MASOKA 6TH DEFENDANT
MUTUKU SILINGI 7TH DEFENDANT
PATRICK NZOMO 8TH DEFENDANT
JOHN KATO 9TH DEFENDANT
MBITHE SILINGI 10TH DEFENDANT**



RULING

1. Before me for determination is the Notice of Motion dated 18th November, 2020 brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, in addition to Order 40 Rule 3 of the Civil Procedure Rules, 2010 in which the Applicants seek the following orders: -
 1. Spent.
 2. That the 9th Defendant/Respondent be committed to civil jail for a period of Six (6) months for wilful disobedience and contempt of the Court order issued by Honourable Justice Mbogo on 30th January, 2019.
 3. That this Honourable Court do issue an order compelling the 9th Defendant/Respondent to demolish the residential house erected on the suit property in contempt of the Court order issued on 30th January, 2019.
 4. That this Honourable Court be pleased to order the Officer Commanding Station (OCS) Wote to enforce the orders issued against the 9th Defendant/Respondent.
 5. That the costs of this application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Justus Kyalo Keesi sworn on his own behalf and on behalf of the 3rd Plaintiff on even date.

The Plaintiffs/Applicants Case

3. The Applicants averred that vide an application dated 26/02/2014, the Plaintiffs/Applicants sought orders inter alia restraining the Defendants from continuing to trespass, constructing, cultivating, selling, wasting or in any way dealing with the suit property known as KILALA/KAUMONI/323 pending the hearing and determination of this suit.
4. That by a ruling delivered on 20/12/2018, the 9th Defendant was restrained from continuing to trespass, constructing, cultivating, selling, invading wasting or in any way dealing with the suit property pending the hearing and determination of the main suit. That the order was issued on 30/01/2019 and a copy thereof together with the ruling was duly served upon the 9th Defendant as demonstrated by the affidavit of service of Ramadhan Hassan sworn on 16/09/2020.
5. The Plaintiff further averred that the 9th Defendant was also served with a letter by their Advocates cautioning him to cease making any development on the suit property as well as to demolish any structure erected in breach of the Court order. That despite being served with the ruling and the order of this Court, the 9th Defendant continued to construct a residential house which he recently completed and was residing therein in blatant breach of the orders of this Court.
6. The Applicants averred that the Court order has not been stayed or varied to date. According to the Applicants, the 9th Defendant has utmost contempt of this Court and he will continue to disrespect the Court unless he is committed to civil jail and ordered to demolish the structure erected on the suit property. The Applicants asserted that the orders sought ought to be granted in order to uphold the authority, dignity and integrity of this court.



The 9th Defendant's Case

7. Opposing the application, the 9th Defendant vide his replying affidavit sworn on 14/12/2020 averred that he started constructing a residential house on the suit property long before he was notified of the existence of any court orders. He averred that his Advocates informed him that Justice Mbogo issued an order on 20/12/2018 restraining the 5th – 9th Defendants from dealing with the suit property in any way. He stated that the said order was valid up to 20/12/2019.
8. He further averred that the portion of the suit property sold to him was allocated to the 1st Defendant who has no objection with him occupying the same. That upon the lapse of the court order issued by Hon. Justice Mbogo, he continued constructing the house which he had commenced way back in the year 2013. He stated that when the COVID pandemic struck, he moved into the suit property in March, 2020 together with his wife and children after being unable to pay rent.
9. He averred that as at the time when he resumed constructing the house on the suit property, there were no valid court order in force. According to him, demolition orders should only be issued after hearing the parties substantially and not at the interim stage. He urged the Court to dismiss the application with costs.

The Response

10. In a further affidavit dated 09/02/2021, the Applicants argued that an injunction does not lapse upon the expiry of twelve months where a court has expressly stated that it will last until the hearing and determination of the suit. It was further argued that the order issued on 20/12/2018 is still in force until it is subsequently set aside or varied.
11. The application was canvassed by way of written submissions.

