



Rio Holdings Limited v Odero & another; Odero (Interested Party); Diali Drilling Limited & 4 others (Proposed Interested Parties) (Miscellaneous Application 312 of 2019) [2025] KEHC 5878 (KLR) (Commercial and Tax) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5878 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 312 OF 2019**

AA VISRAM, J

MAY 8, 2025

BETWEEN

RIO HOLDINGS LIMITED APPLICANT

AND

PEREZ WELLINGTON JOSEPH ODERO 1ST RESPONDENT

THERESA MARY AWUOR ODERO 2ND RESPONDENT

AND

SAMUEL ODERO INTERESTED PARTY

AND

DIALI DRILLING LIMITED PROPOSED INTERESTED PARTY

OCS LANG'ATA POLICE STATION PROPOSED INTERESTED PARTY

WATER RESOURCES AUTHORITY PROPOSED INTERESTED PARTY

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY
(NEMA) PROPOSED INTERESTED PARTY**

NAIROBI CITY COUNTY PROPOSED INTERESTED PARTY

RULING

1. It is common ground that the Applicant instituted this suit on 4th September, 2019, seeking interim measures of protection pending arbitration. By a ruling of the court dated 4th October, 2019, Kasango J., issued the following orders:-



- a. That pending the appointment of an arbitrator the Respondents by themselves and through anyone acting on their behalf, approval or acquiescence including their agents, assigns, workers, the 1st interested party be restrained from interfering in any way with the access and use for commercial purposes the borehole facility situated on L.R. No. 12832/2, Lang'ata Area, Nairobi by the Applicants and its employees.
 - b. That pending the appointment of an arbitrator the Respondents by themselves and through anyone acting on their behalf, approval or acquiescence including their agents, assigns, workers and the 1st interested party be and are restrained from collecting water from the borehole situate on L.R No. 12832/2, Langata Area, Nairobi and selling it at no consideration to the Applicant.
 - c. That in accordance with the terms of the parties Agreement and pending the appointment of the arbitrator the Respondents provide security for the quiet use of the borehole facility and allow the Applicant and its agents to enjoy its use.
 - d. That pending the appointment of the arbitrator, the Respondents be and are hereby restrained by themselves or their or acquiescence, by their agents, employees, assigns, through the 1st interested party or any other person from intimidating, harassing and abusing the Applicant, its employees and agents.
 - e. That costs of the Application dated 3rd September 2019 are awarded to the Applicant.
2. By its application dated 9th June, 2023, the Applicant now accuse the Respondents and the Interested Party of being in contempt of the aforementioned orders, and it urges the Court to punish them for the same by committing them to civil jail. It also seeks to injunct the Respondents and the Interested Party by themselves, agents, proxies, assigns from interfering with the Applicant's use and enjoyment of the borehole facility situated in Parcel L.R. No. 12832/2 and/or drilling any other borehole in land Parcel L.R. No. 12832/2 or in any other parcel of land adjacent to the Applicant's borehole. The application is supported by the affidavit of the Applicant's director, Angela J.A. Odero, sworn on 9th June, 2023, and opposed by the Respondents and the Interested Party through the replying affidavit of the Interested Party sworn on 12th November, 2024.
 3. The Applicant has also filed an application dated 26th June, 2023, seeking inter alia to join the Proposed Interested Parties as Interested Parties in this suit, and that the 1st Respondent be struck out as a party. The Applicant also seeks to find the Interested Party, 1st and 2nd Proposed Interested Parties, guilty of contempt of the temporary injunction issued by the court (Mabeya J.,) on 9th June, 2023. This application is supported by the grounds on its face and the supporting affidavit of Angela J.A. Odero sworn on 26th June, 2023, and opposed by the Respondents and Interested Party through the replying affidavit of the Interested Party sworn on 12th November, 2024. The Proposed 6th Interested Party has also opposed the application through the Grounds of Opposition dated 19th July, 2024. The court directed that the two applications be canvassed by way of written submissions, which I note, are on record, and I will be making relevant references to them in my analysis and determination below.

Analysis and Determination

4. From the applications and submissions, the first issue for the Court's determination is whether an injunction should issue against the Respondents and the Interested Party from interfering with the Applicant's use and enjoyment of the borehole facility situated in Parcel L.R. No. 12832/2 and/or drilling any other borehole in land Parcel L.R. No. 12832/2 or in any other parcel of land adjacent to the Applicant's borehole.



