



REPUBLIC OF KENYA



**KENYA LAW**  
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**Khavere v Kavuludi & 4 others (Environment and Land Appeal  
12 of 2022) [2023] KEELC 21223 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21223 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL 12 OF 2022**

**E ASATI, J**

**NOVEMBER 2, 2023**

**BETWEEN**

**CAROLINE KHAVERE ..... APPLICANT**

**AND**

**PETER KHENDI KAVULUDI ..... 1<sup>ST</sup> RESPONDENT**

**EMILLY KHAVERE ..... 2<sup>ND</sup> RESPONDENT**

**FLORENCE KHAVAI ..... 3<sup>RD</sup> RESPONDENT**

**HELLEN KHADI ..... 4<sup>TH</sup> RESPONDENT**

**JAMIN MISIGO KISIA ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the application dated 22<sup>nd</sup> June 2023 filed on behalf of the Appellant and stated to be brought pursuant to the provisions of Article 159(2) (d) of the Constitution, sections 13(7), 19 and 29 of the Environment and Land Court Act No. 19 of 2011 Laws of Kenya, sections 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 50 Rules 1 Civil procedure Rules 2010. The application seeks for orders that:-
  - a. The Respondents; Peter Khendi, Emily Khavere, Florence Khavai, Jamin Musigo Kisa and Hellen Khadi be cited for contempt of court and be sanctioned in accordance with the provisions of section 29 of the Environment and Land Court Act No. 19 of 2011.
  - b. That the hounourable court be pleased to issue an express order/injunction in respect of the existing stay of execution herein restraining the Respondents their agents, servants, assignees and/or anyone claiming under them or acting on their instructions from trespassing, selling, commencing or continuing to carry out any kind of construction and or in any way whatsoever interfering with or any act which is inconsistent with the applicant's ownership



of all that parcel of land namely Tiriki/Senende/1111 measuring approximately 0.37 pending the hearing and determination of the instant appeal.

- c. Costs be in the cause.
2. The grounds upon which the application was brought are that the suit land is registered in the name of the Applicant that the applicant was aggrieved by the Judgment of the trial court and preferred the appeal herein. That in spite of orders of stay the Respondents trespassed onto the suit land and demolished a perimeter wall. That an application for stay of execution dated 6<sup>th</sup> December 2022 was allowed by consent. That the Respondents were restrained from interfering with the suit property. That the Respondents disobeyed the stay orders and have continued to trespass on the suit land by evicting the tenants from the rental houses, cutting down trees and cultivating the suit land. That the Respondents are acting with impunity and have threatened to demolish the rental houses on the suit land. That unless the Honourable court protect its orders, it may be brought into disrepute. That it is important that the substratum of the appeal which is the suit land be preserved.
3. The application was supported by the averments contained in the Supporting Affidavit sworn by Caroline Khavere on 22<sup>nd</sup> June 2023 and the annexures thereto.
4. The application was not opposed.
5. On 13<sup>th</sup> July, 2023, directions were given that the application be argued by way of written submissions.
6. Written submissions dated 9<sup>th</sup> October 2023 were filed on behalf of the applicant by the firm of Kutto & Kaira Nabasenge Advocates. Counsel submitted that on 7<sup>th</sup> February 2022 the court on the basis of consent of all the parties directed that there be stay of execution of the impugned judgment pending hearing and determination of the appeal herein. That despite the order of stay of execution being in force the Respondents have invaded the suit land by cutting down trees and cultivating the same and threatening to pull down the structures/houses erected on the suit land and that the applicant is forced to outsource security services from the police force to secure the property.
7. Counsel submitted further that for an application for committal of a party for contempt, what the court needs to consider is;
  - a. whether the order existed
  - b. whether the Respondent is aware of the order
  - c. whether the Respondent breached the order
  - d. penalty for contempt
8. On whether or not in the present case there is in existence a court order, Counsel submitted that there is a court order made on the 7<sup>th</sup> February 2023 to the effect that;

“The notice of motion application dated 14<sup>th</sup> November 2022 be and is hereby allowed in terms that there be stay of execution of the Judgment dated 17<sup>th</sup> October 2022 in Hamisi PM C ELC No. E025 of 2021 pending hearing and determination of the appeal herein. No order as to costs.

Counsel submitted that it was clear that the order existed with the knowledge of all the parties.
9. On whether or not the Respondents were aware of the existence of the order, Counsel submitted that the Respondents have not replied to the application to deny knowledge of existence of the order and that the order was granted by consent of all the parties. Counsel relied on the case of *Ringera & 2 others*



*vs Muite & 10 others* HCC at Nairobi Civil Suit No. 1330 of 1991 (unreported) to submit that the Respondents were aware of the order and that there was no need to serve them.