The Applicant's Submissions

12. The Applicants' submissions were filed on 10/03/2021.
13. On their behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the order issued by Justice Mbogo lapsed on 20/12/2019?
 - ii. Whether the Respondent is in contempt of the order of the Court issued on 30/01/2019?
 - iii. Whether the Respondent is liable to be committed to civil jail?
14. On the first issue, Counsel submitted that the interlocutory injunction was to obtain until the hearing and determination of this suit. Counsel argued that the order is valid in accordance with Order 40 Rule 6 of the Civil Procedure Rules since the suit is yet to be heard and determined. To buttress this point, Counsel relied on the case of *Maxam Limited & 2 others v Heineken East Africa Import Co. Ltd & 2 others* [2017] eKLR where the court held that:-

“Where however the court has expressly stated that the interlocutory injunction is to last until hearing and determination of the suit, then I see no reason why it should be argued that the order will lapse at the end of 12 months. The *Civil Procedure Rules* state that the orders will lapse at the end of 12 months. But not where the court states otherwise. This clearly should mean that where the court does not state how long the order is to last then at the expiry of twelve months any affected party may move the court to have the order vacated. Besides, I



am also conscious of the fact that the purpose of interlocutory injunctions is to preserve the ends of justice from being defeated. An argument that an interlocutory injunction lapses automatically may thus be without logic both in law and in equity.”

15. On the second issue, Counsel contended that the 9th Defendant was under a duty to obey the Court order and if aggrieved, he was at liberty to move the Court to have the order set aside. Counsel submitted that the Applicants have demonstrated that the Court order was duly served upon the 9th Respondent who has admitted that he continued constructing the house which he had commenced in the year 2013. Counsel reiterated that the 9th Defendant confirmed that he moved into an incomplete house in the suit property in March 2020 which he completed thereafter.
16. It was further submitted that the Applicants have demonstrated disobedience of the Court order on the part of the 9th Defendant.
17. On the third issue, Counsel submitted that the 9th Defendant was aware of the consequences of disobeying the court order since the order served upon him was endorsed with a penal notice. Counsel further submitted that the 9th Defendant intentionally disobeyed the Court order so as to defeat the ongoing court proceedings. Counsel submitted that the 9th Defendant has continuously disobey the court order and has not taken any steps to purge his contempt.
18. Concluding his submissions, Counsel urged the Court to allow the application as prayed. To buttress his submissions, Counsel relied on the list and bundle of authorities dated 02/02/2021.

The 9th Defendant’s Submissions

19. The 9th Defendant’s submissions were filed on 10/11/2023.
20. On his behalf, Counsel identified the following issues for the Court’s determination: -
 - i. Whether there was a valid injunction in force?
 - ii. Whether the 9th Defendant should be punished for contempt of court?
 - iii. Whether Orders C and D of the application should be granted?
21. On the first issue, Counsel submitted that the interlocutory injunction issued by the Court in December 2018 was only valid for twelve months and lapsed in December 2019 by operation of the law. Counsel urged the court to disregard the holding in the case of *Maxam Limited & 2 Others v Heinken East Africa Import Co. Ltd & 2 Others* relied on by the Applicants for being a High Court decision which is not binding on the Court.
22. On the second issue, Counsel submitted that at no time did the 9th Defendant act in disobedience of any valid court order that was in existence. Counsel further submitted that the Applicants have not discharged the standard of proof in the contempt proceedings herein.
23. On the third issue, Counsel submitted that both parties must be heard on merit before the Court can order the 9th Defendant to demolish the house erected on the suit property. Counsel urged the Court to dismiss the application with costs. To buttress her submissions, Counsel relied on the following authorities: -
 - i. *CIC General Insurance Co. Ltd v Phyllis Mbula* [2019] eKLR
 - ii. *Gitonga & 2 Others v Redken Wells Ltd & 12 Others* [2023] KEHC
 - iii. *Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & Another* [2018] eKLR.



- iv. [*Kennedy Mwaura Kibebe & 3 Others v Annie Wanjiku Kibeh & 3 Others*](#) [2021] eKLR.
- v. [*JGK v FWK*](#) [2019] eKLR.
- vi. [*Blossom Hill Estate Agents Co. Ltd v National Land Commission & 7 Others*](#) [2020] eKLR.
- vii. [*Tatecob Housing and Co-op Sacco Limited v Qwetu Sacco Limited*](#) [2021] eKLR

Analysis and Determination

24. Having considered the application, the respective affidavits and the rival submissions, the following issues fall for determination:-
 - i. Whether the orders issued on 20/12/2018 have lapsed
 - ii. Whether the Defendant is guilty of contempt of court.

