



**Ngao v Munga & 4 others (Environment & Land Case  
64 of 2016) [2022] KEELC 2616 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2616 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 64 OF 2016**

**MAO ODENY, J**

**JULY 5, 2022**

**BETWEEN**

**SULTAN CHAI NGAO ..... APPLICANT**

**AND**

**HARRISON MUNGA ..... 1<sup>ST</sup> RESPONDENT**

**NDORO CHAKA ..... 2<sup>ND</sup> RESPONDENT**

**TSUMA CHAKA ..... 3<sup>RD</sup> RESPONDENT**

**KATANA CHAKA ..... 4<sup>TH</sup> RESPONDENT**

**CHIZI CHARO KOMBE ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect a notice of motion dated September 10, 2021 by the plaintiff/applicant seeking the following orders; -
  1. Spent
  2. That pending the hearing and determination of these contempt proceedings there be a stay of further proceedings in the matter and interim orders initially granted and extended on May 23, 2013 to remain in force until further orders of the court.
  3. That the defendants/respondents be detained in civil jail for a period not exceeding six (6) months for the deliberate breach committed of the interim orders issued and extended on the May 23, 2013.
  4. That honourable court be pleased to grant such orders or further orders as it may deem fit and just to meet the ends of justice.



5. That the costs of this application be borne by the defendants.
2. Counsel agreed to canvas this application by way of written submissions which were duly filed.

### **Plaintiff/applicant's Submissions**

3. The applicant relied on the grounds on the face of the application together with the sworn affidavit of Sultan Chai Ngao who deponed that the Environment and Land Court in Mombasa issued temporary orders of injunction restraining the defendants/respondents by themselves, their servants, employees and/or agents from entering into selling, transferring and/or alienating and/or dealing with the plaintiff/Applicants parcel of land known as Kadzonzo/Madzimbani 1013 adjudication section pending the hearing and determination of this suit and that the said interim orders were extended by justice Mukunya as he was then on May 23, 2013 and later Justice Ann Omollo before the suit was transferred to Malindi Law Court.
4. It was the applicant's case that the suit relates to a boundary dispute of which the defendants were restrained from interfering with the suit land pending the hearing and determination of this suit.
5. The applicant further deponed that his parcel of land and that of the defendants are separated by a valley in accordance with the findings of case number 20, 21 and 26 held on May 16, 2008 by committee members district adjudication section Kilifi and the ruling on the objection No 23 and 114 heard on September 28, 2011 which decisions have never been appealed.
6. It was the applicant's case that he conducted a search on August 31, 2011 which established that a title deed had been issued to a third party known as More Than Conqueror Company Ltd on the March 8, 2019 and the property charged for Kshs 17,000,000 to Gulf African Bank Ltd on December 9, 2019. That by transferring and selling of the said parcel of land the defendants have deliberately and contemptuously breached the terms of the said order resulting in demeaning the authority and dignity of the court.
7. Counsel submitted that there was a valid order issued on April 12, 2013 against the defendants which was never set aside, varied and /or reviewed therefore remains valid and that the defendants willfully disobeyed the court orders hence are in contempt.

Counsel urged the court to find that the defendants are in contempt of court.

### **Defendants' Submissions**

8. The defendants relied on a replying affidavit sworn by the 2<sup>nd</sup> defendant with the authority of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants stating that the orders alleged to have been disobeyed were the orders given on April 12, 2013 by Justice Mukunya (as he was then was) in respect of Plot No 1013/Kadzonzo/Madzimbani adjudication section and at the time the 1<sup>st</sup> defendant was the only defendant in that matter.
9. He stated that the orders for injunction automatically lapsed after a period of one year as per order 40 of the *Civil Procedure Rules* and that he was not a party at the time the orders were issued.
10. The respondent further stated that the applicant has no basis to lay claim in Title No 1189/Kadzonzo/Madzimbani adjudication section as the orders allegedly to have been disobeyed touch on Title No 1013/ Kadzonzo/Madzimbani and that if there should be any contempt proceedings then the same ought to be against the applicant for having sold land parcel no 1013/Kadzonzo/Madzimbani adjudication section.



