



**Alal & another v Owiyo & 4 others (Environment & Land Case  
52 of 2019) [2023] KEELC 20677 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20677 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 52 OF 2019**

**E ASATI, J**

**OCTOBER 12, 2023**

**BETWEEN**

**SETH OUKO ALAL ..... 1<sup>ST</sup> APPLICANT**

**MARY DED OJWANG ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JASON OKOTH OWIYO ..... 1<sup>ST</sup> RESPONDENT**

**DENNIS OTIENO OMONDI ..... 2<sup>ND</sup> RESPONDENT**

**NANCY OKOTH OWITI ..... 3<sup>RD</sup> RESPONDENT**

**ELVIS OTIENOMUGA ..... 4<sup>TH</sup> RESPONDENT**

**MARGARET ADHIAMBO WAGUDE ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the applicant’s Notice of motion application dated 22<sup>nd</sup> June 2023 brought pursuant to the provisions of sections 1A, 1B, 3, 3A, and 63 (e) of the *Civil Procedure Act*, section 5 of the *Judicature Act* and Order 8 rule 3 of the *Civil Procedure Rules*.
2. The Applicant sought the following orders: -
  - a. Pending the hearing and determination of this suit, a temporary injunction do issue restraining the Respondents, their servants and/or agents jointly and severally from selling , transferring, disposing of, dealing , evicting the applicants, cutting or destroying the applicants’ vegetation , further sub dividing and/or interfering whatsoever with the suit original land parcel Kisumu/ Border/1814 now sub-divided to Kisumu/Border/5720, Kisumu/Bore /5721, Kisumu/ Border/5722, Kisumu/Border/5723, Kisumu/Border/5724 and Kisumu/Border/5725.



- b. An order of restriction do issue restraining any further dealing at the Lands Office with respect to Land Parcels Kisumu/Boarder/5720, Kisumu/Border/5721, Kisumu/Border/5722, Kisumu/Border/5723, Kisumu/border/5724 and Kisumu/Border/5725 pending hearing and determination of this suit
  - c. An order of committal to be made against Jason Okoth Owiyo, the 1<sup>st</sup> Respondent herein to prison for such period as this Honourable Court may deem fit and just.
  - d. The applicants be granted leave to join third parties whom the 1<sup>st</sup> Respondent transferred portions of the original suit properties upon further contemptuous action as further respondents in the main suit
  - e. Upon prayer five (5) being granted, the amended Originating Summons be further amended to add the additional Respondents and the respective cause of action against them
  - f. The Costs of this application be provided for.
3. The Application is based on the grounds that on 10<sup>th</sup> December, 2020 in the presence of all the parties the court issued an Order restraining the Respondents from interfering with the suit parcel of land. That the Order was served upon all the Respondents. That the 1<sup>st</sup> Respondent despite having knowledge of the order proceeded not only to interfere with applicant's possession of the suit property but sub divided the land into many other portions and transfer the portions to other third parties not party to this suit. That the original suit property was initially Kisumu/Border/1814 but now sub divided into Kisumu/Border/5720 Kisumu/Border/5721, Kisumu/Border/5722, Kisumu / Border/5723, Kisumu/Border/5724 and Kisumu/Border/5725. That the 1<sup>st</sup> Respondent on 20<sup>th</sup> June, 2023 went on wanton destruction of the property by cutting down trees and vegetation. That the 1<sup>st</sup> Respondent ought to be punished by the Court for the violation of the order of this court in order to restore the dignity and respect of this court. That the 1<sup>st</sup> Respondent has demonstrated absolute disregard and contempt of the court order issued by this Court. That the applicants have no other way of enforcing the said order apart from having the 1<sup>st</sup> Respondent committed to civil Jail. That it has become necessary to join the other parties so that the issues herein can be conclusively determined.
  4. The first Respondent's response to the application was contained in his Replying Affidavit dated 29<sup>th</sup> September 2023. He stated that the land belonged to his late father, that he did succession to the estate of his late father wherein the applicants filed objection which was dismissed with costs to him. That he has never destroyed property belonging to the applicants and has never been served with injunctive orders.
  5. The 2<sup>nd</sup> Respondent responded to the application by filing a Replying Affidavit sworn by him on 10<sup>th</sup> July, 2023. He stated that he is not aware of any order being issued by the court against him with regard to this matter and in any event the said order was issued ex-parte without his involvement or his advocate and the same has never been extended by the court. That his land parcel Number Kisumu/ Border/5721 was transferred to him in January, 2020 after conclusion of the court succession process and long before the said orders were obtained and therefore it is not true that the sub-division and transfer was done after the court order. That he has no problem with the applicants bringing other people into the case, that he is opposed to any order of injunction that seeks to restrain him from dealing with his land parcel which is not even part of what is being claimed by the applicants and the applicants have not stated that they are in occupation of his land parcel which is fenced and is in his possession.
  6. That land larcel number Kisumu/Border/5721 is his land parcel which he bought after going through due diligence of the law and he is not considering disposing of it anytime soon and therefore there is



