



REPUBLIC OF KENYA



**Karebe Gold Mining & another v Korir & 16 others (Environment & Land
Case E009 of 2022) [2023] KEELC 16240 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16240 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E009 OF 2022**

MN MWANYALE, J

MARCH 9, 2023

BETWEEN

KAREBE GOLD MINING 1ST PLAINTIFF

PIUS KIPTANUI KOGO 2ND PLAINTIFF

AND

CHESERET ARAP KORIR DEFENDANT

AND

**CABINET SECRETARY, MINISTRY OF PETROLEUM &
MINING 1ST RESPONDENT**

ROBERT KENEI 2ND RESPONDENT

DOUGLAS KIBITOK 3RD RESPONDENT

EZEKIEL KOECH 4TH RESPONDENT

HILLARY KOECH 5TH RESPONDENT

ZAKAYO KIMELI 6TH RESPONDENT

ALFRED MAGUT 7TH RESPONDENT

THOMAS CHERUIYOT 8TH RESPONDENT

SHADRACK KIPKOECH MELILEI 9TH RESPONDENT

HENTRY KIPROTICH RUTO 10TH RESPONDENT

STANLEY KIPNGETICH 11TH RESPONDENT

EDWIN KIPROP 12TH RESPONDENT

JACKTONE KIPKEMBOI BETT 13TH RESPONDENT



TIMOTHY KIPROP	14TH RESPONDENT
GILBERT KIPSANG	15TH RESPONDENT
DANIEL KIPLAGAT	16TH RESPONDENT

RULING

1. This Ruling is in respect of two applications, the first one by way of the Notice of Motion dated 17th November 2022 (as herein after referred to as the 1st Application) and the second application being the one dated 3rd December 2022 moved by way of a Notice of Motion, (herein after referred to as the 2nd Application).
2. The 1st Application was filed by the 1st Plaintiff/Applicant and was brought under Section 5 (i) of the Judicature Act Cap 8 Laws of Kenya, Order 40 Rule 3 (1) of the Civil Procedure Rules and all other enabling provisions of the law.
The 1st application sought the following substantive reliefs;
 - i. That Robert Kenei, Douglas Kibitok, Ezekiel Koech, Hilary Koech, Zakayo Kimeli, Alfred Magut, Thomas Cheruiyot, Shadrack Kipkoech Melilei, Henry Kiprotich Ruto, Stanley Kipngetich, Edwin Kiprop, Jactone, Kipkemboi Bett, Timothy Kiprop, Gilbert Kipsang and Daniel Kiplagat, be summoned before Court to show cause why they should not be committed to civil jail for blatantly failing to comply with order s given by this Honourable Court on 18th October 2022 and the summons be effected through the OCPD Songhor Police Station.
 - ii. The Honourable Court be pleased to order the resealing of the mine shafts on land parcels Nandi/Chemase/974 and ensure security of the mining shafts pending hearing and determination of the plaint.
 - iii. That the OCPD Songhor police station to execute prayer 3 herein.
 - iv. On failing to show cause, the said Respondents contemnors be committed to prison for a maximum period of 6 months for being in contempt of this Honourable Courts orders given on 18/10/2022.
3. The Application is premised on the grounds on the face of it and the supporting affidavit of Jeremy Frome which annexed the order that is said to have breached by the alleged contemnors/Respondents, as well as affidavits of Cosmas Kiptoo Kemboi Kennedy Murgor, Kipchumba Kosgei, Dancun Kiprotich and a bundle of photographs.
4. The 1st Defendant/Respondent filed a Replying Affidavit on 20th November 2022. This application was further opposed by the Replying Affidavit of Shadrack Kipkoech Melilei on behalf of the 3rd to 17th Respondents as filed by the firm of Kipkenda and Company Advocates.
5. The Replying Affidavits aforementioned shall thus be treated to be their (the Respondents) way of showing cause.
6. The Court directed parties to file written submissions in respect of this application.
7. The 1st Defendant/Respondent filed his submissions on 16/01/2023; the 1st Plaintiff Applicant filed its submissions on 21/12/2022. The 2nd Plaintiff did not file submissions in respect of this first application



- but associated himself with the submissions filed by the 1st Plaintiff, while the 3rd to 17th Respondents did not file submissions.
8. With regard to the 2nd Application, the same was filed by the 1st Defendant/Applicant and it sought orders as follows;
 - i. Spent
 - ii. That the orders issued on 18th October 2022 by this Honourable Court be reviewed varied, set aside and/or vacated in their entirety.
 9. The 2nd Application was based on grounds on the face of it, and the supporting affidavit of the 1st Defendant/Applicant.
 10. The supporting affidavit by the 1st Defendant/Applicant has annexed the order sought to be reviewed, a copy of the Ruling in Nairobi Civil Appeal (Application No. 177/2020 a copy of the email thread with regard to the ruling in Civil Appeal (Application) No. 177/2020).
 11. The 2nd Application is opposed by the Replying Affidavit of Mr. Jeremy Froome deponed on 16th December 2022, as well as a Replying Affidavit by the 2nd Plaintiff deponed and filed on 15th December 2022 and grounds of opposition dated 14/12/2022 by 1st Plaintiff.
 12. The 2nd Application was equally canvassed by way of written submissions. Submissions by the 1st Defendant/Applicant in respect of the 2nd Application were filed in Court on 22nd December 2022.
 13. The Court shall deal with the 1st application, the contempt of Court application for two main reasons before handling the second application.
 14. The first reason being that this application was filed on 17th November, 2022 before the second application and secondly under the decision of the Supreme Court of Kenya in the case of *Bia Toshia Distributors Limited v Kenya Breweries Limited and 6 others* 2023 KESC 14 KLR held as follows;-