Whether the Orders Issued on 20/12/2018 have Lapsed

25. The parties herein differed on the validity of the Court order made on 20/12/2018. The Applicants insisted that the validity of the Court order was effective pending the hearing and determination of the suit while the 9th Defendant maintained that the court order lapsed at the expiry of twelve months in line with Order 40 Rule 6 of the [*Civil Procedure Rules*](#).
26. Order 40 Rule 6 of the [*Civil Procedure Rules*](#) provides as follows: -

‘Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.’
27. The interpretation of Order 40 Rule 6 of the [*Civil Procedure Rules*](#) has been a subject of wide judicial discourse. In the case of [*Nguruman Ltd v Jan Bonde Nielsen & 2 Others*](#) (2014) eKLR, the Court of Appeal held that:-

“Without going into the details, we with respect agree with the submissions of all learned Counsel that the object of introducing Rule 6 in the 2010 Rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various mechanisms to delay the disposal of the suit.”
28. The Plaintiffs relied on the case of [*Maxam Limited & 2 Others v Heineken East Africa Import Co. Ltd & 2 Others*](#) [2017] eKLR where the court held as follows:-

“I must however also appreciate that order 40 Rule 6 of the Civil Procedure Rules anticipates that where an interlocutory injunction has been issued on merit then the suit is to be determined and the parties respective rights asserted within one year of the interlocutory order being made. The rule appreciates and seeks to ensure that neither party is placed at an indefinite hardship through an intermediary order. The mischief was to guard against sluggish and dawdling litigants who seek to delay the prosecution of their claims.”
29. This was also the holding in the case of [*David Wambua Ngii vs Abed Sila Alembi & 6 Others*](#) (2014) eKLR where Justice Gikonyo held that the rule is intended to prevent the mischief where an unscrupulous applicant goes to slumber on the suit after obtaining an injunction. From the foregoing,



it is clear that Rule 6 was intended to prevent parties from being indolent upon obtaining an order of injunction.

30. The order at the center of this application was issued on 20/12/2018 pursuant to the application dated 26/02/2014. The terms of the order were as follows:-
 1. That the 5th and 9th Respondents be and is hereby restrained whether by themselves, their agents, servants, employees or whosoever from continuing to trespass onto, constructing, cultivating, selling, invading, wasting or in any way dealing with the suit property known as Kilala/Kaumoni/386 and Kilala/Kaumoni/323 respectively pending the hearing and determination of this suit.
 2. That the costs of the application be provided for.
31. The order is clear that the injunction was granted pending the hearing and determination of the suit.
32. The record shows that the Plaintiffs instituted this suit on 25th July 2013 in Nairobi ELC Case No. 910 of 2013. On 15/9/2017 Hon Gitumbi J directed that the matter be mentioned before the presiding judge Makueni High Court. On 18/10/2017 Hon Justice C. Kariuki directed that the matter be placed before Hon Justice Mbogo for directions. When the matter was placed before Hon Justice Mbogo for directions, Mr Hassan was present holding brief for Issa for the Plaintiffs while the Defendants were absent. Mr Hassan sought for a ruling date in regards to the application dated 26/02/2014 on the grounds that the parties therein had complied by filing their respective submissions. The court reserved a ruling date for 5/12/2017.
33. On 4/12/2019 Mr Hassan holding brief for Issa for the Plaintiff was present in court. Though duly served, neither the Defendants nor their Counsel were present in court. Mr Hassan informed the court that the Plaintiffs had complied with Order 11 of the Civil Procedure Rules and sought for a hearing date for the main suit. The court directed that the matter proceeds for pre trial directions on 28/02/2019. When the matter came up for pre trial directions on 28/02/2019, the Defendants were absent despite being duly served. Counsel requested for a hearing date for the main suit. The matter was fixed for hearing on 27/05/2019. When the matter came up for hearing on 27/05/2019, Mr Masika holding brief for Mr Mutisya for the 6th Defendant applied for an adjournment on the grounds that the 6th Defendant was deceased and sought for time to substitute the 6th Defendant. Counsel was granted 60 days to substitute the deceased defendant. The matter was thereafter mentioned on 25/09/2019, 11/11/2019 and 27/1/2020. On 25/11/2020 the court gave directions on the disposal of the application dated 18/11/2020 and fixed the matter for mention on 14/11/2020. Thereafter, the matter was mentioned severally and on 20/12/2018 the court pronounced itself on the application dated 26/02/2014.
34. On 4th February 2021 Ms Mutuku Counsel for the 9th Defendant informed the court that the first Plaintiff, Alice Keesi Mbeesa had passed away and that the remaining Administrators had sought for her substitution. Arising from the above, the proceedings herein were stayed for a period of 90 days to enable the Plaintiffs to sort out the issue of administration of the estate of the late Jonathan Keesi Ngonzi in Machakos High Court Succession Cause No. 119 of 2004.
35. The matter was thereafter mentioned severally to confirm the status of the succession cause before the High Court. The Plaintiff thereafter sought to amend the Plaint in view of the rectified grant issued on 22/2/2023. Subsequently, the Plaintiff's application dated 17/03/2023 seeking to substitute the deceased Plaintiff was allowed as it was unopposed. Ms Ahomo Counsel for the Plaintiffs informed the court that there was a pending application for contempt dated 18/11/2020. The court issued directions on the disposal of the application. When the matter came up for mention on 12/10/2023 to confirm



