Kaikai v Kalasinka & 2 others (Civil Case E003 of 2023)
[2025] KEHC 5810 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5810 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CIVIL CASE E003 OF 2023

CM KARIUKI, J

MAY 8, 2025

BETWEEN

JAMES KAYIONI KAIKAI ..... PLAINTIFF

AND

DANIEL LEURU KALASINKA ..... 1ST DEFENDANT

JEPHASON LEKAKENY KALASINGA ..... 2ND DEFENDANT

MESHACK BOI SONKOI ..... 3RD DEFENDANT

RULING

1. The plaintiff vide notice of motion dated 07/08/2023 sought orders.

   a. Spent.

   b. That the respondents' acts of going on the applicant's homestead/ or compound to take photographs without his permission and/ or consent is trespass, unlawful, illegal, and a violation of the applicant's rights to privacy.

   c. That the said act by the respondents contravenes image rights and or personality rights to refer to individual proprietary rights in his personality and the right to prevent unauthorized use of his image likeness or other attributes associated with him.

   d. Spent

   e. That this honourable court be pleased to direct and order the respondents herein and any other authorized or instructed persons by them or their agents, employees, relatives, and associates from harassing, threatening, and tarnishing the image and reputation of the applicant herein.

   f. That the costs of this application, together with the instant suit, be borne by the respondents.

g. Any other reliefs that this honourable court may think fit to grant in relation to these circumstances.

2. The application is premised on section 1A, 1B, 3, 3A and 63€ of the *Civil Procedure Act*, Order 40 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, articles 28, 31, 40 and 159(2)(d) of *the Constitution* of Kenya, and *Judicature Act*.

3. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by James Kayioni Kaikai on 07/08/2023.

The background.

4. The respondents have been taking photographs of the applicant and his homestead continuously as from 25/07/2023 without his permission and or consent, whereby his image rights, privacy rights have been infringed by the said respondents.

5. The applicant is apprehensive that the captured photos can be circulated on social media and or sent to thugs or assailants with bad motives as a way of revenge because of the hotly contested suit between the applicant and the 1st respondent.

6. The applicant is apprehensive that he and his family members are insecure because of the captured photographs taken without their consent.

7. The applicant contends that he has established a prima facie case with high chances of success.

8. The applicant further contends that the orders sought will not prejudice the respondents herein.

The response.

9. The respondents opposed the application vide replying affidavit sworn by DANIEL LEURU KALASINGA on 01/09/2023.

10. The respondents contend that the applicant has not provided any evidence of the allegations he has raised herein.

11. The respondents contend that the applicant does not want to face the realities of the affairs concerning ELC Appeal No. 1 of 2022, which involves the applicant and the 1st respondent. In M ELC Case No. 21 of 2018, the 1st respondent obtained a judgment against the applicant. The applicant was to be evicted on LR. NO. TRANSMARA/ OLOMISMIS/1329. On appeal, the decision to vacate was upheld. The applicant is still in occupation of the suit land. Therefore, the applicant is hiding behind the suit herein to avoid the eviction process.

12. The 1st respondent denied taking any photographs.

The applicant's further affidavit.

13. The applicant filed a further affidavit sworn by James Kayioni Kaikai on 18/09/2023.

14. The applicant contends that the respondents have filed a replying affidavit without filing a letter of appointment contrary to Order 9 Rule 1 of the Civil Procedure Rules. Therefore, the said replying affidavit is irregular, improper, and defective, having been filed by a stranger who lacks audience and capacity to do so.

15. The applicant contends that the respondents have hinged their reply on matters outside the subject of this suit.

16. The applicant averred that the ELC matters are still pending before the court of appeal at Kisumu.

17. The applicant contends that the photographs taken were for the valuation of the suit property. The applicant has deposited security in court for a stay of execution.

18. The applicant contends that the respondents have trespassed on his property and assaulted his children, as demonstrated by OB NO. 15/10/2015, p3 form dated 25/09/2019 and hospital records.

The application dated 16/102023.

19. The applicant filed an application dated 16/10/2023 seeking the following orders;

    i. Spent.

    ii. Spent.

    iii. That this honourable court do strike out the replying affidavit dated 01/09/2023 sworn by one DANIEL LEURU KALASINGA, for having been drawn, filed and served by an advocate who is not properly on record.

    iv. That this honourable court be pleased to declare the said replying affidavit irregular and of no consequence at all.

    v. That this honourable court be pleased to make and/ or issue such other orders as it may deem fit to grant.

    vi. The costs of this application be provided for.

