



REPUBLIC OF KENYA



**Gathuo & another v Mwangi & 3 others (Miscellaneous Application  
5 of 2020) [2021] KEELC 4744 (KLR) (13 May 2021) (Ruling)**

Neutral citation: [2021] KEELC 4744 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
MISCELLANEOUS APPLICATION 5 OF 2020**

**YM ANGIMA, J**

**MAY 13, 2021**

**BETWEEN**

**EDAH NJERI GATHUO ..... 1<sup>ST</sup> APPLICANT**

**DR. E.C. KUNGU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PATRICK MACHARIA MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**GABRIEL MURIRA MUTHIORA ..... 2<sup>ND</sup> RESPONDENT**

**GAKUHI CHEGE P/A GAKUHI CHEGE AND COMPANY  
ADVOCATES ..... 3<sup>RD</sup> RESPONDENT**

**NJOROGE PAUL NJIHIA P/A NJOROGE & COMPANY  
ADVOCATES ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. It would appear that some of the parties herein were parties to Engineer SPMCC No 29 of 2019 – Patrick Macharia Mwangi & Another v Eddah Njeri Mbugua and Engineer SPMCC No 30 of 2019 – Gabriel Murira Muthiora & another v Eddah Njeri Mbugua. Those two suits were apparently consolidated by the trial court on February 7, 2020. The material on record further indicates that the 2<sup>nd</sup> applicant’s application to be joined in the said suits was denied by the trial court.
2. The material on record further indicates that the applicants’ application for an interim injunction in the consolidated suits was dismissed on February 7, 2020. However, the trial court made an order for maintenance of *status quo* until the dissatisfied applicants could make a formal application for some interim orders before the Environment and Land Court or other appropriate forum. It is the said *status*



*quo* orders which the applicants contended were disobeyed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and their advocates (the 3<sup>rd</sup> and 4<sup>th</sup> respondents).

## **B. The Applicants' Application**

3. By an application dated April 8, 2020 expressed to be based upon section 5 of the [Judicature Act](#) (cap 8), chapter 49 of the laws of England and rules 81.8 and 8.10 of part 81 of the [Civil Procedure \(Amendment No 2\) Rules, 2012](#) of England and Wales, the 1<sup>st</sup> and 2<sup>nd</sup> applicants (the applicants) sought the following orders:
  - (a) ...spent
  - (b) ...spent
  - (c) That this honourable court be pleased to declare and hold that, having been served/ having been aware of the order of *status quo* in respect of Nyandarua/Kahuru/10005 and Nyandarua/Kahuru/10002 made by the Senior Principal Magistrate's Court at Engineer in Civil Case No 29 of 2019 - Patrick Macharia Mwangi v Eddah Njeri Mbugua and Civil Case No 30 of 2019 – Gabriel Murira Muthiora v Eddah Njeri Mbugua on February 7, 2020 requiring that the 2<sup>nd</sup> applicant's possession of the said Nyandarua/Kahuru/10005 and Nyandarua/Kahuru/10002 through the 1<sup>st</sup> applicant be interfered with, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have disobeyed the same by entering the same, accompanied by 3 other persons, on February 8, 2020, February 26, 2020, March 19, 2020, April 2, 2020 and April 7, 2020 ploughing, harrowing and planting crops on 2 acres of the suit properties.
  - (d) That this honourable court be pleased to declare and hold that the 3<sup>rd</sup> and 4<sup>th</sup> respondents, advocates of this honourable court and advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, who were present in court when the status quo order was made on February 7, 2020 and were informed of invasions of the said suit properties by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on February 11, 2020, February 26, 2020 and April 2, 2020, respectively, have aided and abetted the 1<sup>st</sup> and 2<sup>nd</sup> respondents in disobeying the same in the manner described in prayer (3) above, by not prevailing on them to obey the same *status quo* order of the Senior Principal Magistrate's Court at Engineer in Civil Case No 29 of 2019 - Patrick Macharia Mwangi v Eddah Njeri Mbugua and Civil Case No 30 of 2019 – Gabriel Murira Muthiora v Eddah Njeri Mbugua on February 7, 2020.
  - (e) That the 3<sup>rd</sup> and 4<sup>th</sup> respondents, advocates of this honorable court who are aware of the directions made on April 1, 2020 by the Honourable the Chief Justice, Hon Justice David K. Maraga, Chairman of the national Council on the Administration of Justice that court orders made prior to March 15, 2020, are suspended until further notice have aided and abetted the 1<sup>st</sup> and 2<sup>nd</sup> respondents in disobeying the *status quo* order made on February 7, 2020, in the manner described in prayer No (3) above, when the 4<sup>th</sup> respondents held the 3<sup>rd</sup> respondent's brief, by not prevailing on the 1<sup>st</sup> and 2<sup>nd</sup> respondents to obey the said *status quo* order of Senior Principal Magistrate's Court at Engineer in Civil Case No 29 of 2019 - Patrick Macharia Mwangi v Eddah Njeri Mbugua and Civil Case No 30 of 2019 – Gabriel Murira Muthiora v Eddah Njeri Mbugua made on February 7, 2020, and also not to act on the order of dismissal of the 2<sup>nd</sup> applicant's injunction application on February 4, 2020 in Nyahururu ELC Suit No 54 of 2019 – Dr Edward C Kungu & another v David Ndungu Njihia & others.
  - (f) That his honourable court be pleased to declare that the 3<sup>rd</sup> respondent, an advocate of the High Court of Kenya being aware of the facts that the Court of Appeal has certified as urgent,