5. As stated in the introductory part, in the ruling of 4th October, 2019, the Respondents and the Interested Party were restrained from interfering with the Applicant's use of the borehole in land Parcel L.R. No. 12832/2. The above order has not been set aside or overturned. Therefore, it is not necessary or proper to issue the same order again.
6. However, based on the deposition before the Court, it appears that the Applicant is aggrieved by events that took place after the said orders were issued because the Respondents and Interested Party drilled another borehole on land parcel LR No. 12832/23, which the Applicant states is adjacent to LR No. 12832/2, and that the same was drilled for the sole purpose of interfering with the use and functions of the borehole facility in the latter. In response, the Respondents and the Interested Party aver that the borehole is being drilled in a different property and that they have acquired the requisite permits and licenses to drill the same by the Proposed 4th Interested Party.
7. From their deposition, the Respondents and the Interested Party have indeed annexed the authorization from the Proposed 4th Interested Party allowing them to drill the borehole on the said property LR. 12832/23. Whereas the Applicant contends that the Respondents and the Interested Party have not complied with the legal requirements of drilling such a borehole and their act is in contravention to the provisions of the law, this contention is negated by the authorization of the Proposed 4th Interested Party. Thus, prima facie, I find that Respondents and the Interested Party have complied with the law because they were authorized by the relevant authorities to drill the borehole on the property LR. 12832/23. I also find that there is insufficient evidence to show that the borehole was drilled by the Respondents and the Interested Party for the sole purposes of defeating or interfering with the Applicant's enjoyment and use of its borehole in LR No. 12832/2. In the circumstances, I decline to issue an injunction in relation to the borehole being drilled on the property LR No. 12832/23 by the Respondents and the Interested Party.
8. My finding as stated above, disposes of the issue relating to contempt of the orders of 4th October, 2019, because there is insufficient evidence before this Court to show that the Respondents and the Interested Party have contravened the previous orders issued by Mabeya, J. as stated above. I say so because, the subject borehole is being drilled on a property that does not belong to the Applicant, and with permission from the authorities in question, finally, there is insufficient evidence to show that it is interfering with the Applicant's use and enjoyment of its borehole on its own property. Based on the record before me and the documentation annexed, unless rebutted, the presumption is that the drilling of the impugned borehole is lawful.
9. As regards the allegation of contempt of the court orders issued on 9th June, 2023, the Interested Party challenged submitted that it had not been served with the same. It denies that the phone number indicated in the documents attached belongs to it, and submitted that the WhatsApp message provided does not show the date of service. In any event, the drilling has since been completed, and therefore it was its position that the application has been overtaken by events. The Interested Party submitted that the telephone number 072XXXX, used to effect service via WhatsApp does not belong to it, the deponent did not however state what his correct number was. Nothing would have been easier than to show the Court what the correct telephone number is. This was not done. Further, I take note of the record, which shows that a process server attended the site but was unable to carry out personal service because the Interested Party was not present. The individual at the site refused to sign the documentation under protest.
10. The Interested Party's version of events is that drilling of the borehole was complete by the time the court order was served upon him. However, again, he did not present any evidence to the Court to show this. On the other hand, neither could the Applicant prove this sufficiently by way of evidence.



It is not entirely clear therefore, whether the terms of the order was breached in the manner submitted by the Applicant.

11. Finally, I take note of the Interested Party's submission that the order of 9th June, 2023, was issued in respect of parcel LR. No. 12832/2 alone. Prayer No. 2 of the application states as follows: 'Pending the hearing and determination of this Application an order do issue restraining the Respondents and the Interested Party by themselves, agents, proxies, assigns from further drilling any other borehole in land Parcel L.R. No. 12832/2 or in any other parcel of land adjacent to the Applicant's borehole.' (Emphasis mine). Further, based on the record, the Court granted prayer No. 2 pending the hearing and determination. Therefore, there is some merit to the contention that terms of the injunction went beyond drilling on LR. No. 12832/2, included the parcel adjacent to the Applicant's borehole.
12. At paragraph 29 of the Interested Party's deposition, he concedes that the parcel LR 12832/23 is neighboring and is "...adjacent to the plot where the Applicant's borehole is situated". This Court, as a court of concurrent jurisdiction, may not overturn or sit on appeal of that decision. As it stands, the said order issued by Mabeya, J. included the adjacent land, and therefore restrained the Respondents and the Interested Party from drilling a borehole land adjacent to LR 12832/2. The said drilling on the Interested Party's land was carried out in contempt of the court's orders issued by Mabeya, J. on 9th June, 2023.
13. The Applicant has stated that the 2nd Respondent complied with the said orders and that the 1st Respondent passed away before the orders were issued. Accordingly, in my view, only the Interested Party and proposed Interested Parties are before the Court for consideration in relation to the orders sought.
14. The law as regards contempt proceedings was set out in *Katsuri Limited v Kapurchand Depar Shab* [2016] eKLR, in which the High Court cited with approval the text from the treatise Contempt in Modern New Zealand as follows:-

