



**Mwenda (Suing as the Administrator of the Estate of Francis Kalunge  
Mwenda) v Mukiamo (Environment & Land Case E008 of 2023)  
[2024] KEELC 7445 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7445 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E008 OF 2023  
CK NZILI, J  
NOVEMBER 6, 2024**

**BETWEEN**

**LILIAN GACERI MWENDA ..... APPLICANT  
SUING AS THE ADMINISTRATOR OF THE ESTATE OF FRANCIS KALUNGE  
MWENDA**

**AND**

**JOSHUA KIRIMI MUKIAMA ..... RESPONDENT**

**RULING**

1. The court is asked through an application dated 13.9.2024 to find Joshua Kirimi Mukiamo guilty of contempt of court of its orders issued on 8.5.2024, owing to his persistent trespass on Parcel No.2591 Karama Adjudication Section belonging to the applicant. The grounds are set out on the face of the application and in the supporting affidavit of Lilian Gaceri Mwenda together with the requisite annexures.
2. The applicant avers that despite clear judgment the respondent is still disrupting and interfering with the applicant's quiet possession of the land he further chased and scared away her works there is still continuing trespass, and the acts of the respondent are malicious and in blatant disregard of the decree; he is not ready to obey or comply with the orders of the court and that there is need for the court to intervene and stamp its authority.
3. The applicant has attached photographs to show that the respondent burned down her fence and trees, a crop destruction report dated 10.9.2024, photos showing the respondent tiling the land and his animals on the land, OB at Muthara Police Station reports and written statements at the police, respondents own letter dated 11.9.2024 to the police seeking to be allowed to continue with the trespass all marked as LG "1-5" respectively.



4. The application is opposed through a replying affidavit sworn by Joshua Kirmi Mukiyama on 1.10.2024, denying the alleged trespass, breach of court decree or interference with the applicant's land. In particular, the respondent denies any acts of trespass in person or through his animals in the absence of lack of proof. Further, the respondent denies the alleged acts of arson, though he admits that there was a police complaint at Muthara Police Station who visited the locus in quo and was yet to charge him with any criminal activity.
5. The respondent avers that after police investigations it was established that the fence had been destroyed by the applicant's worker and not him for he was not anywhere near the locus in quo when the fence allegedly caught fire.
6. Additionally, the respondent avers that on the issue of trespass, the DCI Muthara was still conducting investigations. The respondent however admits writing a letter to the DCI after the applicant lodged a complaint against him over trespass and arson so that the issues would be fully investigated and laid to rest.
7. Save for the decree the respondent averred that she has lodged an appeal regarding the issue of mesne profits, otherwise, the applicant was having a personal vendetta against him including making these allegations which she has not substantiated.
8. In response to the application the respondent gave evidence in court as PW 1 and relied entirely on his affidavit in reply. He admitted that one P.C Balozi from the D.C.I Muthara police station summoned him twice and a scene visit was conducted.
9. PW 1 said that after investigations the police discharged him and has not in any way threatened the applicant. In cross-examination PW 1 said that he had lodged an appeal against the issue of damages. As to the letter dated 11.9.2024 PW 1 stated that since the applicant was disturbing him he opted to write to the DCI to investigate the matter by way of documents held at the land adjudication offices.
10. PW 1 insisted that he never visited the suit land, committed any acts of destruction or threatened the applicant's farm workers. He said that the poles were yet to find him liable for any wrongdoing.
11. Further PW 1 insisted that he never visited the suit land, committed any acts of destruction or threatened the applicant's farm workers. He said that the police were yet to find him liable for any wrongdoing. Similarly, PW 1 said that he had never used proxies to threaten the decree-holder. As for the crop assessment report, PW 1 said that there was no indication in the report that he was the one who had committed the acts of destruction otherwise he was not responsible for it.
12. The applicant has relied on written submissions dated 2.10.2024. She submits that the respondent's defence that the police were yet to charge him for the complained acts of trespass, arson and destruction should not be an excuse to breach the court's decree.
13. The applicant submits that the acts of the respondent have subjected her to visit the police every now and then because she is unable to utilize her land due to threats from the respondent who is making a mockery of the judicial process and the orders of this court.
14. Again, the applicant submits that the court should issue different orders against the respondent for continued contempt of court orders going into the future otherwise he has verbally threatened her; she was scared for her life; she lives in fear; she cannot freely move or utilize her land, courtesy of the respondent's violence.
15. The applicant relied on Bryce Broadcasts & Technologies (K) Ltd vs Makotsi & another Misc Allocation E032 of 2023 (2024) KEHC 2132 (KR) (27<sup>th</sup> February 2024) (ruling), on the elements