the 2<sup>nd</sup> applicant's Civil Application No 36 of 2020 – Dr Edward C Kungu & another v David Ndungu Njihia & others, and the subject matter of the application namely, Nyandarua/Kahuru/143 includes the suit properties which are the subject of the *status quo* order, he has undermined the authority of the court by aiding abetting the 1<sup>st</sup> and 2<sup>nd</sup> respondents whom he represented in Civil Case No 29 of 2019 - Patrick Macharia Mwangi v Eddah Njeri Mbugua and Civil Case No 30 of 2019 – Gabriel Murira Muthiora v Eddah Njeri Mbugua to disobey the said status quo issued on the said case on February 7, 2020.

- (g) That the said respondents ie Patrick Macharia Mwangi, Gabriel Murira Muthiora, Gakuhi Chege and Njoroge Paul Njihia be committed to civil jail for a period of 6 months each or any other period, or any other or further sanction, as this court may deem fit and appropriate.
4. The application was based upon the grounds set out on the face thereof and the contents of the verifying affidavit sworn by Dr Edward Kungu on April 8, 2020. It was contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had violated the *status quo* orders of February 7, 2020 by cultivating and planting crops on a portion of 2 acres of the suit properties and that the 3<sup>rd</sup> and 4<sup>th</sup> respondents had abetted and aided them in the commission of the alleged contempt of court order. That was really the gist of the application.
  5. The 3<sup>rd</sup> respondent, Charles Gakuhi Chege, filed a replying affidavit sworn on November 16, 2020 in opposition to the said application. He stated that he was an advocate of the High Court of Kenya and that he was acting on his own behalf and on behalf of his co- respondents and that the affidavit was filed on his behalf and on their behalf as well.
  6. He stated that he was acting for the 1<sup>st</sup> and 2<sup>nd</sup> respondents in Engineer PMCC No 29 & 30 of 2019 and that the applicants' application for an interim injunction therein was dismissed on February 7, 2020 after an inter parties hearing. It was contended that in its ruling, the Magistrates' Court had acknowledged that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were in possession of the suit properties.
  7. The 3<sup>rd</sup> respondent further stated that upon dismissal of the prayer for injunction the Magistrates' court granted a *status quo* order with respect title No Nyandarua/Kahuru/10002 and 10005 pending appeal and filing of a formal application for interim orders before an appellate court. The envisaged application was filed on April 8, 2020 which was ultimately dismissed on July 10, 2020 by this court.
  8. It was contended that the acts complained of were never restrained in any of the interim orders and rulings by either the subordinate court or the appellate court. The 3<sup>rd</sup> respondent further stated that, in any event, the subordinate court had clarified the nature of status quo it had in mind and found that there was no evidence of violation of the status quo order. It was, therefore, contended that the application had no merit and that it was an abuse of the court process.

