



REPUBLIC OF KENYA



**Mutie v Galgalo (Environment and Land Appeal E001 of 2022)
[2025] KEELC 3802 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3802 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E001 OF 2022**

EO OBAGA, J

MAY 15, 2025

BETWEEN

FRANCIS MUTIE APPELLANT

AND

GILBERT GALGALO RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated 10th June, 2024. It is brought under the provisions of Order 40 Rule 3 (1) of the Civil Procedure Rules, 2010.
2. The Applicant seeks the following orders: -
 1. [Spent]
 2. That the Appellant/Respondent be committed to civil jail for a period not exceeding 6 months for contempt of court.
 3. That this honourable court do issue warrants of arrest against the Appellant/Respondent to be arrested and detained in prison for a term not exceeding 6 months for deliberate breach of the court injunction order/judgment.
 4. That the Officer Commanding Station (OCS) Kibwezi Police Station be authorized to arrest the Appellant/Respondent and/or their agents and/or servants acting on their behalf in contravention of the injunction orders to maintain authority and dignity of the court.
3. The application is premised on the grounds appearing on its face. It is also supported by the affidavit of Gilbert Galgalo sworn on even date. The Applicant averred that a judgment was delivered in his favour on 17th December, 2021 restraining the Appellant from trespassing/interfering with Plot No. 268 Kibwezi Township. That the Appellant filed the instant appeal challenging the said judgment.



4. The Applicant averred that the Appellant is aware of the existence of the said orders and the consequences of the same yet he chose to act against them. He added that the Appellant has trespassed into the suit property and started building structures and laying building materials thereon.
5. The Applicant contended that unless the orders sought are issued, the Appellant will continue with his unlawful activities on the suit property despite the existence of the instant appeal and the lower court's judgment. That it is in the interest of justice that the orders sought do issue in order to protect the dignity and integrity of this court.
6. Opposing the application, the Appellant/Respondent filed the replying affidavit duly sworn on 3rd March, 2025. He averred that after judgment was delivered by the lower court, he was granted stay orders by this court on 30th May, 2024 upon payment of Kshs.100,000/=. He further refuted the Applicant's allegations that he had trespassed into the suit property and commenced constructions insisting that the structures thereon were constructed long before the delivery of the judgment.
7. The Respondent contended that the annexed photographs do not indicate when they were taken and the same are in contravention of Sections 106A and 106B of the Evidence Act.
8. The Respondent went on to state that it is the Applicant who is in contempt of court orders because after this court issued stay orders, the Applicant went in and locked all the kiosks operating in the suit property. He contended that the application herein is an afterthought and that it is meant to delay hearing of the appeal. He urged the court to dismiss the application with costs.
9. Parties agreed to canvass the application by way of written submissions.
10. In the Applicant's submissions dated 1st October, 2024, Counsel reiterated that the Appellant was in breach of the judgment of the court in Makindu ELC Case No. 10 of 2011 and therefore in contempt of court. Counsel contended that the Appellant's actions of putting up structures and building materials on the suit property were deliberate and in breach of court orders. It was submitted that the application should be allowed as prayed.
11. In the Appellant's submissions dated 3rd March, 2025, Counsel argued that the photographic evidence that was annexed in the supporting affidavit is not accompanied by a certificate of electronic evidence. It was submitted that the photographs are not admissible in evidence. Counsel further argued that the Applicant had not sufficiently demonstrated that the Appellant deliberately disobeyed the court's orders.
12. Urging the Court to dismiss the application with costs, Counsel for the Appellant placed reliance on the holding of the court in Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [2021] eKLR.
13. The sole issue for determination is whether the Applicants has demonstrated that the Respondent deliberately breached the terms of the judgment and decree of the lower court which was delivered on 17th December, 2021 in order to cite the Respondent liable for contempt of court.
14. The instant application has been brought under the provisions of Order 40 Rule 3 of the Civil Procedure Rules, 2010 which outline the consequences of breach of an order of injunction. Order 40 Rule 3 (1) provides as follows: -

‘In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached,



and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.’

15. The test which an Applicant must pass in an application for contempt was laid out in the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR, where Mativo J. (as he then was) observed 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. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated: -

“There are essentially four elements that must be proved to make the case for civil contempt. 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.”

16. Whereas the lower court issued a permanent injunction against the Appellant vide the impugned judgment in the present appeal, the record clearly shows that an order of stay of execution of judgment and decree was issued by this court on 30th April, 2024. The order of stay of execution was conditional upon the Appellant depositing Kshs.100,000/=. The Applicant has not demonstrated that the Appellant did not comply with the stay orders issued by this court.

17. In the case of Z-U-DG v SJK-U [2021] eKLR, Lady Justice Maureen Odero observed as follows: -

“The ruling of the Hon Kadhi was clear and unambiguous. The Application for stay of execution was allowed as prayed. Thus execution of any of the orders granted by the Hon Kadhi including the order for payment of mut’ah have been stayed pending determination of the appeal filed before the Court of Appeal. It would be illogical for this court to pursue execution of an order which already been stayed and it stands to reason that the Respondent cannot be found to have breached orders which have lawfully been stayed... To pursue contempt proceedings in the face of stay of execution orders granted by the Hon Kadhi would not only be untidy but would also amount to a misuse of the courts stretched resources. I find that execution of the judgment delivered by the Hon Kadhi on 6th November 2017 cannot be pursued until the appeal filed by the Respondent is determined by the Court of Appeal.”



18. In the above case law, the court placed reliance on the case of Berliner Industriebank Aktiengesellschaft v Jost [1971] 2 ALL ER 1513 where the Court of Appeal aptly held as follows: -

“Where a stay is granted pending the hearing of an appeal, it is assumed that nothing can be done by the successful plaintiff to enforce the judgment until the appeal has been heard.”

19. Similarly, in Koinange Investments and Development Company Limited v Ian Kahiu Ngethe & 3 others [2015] eKLR, the court expressed itself as follows:-

“32. I therefore agree with the Defendants submission that in view of the order for stay of execution, it would have been improper for the Defendants to carry out any form of execution of the decree. A decree or order becomes enforceable from its date. Therefore time on the judgement delivered on 14th October, 2002 started running as from the date of its delivery.

33. However, the filing of appeal number 108/2003 would not affect the enforceability of the judgement/decree. However this court, through the orders of Mutungi J stayed the judgment decree’s operation. I am therefore of the view that the judgment has not lapsed due to the effluxion of time as argued by the Plaintiff. The orders of Mutungi J had the net effect of suspending the completion of the ongoing execution of the judgment in any terms, as long as an appeal was being determined in the Court of Appeal.”

20. From the foregoing, it is noteworthy that the judgement of the lower court was stayed by this court exercising its appellate jurisdiction. The Applicant could therefore not enforce or execute the ensuing decree pending hearing and determination of the present appeal as noted in the orders granted on 30th April, 2024.

21. Accordingly, the Applicant has failed to demonstrate breach or wilful disobedience of the judgment of the lower court by the Appellant. The instant application is devoid of merit and ought to be dismissed with costs.

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HON. E. O. OBAGA

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF MAY, 2025.

In The Presence Of:

Mr. Kasyoka for Applicant.

Mr. Makundi for Respondent.

Court assistant – Steve Musyoki