11. He further deponed that there is no nexus in the alleged order issued in respect of Kadzonzo/Madzimbani/1013 and Kadzonzo/Madzimbani/1189 in which the applicant has no proprietary interest.

Counsel listed the following issue for determination by the court: -

- a. Whether there are any interim orders issued by the court still in force.
  - b. Whether the interim orders initially granted and extended on the May 23, 2013 can be further extended.
  - c. Whether the 2<sup>nd</sup> defendant has authority to swear affidavits on behalf of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.
  - d. Whether the defendants should be detained in civil jail for a period not exceeding six (6) months for the deliberate contempt of the interim orders issued and extended on the May 23, 2013.
12. Counsel submitted that on June 8, 2015, hon Justice A Omollo issued orders that the District Land Registrar Kilifi and Land Registrar Surveyor to visit Plot No 1013/Kadzonzo/Madzimbani adjudication section and Plot No 1189/ Kadzonzo/Madzimbani adjudication section with a view to establishing boundaries. That the report was filed on 5<sup>th</sup> October and the plaintiff has never extended the said orders since the said orders were issued thus the same lapsed by dint of order 40 rule 6.
13. Counsel cited the cases of *Bushasha Lucheri V Joseph Langat Sitinei & Another* [2012] eKLR and *Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & Another* [2018] eKLR on lapse of injunctions by operation of the law. The court held that where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

### **Analysis And Determination**

14. The history of this file shows that it was initially filed in Mombasa Environment and Land Court in 2013 and was later transferred to Malindi Environment and Land Court in 2016. By all standards, this is an old matter that should be out of the system either by having been heard and concluded or at the tail end of the hearing process.
15. It is unfortunate that the parties involved have not taken any steps to ensure that the matter is fixed for hearing of the main suit. Instead counsel has filed an application to extend interim orders which were issued on April 12, 2013 which is more than 10 years after the fact.
16. The court will only deal with the issue whether the interim orders issued on April 12, 2013 are still in force or existence, if the court finds in the negative then it will not deal with the issue of contempt of court.

Order 40 rule 6 of the *Civil Procedure Rules* provides that: -

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise”.



17. In the case of *Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & Another* [2018] eKLR, the Court of Appeal stated thus: -

A plain reading of order 40 rule 6 shows that the rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not lapse.”

18. In the case of *Nguruman Ltd v Ian Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal held that: -

Without going into the details, we with respect agree with the submissions of all learned counsel that the object of introducing rule 6 in the 2010 rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various mechanization to delay the disposal of the suit.”

19. In this case it seems the plaintiff is not interested in the conclusion of this case, that is why such an application for extension of interim orders granted on April 12, 2013 has been filed after 10 years, instead of fixing the case for hearing. Applications are interim measures to preserve the suit property pending the hearing and determination of the case.

20. The orders that are sought to be extended and to cite the defendants for contempt do not exist as they had lapsed by operation of the law. It should also be noted that further to the court order, there has been a consent order for the County Surveyor and the Land Registrar to visit the suit land and file a report in respect of the boundary. The court noted that this matter was being mentioned severally for the survey report to be filed and no progress on the way forward.

21. In the case of *Erick Kimingichi Wapang'ana & Another v Equity Bank Limited & Another* [2015] eKLR, the Court of Appeal held that: -

Order 40 rule 6 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months “unless”, as the rule provides, for any sufficient reason the court orders otherwise. In this case, there was no subsequent order extending the injunction.”

22. The court is not a parking lot for cases that parties do not want to proceed with. This is a case that a notice to show cause should be issued for dismissal if the parties are not interested in the hearing and determination. The application for extension for interim orders granted on April 12, 2013 and for contempt are hereby dismissed with costs to the defendants. The issue of contempt does not arise as there has to be a valid order which a party willfully disobeys.

23. The applicant to fix this matter for hearing within 30 days failure to which the case will be dismissed for want of prosecution.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 5<sup>TH</sup> DAY OF JULY, 2022.**

**M.A. ODENY**

**JUDGE**

**NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to**



**the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.**

