



REPUBLIC OF KENYA



**Mungai v Njunge (Miscellaneous Application E011 'B' of 2023)
[2023] KEELC 19958 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19958 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION E011 'B' OF 2023**

**JG KEMEI, J
SEPTEMBER 19, 2023**

BETWEEN

JAMES CHAU MUNGAI APPLICANT

AND

VERONICAH WANGARI NJUNGE RESPONDENT

RULING

1. The application dated the 27/1/2023 is filed by the Applicant seeking the following orders;
 - a. That the Court grant leave to the Applicant to commence contempt proceedings against the Respondent.
 - b. That the Court to commit the contemnor to Civil jail, for contempt of the orders in Kikuyu SPM Court issue in MCLC No. E90 of 2021 on the 28/3/2022.
 - c. Costs of the application be provided for.
2. The application is supported by the grounds annexed thereto and the Affidavit of Mandela K. Chege sworn on the 27/1/2023 in which he deposed that he is the Counsel representing the Applicant and that he is versed with the matter. The Applicant filed suit in MCLC No. 90 of 2021 where he successfully obtained orders of injunction on the 28/3/2022 restraining the Respondent from encroaching occupying developing selling and or in any way dealing with the suit premises Muguga/ Muguga/4200 (suit land) pending the hearing and determination of the suit. The orders were served upon the Respondent and her Advocate vide the letter dated the 25/5/2022 enclosing the said orders. That despite the service of the orders the Respondent has refused to comply with the same and continues to develop the suit land despite several warnings by the SPM Court.
3. The application is opposed by the Respondent vide the Replying Affidavit deponed by the Respondent on record on the 11/5/2023. She objected to the Supporting Affidavit sworn by the



Counsel of the Applicant on the grounds that the said Advocate had no capacity to swear an Affidavit on issues that he cannot ascertain. She posited that moreover, the said Advocate was a stranger to her and he cannot bring evidence of the alleged contempt.

4. Further, the Respondent conceded being served with the Court orders in the month of May 2022 restraining her from encroaching occupying developing selling and dealing with the suit premises. That since receipt of the said orders she has not dealt with the premises in any way whatsoever. That she is aware that the premises are as at time the orders were issued and that no works have continued in obedience of the said orders. She was of the view that in any event the Respondent has not demonstrated any evidence to show that she has occupied and or trespassed onto the suit land. She stated that prior to the issuance of the orders aforesaid, she had constructed a permanent house and fenced the suit land and planted trees and fruits. She urged the Court to disallow the application.
5. In a rejoinder filed on the 12/6/2023 the Applicant deposed that the Respondent is lying to the Court that the construction stopped upon the issuance of the Court orders. Relying on the photographs annexed to his Replying Affidavit and taken on the 27/1/2023, he opined that the Respondent did not comply with the Court orders. That the Court orders must be complied with to protect the dignity of the Court and that the Respondent should be punished for contempt.
6. The Applicant submitted that the orders of the Court were clear and unambiguous yet the Respondent went ahead and constructed a perimeter wall as shown on the photographs annexed to the Affidavit in support of the application. The Respondent has not disputed service of the said orders and that by constructing occupying and generally developing the land, the Respondents' acts amount to clear breach of the Court orders punishable by contempt. That the Defendants said actions were deliberate.
7. The Respondent failed to file written submissions despite the direction of the Court.
8. Having considered the application the Affidavit evidence the written submissions and all the material placed before me the issue that commend itself for determination is whether the Applicant has proved contempt against the Respondent and what orders should be issued by the Court.
9. Before I delve into the key issues as set out above, I find it necessary to address the jurisdictional positioning of the Magistrate Court in determining contempt of Court proceedings.
10. This miscellaneous cause springs from a suit filed in MCLE No. 90 of 2021 – James Chau Mungai Vs. Veronica Wangari Njunge & Anor. In this case the Applicant successfully obtained restraining orders against the Respondent as set out in this Ruling. It is the case of the Applicant that the Respondent has wilfully breached the orders of the Court and urged this Court to hold the Respondent in contempt and punish her consequently.
11. Section 10 of the *Magistrates' Court Act* states as follows;