10. On whether the Respondents breached the court order Counsel submitted that in view of the photographs annexed to the Affidavit in support of the application it is apparent that the Respondents continue to breach the court order openly and flagrantly, that they have trespassed onto the suit land, cut down trees and erected structures. That the Respondents activities on the suit land are against the spirit of the stay orders. Counsel relied on the cases of [\*Kenya National Assurance Co. \(2001\) Ltd Kencent Holdings Vs Nelson Marwa Regional Commission Coast & 5 others\*](#) (2017) eKLR and [\*Beldina Mokaya Vs Robert Ombaso Nyaresu & another\*](#) (2009) eKLR and urged the court to punish the Respondents as per the provisions of Section 29 of the [\*Environment and Land Court Act\*](#).
11. And on whether or not the Respondents should be restrained from interfering with the suit land, Counsel submitted that the applicant seeks for orders of injunction to safe guard the land pending appeal. That there is need for the honorable court to caution the Respondent not to interfere with the suit land against the stay orders in force. That the court should issue an order restraining the Respondents their agents and/or servants from interfering with the suit property in any manner whatsoever pending hearing and determination of the appeal.
12. No submissions were filed on behalf of the Respondents within the timelines given.
13. The application seeks for two substantive orders; an order for punishing the Respondents for breach of a court order and an order for temporary injunction pending hearing and determination of the appeal.
14. As submitted by the applicant, in an application for contempt of court; there must be proof of a 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.
15. In the case of [\*Philomena Wariga Waweru vs 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 vs 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.”
16. The order the subject of the contempt application is dated 7<sup>th</sup> February 2023 It is an order of stay of execution of the judgment in Hamisi PC EL Case No. E025 of 2021 pending hearing and determination of the appeal. A reading of the order shows that it was unambiguous and clear in its terms.
17. As to whether the Respondents were aware of the order the same was entered by consent at the instance of counsel for the Respondents. The court proceedings of 7<sup>th</sup> February 2023 when the order was made show that Counsel for the Respondents indicated to the court that she was not opposing the application for stay of execution as she wished to have the appeal disposed of speedily. Consequently, the order of stay of execution was made by consent.



18. As to whether there was breach of the order, the applicant claims that the Respondents destroyed perimeter fence, felled trees and are cultivating the suit land in breach of the court order. The applicant had made an earlier application seeking similar orders for which ruling was delivered on 13th April 2023. The court had found in that ruling that the actions of the Respondents though deliberate, did not amount to breach of the stay of execution order. The judgement in Hamisi PMC E L Case NO E025 OF 2021 was for:
- a. A declaration that land parcel No. Tiriki/senende/5 Andtiriki/senende/106 were ancestral and that the registration of the 1<sup>st</sup> Defendant Jamin Misigo Kisia as proprietor was by trust for the plaintiffs who were at all times beneficiary entitled to the same under the trust
  - b. A declaration that the subdivision of Land parcel known as Tiriki/senende/106 to create land parcel known as Tiriki/senende/1110, 111 and 1112 and the subsequent transfer of the resulting parcels to the Defendants to the exclusion of the Plaintiffs was in violation of the existing customary trust and to that extent null and void for all purposes
  - c. The subdivision of land parcel No. Tiriki/senende/106 and the transfer of the resulting parcels to the Defendants having been found to be unlawful, be all cancelled and the new titles arising from the said Original Title be and is hereby revoked and that upon cancellation of the new titles the same reverts to the original title in the names of the 1<sup>st</sup> Defendant.
  - d. That in the meantime an order of this court be issued and is hereby directed to the Land Registrar Vihiga to register a prohibition on the suit land parcel Numbers Tiriki/senende/1110, 1111 and 1112 prohibiting any dealings on the same pending their cancellation.
  - e. This being a family dispute, there shall be no orders as to costs.
19. These are the orders whose execution was stayed by the order of 7/2/2023. There is no evidence that the Respondents have breached any of them. I find that the application for contempt has not been proved.
20. As regards the application for temporary injunction, on the basis of the circumstances of this case, I find that the prayer is justified so as to preserve the suit land pending appeal
21. For the foregoing reasons I find that the application dated 22/6/2023 succeeds partly as follows: -
- a. An order of temporary injunction is hereby issued restraining the Respondents their agents, servants, assignees and/or anyone claiming under them or acting on their instructions from trespassing, selling, commencing or continuing to carry out any kind of construction and or in any way whatsoever interfering with the applicant's ownership of all that parcel of land namely Tiriki/senende/1111 measuring approximately 0.37 pending the hearing and determination of the appeal herein.
  - b. Costs be in the appeal.

Orders accordingly.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 2<sup>ND</sup> DAY OF NOVEMBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI**

.....

**JUDGE.**

I certify that this is a true copy of the original



Signed

**DEPUTY REGISTRAR**

**In the presence of:**

Maureen: Court Assistant.

Nabasenge for the applicant.

No appearance for the Respondents.