compliance Mr Muthiani Counsel for the 1st – 8th and 10th Defendants informed the court that he was not opposed to the application. The matter was again mentioned on 27/11/2023 when the court reserved the ruling date for 6th March 2024 From the foregoing, it is crystal clear that this matter has been active and that the Plaintiffs have not been indolent.

36. The Plaintiffs have shown the steps that they have undertaken in progressing this matter to full hearing. These in my view are special circumstances that the court will consider where a matter has not been finalized within 12 months.
37. In the case of *Wilson Tanui Barno & 2 Others v Jeniffer Kositany* (2015) eKLR where Justice Munyao when faced with similar circumstances observed as follows:-

“I have my own problems with the practicability of Order 40 Rule 7 and I think it needs to be modified to take into account the reality that we have serious backlog of cases. It is not realistic that all cases will be determined within one year of the issuance of the order. In my view where the court has issued an order of injunction pending hearing and determination of the suit then that position should ensue and if any party is aggrieved by the continued existence of the order of injunction or wishes to have it set aside whether on the basis of order 40 Rule 6 or Rule 7 then such party is at liberty to apply the court for the order of injunction to be set aside or to be varied.”.

38. I am in agreement with the holding in *Wilson Tanui Barno & 2 Others v Jeniffer Kositany* (*supra*) where it was held that the lapse of an injunction should be declared upon the application of a party.
39. Indeed, if a court has issued an injunction pending the hearing and determination of the suit, the same should subsist unless any party is aggrieved by the existence of the order wishes to have it varied or set aside. It is not in dispute that our courts are faced with challenges of backlog and heavy case load, making it impracticable to implement the subrule.
40. It is not in doubt that the purpose of an interlocutory injunction is to prevent irreparable injury from occurring before the Court has had a chance to hear and determine the case in a full trial. The record shows that the Plaintiffs have made steps in setting down this suit for hearing. No evidence of indolence was demonstrated on the part of the Plaintiffs. This court therefore finds and holds that the order made by Hon. Justice Mbogo has not lapsed and is still in force.

Whether the 9th Defendant is in Contempt of the Court Order Issued on 20/12/2018

41. The *Black's Law Dictionary* 9th Edition defines contempt of court as follows:-

“conduct that defies the authority or dignity of the court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment,”

42. In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another* [2005] eKLR Ibrahim J (as he then was) stated as follows:-

“It is essential for the maintenance of the Rule of Law and order that the authority and 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 or in respect to whom an order is made by the court of competent jurisdiction, to obey it unless and until that 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 an order believes it to be irregular or void.”

43. The law guiding the present application is Order 40 Rule 3(1) of the [Civil Procedure Rules](#) which provides as follows:-

In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

44. Section 5 of the [Judicature Act](#) confers jurisdiction on the superior Courts to punish for contempt and provides that;

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 such 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.

45. The High court of South Africa in the case of [Carla Burchell v Barry Grant Burchell](#) Eastern Cape Division Case No 364 of 2005 held that in order to succeed in civil contempt proceedings, an applicant has to prove:-

- i. The terms of the order
- ii. Knowledge of these terms by the respondent
- iii. Failure by the respondents to comply with the terms of the order.