### **C. The Applicants' Supplementary Affidavits**

9. The 2<sup>nd</sup> Applicant filed a further affidavit sworn on February 16, 2021 in response to the 3<sup>rd</sup> respondent's replying affidavit. The said affidavit which ran into 41 paragraphs was merely argumentative and did not bring forth any significant factual information. It raised several legal arguments and cited several authorities in support of the contempt application. It was more in the nature of written submissions than an affidavit on factual information.
10. The applicants also filed a supplementary affidavit sworn by Grace Wambui Kungu on March 9, 2021. The deponent stated that she was the daughter of the 2<sup>nd</sup> applicant. It was contended that the respondents had greatly interfered with their possessions of the suit properties since February 4, 2020 despite protective orders issued by both the Magistrates' Court and the Court of Appeal in



Nairobi Civil Application No 36 of 2020. The rest of the contents of the affidavit consisted mainly of arguments and legal submissions in which several authorities were cited.

#### **D. The Respondents' Further Replying Affidavit**

11. The 3<sup>rd</sup> respondent filed a further replying affidavit sworn on March 22, 2021 in response to the supplementary affidavit sworn by Grace Wambui Kungu. It was contended that she had no capacity to swear the said affidavit since her application to be joined as a party in Engineer SPMCC No 29 & 30 of 2019 was dismissed by the court. It was further denied that the respondents had violated the interim injunction granted by the Court of Appeal in Application No 36 of 2020. It was contended that the applicants were bound by their pleadings and could not introduce new matters midstream without formally amending their application. It was also contended that the activities complained of by the applicants were normal farming activities which were never restrained by either of the two courts referred to.

#### **E. Directions On Submissions**

12. It would appear that the parties had agreed to canvass the said application through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the respondents filed their submissions on November 16, 2020 whereas the applicants filed their submissions on February 17, 2021 in response thereto. The applicants also filed separate written submissions on their application on February 17, 2021 and supplementary submissions on April 9, 2021.

#### **F. The Issues For Determination**

13. The court has perused the applicants' application notice dated April 8, 2020 together with the supporting affidavit and annexures thereto, the respondents' replying affidavit in opposition thereto, the applicants' two supplementary affidavits as well as the respondents' further replying affidavit. The court is of the opinion that the following issues were for determination herein:
  - (a) Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents have disobeyed the *status quo* orders made on February 7, 2020.
  - (b) If the answer to (a) is in the affirmative whether the 3<sup>rd</sup> and 4<sup>th</sup> respondents abetted and aided the 1<sup>st</sup> and 2<sup>nd</sup> respondents in its disobedience.
  - (d) If the answer to (a) and (b) is in the affirmative, what punishment should be meted out to the respondents.
  - (c) Who shall bear costs of the application.

#### **G. Analysis And Determination**

##### **(a) Whether The 1<sup>st</sup> And 2<sup>nd</sup> Respondents Have Disobeyed The Status Quo Order Made On February 7, 2020**

14. The court has considered the various affidavits and submissions on record on this issue. The applicants submitted that the status quo orders with respect to parcel Nos 1002 and 10005 were blatantly disobeyed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents when they ploughed, harrowed and planted crops on a portion of about 2 acres of the suit properties. The respondents contended that the *status quo* order of February 7, 2020 did not restrain of the actions complained of and that the actions complained of were normal farming activities which were not restrained by the subordinate court. It was further



contended that, in any event, the subordinate court had clarified that the status quo envisaged was the prevention of eviction of the applicants from the suit properties and that the court had found no evidence of its violation.