no need for orders of injunction against his title deed and in any event the applicants through their advocates had already lodged a restriction prohibiting any dealings on the said land parcel until this case is heard and determined. That the Applicants have no legal basis for injunction against him. That the Applicant was given similar orders of injunction in the year 2020 and never prosecuted the suit until the said orders lapsed as per the provisions of Order 40 Rule 6 of the Civil Procedure Rules.

7. Directions were taken on 4/7/2023 that the application be canvassed by way of written submissions.
8. The applicants relied on the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules and the case of *Giella v Cassman Brown* and submitted that they have a prima facie case against the Respondents because they are currently in possession land parcel Kisumu/Border/1814 now sub-divided to Kisumu/Border/5720, Kisumu/Bore/5721, Kisumu/Border/5722, Kisumu/Border/5723, Kisumu/Border/5724 and Kisumu/Border/5725. That on 10<sup>th</sup> December, 2020 the court issued injunctive orders restraining the Respondents until conclusion of the suit filed herein in full.
9. That the Respondents herein in utter disregard of the injunctive orders went ahead and sub-divided the suit property land parcel Kisumu /Border/1814 to several other parcels being Kisumu/Border/5720, Kisumu/Bore /5721, Kisumu/Border/5722, Kisumu/Border/5723, Kisumu/Border/5724 and Kisumu/Border/5725 and sold the same to other third parties who are not parties in this suit. That the purpose of temporary injunction being sought seeks to stop any further subdivision of the parcels listed above.
10. They submitted that the Applicants and their families are the owners and in possession of the suit property. That the Respondents on 20<sup>th</sup> June ,2023 went to wanton destruction of the land cut down trees and destroyed vegetation valued at Kshs.261, 326/= as per annexure 5 of the Supporting Affidavit. That the suit property has already been sub-divided and is at risk of further being sub-divided by the third parties. That the Applicants may continue being at risk of losing the suit property which action will render the suit nugatory, the Applicant therefore stands to suffer irreparable injury wherefore they believe they have valid claim against the Respondents.
11. Counsel relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR. to submit that the balance of convenience is in favour of the Applicants as they are the owners of the suit property and are in current possession and occupation of the suit property. That the Court issued injunctive orders on 10<sup>th</sup> December, 2022 but the Respondents in defiance went against the orders.  
That the Applicants are at the verge of suffering a great inconvenience as they risk losing the suit property if the injunctive orders are not granted which may render the suit filed herein nugatory.
12. On whether an order of restriction should issue They relied on Section 76 of the Land Registration Act, 2012. The applicants submitted that the Respondents defied orders of the Court issued on 10<sup>th</sup> December, 2020 and went ahead to sub-divide land parcel Kisumu /Border/1814. That in order to stop the Respondents from any further dealings on the resultant parcels it is prudent that the court directs the land Registrar, Kisumu County to register a restriction pursuant to the provisions of the Land Registration Act, 2012 so as to guard against fraud or improper dealings with respect to Kisumu/Border/5720, Kisumu/Border/5721, Kisumu/Border/5722, Kisumu/Border/5723, Kisumu/Border/5724 and Kisumu/Border/5725.

The applicants relied in the case of *Matonya v Standard Chartered Bank(K) Ltd & Others* [2003] 1EA 140 where it was held that;

“A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of



an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented”.