20. The application is premised on Article 159(2)(d) of *the constitution*, Order 2 Rule 15, Order 10 Rule 9 of the Civil Procedure Rules, section 1A, 1B, 1C, 3, and 3A of the *Civil Procedure Act*.

21. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by James Kayioni Kaikai on 16/10/2023.

The grounds of the application.

22. The application is based on the grounds that the respondents, despite being properly served with summons to enter appearance, did not enter appearance or file any defence. They went ahead to file a replying affidavit.

23. The applicant, therefore, seeks to have the replying affidavit sworn by Daniel Leuru Kalasinga struck out for having been filed by an advocate who was not on record.

24. The application dated 07/06/2024.

25. The applicant filed an application dated 07/06/2024 seeking the following orders.

    a. Spent.

    b. That summons be issued against the 1st and 3rd respondents herein together with the Ag. Deputy County Commissioner- trans mara west sub-county, officer commanding Kilgoris police station, and Chief Olomismi's location to appear before this honourable court to show cause why they should not be committed to civil jail for such terms as the court may deem just.

    c. That the 1st and 3rd respondents herein, together with the Ag. Depuy County commissioner- trans mara west sub county, officer commanding Kilgoris police station and chief, Olomis location, be cited for contempt of court and be committed and comply with the orders of this

court issued on 11/08/2023, and or they be ordered to purge the contempt on terms this court deems fit.

d. That in lieu of prayer © above, the 1st and 3rd respondents herein, together with Ag. Deputy county commissioner- trans mara west sub county, Officer Commanding Kilgoris police station, and Chief Olomisis location be cited for contempt of court and fined a sum of at least kshs. 200,000/= each.

e. That the court do make any such order for purposes of enforcing the temporary injunction issued by this court on 11/08/08/2023.

f. That costs of this application be provided for.

26. The application is premised on Order 40 rules 1, 2, and 3, Order 51 rule 1 of the Civil Procedure Rules, section 5(1) of the *Judicature Act*, Sections 1A and 3A of the *Civil Procedure Act*.

27. The application is based on the grounds set out on the face of the application and the supporting affidavit sworn by James Kayioni Kaikai on 07/06/2024.

The grounds of the application.

28. The applicant contends that the cited contemnors were served with the orders of 11/08/2023. However, in violation of the said orders, the contemnors on 03/06/2024 entered his home with the intent to evict the applicant. The applicant, therefore, urges this court to punish the contempt of this court's orders.

The response.

29. The respondents filed a replying affidavit sworn by DANIEL LEURU KALASINGA on 15/07/2024.

30. The respondents contended that the applicant has been filing several applications and cases, and therefore mixing up issues.

31. The respondents contended that the sole purpose of this case is to stop the execution process of the ELC case.

32. The respondents denied being in contempt of this court's order.

Further affidavit.

33. The applicant filed a further affidavit sworn by James Kayioni Kaikai on 16/07/2024.

34. The applicant contends that the respondents have not explained whether he trespassed on his homestead.

Directions of the court.

35. concerning application dated 07/08/2023, This court (Hon. R. Lagat- Korir J.) on 11/08/2023 issued a temporary injunction restraining the respondent's persons and or through their agents, relatives, employees associates and any other third parties from trespassing, taking photographs within and or outside the applicant's homestead, either using cameras, telephotos and or smartphones or any other devices whatsoever pending inter partes hearing.

36. Concerning the application dated 16/10/2023, this court (Hon. F.M. Gikonyo J.) ordered that the application is not certified as urgent as it does not disclose whether it has utilized the provisions of the civil procedure rules on default appearance.

37. The applications were canvassed by way of written submissions.

The Applicant's Submissions

38. The applicant submitted that the contemnors have acted in breach of the terms of the orders of 11/08/2023. The applicant contends that the respondents were physically served and had notice of the terms of the orders. Therefore, the contemnors should be punished accordingly. The applicant relied on the case of Samuel M.N. Mweru & others v National Land Commission & 2 others [2020] eKLR, Mutitika v Baharini Farm, Civil Application No. Nai 24 of 1985[1985] eKLR, Shimmers Plaza Limited v National Bank of Kenya limited [2015] eKLR, Hadkinson v Hadkinson [1952] 2 All Er 56, Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi, Econet Wireless Kenya Ltd v Minister For Information & Communication Of Kenya & Another [2005] 1 KLR 828, Gulabchand Popatial Shah & Another Civil Application No. 39 Of 1990(Unreported), Att-Gen. v Times Newspaper Ltd[1974] A.C. 273, A.B.. & Another v R.B. Civil Application No. 4 Of 2016[2016] eKLR, Burchell v Burchell, Case No. 364 Of 2005, B v Attorney General [2004] 1 KLR 431, Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) [2018] eKLR, Jane Nduta Maina v Muthoni (Wa Monica) Miscellaneous Civil Application No. 490 Of 2012, Refrigerator & Kitchen Utensils Ltd v Gulabchand Shah & Others Civil Application No. Nai 39 Of 1990, Central Bank Of Kenya & Another v Ratilal Automobiles Limited & Others, Civil Application No. Nai 247 Of 2006, and B v Attorney General [2004] 1 KLR 431.

