



**Ithira v Robert (Environment and Land Appeal 46 of 2020)
[2024] KEELC 5133 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5133 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 46 OF 2020**

CK YANO, J

JULY 11, 2024

BETWEEN

AMOS MUTWIRI ITHIRA APPELLANT

AND

DAVID KIRIMI ROBERT RESPONDENT

JUDGMENT

Introduction

1. The present appeal is against a ruling delivered on 19th August, 2020 by the trial court, Hon. G. Sogomo P.M in the Principal Magistrate’s court at Tigania E& L case no. 23 of 2020. The said ruling was in respect of a notice of motion application dated 21st July, 2020 by the respondent herein which sought to cite and commit the appellant herein for contempt of court for disobeying court orders issued by the trial court on 5th June 2020.
2. In opposing the said application, the appellant filed a notice of preliminary objection dated 17th June 2020 and a replying affidavit sworn on 28th July, 2020.
3. The said application and the preliminary objection were disposed of conjunctively. Upon considering the matter, the trial court dismissed the appellant’s preliminary objection, allowed the application and issued a notice to show cause to the appellant as to why he should not be punished for disobeying the court’s orders.
4. The appellant was aggrieved by that ruling and filed this appeal on the following grounds-;
 1. That the learned principal Magistrate erred in law and facts in failing to find that there was no land known as LR no. Tigania/Tea Scheme /Kirimachuma/12.
 2. That the learned principal magistrate erred in law and fact in failing to find that if there was land registered as LR no. Tigania/Tea Scheme/Kirimachuma/12, the same was registered in



the name of Ithiira Kaumbuthu and not in the name of Amos Mutwiri Ithiira, the appellant herein.

3. That the learned trial Magistrate erred both in law and fact in failing to find that the defendant had no locus standi before the court as he was neither the registered owner of the land nor was he the administrator of the estate of Ithiira Kaumbuthu.
 4. That the learned trial magistrate erred in law and fact in issuing orders directed to the appellant whereas it was clear from the search that he was not the owner of the land Parcel No. Tigania/Tea Scheme/Kirimachuma/12.
 5. That the learned trial magistrate erred both in law and fact in failing to find that since the appellant was not the registered owner of the land and neither was he an administrator of Ithiira Kiambuthu's estate, no order in relation to the said land could validly issue against him.
 6. That the learned trial magistrate erred both in law and fact in finding that the appellant was in contempt of court orders issued by the honourable court on 5th June, 2020, whereas it was clear that the appellant was not the registered owner of the land parcel No. Tigania/Tea Scheme/Kirimachuma/12 and neither was he the representative of the estate of the registered owner.
 7. That the learned trial magistrate erred both in law and fact in failing to find that the orders of 5th June 2020 were wrongly directed against an undeserving party, who is the applicant (*sic*) herein.
 8. That the learned trial magistrate erred both in law and fact in failing to find and hold that the orders of the Honourable court issued on 5th June, 2020 could not validly issue to protect a property that did not exist being land parcel No. Tigania/Tea Scheme/Kirimachuma/12 and secondly, the orders could not issue against a party who was wrongly enjoined as a defendant.
5. The appellant prays that the appeal be allowed and the ruling made by the learned trial magistrate be set aside, an order that the appellant herein lacks locus standi as a defendant in the suit, that the trial court orders of 5th June 2020 could not validly issue against the appellant herein and that the costs of this appeal be borne by the respondent.
 6. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 9th February, 2024 through the firm of Mbaabu M'Inoti & Co. Advocates LLP while the respondent filed his dated 29th February, 2024 through the firm of Nkunja & Company Advocates.

Appellant's Submissions

7. The appellant's counsel gave a background of the matter and identified three issues for determination, namely whether the appellant herein was wrongly sued as a defendant in the case before the trial court, whether orders can validly issue against a party who has been wrongly sued in a matter and whether the appellant was in contempt of the court orders of 5th June 2020.
8. On the first issue, it was submitted on behalf of the appellant that the appellant was wrongly sued at the trial court and that the orders issued against him were unmerited. That this is because the appellant is not and has never been the registered proprietor of the property known as Tigania/Tea Scheme/Kirimachuma/12. That it is clear from the evidence on record that it is the appellant's late father, Ithiira Kaumbuthu, who was and is registered owner of the said land. That the appellant was neither the owner of the said land nor was he the personal representative of his late father's estate. It is submitted that the trial court in the impugned ruling disregarded these facts and therefore arrived at an erroneous



conclusion of law. For the said reasons, the appellant submitted that grounds 1, 2, 3, 4, 5 and 8 of the appeal are merited and must succeed.

