



**Kabugua v Giiko & another (Environment & Land Case
35 of 2019) [2023] KEELC 18707 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18707 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 35 OF 2019
LN GACHERU, J
JULY 6, 2023**

BETWEEN

JOSEPH NJUGUNA KABUGUA PLAINTIFF

AND

PETER NJUGUNA GIICO 1ST DEFENDANT

JOHN THUO GIICO 2ND DEFENDANT

RULING

1. Before this Court are two applications; one by the Defendants dated 19th October 2022, and the other by the Plaintiff dated 19th December, 2022.
2. The Defendants' application dated 19th October 2022, seeks for the following orders;
 1. That this Honourable Court be pleased to review the judgment issued by this Honourable Court.
3. The application is premised on the grounds set out on the face of the said application and the Supporting Affidavit of the 1st Defendant-Peter Njuguna Giiko. He posits that this Court gave judgment in favour of the Plaintiff, and which Judgment has been executed hence cancellation of title. He averred that the Defendants are now in possession of some documents, which they did not have at the time of the suit, which has significant impact on the judgment of this Court hence the need to review the said judgment.
4. In opposing the application, the Plaintiff filed a Replying Affidavit sworn on the 24th January 2023, wherein he deponed that the application is brought in the guise of review, but is meant to re-litigate the matter and stay execution. That the Defendants have not established any grounds for the grant of orders of review and further that the issues raised in the application were raised during the pendency of



the suit and a ruling issued, hence the application is res judicata. It is his disposition that the application should be dismissed for being vexatious, frivolous and oppressive.

5. The Plaintiff on the other hand filed an application dated 19th December 2022, for orders:
 1. That the Defendants herein Peter Njuguna Giiko and John Thuo Giiko be committed to civil jail for such a period of time as this Honourable Court may deem fit, for having deliberately disobeyed the orders of this Court granted on the 26th May, 2021.
 2. That any other or further orders of the Court be granted geared towards protecting the dignity and authority of the Honourable Court.
 3. That costs of this application be borne by the Defendants/Respondents.
6. The application is brought on the grounds contained therein and the Supporting Affidavit of Plaintiff. He contended that the Defendants did in total disregard of the orders of this Court of 26th May 2021, caused to be registered an order of the lower Court in the green card of the suit property. That the Defendants' actions are geared towards preventing the Plaintiff from enjoying the fruits of the judgment and is also tantamount to disobedience of the orders of Court. It is his disposition that the Defendants' conduct should be punished by allowing the instant application.
7. The Defendants opposed the application through the Replying Affidavit sworn by the 1st Defendant on the 23rd January, 2023. He deponed that the order registered in the green card was issued in 1998 and the fact that the same was not registered does not render it a nullity as such this Court has no jurisdiction. He contended that they are not in contempt of any proceedings since they already vacated from the suit property and added that the notice to show cause proceedings are ongoing.
8. The Plaintiff filed his written submissions through the Law Firm of Wambo Muyala & Co. Advocates and addressed both applications.
9. On the application for review, he raised one issue for determination by this Court being; - whether the Defendants have met the threshold for review, of the judgment. He submitted on the provisions of the law on review as set out in Section 80(1)(b) of the Civil Procedure Act, as well as Order 45 of the Civil Procedure Rules. He submitted that the Defendants are guilty of misrepresentation of facts for causing an order to be registered after judgment had been delivered. He added that the issues raised by the Defendants were addressed by this Court in paragraphs 36 & 37 of its' judgment. It was also pointed out that by dint of paragraphs 34 & 35 of the said judgments, the Court sufficiently addressed itself on the issues raised by the Defendants. In submitting that the Defendant had not raised any material to demonstrate the existence of new evidence, he relied on the case of *Evan Bwire vs Andrew Aginda* Civ Appeal No. 147 of 2006, as cited in *Stephen Gitbua Kimani vs Nancy Wanjiru Waruingi T/A Providence Auctioneers* {2016} eKLR, where the Court observed that an application for review that may result in the re-opening of a case must be strongly grounded. He submitted that the Defendants had not made out a case for grant of orders of review and the application should thus be dismissed.
10. On the application for contempt, he invited this Court to the definition of contempt as defined in the Halsbury's Laws of England and the case of *Sam Nyamweya & Another vs Kenya Premier League Ltd and Others*. The Plaintiff invited this Court to the principles to be established in a case of contempt as set out in the case of *Samuel M N Mweru & Others vs National Land Commission & 2 Others* {2020} eKLR. It was the Plaintiff's further submissions that the standard of proof in contempt proceedings is higher than that of balance of probability, but not beyond reasonable doubt. Reliance was placed on a number of cases cited in the submissions.