of contempt namely; terms of the order knowledge of the term by the respondent failure to comply with the terms. In this case the applicant submits that the respondent attended the delivery of the judgment, whose content was explained to him, but has continued to disregard the rights to property of the applicant by trespassing onto it willingly he has ignored the court orders; despite police reports; the respondent, because she has not been charged with any crime; keeps ignoring the court orders and instead from his letter to the police, he seeks to re-open issues of land ownership with the police instead of appealing against it.

16. The respondent relies on written submissions dated 1.10.2024. The respondent relied on Section 5 of the *Judicature Act*, Henry Musemate Murwa vs Francis Owino Principal Secretary Ministry of Public Service Youth and Gender Affairs and another (2021) eKLR, Samuel M.N Mweru & others vs National Land Commission & others (2020) eKLR, regarding the elements of contempt namely; terms of the order being clear, unambiguous and binding on the defendant knowledge of or proper notice of the terms of the order acting in breach of the terms of the order and lastly; the conduct is deliberate.
17. In this case, the respondent submits that the applicant has not demonstrated that he was in contempt of the court orders otherwise allegations of trespass have been investigated by DCIO Muthara who has found him not culpable there was no proof of the allegations by the applicant and that the application should be dismissed.
18. There is no dispute that this court pronounced itself through the judgment dated 8.5.2024 regarding prayers (d), (c) and (f) of the plaint dated 5.5.2023. When the respondent extracted the decree he deliberately and mischievously left out the issues that were determined to be finality by the court. A permanent injunction was issued against the defendant restraining him from interfering in any way whatsoever with the plaintiff's ownership, occupation and use of land Parcel No. 2591 Karama Adjudication Section and to pay the applicant mesne profits for loss of user. The orders were to be enforced by the OCS Muthara Police station
19. After the judgment the respondent filed a notice of appeal dated 9.5.2024 followed by a memorandum of appeal dated 4.7.2024 appealing against the whole of the said decision.
20. A higher court of competent jurisdiction has not stayed the decision of the court. The decree which the respondent has attached and swears on oath to have fully complied with is at variance with the judgment of the court. It is the respondent who unilaterally extracted the decree and has appealed against the judgment from the memorandum of appeal. The respondent has appealed against the rest of the reliefs granted in the judgment. The pendency of an appeal does not absolve the respondent from complying with the judgment.
21. Order 21 Rule 8 of the Civil Procedure Rules deal with the preparation and dating of decrees. A decree holder has no monopoly in the preparation of a decree. He has to involve the judgment debtor so that he may be aware of the decree. There is no evidence that the respondent involved the applicant in extracting the decree as per Order 21 Rule 8 (2) Civil Procedure Rules. The applicant has termed the respondent as mischievous in the manner he deliberately extracted the decree so as to mislead and avoid compliance with the judgment.
22. Order 21 Rule 7 of the Civil Procedure Rules provides that a decree must agree with the judgment. The judgment was delivered in the presence of the parties. In the court file, there is evidence that the respondent brought several drafts which were rejected by the deputy registrar, even the one dated 10.7.2024 has fundamental errors for it excluded the other reliefs granted. It does not tally with the judgment at all. A decree extracted without being passed over to the other parties for approval was held as a nullity in *China Wu Yi Ltd vs Belyi Holdings Ltd* (2018) eKLR, *Landmark Holdings Ltd vs Robert Macharia Kinyua* (2018) eKLR and *Eco Bank Ltd vs Elsek (K) Ltd & others* (2015) eKLR. I