“Contempt of Court

1. Subject to the provisions of any other law, the Court shall have power to punish for contempt.
2. A person who, in the face of the Court-
 - a. Assaults, threatens, intimidates, or insults a Magistrate, Court Administrator, Judicial Officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court,
 - b. Interrupts or obstructs the proceedings of the Court; or



- c. Without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence.
 3. In the case of civil proceedings, the wilful disobedience of any Judgment, decree, direction, order, or other process of a Court or wilful breach of an undertaking given to a Court constitutes contempt of Court.”
12. My understanding of the above section of the law is that the Magistrate Court has power to punish for contempt in two instances, contempt on the face of the Court and any disobedience of its orders including interlocutory orders.
13. Section 10 of the *Magistrates' Court Act, 2015* that came into force in January, 2 2016 gave the Magistrate’s Court unlimited jurisdiction to punish for contempt. Prior to 2015, it is trite the Magistrates had no power to punish for contempt and the power was repositied in the High Court (read ELC) and the Court of Appeal.
14. In the case of *Ramadhan Salim Vs. Evans M. Maabi T/A Murby Auctioneers & Another* [2016]eKLR the Court held that;

“... the order contravened was in the nature of temporary injunction which the Magistrate’s Court had jurisdiction to punish as opposed to mandatory injunction which the Magistrate’s Court lacked jurisdiction to punish for contempt.”
15. In the case of *Esther Nyagutii Maina Vs. Rachel Wanjiku Kamara & Another* [2020]eKLR the Court held that;

“Section 10(3) is in respect of civil proceedings before the Court and any disobedience of a decree or order of the Court constitutes contempt and is punishable by the same Court.”
16. In *Re ZJA & TA (Minors)* [2020]eKLR the Court held as follows;

“When the *Contempt of Court Act* came to force on 23rd January 2017, it actually provided for procedure in handling proceedings on contempt committed on the face of it and conduct committed outside court but classified as constituting an offence committed against the court. The Act did not deal with disobedience of court judgments or decrees as provided under Section 10(3) of the magistrate’s Act. Under section 36 of that Act, it provided that the provisions of that Act superseded those of any written law. This Act which has since been nullified did not amend the provisions of the magistrate’s Act and in particular Section 10(3) which is relevant in this case. Therefore, in my view the nullification of the *Contempt of Court Act* by the High Court on 9th November 2018 has no effect on the Magistrate’s Court in punishing contemnors for acts of disobedience committed against its orders under Section 10(3) of the Magistrate’s Act.”
17. Indeed, in the Ramadhan case above quoted, the issue revolved around disobedience of Court orders issued before the *Magistrates' Court Act* of 2015 came to force by which time Magistrates had no powers to handle contempt proceedings hence the pronouncement by the Court of Appeal. The same Court actually affirmed the position that with the new Magistrates Act, that Magistrates have powers



under Section 10 of that Act to hear and punish for contempt arising out of its decisions. The Court went further to state;

“From the above, it does appear that the magistrate did not have jurisdiction to entertain the contempt proceedings as he correctly held. That jurisdiction belonged to the High Court or Court of Appeal. It is instructive that when the High Court and this Court exercise that jurisdiction, it extends to the contempt committed in the subordinate court. The only jurisdiction the magistrate’s court could exercise when dealing with contempt of court is, if it is committed in the face of the court. However, the *Magistrates’ Courts Act*, 2015 which came into force on 2nd January 2016 now gives the magistrate’s courts unlimited jurisdiction to punish for contempt.”

18. I agree with the body of jurisprudence laid out in the authorities cited above.
19. Having analysed case law I am of the firm persuasion that the orders being alleged to have been disobeyed were in the nature of temporary injunction and for that reason, I hold that the Magistrate’s Court has jurisdiction to punish for contempt.
20. In conclusion I find that justice will be served better if the application herein is struck out to enable the Applicant mount the application in the right fora.
21. I make no orders as to costs.
22. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent but served

Ms. Kyallo for Respondent