The respondents' Submissions.

39. The respondents submitted that the order the applicant intends to enforce has never been extended, and the same has lapsed. Further, the others' cited contemnors are not parties to this particular case. The respondents contend that there is no order that has been violated by the alleged contemnors. Therefore, the application is an abuse of the court process. The respondents relied on Nairobi Misc. Civil Application No. 685 of 2017, Saiya Bhama Gandhi v Director of Public Prosecutions And 3 Others, Nairobi Civil Appeal No. 25 Of 2002, Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd, and Machakos HCCC. No. E025 of 2021 Hon. Alfred Mutual v Boniface Mwangi.

40. The respondents submitted that the applicant has not provided any evidence of the respondents taking photographs of himself and their homestead. The respondents contend that the applicant is trying to run away from the issues in controversy by filing the instant motion. The applicant is trying to use the instant motion to stop his eviction. The respondents relied on sections 107, 108, and 109 of the *Evidence Act*, Machakos Civil Appeal No. 102 of 2018, Kyalo Ely Joy v Samuel Gitahi Kanyeri, Nairobi Misc. Civil Application No. 685 of 2017 Satya Bhama Gandhi v Director of Public Prosecutions and 3 others, and Nairobi Civil Appeal No. 25 of 2002, Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd.

Analysis And Determination.

41. This court considered the Pleadings and the submission by the respective parties.

Issues

42. The main issue for determination: -Whether the cited contemnors are in contempt of court. And order as to costs.

Whether the cited contemnors are in contempt of court.

43. A brief look at the applications filed by the applicant, most of the issues raised in the applications are spent. On striking out of the respondents' replying to affidavit, this court notes that a memorandum of appearance was filed on 29/08/023 and is dated 25/08/2023, while the replying affidavit is dated 01/09/2023. Therefore, this issue is mute. On the temporary injunction, this court has already issued the said orders. Therefore, the same is spent. What is left is for this court to determine whether there was contempt of court orders by the respondents.

44. Service of the court orders of 11/08/2023 is not disputed. What is disputed is the existence of the said orders after the applicant failed to extend the same. The same are said to have lapsed. The respondents contend that some of the cited contemnors are not parties in this suit.

45. Black's Law Dictionary defines the term 'contempt of court' to mean conduct that defies the authority and dignity of a court. It is a disregard of or disobedience to the orders of a judicial body.

46. Every person against whom an order has been made has the singular duty to obey the order. This obligation extends to cover orders which the person believes were obtained irregularly. Until the orders are set aside, they must be respected (Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] eKLR)

47. An individual is said to have defied a court order if he was aware of it but disregarded it. As such, it has always been a requirement that before a court can punish one for contempt of court, it must be demonstrated that the person who has been served with the order he is accused of having disregarded.

48. But this was the traditional approach to contempt of court proceedings. Presently, what is critical before punishing one for contempt is evidence that he was aware of the order he had defied, irrespective of whether he had been served with the said order. As such, personal service of the order is no longer a prerequisite for holding an individual in contempt of court if he was aware of the order.

49. Contempt of court definition according to the Black's Law Dictionary is as follows.

> " Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolvent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

50. The High Court in the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR discussed the applicable law on contempt of court as follows: -

> " It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove
>
> (i) The terms of the order,
>
> (ii) Knowledge of these terms by the Respondent,
>
> (iii) Failure by the Respondent to comply with the terms of the order."

51. The applicant has not proved that the court orders were violated.

52. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That,

in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.

53. From the foregoing, I am satisfied that the applicant has not sufficiently proved that the respondents are guilty of contempt of this court's orders dated 11/08/2023.

54. Thus, the court makes the orders.

I. The application is dismissed with costs

55. Orders accordingly.

DATED, SIGNED, AND DELIvERED AT KILGORIS THROUGH TEAMS APPLICATION, THIS 8TH DAY OF MAY,2025

CHARLES KARIUKI

JUDGE

In The Presence OF:

Court Assistant: Mr.nyangaresi