- find the same a nullity ab initio for not faithfully and accurately reflecting the judgment of the court. See *Highway Furniture Mart Ltd vs P.S Office of the President and another* (2006) eKLR.
23. Section 14 of the *Environment and Land Court Act* provides that a judgment award order or decree of the court shall be enforced in accordance with the *Civil Procedure Act* Section 34 (1) of the *Civil Procedure Act* provides that all questions arising between the parties to a suit in which the decree was passed shall be deferred by the court executing the decree. Section 29 of the ELC act grants this court powers to punish for contempt of court against anyone who refuses, fails or neglects to obey court orders.
  24. The standard of proof in contempt proceedings is higher than proof on the balance of probabilities but to exactly beyond a reasonable doubt as held in *Mutitika vs Baharini Farm Ltd* (9185) eKLR. The ingredients to prove contempt include the existence of a court order with clear and explicit terms, knowledge of the court order by the adverse party; service of the court order and acts of proof of disobedience. See *Henry Musemate vs Francis Owino & another* (supra), *Bryce Broadcast & Technologies vs Makotsi & another* (supra).
  25. In *Basil Criticos vs AG* (2012) eKLR the court held that where a party clearly acts and shows that he had knowledge of a court order, personal service is rendered necessary. Further, the court held that where a party is represented by counsel who was present in court when the orders were made knowledge of the judgment or orders suffices for contempt proceedings.
  26. In *Shimmers Plaza Ltd vs National Bank of Kenya Ltd* (2015) eKLR the court said that parties, when court orders are made, cannot be allowed to trash them with impunity, the obedience to court orders was not an option but mandatory and a person cannot choose whether to obey a court order or not since no man is above or below the law, nor can one ask permission to obey the law given obedience to the law was in right and not a favour.
  27. In *Hadkinson vs Harkinson* (1952) ALL ER 567 the court observed that every person has an obligation to obey an order of a competent court unless it is discharged, otherwise it could invite contempt proceedings. In *Mutitika vs Baharini* (supra) the court said that a person who knows of an injunction willfully does something or causes another to do something to break the injunction or interfere was liable for contempt of court for though his conduct obstructs justice.
  28. In *Michael Sistu Mwaura Kamau vs DPP & others* (2018) eKLR the court observed that to commit someone for contempt of court the court must be satisfied that the has willfully and deliberately disobeyed a court order that he has been aware of.
  29. Further in *Republic vs Ahmed Abolfathi Mohamad & another* (2019) eKLR, the Supreme Court of Kenya held that to sustain a committal for contempt of court the order of the court alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or refrain from doing.
  30. In *Teachers Service Commission vs Kenya National Union of Teachers & others* (2013) eKLR the court held that punishment for contempt of court is aimed at safeguarding the rule of law, which is fundamental in the administration of justice but not the integrity of the judiciary or the personal ego of the presiding court officer, given a party who walks out of court with an order must be assured that the order will be obeyed by those whom it is directed for it is not a mere suggestion, opinion or a point of view since it is a directive issued after much thought and with circumspection. The court said that to see it any other way is to open the door to chaos and anarchy. A party who knows of an order whether null, valid, regular or irregular cannot be allowed to disobey it.