“in our view, just like a Preliminary Objection, when an issue of contempt of Court arises, it is one which should be prioritised and determined in Limine as soon as it arises. Authority of a Court over a matter is an ongoing process that should be safeguarded during and after the Court process. The effect of taking Court processes and in particular Court orders lightly even in the face of the Court is that it is likely to encourage descend into anarchy and loss of confidence in the Court process.”
 15. I have analysed the application, the rival affidavits and the submissions before Court and the Court frames the following as the issues for determination in respect of this application.
 - i. Whether the terms of the order (injunction or undertaking were clear and unambiguous and were binding on the Defendant.
 - ii. Whether the Defendant had knowledge of or proper notice of the terms of the orders
 - iii. Whether the Defendant has acted in breach of the terms of the order and
 - iv. Whether the Defendants conduct was deliberate.
 16. Both the Applicant and the 1st Respondent have framed the above as their issues for determination and submitted on the same.



17. With regard to issue number 1, whether the terms of the order were clear and unambiguous and were binding on the Defendant. The 1st Defendant/Respondent vide paragraph 6 and 7 of the Replying Affidavit concedes that the order was clear and unambiguous and specific.
18. At paragraph 8 of his submissions the 1st Defendant/Respondent equal concedes that the orders were clear and ambiguous.
19. The 2nd Plaintiff in his submissions submits that the orders of the Court were clear and unambiguous. In the Replying Affidavit of Shadrack Kipkoech Melilei, who swore the affidavit on behalf of the 3rd to 17th Respondents depones, that they were not aware of the order dated 18th October 2022, as they are not. Parties to the suit and neither are they agents of the 1st Respondent.
20. The 3rd to 17th Respondents whilst denying knowledge of the order, do not deny the photographs annexed by the 1st Defendant, as well as the depositions on the affidavits of Kennedy Murgor, Kipchumba Kosgei and Dancun Kiprotich, and have not offered an explanation as to why they were around the mining shaft on 7/11/2022, and removing the tapes and barriers and caught on camera at the mining shaft; as per the affidavits.
21. Since the terms of the orders were unambiguous and clear and were binding on the 1st Defendant. The explanation that by the 3rd to 17th Defendants that they were not aware of the order nor were there agents of the 1st Defendant is not satisfactory, as the order bound not only the 1st Defendant but anyone acting under his direction, and the presence of the 3rd to 17th Defendants on the mine shift, leads to the irrebutable presumption that they were at the mine shaft with the knowledge of the 1st Defendant; and they were thus bound by the order.
22. On issue number 2, were the Defendants in breach of the order; The Court order prohibited any Mining in Nandi/Chemase/974. The photographs exhibited by the Applicant show that the 3rd to 17th Respondents removing the seal to the entrance of the mining shaft.
23. The 1st Respondent indicates that he was entitled to clear bushes. The 3rd to 17th Respondents indicate that no samples of the extracted minerals have been produced in Court to prove the allegations of mining.
24. The access to the mining shaft where and removal of the barrier therein, by the 3rd to 17th Respondents, was against the orders of maintenance of status quo, which issued on 18th October 2022, and there was thus a breach of the said orders since the order encompassed the state of affairs being as they were on the ground including the barrier to the mining shaft being in situ, and removal of the barriers and the tapes was thus in breach of the said orders, which in addition had expressly prohibited any mining activities. On the suit property.
25. The Court thus answers issue number 2 in the affirmative.
26. On issue number 3, as to whether the actions were deliberate.

The 1st Respondent vide paragraph 9 of the Replying Affidavit, depones that the Court order did not prevent him for utilising his property but only prevented him from any mining activities. In their response the 3rd to 17th Respondents equally at paragraphs 9 and 10 the Replying Affidavit, indicate that they did not mine in the suit property.
27. As noted earlier in the ruling, the photographs exhibited by the Applicant show the seals of the mining shaft and the barrier to the mining shaft been removed by the 3rd to 17th Respondents.