9. Regarding the second issue, it was submitted that the appellant was not in contempt of the trial court's orders of 5th June 2020. The appellant's submission is rooted on the fact that he was wrongly sued and that the trial court's orders of 5th June 2020 referred to non-existent piece of land. For those reasons, it was submitted on behalf of the appellant that grounds 6 and 7 of the appeal are merited and must succeed. The appellant's counsel relied on the case of *Christine Wangari Gachega v Elizabeth Wanjiku Evans & 11 others* Civil case no. 3 of 2013, *Gabaria Mutitika v Babarini Farm Limited*, Civil Appeal No. 24 of 1985 and *Sheila Cassat Issenberg & another v Antony Machata Kinyanjui* [2021] eKLR and submitted that the respondent herein failed to meet the threshold of grant of orders of contempt of court and that the trial court relied on inaccurate facts and arrived at a wrong conclusion of law in its ruling. It is submitted that the appeal is merited and should be allowed as prayed.

Respondent's Submissions

10. The respondent's counsel also gave a brief facts of the case and identified the issues as: whether there was a valid order granted by the court, whether the appellant was aware of the said order and whether the appellant was in contempt of the said orders of the court, all of which the respondent answered in the affirmative. It is submitted that the order of court granting the respondent a mandatory injunction was validly issued by the trial court on 8th June 2020. That vide an affidavit of service filed in court, the appellant was made aware of the said orders of the court. Further, that the evidence produced by the respondent prove that the appellant, having been aware of the said orders of the court and fully knowing its impact went ahead to chase the workers of the respondent.
11. The respondent submitted that his case was based on an agreement dated 15th September, 2016 entered into by the parties herein for sale of 0.30 Ha of LR. No. Tigania/Tea Scheme/Kirimachuma/12. That the appellant acknowledged not being the registered owner of the said land and did not enter into the said agreement as a representative of the estate of his deceased father who was still alive at the time of the agreement and cannot turn around and deny and denounce the agreement he entered into voluntarily. The respondent's counsel associated themselves with the reasoning of the trial magistrate in his ruling that the issues raised in the preliminary objection were questions of fact that should be reserved for ventilation at trial and not through a preliminary objection.
12. It is further submitted that the issue of locus standi as raised by the appellant in his memorandum of appeal go to the root cause of the issue and should be ventilated at the trial of the case. The respondent relied on the case of *Besta Court Limited v Alice Njeri Kamau t/a Alibra Enterprises* [2015] eKLR.
13. The respondent also cited Order 40 Rule 3(1) of the *Civil Procedure Rules* which provides for consequences for disobedience or breach of orders in which a court has granted an injunction and further cited the definition of contempt of court in the *Black's Law Dictionary* (Ninth Edition). The respondent also relied on the case of *James Gachiri Mwangi V John Waweru Muriuki & 3 others* [2020] eKLR, *Samuel M.N. Mweru & others v National Land Commission & 2 others* [2020] eKLR and *Mutitika v Babarini Farm Ltd* (1985) KLR 229.
14. Further, the respondent submitted that the issue of contempt has been overtaken by events because the appellant had already served six months in civil jail after he failed to show cause why the warrants of arrest should not issue on 2nd September, 2020.
15. It was submitted on behalf of the respondent that the appeal should be dismissed with costs to the respondent on the grounds that the preliminary objection deals with issues that go to the root of the



case and as such would be properly ventilated at the trial of the matter, and that the orders issued by the trial court citing the appellant for contempt of court were properly issued.

Analysis and Determination

16. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities cited. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & another v Associated Motor Boat Co. Ltd* (1968) EA 123. There are only two issues for determination that I can deduce from the appeal:
- i. Whether the preliminary objection was merited.
 - ii. Whether or not the appellant was in contempt of the court orders issued by the trial court on 5th June, 2020.

Whether the preliminary objection was merited

17. In opposing the respondent's application dated 4th June 2020 which sought orders of inhibition and injunction, the appellant raised a preliminary objection on the ground that the suit lacked merit and that there was no land known as LR No. Tigania/Tea Scheme Kirimachuma/12 and if there was one, the same is registered in the name of the deceased one Ithara Kaumbuthu. Secondly, that the motion was otherwise an abuse of the court process and designed to delay the faster hearing of criminal case No. 20 of 2020 where the respondent was the complainant in the matter and the appellant was the accused person and the criminal case related to the same subject matter that is, the ELC matter.
18. The court will first have to determine whether the objection raised by the appellant qualifies to be a preliminary Objection as described in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 495 where Law J.A stated that-;
- “So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit.”
19. Further the court stated-;
- “A preliminary objection raises a pure point to law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
20. The appellant contended that there was no land known as LR No. Tigania/Tea Scheme/ Kirimachuma/12 and if there was the same is registered in the name of one Ithara Kaumbuthu (deceased). Clearly, this is an issue of fact that must be ascertained at the trial. In my opinion, it was not a pure point of law and I agree with the leaned trial magistrate's reasoning that the issues raised by the appellant in the preliminary objection were wholly and argumentative questions of fact that ought to be reserved for ventilation at the trial.