11. It was the Plaintiff's further submissions that the Defendants were aware of the orders of the Court of 26th May 2021, and if any, their advocate as their agent was well seized of the orders. In submitting that personal service was not necessary, he relied on the cases of *Kenya Tourist Development Corporation vs Kenya National Capital Corporation & Another Nairobi* HCCC No. 6776 of 1992 and *Kenya Bus Services vs Susan Muteti*, Nairobi Civil Appeal No. 15 of 1992.
12. The Defendants on the other hand filed their submissions for the two applications through the Law Firm of Waweru Nyambura & Co. Advocates.
13. On the application for review, it was their submissions that reviewing the judgment of the Court would not amount to res judicata within the meaning of res judicata as set out in the case of *V Chokaa & Co. Advocates vs Francis Thoya, County Secretary, Mombasa County Government & 4 Others* {2021} eKLR and *Gurbachan Singh Kalsi vs Yowani Ekori*, E.A Court of Appeal No. 62 of 1958, They submitted that they were not in possession of the Order of the lower Court that cancelled the title deed for the property that was the subject matter of the judgment.
14. On whether the judgment should be reviewed; they highlighted the law on review and maintained that the registration of the order of the lower Court changed the substratum of the judgment and provided new evidence that this Court ought to consider as it may result in review of its judgement. In submitting in favour for the orders for review they invited this Court to consider the pronouncement in *Republic vs Public Procurement Administrative Review Board & 2 Others* {2018} eKLR, *Dickson Karaba vs John Ngata Kariuki & Another* and *Dyson vs Attorney General*.
15. On the application for contempt, it was the Defendants submissions that they had not gone beyond the four elements of contempt as were elaborated in the case of *Samuel M.N Mweru & Others, supra*. Further, they submitted that they registered an order of Court that was issued in Thika Civil Case No. 1284 of 1995, and the fact that the order was not enforced did not render it a nullity. It is thus their submissions that the judgement of the Court was issued on a parcel of land that ceased to exist by dint of the judgment of the Court in Thika Civil Case No. 1284 of 1995. That as per the Green Card attached to the application for review, it is evident that the title deed of the suit property, the subject matter of the judgment had since been revoked. They submitted thus that the Plaintiff is fighting for a non-exist land and the application for contempt ought to be dismissed. In the end, they submitted that they are not in contempt of the orders of Court since they are neither in occupation of the land nor has taxation been finalized.
16. This Court rendered its judgment on 26th May 2021, in favour of the Plaintiff, thereby finding the Defendants to be illegally occupying L.R No. LOC.1/Thuita/1078, Thika, and ordered the Defendants to vacate from the suit land within 90 Days of the Judgment. Thereafter, the Plaintiff filed an application for eviction orders against the Defendants and this Court vide the ruling of 17th February 2022, allowed the application. The matter was then placed before the Deputy Registrar for taxation and the Bill of Costs was taxed. The Decree holder took out a Notice to Show Cause against the Judgment Debtor and while this was pending, parties filed the instant applications.
17. This Court must first determine the application for review filed by the Defendants before determining the issue for contempt.



18. The law on review is well set out under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules as submitted by both parties. Order 45 Rule 1(b) sets out what to be taken into account when considering whether to allow an application for review or not. It provides:

“(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The principles anticipated in the above excerpt are:

- i. The Order cannot be appealed against
- ii. Discovery of new and important evidence after due diligence
- iii. Mistake or an error apparent on the face of the record
- iv. Any other sufficient reason

19. The Supreme Court in the case of *Parliamentary Service Commission Vs Martin Nyaga Wambora & others* [2018] eKLR laid down the guiding principles for consideration in application for review. They include:

- (i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
- (ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- (iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- (iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- (v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- (vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in the exercise of discretion and:
 - (a) as a result a wrong decision was arrived at; or
 - (b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.