13. On whether or not an order of committal should be made against Jason Okoth Owiyo the applicants relied on Section 6 of the Legal Notice Number 46 of 2016 and the case of *Samuel M. N. Mweru & Others vs National Land Commission & 2 others* (2020) eKLR to show that the applicant has to prove four elements in application for contempt of Court namely; the terms of the Order ought to be clear, unambiguous and binding on the 1<sup>st</sup> Respondent. Counsel submitted That the order given on 10<sup>th</sup> December, 2020 was clear, free from ambiguity and self-explanatory upon the 1<sup>st</sup> Respondent. Knowledge of the terms of the Order by the 1<sup>st</sup> Respondent. That annexure 2 of the Supporting Affidavit indicates that the 1<sup>st</sup> Respondent was properly served and was well aware of the existence of the order of the court. Failure by the 1<sup>st</sup> Respondent to comply with the terms of the order. That the order issued by the court on 10<sup>th</sup> December, 2020 restrained the 1<sup>st</sup> Respondent from dealing in any manner whatsoever with the suit property up until the conclusion of this suit but the 1<sup>st</sup> Respondent defied the said orders and subdivided the land to many portions and later sold to other third parties. That the 1<sup>st</sup> Respondent also destroyed trees and vegetation. That the 1<sup>st</sup> Respondent actions are in direct contempt of the orders and he should be punished accordingly. That the 1<sup>st</sup> Respondent’s conduct was deliberate.
14. On whether leave should be granted to the Applicants to amend the Originating summons to include third parties to be enjoined as Respondents. The applicants relied on Order 8 Rule 3 of the *Civil Procedure Rules* and the case of *Ochieng and others vs First National Bank of Chicago* Civil Appeal Number 147 of 1991. That it is necessary to amend the Originating Summons to include the third parties to whom the 1<sup>st</sup> Respondent sold and transferred the land parcel as Respondents in the suit.
15. The 1<sup>st</sup> Respondent filed submissions dated 29<sup>th</sup> September 2023 and submitted that for a party to be found in contempt of court orders the party must be served with the orders in person that since he was not served, there cannot be contempt.
16. The 2<sup>nd</sup> Respondents filed written submissions dated 2<sup>nd</sup> August, 2023. He submitted that the applicant doesn’t deserve any injunctive orders as sought. That the cited land parcels were in existence since January, 2020 and orders issued by the court on 10<sup>th</sup> December, 2020 covered them but the applicants delayed in prosecuting the case until the orders automatically lapsed. He relied on Order 40 Rule 6 of the *Civil Procedure Rules*. That the applicant has not sought to extend orders issued on 10<sup>th</sup> December, 2020 but is seeking fresh orders as per the application dated 22<sup>nd</sup> June 2023. He relied on the case of Nairobi Court of Appeal Civil Appeal No. 223 Of 2016 *Barclays Bank Of Kenya Limited v Henry Ndungu Kinuthia & Another* [2018] eKLR.
17. That the applicants only claim to be in occupation of the portions of the suit land parcel as per annexure marked SOA-6. That there is no surveyor report indicating that there is any occupation by the applicants on the Land parcel Kisumu/Border/5721 owned by the 2<sup>nd</sup> Respondent. That the 2<sup>nd</sup> Respondent is the registered owner of Land parcel Kisumu/Border/5721 having obtained his title sometime in January, 2020. That the Applicant has only produced photographs which don’t show the place the alleged house is situated on the Land parcel.



18. The prayers sought are a temporary injunction, a restriction, an order for committal of the 1st Respondent to prison for breach of a court order, joinder of parties and amendment to the Originating Summons.
19. The prayers for joinder of parties and for amendment Originating Summons are not opposed. In any event, given that the original suit land has been subdivided into the resultant parcels and that the parties sought to be added to the suit have interest in the resultant parcels their presence in the suit is necessary so as to adequately adjudicate and decide on the issues in controversy.
20. As concerns the prayer for temporary, the record shows that such a relief was sought by the applicant herein and granted by the court soon after the inception of this suit on 10/12/2020. However, the order was in respect of the original suit land number Kisumu/Border/1814 only. The applicant now seeks similar orders to cover the resultant parcels. While the applicant contends that he is in occupation of the entire of what was parcel number 1814, the 2<sup>nd</sup> Respondent contends that he is in occupation of a resultant parcel number Kisumu/Border/5721. The other Respondents did not reply to the application. The burden of proof that he occupies the entire of the original parcel was upon the applicant. He did not discharge the burden. An order of temporary injunction is not meant to evict parties who are already in occupation. Taking into account the provisions of Order 40 Rules 1 and 2 *Civil Procedure Rules* and the principles in *Giella vs Cassman Brown* on temporary injunctions and the averment in the supporting Affidavit that the suit land is being wasted, it is my view that an order of temporary injunction to stop certain activities with a view to preserve the suit land pending disposal of the suit is merited.
21. The purpose for an order of restriction is to preserve the status quo of the register and other records in respect of the suit land pending an event or for a given duration. In the circumstances of this case it is my view that the order is merited.
22. The last prayer I will consider is the prayer for committal of the 1<sup>st</sup> Respondent to prison for disobeying a court order. In order for such orders to be granted, as rightly submitted on behalf of the applicant, there must be proof of existence of a court order whose terms are clear and unambiguous and binding on the Respondent, secondly, that the Respondent was aware or given proper notice of the terms of the order, thirdly, that the Respondent has breached the terms of the order and lastly, that the action of the Respondent was deliberate.
23. In the case of *Philomena Wariga Waweru v Duncan- Wanyoike & 3 others* [2018] eKLR it was held that

“Contempt of court is an offence which is quasi-criminal in nature. It ought to be proved satisfactorily.”