"The Applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;(b) the Defendant had knowledge of or proper notice of the terms of the order;(c) the Defendant has acted in breach of the terms of the order; and (d) the Defendant's conduct was deliberate."
15. Further to the above, the standard of proof in contempt proceedings is higher than the balance of probabilities but not as stringent as beyond reasonable doubt. In *Mutitika v Baharini Farm Ltd* [1985] eKLR, the Court of Appeal stated the following:-

"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."
16. The above nuanced standard acknowledges the quasi-criminal nature of contempt, given its potential to affect personal liberty. The burden of proof rests with the Applicant and the Applicant is therefore required to prove the allegations to the above standard.
17. Guided by the above, based on the record before me, it is not clear if the Interested Party was ever personally served with the orders of the Court dated 9th June, 2023. The Applicant has not proved that the number he used for service belongs to the Interested Party. Further, it is evident that personal service of the order was never effected on the Interested Party either. As regards knowledge of the orders, and the requirement that the same were clear and unambiguous, and willfully and deliberately disobeyed;



neither is this apparent to the relevant standard. The Interested Party claimed that he has ceased all work and drilling as at the date of issuance of the Order, while the Applicant submitted that this was not the case. Neither of the parties provided sufficient evidence to prove this point to the court one way, or the other. I therefore find that the burden of proof has not been met to the applicable standard.

18. On the issue of joinder, the Applicant stated that the Proposed 2nd Interested Party is a necessary party to enable the Court arrive at a just and fair determination as it is in contempt of the said orders of this Court by virtue of effecting drilling of the borehole contrary to the Orders of this Court. The Proposed 2nd Interested Party did not respond to this. Nor did the Interested Party deny that it carried out the drilling of the property in question. However, once again, it is not clear if proper service was effected on the Proposed 2nd Interested Party.
19. As for the Proposed 3rd Interested Party, the Applicant has stated that it is responsible to enforce law and order within Lang'ata area where the Applicant's bore hole is situated in the parcel of land L.R. No. 12832/2 and is therefore a necessary party to this suit. While this may be the case, I do not think that this is an appropriate ground to join a police station to civil proceedings. The OCS has no identifiable stake in these proceedings, nor will joinder assist the Court in making a just determination. I decline to join the 3rd Interested Party to the proceedings.
20. The above rationale may be applied to the 4th, 5th and 6th Proposed Interested Parties. Having found that the drilling is prima facie, legal, it follows that no meaningful purpose will be served by joinder of the above parties. I therefore find that only the Proposed 2nd Interested Party, is a suitable party for the purpose of joinder and the same is hereby joined to the present proceedings. The said party ought to be given an opportunity to show cause why it should not be cited for contempt of the orders of 9th June, 2023, before this Court reaches a conclusion in relation to that issue.
21. As regards the prayer seeking to strike out the 1st Respondent as a party in this suit, based on the record, it is not in dispute that the said party passed away sometime in March, 2021. Order 24, rule 4 of the Civil Procedure Rules provides that; "Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit." (Emphasis mine). Rule 4(3) goes on to state that "Where within one year no application is made under subrule (1), the suit shall abate as against the deceased Defendant." Because the 1st Respondent passed away in the year 2021, and there has been no such application as described above, I do not think any prejudice will be occasioned by striking him out as a party to the proceedings. The suit against him would have abated in 2022, is deemed to stand as dismissed.
22. Finally, it is not lost on me that the present application was filed pending the commencement of arbitral proceedings. In my view, the parties ought to, if they have not already done so, proceed to arbitration which is the dispute mechanism they had mutually agreed upon as the appropriate forum for resolution of the present dispute.

Conclusion and Disposition

23. Based on the reasons set out above, the court issued the following orders:-
 1. The Applications are dismissed.
 2. The Interested Party shall bear its own costs.



3. The Applicant shall bear, if any, the costs of the Proposed Interested Parties and costs of the 1st and 2nd Respondents.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 8TH DAY OF MAY, 2025.

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

.....Court Assistant
.....Applicant
.....1st Respondent
.....2nd Respondent
.....1st Interested Party
.....proposed 2nd interested party
.....proposed 3rd Interested Party
.....proposed 4th Interested Party
.....proposed 5th Interested Party
.....proposed 6th Interested Party

