



Kella v Kiilu (Sued as the Legal Representative of the Estate of the Late Peter Kiilu Kimenye alias Peter Kiilu Matolo) (Environment and Land Case E022 of 2020) [2024] KEELC 5267 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5267 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE E022 OF 2020**

**A NYUKURI, J
JULY 10, 2024**

BETWEEN

MARY NDUKU KELLA PLAINTIFF

AND

JANEFRANCISCA MUTIO KIILU (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE PETER KIILU KIMENYE ALIAS PETER KIILU MATOLO) DEFENDANT

RULING

1. Before court is a notice of motion application dated 1st November 2022 filed by the the plaintiff seeking the following orders;
 - a. That a declaration be made that the Defendant has wilfully disobeyed the order of temporary injunction issued by this honourable court on 1st July 2021 restraining the defendant, his servants, by themselves or others from occupying, encroaching, constructing, alienating, laying claim or otherwise interfering with the plaintiff's land parcel number Mavoko Town Block 12/146.
 - b. That this honourable court be pleased to issue an order of committal to civil jail of the defendant for 6 months for contempt for failing to comply with an order of the court issued on 1st July 221 directing that status quo in respect to the suit property be maintained.
 - c. That the costs of this application be provided for.
2. The application was based on grounds on the face of it and supported by the affidavit dated 6th March 2020 and sworn by one Mary Nduku Kella, the plaintiff herein. It was her case that this court made orders dated 1st July 2021 retraining the defendant from interfering with the suit property. She also deposed to have been in occupation of the suit property, being Mavoko Town Block 12/146 since 2004,



and that the property had two structures which belonged to her and her son. She averred that her house was older and was built in 2004 whereas her son's house was built in 2015. She further deposed that on or about 17th May 2022, the respondent demolished the old house and stole household goods, which acts were contemptuous and also amount to harassment of the plaintiff and that the court has authority to punish for contempt. It was also her assertion that the demolition amounted to destruction/deletion of evidence proving long occupation on the suit property.

3. It was the deponent's averment that the demolition led her to construct a new structure for her son to live in, and prayed that the court does issue an order of committal to civil jail to the respondent for 6 months for contempt. She also averred that the application had been timeously brought and that she had suffered great prejudice and financial loss and prayed that the orders sought be granted for the interests of justice. She annexed photographs of an iron sheet structure and a concrete floor.
4. The application was opposed. The respondent swore a replying affidavit dated 24th November 2022 in response to the application. He deposed that the allegations by the applicant were untrue as he lived in Kangundo area which is over thirty kilometres from the suit property and that he was not aware of any destruction. He also averred that the last time he stepped onto the suit property was 2019 when the surveyor of Drumvale Farmers' Co-operative Society Ltd confirmed to him that the suit property was the property of the late Peter Kiilu. He further deposed that he had never stepped thereon again as he embarked on finding out who had taken their father's land and the legal ways of recovering the same, until they were served with the court papers in this matter. He prayed that the application be dismissed.
5. The application was canvassed by way of written submissions. On record are the applicant's submissions dated 28th March 2023 and filed on 29th March 2023, whereas the respondent's submissions are dated 29th March 2023 and filed on 30th March 2023.

Submissions by the applicant

6. Counsel for the applicant submitted that court orders need to be obeyed. Reliance was placed on section 2 of the *Civil Procedure Act* and the Black's Law Dictionary on the definition of an order. It was their submission that orders that status quo be maintained meant a stay of any action on the suit property. As to what constitutes contempt of court, reliance was placed on the cases of *Kimani Gachubi & Another v Evangelical Mission for Africa & 3 Others* [2018] eKLR and *Roberton v Her Majesty's Advocate* [2007] HJAC 63.
7. On whether the applicant had met the standard of proof for contempt, counsel referred to the case of *Katsuri limited v Kapurchand Depar Shah* [2016] eKLR and submitted that contempt must be proved beyond par adventure. Counsel argued that the applicant must show the elements of contempt being terms of the order, knowledge of the order and failure to comply with the order. It was their contention that the said orders were issued in the presence of the respondents and their advocates and that the actions of the respondent were meant to defeat the plaintiff's peaceful stay on the land. They prayed that the orders be issued as prayed.

