



**Muasya & another v Sesi (Civil Appeal 187 of 2011)
[2024] KEHC 15653 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 187 OF 2011
MW MUIGAI, J
DECEMBER 9, 2024**

BETWEEN

JOSEPH MUTISYA MUASYA 1ST APPLICANT

GEORGE KISISO KIETI 2ND APPLICANT

AND

LEONARD MUTUKU SESI RESPONDENT

RULING

1. Vide an application dated 27.10.2023 under Order 22 Rule 1 of the Civil Procedure Rules and Article 40 of *the Constitution* of Kenya, 2010 the Applicant seeks the following orders, that;
 - a. Spent
 - b. The court do and hereby issue eviction orders as per the decree of the court given on 6/9/2018
 - c. This Honourable court be pleased to issue security by ordering the OCS Kangundo to provide officers to enable Falcon Auctioneers evict the Respondent herein Leonard Mutuku Sesi from Pot 13b Tala Market and costs of the police officers be borne by the Respondent Leonard Mutuku Sesi
 - d. The costs of the application be borne by the Respondent
2. The Application is supported by the Affidavit of Joseph Mutisya Muasya deposed on 27.10.2023 stating that they are the decree holders having substituted Judah Ndambuki Kituku who is deceased. He stated that there is no pending appeal nor application for stay of execution by the Respondent in respect of the Ruling in this appeal and the decree issued stated that the Respondent should give vacant possession of the property failure to which eviction orders would issue.



3. It was contended that the Respondent has notoriously refused to give vacant possession of the suit property to their detriment.
4. It was deposed that they had filed an application for police assistance in the wrong cause as the parties herein had another case and Justice Odunga then sat in the High Court and ordered that it be filed in the correct cause. He stated that they have talked to the Respondent severally to vacate but he is always giving false promises.

Grounds Of Opposition

5. The Respondent filed grounds of opposition on 19.11.2023 and opposed the application and sought costs and to have the application dismissed on the following grounds;
 - a. The issues named therein are res judicata
 - b. There is an existing judgement by Hon P. Nyamweya delivered in 26.01.2016 and to date no appeal was preferred
 - c. That in the ruling dated 11.02.2017, the issues raised in the present application were determined by Hon. P. Nyamweya
 - d. That a similar application by the applicant was filed dated 28.02.2017 and determined
6. The application was canvassed by way of written submissions.

Applicants Submissions Dated 10.01.2024

7. The Applicants relied on the case of Mariko Ndwiga vs Edith Muthanje [2020] eKLR and submitted that they are the decree holders and the Respondent has refused to vacate, pay rent and costs of the suit. That it is an acceptable principle that once a competent court pronounces a judgment, it must be accepted and implemented and the decree holders should not be deprived of the fruits of judgment. That litigation must come to an end otherwise the access to justice would be chaotic as parties would engage in endless spiral of suits. It was contended that there is nothing left to adjudicate this matter between the parties.
8. The Applicants also prayed for costs of the suit.
9. As at the time of writing this ruling, the Respondent had not filed submissions.

Determination

10. I have considered the Chamber Summons Application, the grounds of opposition and the submissions on record find the issues for determination are;
 - a. Whether the application is res judicata
 - b. Whether the Applicant is entitled to the orders sought
11. It is not in dispute that there is a judgment of the court dated 26.01.2016 and subsequently a decree issued on 6.09.2019 which is yet to be complied with to date. The order stated that the appeal is allowed in the following terms;
 - a. The tenancy between the Applicant and the Respondent be and is hereby deemed to have terminated on 1st February 2005



- b. The Respondent be and is hereby ordered to vacate the premises known as Plot 13B Tala Market within 3 months of the date of this judgment failing which eviction orders shall be issued to the Appellant
 - c. The Respondent be and is hereby ordered to meet the costs in the trial court and the costs of this Appeal. [emphasis added]
12. When the application was filed, this court gave inter alia the following orders on 14.11.2023;
 1.
 2.
 3. That Notice to show cause to issue to the Respondent to appear in court and explain why judgment of 11/1/2017 is not yet implemented to date
 4. That the Respondent to appear in person on 4/12/2023 and/or be represented by legal counsel
 5. That in default to have warrant of arrest issued.
 13. On 4/12/2023, counsel for the Applicant told the court that they were not served with the application and further stated that they were opposed to the Application as it is an ELC matter and not for this court, that there is a ruling by Hon Justice G.V Odunga (as he then was) to that effect. This court directed the Respondent to file a replying affidavit and set aside the notice to show cause as the Respondent appeared in person.
 14. The doctrine of Res Judicata is set out in the *Civil Procedure Act* at section 7 as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
 15. In the case of AN *M v PMN (Civil Case 14 of 2015)* [2016] KEHC 1770 (KLR) where the court held as follows;

“The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

 - i. “Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.
 - ii. Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
 - iii. Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”
 16. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been



determined on merits by a court of competent jurisdiction. The court in the English case of *Henderson v Henderson* (1843-60) All ER 378, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

17. Applying to this case, the court rendered itself on the issue of the eviction orders on 26.01.2016 wherein it inter alia ordered that the Respondent vacate the premises known as Plot 13B Tala Market within 3 months of the date of this judgment failing which eviction orders shall be issued to the Appellant. This means that there are eviction orders in place thus it is not an issue for this court to belabour on.
18. The Respondent did not file a replying affidavit and continues to be in contempt of the orders of this court. As has been said time and again, court orders are not mere suggestions but are to be followed to the later.
19. In the case of the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* [2018] eKLR made the following observations:
 23. Authorities on the necessity to punish for contempt are legion. We have considered those provided by the respondent, and also cite the following, in affirmation of the principle.
 24. In *Econet Wireless Kenya Ltd V. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Poptlal Shah & Another Civil Application No. 39 of 1990* (unreported), where the Court of Appeal stated as follows:

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In *Hadkinson v. Hadkinson* (1952) 2 All E.R. 567, it was held that: It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”
25. In *Att-Gen. v. Times Newspapers Ltd.* [1974] A.C. 273, Lord Diplock stated:

“... There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.”



26. The Court of Appeal in *A.B. & Another v R.B.*, Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa’s decision in *Burchell v. Burchell*, Case No.364 of 2005 where it was held:
- “Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”
27. Ojwang, J (as he then was) in *B. V. Attorney General* [2004] 1 KLR 431 that:
- “The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”
28. It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 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...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”
29. The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to 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.”
20. The decree which is the subject of this Application directed that compliance be in 3 months from 26.01.2016 and the Respondent has not complied to date, 9 years later.

Disposition

In the circumstances, I hereby direct as follows;

- a. The eviction orders of 26.01.2016 remain in force.
- b. The OCS Kangundo will provide officers to enable Falcon Auctioneers evict the Respondent herein ,Leornard Mutuku Sesi from Plot 13b Tala Market and costs of



the police officers and the auctioneers be borne by the Respondent Leonard Mutuku
Sesi within 14 days of this judgment.

c. It is so ordered.

**RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 9/12/2024 IN MACHAKOS
HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

In The Presence Of:

Wangari H/B For Mutua Makau for The Applicant

No Appearance for The Respondent

Geoffrey – Court Assistant

