



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutyaene v Kenya National Highways Authority & 3 others (Environment & Land Petition 8 of 2020) [2025] KEELC 3954 (KLR) (20 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3954 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND PETITION 8 OF 2020**

**AY KOROSS, J**

**MAY 20, 2025**

**BETWEEN**

**REUBEN KIOKO MUTYAENE ..... PETITIONER**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MACHAKOS ..... 2<sup>ND</sup> RESPONDENT**

**MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling seeks to determine two notices of motion, one filed by the 1<sup>st</sup> respondent, dated 12/04/2023 and the other filed by the petitioner, who acts in person, dated 29/05/2023.

**Motion dated 12/04/2023**

2. In this particular notice of motion, the 1<sup>st</sup> respondent sought the following reliefs: -
  - a. Spent.
  - b. THAT the Honourable court be pleased to review and vary its orders issued on 6/02/2023, and re-open the case and allow the 1<sup>st</sup> respondent to cross-examine the petitioner's expert witness.
  - c. THAT the Honourable Court be pleased to allow the 1<sup>st</sup> respondent to call its key witness, Mr. Samuel Odoyo Orwa, to tender evidence in support of the 1<sup>st</sup> respondent's case.
  - d. THAT the cost of this motion be in the cause.
  - e. Any other orders this honourable court may deem fit and just to grant.



3. The motion is premised on the grounds listed on the face thereof and Samuel Odoyo Orwa's supporting affidavit sworn on 12/04/2023. The grounds in support of the motion are: a) the honourable court proceeded with the hearing of the case on 6/02/2023 in the absence of the 1<sup>st</sup> respondent and subsequently closed both the petitioner's case and the respondents' cases, b) out of oversight, the 1<sup>st</sup> respondent's advocate inadvertently mis-diarized the matter for hearing on 6/04/2023 instead of 6/02/2023; and
4. C)That it is only upon perusing this honourable court's cause list for 6/02/2023, that the 1<sup>st</sup> respondent's advocate discovered the mistake in the diary; d) The 1<sup>st</sup> respondent stands to be greatly prejudiced if it is not offered the opportunity to cross-examine the petitioner's expert witness and to tender its testimony in defence of the petition herein, e)the 1<sup>st</sup> respondent is a public body and any prejudice to it shall directly be borne by the public, f)lastly, the subject matter is land which is extremely emotive and needs to be handled with utmost care, lastly g) it will be in the interests of the public and of justice to allow the case to be re-opened and the petitioner and their witnesses to be recalled for cross-examination.
5. The motion is opposed vide replying affidavit sworn by the petitioner. In summary, the petitioner avers that: a) the prayer to reopen the closed case falls short of the legal threshold for review and/or vary the order issued on 6/02/2023, b) the reasons advanced for failure to attend court on 6/02/2023 are neither sufficient/compelling, nor legally sound as the hearing date was taken in the presence of the 1<sup>st</sup> respondent's counsel; and
6. C)The 1<sup>st</sup> respondent had breached the orders of this court and frustrated its expeditious disposal by either failing to attend court proceedings and/or claiming unavailability of its witness, d) the 1<sup>st</sup> respondent was served with the petitioner's submissions together with mention notice on 25/03/2023 but waited to file the instant application on 8/05/2023 and he will be highly prejudiced if the motion is allowed.

**Motion dated 29/05/2023.**

7. The orders sought are: -
  - a. Pending hearing and determination of the motion and petition, ex parte injunction orders be hereby issued restricting the 1<sup>st</sup> respondent from conducting any activities/works on Machakos (Kyumbi)- Kitui (Syongila) Road (coded "C97", else "B62 to within 40 meters.
  - b. Pending the hearing and determination of the motion and petition, injunction orders be issued prohibiting the 3<sup>rd</sup> respondent from registering and/or issuing ownership documents/title deeds(s) to the 1<sup>st</sup> respondent in respect of the suit road.
  - c. The director general and the regional director, lower eastern of the 1<sup>st</sup> respondent, be summoned to appear before this court to show cause why they should not be found guilty for contempt and punished per the law for failing to obey the terms of the court orders dated 29/09/2020.
  - d. That in the event the contempt is not purged, an order for committal to civil jail of the 1<sup>st</sup> respondent's director general and the regional director, lower eastern for a period this hounourable court deems fit, and/or the honourable court does impose a retributive fine of an amount the court deems fit, upon the 1<sup>st</sup> respondent.
  - e. Spent.