Submissions by the Respondent

8. Counsel for the respondent relied on the case of *Samuel M.N Mweru & Others v National Land Commission & 2 Others* [2020] eKLR on the elements to prove contempt. Regarding the terms of the order, counsel submitted that the application pointed to two different orders, being orders of injunction and orders of status quo, which are different as injunction restrains one party but status quo restrains both parties. It was submitted for the respondent that the applicant had failed to attach an extract copy of the orders issued on 1st July 2021. It was also submitted that if it was an order of



status quo, then the applicant had disobeyed the same by stating that she had built a new structure on the suit property as per paragraphs 4 and 6 of their supporting affidavit. It was also argued that the photographs attached on the application showed only one structure and not two structures as alleged by the applicant.

9. On whether the defendant had knowledge of the alleged orders, it was submitted that there was no evidence that the respondent was aware of the alleged orders of 1st July 2021 or to show that the applicant had served the said orders upon the respondent. On whether the respondent had failed to comply with the said orders, counsel contended that the applicant had failed to show the house that was allegedly on the land was there, and that the respondent had wilfully destroyed the same. Reliance was placed on the provisions of section 106B, 107, 108 and 109 of the Evidence Act on admissibility of electronic records, and the burden of proof in a case.
10. Counsel argued that although the applicant stated that she lives on the land she did not state that she saw the respondent destroy her house, and on the other hand the respondent stated that he had not been on the land since 2019.
11. Reliance was further placed on the case of Gatharia K. Mutikika v Babarini Farm Limited [1985] KLR 227 for the proposition that the standard of proof for contempt is higher than on a balance of probabilities but below reasonable doubt. Counsel therefore submitted that the applicant had not met this standard as there was no cogent evidence in support of her application.

Analysis and determination

12. The court has carefully considered the application, response and rival submissions of the parties. The sole issue that arise for determination is whether the defendant is in contempt of the court order of 1st July 2021.
13. Contempt is any conduct that despises the authority and dignity of the court. The Black's Law Dictionary 9th Edition defines Contempt as;
The act or state of despising; conduct of being despised. Conduct that defies the authority of a court or legislature, because such conduct interferes with the administration of justice.
14. Section 5 (1) of the Judicature Act makes provision for the court's jurisdiction to punish for contempt of court and states as follows;
 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.
15. Courts ought not tolerate contempt of court for the sake of the rule of law which is the cornerstone of any democratic state like ours. In the case of Econet Wireless Kenya Limited v Minister for Information and Communication of Kenya Authority [2005] eKLR, the court stated as follows: -
It is essential for the maintenance of the rule of law and order that the authority and the 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 whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void. (emphasis)

16. Similarly, in the case of *T.N Gadavarman Thiru Mulpad v Asbok Khot & Another* [2005] 5 SCC, the Supreme Court of India in emphasizing the dangers of disobeying court orders held as follows:

Disobedience of this Court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. 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 corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court's orders are to be followed and complied with.

17. Civil contempt are quasi-criminal proceedings because the consequence and punishment thereof may lead to curtailing of a proven contemnor's liberty and therefore, the standard of proof for contempt is higher than that required in ordinary civil cases, of the balance of probabilities although lower than the standard of beyond reasonable doubt required in criminal cases.
18. To prove contempt, an applicant must demonstrate that the terms of the court order are clear and unambiguous; that the respondent had knowledge of the clear terms of the order; and that the respondent wilfully disobeyed the order.
19. In this case, the applicant referred to an order dated 1st July 2021. She did not attach the order although she stated that the order was both injuncting the respondent and also provided for maintenance of status quo. I have considered the record and I have not seen any proceedings or order made by this court on 1st of July 2021. There is no evidence on record to show that proceedings were taken in this matter on 1st July 2021. In addition, the alleged order of 1st July 2021 is not attached to the application herein. In the premises, I find and hold that there is no proof by the applicant that there are clear terms of an order made on 1st July 2021 requiring the respondent to do or refrain from doing any act.
20. The upshot is that the application dated 1st November 2022 is an abuse of the court process, lacks merit and the same is hereby dismissed with costs to the respondent.
21. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10TH DAY OF JULY 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Oyunge for applicant

Mr. Muia for defendant

Court assistant – Josephine