Similarly, in *Michael Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR the Court of Appeal sated that

“It is trite law that to commit a person for contempt of court, the court must be satisfied that he has wilfully and deliberately disobeyed a court order that he was aware of.”



24. In the present case, it is not disputed that the court issued an order dated 10/12/2020. A copy of the order is annexed to the Supporting Affidavit and marked SOA-1. It was an order of temporary injunction

“restraining the Defendant/respondents their employees, servants and/or agents from evicting the plaintiff/applicants and their families, employees, and assigns and/or destroying the plaintiff/applicants’ crops and fences until the conclusion of the suit.”

And secondly

“restraining the Defendants/Respondents their employees, servants and/or agents from inviting, allowing, leasing, selling the parcels of land subject to this suit to third parties or interfering by any means howsoever with the ownership and possession of the same or interfering with the status quo as at the time of filing the suit until the conclusion of the suit.”

A reading of the order reveals that the same was clear, unambiguous, directed and binding on the Respondents.

25. It is the applicants’ position that the order was issued in the presence of the parties and that the Respondents were served with the extracted order. Perusal of the court file does not show who was present when the ruling containing the court order was delivered. Affidavit of Service attached to the Supporting Affidavit and marked SA-2 was sworn by Stephen Otieno Onyango on 4<sup>th</sup> May 2020. This was obviously before the order was issued. The affidavit was in respect of service of the Originating Summons and the accompanying documents. There is no evidence that the Respondents were served or were aware of the court order.

26. Thirdly, the actions complained of as constituting breach of the court order are; subdivision of the suit land and transfer of the resultant parcels, felling of trees and destruction of crops and vegetation on the suit land. Photographs and a valuation report were exhibited and marked SOA-4 and SOA-5 respectively as evidence of the damage and the quantum thereof. As regards the subdivision and transfer, the green cards (copies of register) exhibited and marked SOA-3 show that subdivision of the original suit land occurred before 22.1.2020 because the resultant parcels were transferred to the Respondents on 22.01.2020 long before the subject court orders were issued.

27. Though the need to uphold the rule of law and integrity of the court is paramount, and courts ought to act to punish parties who breach court orders, a case for contempt of court must be made out in every such case. The applicant must prove all the ingredients of contempt as outlined herein above to the required standard of proof. The standard of proof as stated in the case of *Mutitika v Baharini Farm Limited* [1985] KLR 227

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. It must be higher than proof on a balance of probabilities almost, but not exactly, beyond reasonable doubt.”

28. The burden of proof, under the provisions of sections 106, 107, 108 and 109 of the *Evidence Act* is with the applicant. This burden has not been discharged.

29. In conclusion, the prayers for joinder of parties and amendment of the Originating Summons are not opposed. This court has made findings that the prayers for injunction and restriction are merited and that the prayer for committal to prison of the 1<sup>st</sup> Respondent for contempt of court has not been



proved. On the basis of these findings, I allow the application accordingly and make the following orders: -

- a. Pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the Respondents, their servants and/or agents jointly and severally from selling, transferring, disposing of, evicting the applicants, cutting or destroying the applicants vegetation and further sub dividing the suit original land parcel Kisumu/Border/1814 now sub-divided to Kisumu/Border/5720, Kisumu/Bore/5721, Kisumu/Border/5722, Kisumu/Border/5723, Kisumu/Border/5724 and Kisumu/Border/5725.
- b. An order of restriction is hereby issued restraining any further dealing at the Lands Office with respect to Land Parcels Kisumu/Boarder/5720, Kisumu/Border/5721, Kisumu/Border/5722, Kisumu/Border/5723, Kisumu/border/5724 and Kisumu/Border/5725 pending hearing and determination of this suit
- c. Leave is hereby granted to the applicants join more parties Respondents in the suit.
- d. Leave is hereby granted to the applicants to amend Originating Summons further in respect the additional Respondents and the respective cause of action against them. Amended Originating Summons to be filed and served within 14 days hereof.
- e. Costs of the application be in the main suit.

Orders accordingly.

**Ruling, dated and signed at Kisumu, read virtually this 12th day of October 2023 through Microsoft Teams Online Application.**

**E. ASATI**

**JUDGE.**

In the presence of:

Ajevi: Court Assistant.

Khisa for the applicants.

No appearance for the 1<sup>st</sup> Respondent.

No appearance for the 2<sup>nd</sup> Respondent

No appearance for the 3<sup>rd</sup> Respondent