- f. The costs of the motion be borne by the 1<sup>st</sup> respondent and be assessed forthwith.
8. The motion is premised on the grounds listed on the face thereof and the petitioner's supporting affidavit sworn on 29/05/2023. In brief, the grounds in support of the motion are: a) the orders issued by the court on 16/09/2020 were that orders of the current prevailing status quo be maintained, which were issued in the presence of the 1<sup>st</sup> respondent's counsel; and
9. B) In disregard of the orders, the 1<sup>st</sup> respondent, its servants, agents and/or contractor named Geodev Kenya Limited had blatantly ignored and/or refused to abide by the orders of the court by entering into the disputed parcels and erecting more beacons at the impugned 60-meter mark.
10. The 1<sup>st</sup> respondent opposed this motion by a replying affidavit sworn by Samuel Odoyo Orwa on 13/08/2023. Concisely, he averred, a) the motion had failed to meet the legal threshold and contravened Rule 81.1 (2), 81.4, 81.5 and 81.8 of the English Civil Procedure Rules; b) the 1<sup>st</sup> respondent's director and regional director have not been joined to the proceedings; c) there was no personal service; and,
11. D) The interim orders lapsed on 16/09/2021, e) it had not breached the status quo orders and urged the court to dismiss the motion.
12. In rejoinder, the petitioner filed a supplementary affidavit sworn 25/10/2023, and he reiterated the averments in support of the motion and stated that, being a successful bidder, Geodev Kenya Limited had established beacons on the suit road.

#### **Submissions.**

13. This court has considered the well-written submissions and is highly indebted to the petitioner and the 1<sup>st</sup> respondent's counsel in that respect.

#### **Issues for determination.**

14. Having carefully considered the motions, their grounds, affidavits and submissions, the following issues, which shall be handled separately, arise for determination.
- a. Whether the motion dated 12/04/2023 is merited.
- b. Whether the motion dated 29/05/2023 is merited.

#### **Analysis and Determination**

a - Whether the motion dated 12/04/2023 is merited.

15. In filing this motion, the 1<sup>st</sup> respondent moved this court under the provisions of Section 146 (4) of the *Evidence Act*, which permits the court to recall a witness either for further examination-in-chief or for further cross-examination. This Section of the law is replicated in our Order 18, Rule 10 of the Civil Procedure Rules (CPR), which additionally allows the court to pose questions to a witness.
16. In re-opening a case, the court exercises judicious discretion anchored in law, evidence and reasons. The tests to be applied in such exercise of discretion were well summarised by the persuasive decision of *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] KEELC 8 (KLR) in the following manner: -

“First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a part's case does not embarrass or prejudice the opposite party. Second, where the proposed re-



opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible.”

17. The dispute in this case revolves around the width of a public road, with the petitioner contending it is 40 meters and the 1<sup>st</sup> respondent 60 meters. Sometimes on 16/09/2020, this court directed that the prevailing status quo be maintained and for the petition to be heard on a priority basis.
18. When this matter would be scheduled for hearing, the 1<sup>st</sup> respondent would give one excuse or the other as to why it was not ready. On 12/10/2021, its counsel, Ms. Kaloki, informed the court that her witness was indisposed despite the petitioner being ready to proceed.
19. On 19/1/2022, Mr. Sudi, who held Ms. Kaloki’s brief, informed the court that Ms. Kaloki was indisposed. On this day, there were a lot of protests from the petitioner who acts in person and who not only incurred expenses for his travel from Nakuru but also those of his expert witness who had travelled from Siaya.
20. On the next scheduled hearing date of 30/5/2022, Ms. Kaloki informed the court that her witness was unwell. The petitioner protested and asserted the matter had been pending in court for too long and maintained he had incurred considerable travel expenses.
21. On hearing parties and looking at the previous conduct of the 1<sup>st</sup> respondent, the court declined the adjournment, but at noon, when the matter was to take off, a Mr. Loki held Ms. Kaloki’s brief and stated counsel had been involved in an accident. The court gave counsel the benefit of doubt, granted a last adjournment, and awarded costs of kshs. 19,000/- to the petitioner and issued the following specific directions: -

“Hearing of the main suit on 27/10/2022. All parties to avail witnesses.”