31. In *Woburn Estate Ltd vs Margaret Bashforth* (2016) eKLR the court cited *Refrigerator & Kitchen Utensils Ltd vs Gulabchand Popatlal Sharh & another* NRB Civil Application No. 39 of 1990, that it would be not a danger to hold that the suitors or solicitors could themselves judge whether an order was null or void whether regular or irregular.
32. In this application the respondent has not denied knowledge of the contents of the judgment that was delivered in his absence and which his lawyers on record were present during its delivery and out of his instructions sought for and obtained a copy of 20.5.2024 after filing a notice of appeal to it on 17.5.2024, subsequent to a letter dated 8.5.2024 seeking for it. It is the respondent who drafted a decree which was rejected by the court and collected one dated 10.7.2024, on 24.7.2024 now attached is the replying affidavit. Therefore, no doubt that the respondent knew of the judgment which took effect immediately after it was delivered. The suit has not been discharged, varied or set aside.
33. A permanent injunction was issued in the presence of the respondent. He unfortunately read the judgment and extracted a different decree which he now says that he has fully complied with. A party who deliberately chooses what to extract in the judgment what to follow and not to follow is what the framers of Section 5 of the *Judicature Act* and Section 29 of the ELC Act had in mind.
34. In *Re- Breamblevale Ltd* (1969) 3 ALLER 1062 lord Denning held that contempt of court is an offence of a criminal character where a party may be set to prison if proven that he willfully intentionally and deliberately disobeyed a court order while aware of its contents. See *Sheila Cassat Issenberg & another vs Machatha Kinyanjui* (2021) KEHC 5692.
35. The applicant has listed the particulars of deliberate willful and intentional interference with the judgment of this court by the respondent to the extent of involving the agricultural officer and the police to investigate and take action against the respondent. The respondent on his part has admitted the complaints leveled against him with the DCI Muthara Police Station to the extent of writing a letter dated 11.9.2024.
36. The letter relates to, among other things Parcel No. 2951 where the court had pronounced itself on the right of the applicant and barred the respondent from interfering with the quiet possession, use and occupation by the applicant and to which the respondent has appealed to the Court of Appeal among other things, that the court had no jurisdiction to hear the suit, it erred for finding him culpable of trespass and there was a miscarriage of justice.
37. In the said letter the respondent does not mention that there is an appeal and request for investigators on how Parcel No. 2591 belongs to the applicant, the absence of which the applicant should be advised to desist with immediate effect from causing unnecessary disturbances to him. The letter came immediately after the OB's by the applicant and written statements attached as annexure marked LG "1", "2", 4 (a) (b).
38. The respondent has averred in paragraphs 4 – 12 of the replying affidavit that he has not disobeyed the judgment of the court and that there were pending investigations.
39. In the written submissions dated 1.10.2020 the respondent on page 2 urges the court to find that the application for contempt is unsubstantiated for the allegations of contempt were investigated by DCIO Muthara who has found him not culpable, the application is brought by a disposed applicant and in bad faith. On the other hand, the applicant avers and submits that the respondent is endlessly engaging her through the police and hiding under the name of pending investigations to continue interfering with the judgment. The judgment given by this court was clear and precise that the decree holders continue to enjoy their proprietary rights and privileges on parcel No. 2591 Karama Adjudication Section undisturbed by the respondent.



40. The respondent extracted a totally different decree at variance with the judgment which he now urges the court to hold he had complied with. The obedience and the punishment for the contempt of the judgment are not dependent on police investigations. Indeed, the respondent is silent that his court also ordered the O.C.S Muthara to ensure compliance with the judgment for there to be law and order.
41. The respondent has been economical with the truth and has deliberately chosen to discard the contents of the judgment yet he had knowledge of its precise, explicit and clear contents regarding a permanent injunction.
42. The judgment restrained the respondent from the acts which he is now accused of through this application. He has filed in his replying affidavit and testimony before the court to address the issue of why he is acting contrary to the judgment to the extent of questioning it through a letter dated 11.9.2024 to the DCI, Muthara yet the land falls under the *Land Adjudication Act* & *Land Consolidation Act* (Cap 284 and 283) where the DCI has no role to play as regards, ownership of the land. The court declined to grant prayer (1)d of the plaint since the issue falls under Cap 283 and 284.
43. Order 40 Rule 3(1) of the Civil Procedure Rules as read together with Sections 63 (c) of the *Civil Procedure Act* and Sections 29 of the ELC Act are clear that in order to prevent the end of justice from being defeated can convict for contempt of court.
44. In this application I find that the applicant has proved all the elements of contempt of court. The upshot is the respondent is directed to be arrested by the court bailiff in conjunction with the OCS Meru Police Station and be arraigned in court on 7.11.2024 to show cause why he should not be committed to prison or otherwise penalized or contempt of court to the applicant.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6<sup>TH</sup> NOVEMBER, 2024**

In presence of

C.A Kananu

Maheli for applicant

Applicant

Muna for the defendant

**HON. C K NZILI**

**JUDGE**