20. In the case of *Republic v Public Procurement Administrative Review Board & 2 others*, *supra* as quoted by the Defendants in their submissions, the Court also held:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.”

21. The power of review is discretionary and can only be granted to a deserving party and such a party is the one who has met the aforementioned principles. The Applicants seek to review the judgment of this Court on the premise that the suit property has since changed hands and the title to the suit property was cancelled by an order of Court. That this Court thus issued judgment on a non-existing parcel.

22. The impugned order which is the substance of the application was registered on the 21st September 2022, which indicates that it was issued in Thika SPM No. 1284 of 1995. The said order meant that it cancelled entries 1-4 as contained in the green card. The copy of the Green Card has been attached to the application.

23. A perusal of the pleadings informs this Court that a copy of Green Card was availed in Court and as at the time of its production the same did not have the impugned order registered. This order was registered after the judgment of this Court. Despite the order having not been registered, the attention of the same was brought to the Court and the same was discussed in the judgment. Importantly, this Court in its judgment of succinctly held in paragraph 36

“The Defendant did not explain why the said orders were not implemented nor call Agnes to testify on her ownership of the suit land. In light of the above provision, it is not in doubt therefore that the Court Order issued on 24/06/1998 expired in 2010 by operation of law and the Defendants cannot rely on it”

24. This pronouncement is a clear position of the Court with regards to the orders issued in Thika Civil Case No. 1284/1995, which was registered on 21st September, 2022. As if to disregard the Court’s pronouncement the Defendants went ahead and registered the impugned orders and are now seeking this Court to review its Judgment on the very same orders that it pronounced itself on. The Defendants ought to be candid in their pursuit. If they were not satisfied with the pronouncement of the Court on the said order, it was incumbent on the Defendants to pursue an appeal. This is an insolate attitude to the judgment of this Court, which this Court cannot aid and/ or tolerate.

25. The Court in the case of *Daniel Lago Okomo v Safari Park Hotel Ltd & another* [2018] eKLR, held:

“The exceptionality of the circumstances under which this Court will review its judgments and even so with great caution and circumspection, are matters of such critical importance, raising the bar so high, that seldom will review applications be successful..... We do



not review judgments just because a losing litigant is unhappy and despondent. We have no jurisdiction to do so”

26. The Applicants have not demonstrated any reasons why the order had to be registered after the judgment of the Court. It appears to this Court that the Applicants’ move of registering the Order was meant to defeat the judgment of this Court. Within the principles of grant of review as set out above, and being alive to the provisions of the law on review, this Court finds and holds that the Applicants have not established any principles and proceeds to dismiss the application.
27. On the application for contempt, the Plaintiff contends that the Defendants are in contempt of the orders of Court of 26th May, 2021. The application is majorly predicated on the registration of the order issued in Thika Civil Case No. 1284/1995, which were issued on 24th June 1998, and registered on 21st September, 2022. To determine whether there was contempt or not this Court will rehearse the orders as set out in paragraph 43 of the judgment;
- a. It is hereby declared that Peter Njuguna Giiko and John Thuo Giiko are illegally occupying the land parcel L.R No. LOC. 1/ Thuita/ 1078, Thika
 - b. The Defendants be and are hereby ordered to vacate from the suit land within 90 days from the date of this judgment, in default they shall be evicted in accordance with the provisions of the law
 - c. The claim of mesne profits is declined
 - d. The costs of the suit shall be borne by the Defendants in favour of the Plaintiff.
28. The Defendants did not move from the said property within the 90 Days as directed by the Court necessitating the filing of eviction orders which this Court granted vide its ruling of 17th February, 2022. There is an admission by the Defendants that they are no longer in occupation of the suit property. The question this Court will therefore seek to answer is whether the conduct of registering the order amounted to contempt.
29. The law on contempt orders is laid down in Section 5 of the *Judicature Act*, which provides:
- 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.”
30. This is echoed in section 63 (c) of the *Civil Procedure Act*. The procedure to be adopted in cases of contempt was set out in *Christine Wangari Chege vs Elizabeth Wanjiru Evans & Others* where the Court observed: -

“Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the *Judicature Act*, the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

.....