22. On that hearing date of 27/10/2022, the 1<sup>st</sup> respondent’s witness was engaged in another court, but the court proceeded with the petitioner’s evidence. Nevertheless, due to constraints of time, the court adjourned the matter for further hearing. In seeking another hearing date, Ms. Kaloki beseeched the court as follows: -

“I will be having only one witness. We can take another date in February”

23. Indeed, the case was rescheduled for 6/02/2023 for further hearing, and the court directed the petitioner and the 1<sup>st</sup> respondent to avail witnesses. On this rescheduled date, the petitioner called his expert witness, Mr. Peter Otieno, who testified as PW2. On that day, Mr. Kuria was present for the 3<sup>rd</sup> and 4<sup>th</sup> respondents and Mr. Guy for the 2<sup>nd</sup> respondent, but M/s. Kaloki was a no-show, and they (counsel for 2<sup>nd</sup>-4<sup>th</sup> respondents) intimated that they would not be calling any witnesses.
24. On conclusion of the hearing, all the cases were marked as closed, and the court directed the petitioner to file and serve his submissions before the other counsels could respond. He was also directed to serve the mention notice of 8/05/2023.



25. As shown from the petitioner's email of 25/03/2023, he complied with the directions and served the 1<sup>st</sup> respondent. On the mention date, the parties were all ambushed with the instant motion, which Ms. Kaloki had not served upon them.
26. Having elaborated on the history of this matter, the grounds advanced and application of the legal principles, this court finds the 1<sup>st</sup> respondent's motion has fallen far short of the legal threshold for several reasons.
27. Firstly, the matter had been slated for hearing on a priority basis, but the 1<sup>st</sup> respondent had been hell bent on not proceeding with the case, thus causing the petitioner to suffer anxiety over the conclusion of his matter and incur significant expenses. It is uncertain if he has ever even been paid the costs awarded to him. Put another way, the petitioner will be highly prejudiced if the orders are granted at the expense of a respondent that has never been keen to defend its case.
28. Secondly, the specific date of 6/02/2023, which was in February, was particularly sought for by Ms. Kaloki, which was indulged by the court, and the excuse proffered for non-attendance is nothing but a smokescreen as counsel's diary for 6/04/2024 has not been availed. Furthermore, as of 25/03/2025, counsel was well aware the matter had taken off, yet she took close to 6 weeks to file the instant motion, which this court considers was filed with delay.
29. Thirdly, the 1<sup>st</sup> respondent wants to be allowed to reopen the petitioner's case or its case, either because it did not cross-examine PW2 or because it did not lead evidence. In this court's humble view, the reasons advanced certainly are not the circumstances under which a trial court exercises the discretionary jurisdiction to re-open a case in a civil trial.
30. Lastly, as held in Susan Wavinya Mutavi (Supra), parties are required to tender all their evidence and close their cases, notwithstanding that they are public bodies. The 1<sup>st</sup> respondent has no right to reopen the cases to rebut the opposing party's evidence after the cases have closed and after parties have exchanged their written submissions. Additionally, its failure to lead evidence is not a legitimate basis for reopening cases. In the end, the court finds no merit in the motion.

**b. Whether the motion dated 29/05/2023 is merited.**

31. Regarding reliefs (a) and (b) and having considered the orders issued on 16/09/2020 in respect of the notice of motion dated 26/05/2020, which the petitioner contends the 1<sup>st</sup> respondent is in contempt thereof, and as a preliminary issue, this court finds these reliefs are res judicata and an abuse of court process.
32. Now, on the reliefs of contempt, it must be noted that Section 5 of the *Judicature Act* is bereft of the procedure for instituting contempt proceedings, and consequently, this court has to seek recourse in the procedure applicable in the High Court of Justice in England and Wales. These procedures were well considered in the Court of Appeal decision of Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR.
33. Accordingly, it is prudent for this court to stipulate the relevant law. Rule 81.4 of the England and Wales Civil Procedure Rules, which deals with the ingredients of contempt applications, provides thus: -

“

- “(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.



- (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
- (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
  - (b) the date and terms of any order allegedly breached or disobeyed;
  - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
  - (d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
  - (e) whether a penal notice had been added to the front of any order allegedly breached or disobeyed included a penal notice;
  - (f) the date and terms of any undertaking allegedly breached;
  - (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
  - (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
    - (i) that the defendant has the right to be legally represented in the contempt proceedings;
    - (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
    - (k) that the defendant may be entitled to the services of an interpreter;
    - (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
  - (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
  - (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
  - (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
  - (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
  - (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;



- (r) that the court’s findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.”