15. The court agrees with the applicants' submission that the court has jurisdiction to entertain an application for contempt of a court order granted by a subordinate court. The court also agrees with the rationale for punishing acts of contempt as submitted by the applicants. The court is also in complete agreement with the applicants that obedience of court orders is mandatory for the maintenance of the rule of law. The applicants cited numerous authorities in support of the application. The court has no doubt that they represent the correct legal position on the issue of contempt.
16. However, before the alleged contemnors can be held into account the alleged acts of contempt must be adequately proved to the satisfaction of the court. The court must also satisfy itself that the terms of the order were clear and unequivocal hence the disobedience was deliberate or wilful. In the case of *Ochino & Another Okombo & 4 others* [1989] eKLR the Court of Appeal observed, *inter alia*, that:

“...As this court pointed out recently in the case of *Mwangi Mang'onde v Nairobi City Commission* (Civil Appeal No 95 of 1988:

This requirement is important because the court will only punish as contempt a breach of the injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant had proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.” (Emphasis added).
17. A reading of the various affidavits and counter affidavits on record reveals that the parties herein are not agreed on what status was being preserved by the status quo order. There is no material on record to demonstrate that the existing status was agreed or settled by the subordinate court at the time the order was made on February 7, 2020.
18. The applicants were of the opinion that the acts of cultivating and planting crops on a portion of the suit properties was a violation of the status quo order whereas the respondents took the view that those were normal farming activities which were never restrained by the court. Whereas the applicants contended that they were the ones in actual possession at the time, the respondents contended that the subordinate court acknowledged that they were also in possession.
19. The subordinate court also appears to have given its opinion on what status quo was envisaged by its interim orders and it was of the view that they were merely intended to protect the parties in possession from possible eviction during the pendency of the application before it. That opinion was rendered when the applicants objected to the 1<sup>st</sup> and 2<sup>nd</sup> respondents being heard until they had purged the alleged contempt.
20. In *Alex Ngarachu Njenga & 2 others v Kenya Electricity Transmission Co Ltd* Nyahururu ELC Appeal No 14 of 2020 (unreported), This court encountered a situation similar to this and held as follows:

“Turning to the circumstances of this case, there is a dispute amongst the parties as to what the status quo was at the time of filing the application for stay on September 18, 2020. The court did not specify the *status quo* which obtained as at September 18, 2020 hence it could not be said that the terms of the interim order were clear and unequivocal. It would, therefore, follow that an alleged contemnor ought not to be punished for contempt of such an order. The court is thus of the opinion that the appellants have failed to prove the alleged contempt against the respondent's officers to the required standard.”



21. The court is of the same persuasion in the instant application. The applicants, the respondents, and the subordinate court appear to have different interpretations of the meaning and import of the *status quo* order in issue. It is thus evident that the terms of the said order were not sufficiently clear and unambiguous as required by law. The standard of proof is not, of course, beyond reasonable doubt as indicated in the case of *Mwangi Magond'u (supra)* but the one enunciated in the subsequent case of *Mutitika v Babarini Farm Limited* [1985] eKLR. In the latter case, the Court of Appeal held that:

“In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly beyond reasonable doubt...”

**(b) If The Answer To (a) Is In The Affirmative, Whether The 3<sup>Rd</sup> And 4<sup>Th</sup> Respondents Abetted And Aided The 1<sup>St</sup> And 2<sup>Nd</sup> Respondents In Its Disobedience**

22. This issue was dependent on the first issue being answered in the affirmative. Since the court has found that the applicants have failed to demonstrate the contempt alleged against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, it would follow that the 3<sup>rd</sup> and 4<sup>th</sup> respondents cannot be guilty of abetting and aiding the commission of the alleged offence.

**(c) If The Answer (a) And (b) Is In The Affirmative, What Punishment Should Be Meted Out To The Respondents**

23. Since the court has answered both issue (a) and issue (b) in the negative, it would follow that the third issue has become moot.

**(d) Who Shall Bear Costs Of The Application**

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful parties should not be awarded costs of the application. Accordingly, the respondents shall be awarded costs of the application.

**H. Conclusion And Disposal**

25. The upshot of the foregoing is that the court finds no merit in the application for contempt of court against the respondents, or any one of them. Accordingly, the notice of application dated April 8, 2020 is hereby dismissed in its entirety with costs to the respondents.

It is so decided.

**RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 13<sup>TH</sup> DAY OF MAY, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of :**

Mr Ndungu holding brief for Dr Kamau Kuria for the applicants.

No appearance for the respondents.

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**YM ANGIMA**

**JUDGE**