The procedure may be summarized as follows, in so far as it relates to the High Court of Justice: -

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
 - ii. An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
 - iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
 - iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
 - v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
 - vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
 - vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.
31. Leave is not however required where the contempt sought is in respect of Orders, judgments or undertaking. This position was held in the Christine Wangari Chege case, supra. It is trite law that Court orders cannot be issued in vain. Judicial authority is derived from the *Constitution* and the orders issued must be obeyed, unless they have been set aside, varied or reviewed. As rightly put by J.B Ojwang J as he then was in Nairobi Misc App No 1609 of 2003 *B v Attorney General* [2004] eKLR, where the Court 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.”
32. Contempt proceedings are personal in nature and can result in loss of personal liberty, thus the standard of proof is high. Because of its criminal nature, it must be demonstrated that the person cited for contempt was aware of the order and he wilfully neglected and/or ignored to obey the order. The Defendants were well aware of the orders of the Court and there is evidence that they have complied with the orders of the Court.
33. This Court indeed considered the effect of the Order that has now been registered and even though it did not make any order barring the registration of the said order, it rendered its mind on the same. The Defendants took advantage of this and went ahead to cause the said order to be registered. The Plaintiff averred that the registration of the said order against the suit property would thwart him from enjoying the fruits of the judgment as it will prevent him from transacting on the suit property. It is



no doubt that the effect of registering the said order may result in cancellation of the Plaintiff's title. This will in essence defeat the judgment of this Court.

34. It is evident that the Defendants proceeded to cause registration of the said order in a bid to defeat the judgment of this Court considering the timing when the order was registered. This is no doubt a total and blatant disregard of the judgment of this Court. It is not clear as why the Land Registrar would cause the said order to be registered oblivious of the fact that the order is stale.

35. The Court in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR best elaborated the powers of a Court on contempt when it held:

A court without contempt power is not a court. 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 judgments 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."

36. The Court went ahead and enumerated the consideration to be taken into account before contempt can issue. It held:

"It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove

- (i) the terms of the order,
- (ii) Knowledge of these terms by the Respondent,
- (iii). Failure by the Respondent to comply with the terms of the order.

37. Upon proof of these requirements the presence of wilfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. 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 order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.

38. This Court is alive to its orders of 26th May 2021, and it is also alive to the fact that the Defendants were evicted from the suit property. There is clearly evidence that the Defendants have complied with the orders of the Court. Within the elements of contempt as has been cited above and which this Court adopts, it would be difficult for this Court to find the Defendants to be in contempt of the orders of 26th May, 2021.



39. However, alive to the pronouncement of this Court in its Judgment on paragraph 36, specifically, to the effect of the orders of the Court in Thika Civil Case No. 1284 of 1995, issued on 24th June, 1998, the registration of the said orders is null and void. The effect of the foregoing is that the registration of the orders in the Green Card noted there in as entry No.5 be and is hereby cancelled.
40. This Court must at this point caution the Defendants' action and their deliberate attempt to scuttle the Judgment of this Court. The "maxim of equity, he who seeks equity must do equity" requires of the Defendants to do that which is right before they can claim protection from the same Court. Equity does not aid such a person who is geared towards defeating justice.
41. On the issue of costs for both Applications, this Court directs that in regard to the Defendants Notice of Motion Application dated 19th October 2022, the said Application is dismissed with costs to the Plaintiff/Respondent.
42. In regard to the Plaintiff's Application dated 19th December 2022, the Defendants/Respondents will bear costs of the said Application too.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 6TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Mr Andati for the Plaintiff /Respondent/Applicant

M/s Weyimi H/B for Waweru Nyambura for the 1st and 2nd Defendants/Applicants/Respondents

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