Whether or not the appellant was in contempt of the court orders issued by the trial court on 5th June 2020

21. Having perused the record of appeal and the original record, it is not in dispute that in the notice of motion application dated 4th June 2020, the respondent herein sought inter alia, an order of inhibition inhibiting any dealings in LR No. Tigania/Tea Scheme/Kirimachuma/12 and a mandatory injunction compelling the appellant herein to allow the respondent to continue picking the leased 1070 tea bushes growing on the said land till the expiry of the lease. Upon perusing and considering the said application, the trial court on 5th June 2020 granted the said orders. The learned trial magistrate further ordered that the application be served on the appellant for interpartes hearing on 11th June 2020.
22. The original lower court record contains an affidavit of service dated 9th June 2020 sworn by one Ambrose Kaggia, a licensed court process server. The process server deposed that on 8th June 2020 he received inter alia, the court order with instructions to serve the same upon the appellant herein. That on the same day, he served the respondent with the said documents including the court order, in the presence of the area chief. It is therefore clear that the appellant was served and was aware of the court orders issued by the trial court on 5th June 2020. Moreover, the respondent's averments as to the contemptuous acts by the appellant were corroborated by affidavits sworn by the eye witnesses and a report that was made by the respondent at the local police post. Further, it is clear from the material and evidence on record that the appellant did not deny that he was served with the orders given by the trial court on 5th June 2020. Instead, the respondent put a lot of emphasis on matters that go to the merit of the main suit. Even the appellant's submissions herein are, in my view not addressing the main issue in the appeal, which is whether or not the appellant was in contempt of the said court orders. Instead, the appellant has persistently submitted that he was wrongly sued and that he was not the owner of and there is no such property known as Tigania/Tea Scheme/Kirimachuma/12.
23. In an application for contempt of court orders, an applicant has to meet the following requirements: Whether an order was granted, whether the service was sufficient and whether the order was clear, unambiguous and unequivocal and whether there was disobedience of the said court order (See the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR.)
24. In the instant case, there is no dispute that the order had been issued and the order was clear, unambiguous and unequivocal. From the evidence before me, I am satisfied that the appellant had disobeyed the said court orders and the learned trial magistrate was right in his finding.
25. In *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution & Planning & 3 others* [2017] Mativo J. (as he then was) in a persuasive decision stated:

“If the Judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and a civilized life in the society. It is for this purpose that courts are entrusted with the extra ordinary power of punishing those who indulge in acts whether inside or outside it which tend to undermine the authority and bring them in disrepute and disrespect by scandalizing them and obstructing them from discharging their duties without fear or favour. When the court exercises this power, it does so to uphold the majesty of the law and of the administration of Justice. The foundation of the Judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts



which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working the edifice of the Judicial system gets eroded.”

26. Clearly, the appellant was obliged to comply with the said orders even if he did not agree with the same since court orders are not issued in vain.

27. In the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2015] 1 KLR 828, Ibrahim J (as he then was) stated:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of court is 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 of whom, an order is made by a 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.”

28. In the case of *Awadh v Mambu (No. 2)* No. 53 of 2004 (004) KLR 458 it was stated as follows-;

“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilized societies from those applying the law of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.”

29. Also, in the case of *B v Attorney General* (2004) 1 KLR 431 Ojwang J. (as he then was) held-;

“The court does not, and ought not to be seen to make orders in vain, otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality and for the rights of all people.”

30. A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. Willful and flagrant disobedience of court orders undermines the authority and dignity of the courts and must be dealt with firmly so that the court’s authority is not brought to disrepute.

31. In the case of *Samuel M.N Mweru & others v National Land Commission & 2 others* [2020] eKLR the court held that:

“A court without contempt power is not a court. [30] the contempt power (both in its civil and Criminal form) is so innate in the concept of jurisdictional authority that a court that could not secure compliance with its own judgment and orders is a contradiction in terms, an “oxymoron”. Contempt power is something regarded as intrinsic to the notion of court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in courts, and automatically exists by its very nature...”

A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. Article 159 (1) of the *Constitution* provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the *Constitution*. Under Article 10 (1) of the *constitution*



the national values and principles of governance in the article bind all state organs, state officers, public officers and all persons whenever any of them

- (a) applies or interprets the Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions. Under clause (2) (a) of the same Article the national values and principles of governance include the rule of law.

It is a crime unlawfully and intentionally to disobey a court order.

This type of contempt of court is part of a broader offence, which can take many forms but the essence of which lies in violating the dignity, repute or authority of the court.

[36] The offence has in general terms received a Constitutional “stamp of approval, ‘since the rule of law – a founding value of the constitution ‘requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.”

32. Similarly, order 40 rule 3(1) of the *Civil Procedure Rules* stipulates 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.”

33. Having considered the material and evidence on record, I am satisfied that the finding and holdings of the learned trial magistrate were justified and well founded, and I find no reason to interfere with the same.

34. Consequently, I find no merit in this appeal and the same is dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF JULY, 2024

In the presence of:-

Court Assistant – Tupet.

Ms Githinji holding brief for Mbaabu M’Inoti for appellant

Ms Kiema holding brief for Kaberia for respondent

C.K YANO

JUDGE