46. Back home, in the case of [Samuel M.N. Mweru & Others v National Land Commission & 2 Others](#) (2020) e KLR the court set out the elements to be proved in an application for contempt of court as follows:-

“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 knowledge.
- c. The defendant has acted in breach of the terms of the order; and
- d. The defendant’s conduct was deliberate.

47. The first issue for determination is whether the terms of the order were clear. It is not in dispute that on 20/12/2018, the court issued an injunction against the 5th and 9th Defendants pending the hearing and determination of this suit.



48. The order was unambiguous as it restrained the 5th and 9th Respondents whether by themselves, their agents, servants, employees or whomsoever from continuing to trespass into, constructing cultivating, selling, invading, wasting or in any way dealing with the suit property known as Kilala/Kaumoni/386 and Kilala/Kaumoni/323 pending the hearing and determination of this suit. To this end I find that the order issued on 20/12/2018 was clear and unambiguous.
49. The next issue for determination is whether the 9th Defendant was served or had proper notice of the order. The Applicants averred that the 9th Defendant was aware of the terms of the order as the same was served upon him by their Advocate. In this regard, the Applicants produced the affidavit of service of Ramadhan Hassan Advocate sworn on 16/09/2020. In addition, the Applicants produced a letter dated 03/07/2020(JKK5) showing that the 9th Defendant was served with a cautionary notice. In his replying affidavit, the 9th Defendant admitted that his Advocate informed him about the existence of the Order. I am therefore satisfied that the 9th Defendant was aware of the terms of the order. I also find that the terms of the order were clear in terms of the parcel numbers and the injunctive order.
50. On whether the 9th Defendant deliberately breached the court order, the Applicants have a duty to prove their case beyond the balance of probabilities. This is because contempt of court is in the nature of criminal proceedings and the liberty of the subject is usually at stake. The Applicants must prove wilful and deliberate disobedience of the court order if they are to succeed as was held in the case of Gatharia K. Mutitika v Babarini farm ltd (1985) KLR where the court held that:-
- “ A contempt of court is an offence of a criminal nature. A man may be sent to prison. It must be proved satisfactorily.....It must be higher than prove 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 nature.”
51. In the case of Peter K Yego & Others v Pauline Wekesa Kode ACC NO. 194 OF 2014 the court held that:-
- “It must be proved that one had actually disobeyed the court order before being cited for contempt”
52. In the present case, the Applicants asserted that the 9th Defendant continued to construct a residential house on the suit property soon after the order dated 20/12/2018 and the letter dated 3/7/2020 were served upon him. The Applicants averred that 9th Defendant moved into the suit property and completed constructing a residential house while the order was still in force. In this regard, the Applicants produced the letter dated 3/7/2020 addressed to the 9th Defendant cautioning him to cease development on the suit property and requiring him to demolish the structures erected thereon in breach of the court order. The Applicants also produced photographs marked as Exhibit “JKK7” showing a residential house on the suit property where the 9th Defendant was residing. The Applicants maintained that the 9th Defendant continued to trespass into the suit property while the order was still in force.
53. On the other hand, the 9th Defendant contended that he began constructing the house in the year 2013 and continued to construct the house after the court order issued on 20/12/2018 lapsed by operation of the law. He stated that he moved into the suit property in March, 2020 when the COVID pandemic struck and completed constructing the residential house. The photographs produced by the Applicants clearly demonstrate that the 9th Defendant is in blatant breach of the terms of the said order.



54. The 9th Defendant admitted that he completed constructing the house in the suit property and was residing thereon. The Applicants have clearly demonstrated that the 9th Respondent constructed a permanent house on the suit land in blatant breach of the court order. Court orders are not made in vain and are meant to be complied with.
55. The upshot of the foregoing is that I find that the 9th Defendant is guilty of contempt of the order dated 20/11/2018. I hereby direct that he appears before this court on 7/05/2024 for sentencing and further orders.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF MARCH, 2024.

In the presence of:

Court assistant Kwemboi.

Ms Ahomo for the Plaintiffs

Ms Chepngeno holding brief for

Ms Mutuku for the 9th Defendant.