28. At the time of the issuance of the maintenance of status quo, order, the seals and barriers of the mining shaft were in situ and as the Court has already found tempering with them amounted to contempt, the Court finds on the strength of paragraph 9 of the Replying Affidavit that the 1st Defendant utilised his parcel of land by removing and/or directing removal of the seals and barriers to the mining shaft as a deliberate action. This is because the utilisation of the property led to the removal of tapes and barriers that were in situ at the time of issuance of the orders.
29. From the analysis above, the Court is convinced that the 1st Defendant, 3rd to 17th Respondents, jointly and severally were in contempt of the orders issued on 18th October 2022 in this suit, and accordingly summons the said Respondents to appear in Court for mitigation and sentencing on 23rd March 2023 at 9.00 am in Open Court, at Kapsabet.
30. With regard to the 2nd Application for review, the Applicant submits that in view of the Ruling of the Court of Appeal, in civil Application No. 177 of 2022, the Ruling and orders of 18th October 2022 ought to be reviewed.
31. In opposition to the application as set in paragraph 11 and 12 of this ruling the 1st Plaintiff and 2nd Plaintiff have opposed the application. The 1st Plaintiff/Respondent state that the application offends Order 45 Rule 1 (b) of the Civil Procedure Rules as a Notice of Appeal against the order which is sought to be reviewed was filed in Court, hence the Applicant cannot see review of an order which he has preferred an appeal.
32. I have perused the application, affidavits and submission as well as the Court record; and frame the following issue for determination.
- i. Whether the application is property before Court.
 - ii. Whether the same is merited.
- The 2nd Application is expressed to be made under the provision of Section 1A, 113 and 3A of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.
33. The Applicant submits that the delivery of the Ruling in Civil Application No. 177/2020 is a new fact that should be considered as such reviewing the orders of 18/10/2022.
34. The 1st Plaintiff/Respondent has not annexed the Notice of Appeal that it alludes in the Replying Affidavit of Jeremy Froome, the Court has perused the Court record and has found that on 4/11/2022 the Applicant filed a Notice of Appeal against the Order of 18/10/2022 which is the same order sought to be reviewed. There is thus a pending appeal pursuant to that Notice of Appeal as filed.
35. The 1st Defendant/Applicant has submitted based on the decision in Gucokanirira Kibato Traders and Farmers Company Limited v Attorney General, that the Notice of Appeal before the Court of Appeal is an intention to file an appeal, and that the application for Review is thus property before Court.
36. On the part of the 1st Plaintiff/Respondent he submits citing the decision in Acorn Properties v Issac Gathugu and 2 others High Court Misc Civil Application No. 305/2017 decision in Serephen Nyasani Menge v Rispah Onsase – ELCKisii Misc. Application5/2018, Kiambu County Public Service Board and 5 others v Arungo was Thangwa 2021 eKLR.
37. The decisions cited by the 1st Defendant/Applicant as well as the 1st Respondents are decisions of the High Court, thus Courts of concurrent jurisdiction, yet they offer different interpretation of the law.
38. In view of that conflict of the decisions by Courts of concurrent jurisdictions on the same point, this Court has sought guidance from the Court of Appeal decisions, and in the Court of Appeal decision,



in the case of *Gerald Kithu Muchange v Catherine Muthoni Ngare and another*. The learned judges of appeal while quoting the decision *Multichoice K Limited v Wanjiru Mwangi and another*, as well as the decision *Multichoice K Ltd v Wanchi Group (k) Ltd and 2 others*, observed that the law on that issue is purely settled.

39. In *Martha Wambua v Irine Wanjiku Muangi and another* quoted in the case of Gerald Kithu Muchange, the Court held as follows:-

“from the above provisions of Section 80 an Order 45 of the Civil Procedure Rules, it is clear that one cannot exercise the right of appeal, and at the same time apply for review of the same judgement/decree one must elect to file an appeal or to apply for a review. It therefore follows that the Appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed, and having exercised the right to a review she lost the right of appeal against the same order.”

40. This then is what the Court of Appeal termed as the settlement of that point of Law.

41. In our present scenario, the Notice of Appeal was dated 3rd November 2022, lodged before the Deputy Registrar on 4th November 2022 and filed on the same dated 4th November 2022, the application for review is dated 3rd December 2022 and filed on 5th December 2022. I month after the Notice of Appeal.

42. Thus the 1st Defendant/Applicant having elected to first file the Notice of Appeal lost the right to have the orders reviewed and the application before is therefore not properly before Court.

43. Having found that the application is not properly before Court, the Court shall not determine its merits, as the same is hereby dismissed.

44. The upshot with regard to two applications is that the orders issued on 18th October 2022 are for avoidance of doubt confirmed pending hearing and determination of the suit.

45. The 1st Defendant/Respondent is equally directed to purge the contempt by resealing the mineshafts by erecting the barriers that the 3rd to 17th Respondents removed before the mitigation and sentencing on 23rd March 2023 and avail photographs to Court by way of an affidavit to be filed before the said date.

46. Costs of the applications shall be in the cause.

DATED AT KAPSABET THIS 9TH DAY OF MARCH 2023.

HON. M. N. MWANYALE

JUDGE

In the presence of;

1. Mr. Mango holding brief for Mr. Orende for 1st Plaintiff

2. Ms. Korir holding brief for Mr. Kenei for 2nd Plaintiff

3. Mr. Kinyanjui for 1st Defendant

4. Mr. Letting for 2nd Defendant

5. Mr. Maiyo for 3rd to 17th Respondents