34. Significantly, this court’s authority to deal with contempt proceedings is derived from Section 29 of the *Environment and Land Court Act*.
35. As held in the Supreme Court of Kenya decision of Republic v Ahmad Abolfathi Mohammed & Sayeed Mansour Mousavi [2018] KESC 51 (KLR), contempt proceedings are quasi-criminal.
36. As stated in this decision, contempt proceedings must be exercised with utmost care and only as a last resort; an applicant must establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the court order.
37. Further, as stated in the decision of Aaron Gitonga Ringera & 3 Others vs. P. K. Muite & Others, Nairobi HCCC No. 1330 of 1991, which was cited with approval and summarized in KAR v JR [2023] KEHC 18588 (KLR), in contempt proceedings, (a)there must be an existing court order capable of being disobeyed;(b)the alleged contemnor must have been made aware of the existence of the court order; and (c)there must be shown to be a breach (disobedience) of the said court order.
38. Usually and as stated in the decision of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 that was cited with approval in Republic v Ahmad (Supra), the standard of proof in contempt proceedings is higher than proof on the balance of probabilities, almost but not exactly, beyond a reasonable doubt. Therefore, this is the measurement that will be meted against the motion.
39. The 1<sup>st</sup> step in contempt proceedings is service. In this case, the 1<sup>st</sup> respondent’s counsel, Mr. Sinene, was present in court when it heard the notice of motion dated 16/09/2020 and issued the order that the current prevailing status quo be maintained.
40. The import of that order of “status quo” which in normal English parlance means the present situation, the way things stand as at the time the order is made, was intended that the existing state of things on the suit road was to be maintained. None of the parties or counsels in court on that day sought any clarification from the court as to what the status quo meant, and it is inferred that they understood the significance of the order.
41. This order has never been discharged, varied or set aside, and it is superfluous for the 1<sup>st</sup> respondent to contend that it was only to last for one year. Moreover, the said orders were unambiguous on what was required of the 1<sup>st</sup> respondent.
42. Additionally, the 1<sup>st</sup> respondent’s counsel was served with the order on 6/10/2020, and it had a notice of penal consequences embossed on its face. As held in the Court of Appeal decision of Shimmers Plaza Limited v National Bank of Kenya Limited [2015] KECA 945 (KLR), the mode of service applied in the situation of this case met the legal threshold.
43. Regarding the next step after proving notice by the 1<sup>st</sup> respondent of the order, the petitioner who is the applicant bears an evidential burden in relation to willfulness and mala fides disobedience as stated in Shimmers (Supra).
44. Although the 1<sup>st</sup> respondent merely stated its conduct on the disputed road or parcels of land was a sensitisation exercise to locals residing along Embu - Kanyonyo (A9) and Kyumvi - Syongila (B62)



roads, the petitioner rebutted this and presented photographs showing recent beaconing on land parcels no. Masii/Mithini 7X4 and Masii/Utithini 4X5.

45. He also availed documents showing the tendering process of works to be conducted on the disputed road, which included communication to bidders dated 28/04/2022 for consultancy services for road reserve survey for 28/04/2022 and request for proposal for Machakos-Syongila (B62) road, which was done by the 1<sup>st</sup> respondent's Director General.
46. Having considered these documents, this court has satisfied itself that the 1<sup>st</sup> respondent's officers and/or agents committed the acts complained of with full knowledge or notice of the existence of the order of the court.
47. It cannot be gainsaid that the duty to obey the law by all individuals and institutions is paramount in the maintenance of the rule of law, good order and the due administration of justice.
48. In this court's view, the contempt has been committed with the consent or connivance of, or is attributable to the neglect on the part of, the accounting officer who is the director general of the 1<sup>st</sup> respondent. Consequently, this court finds the director general guilty of contempt of the court orders issued on 16/09/2020.
49. In the end, this court hereby issues the following final disposal orders: -
  - a. The notice of motion dated 12/04/2023 is hereby dismissed.
  - b. Within 21 days, parties are at liberty to file written submissions on the substantive petition, capped at 8 pages.
  - c. The 1<sup>st</sup> respondent's director general is hereby cited for contempt of court.
  - d. The 1<sup>st</sup> respondent's general director is given 60 days to purge the contempt.
  - e. In failure to act on order (d) above, this court will proceed to mete out such sentence and/or sanction on the 1<sup>st</sup> respondent's director general, as it deems fit.
  - f. The matter to be mentioned on a date to be given for further orders.
  - g. Costs of the notice of motions are awarded to the petitioner, which shall be borne by the 1<sup>st</sup> respondent.

Orders accordingly.

**DELIVERED AND DATED AT MACHAKOS THIS 20<sup>TH</sup> DAY OF MAY, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

