



REPUBLIC OF KENYA



KENYA LAW
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**Magany & another v Mware & 4 others (Environment and Land Appeal
22 of 2021) [2025] KEELC 324 (KLR) (22 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 22 OF 2021
FO NYAGAKA, J
JANUARY 22, 2025**

BETWEEN

SERFINA OKUTA MAGANY 1ST APPELLANT

ANDREW ONYANGO MAGANY 2ND APPELLANT

AND

ISAYA JUMA MWARE 1ST RESPONDENT

MARTIN JOHN OKECH 2ND RESPONDENT

LAND ADJUDICATION OFFICER-SUBA/MBITA 3RD RESPONDENT

LAND REGISTRAR-HOMABAY 4TH RESPONDENT

HON ATTORNEY GENERAL 5TH RESPONDENT

RULING

1. By a Notice of Motion dated 4th September 2024 the Respondents moved this Court under Order 40 Rule 3(1) of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Article 159 of *the Constitution* and any other enabling provisions of the law. They prayed for the following orders: -
 1. That the appellants be personally summoned before the Court to show cause why they should not be punished for contempt of the Court Orders of 10th May 2022.
 2. That the 1st and 2nd appellants be and are hereby detained in prison for a period not exceeding 6 months for disobeying the Honorable Court Orders of 10th May 2022.
 3. Spent.
 4. That costs of this application be paid by the Defendants.



2. The application was based on nine (9) grounds which were as follows. On 10th May 2022, pursuant to an application by their 1st, 2nd and 3rd Respondents the honourable court issued a stay of its judgment, decree and execution of the judgment rendered on 25th January 2022 by which it ruled in favour of the Appellants. By staying the Judgment, decree and execution, this Court did revert to the judgment of the lower court in Mbita land case which recognized the sanctity of the titles held by the 3rd Respondent. Contempt of Court should be punished. The Appellants ignored and disregarded the stay order issued herein. They ought to fully comply with the orders of 10th May 2022 and should be punished for the contempt thereof. Unless the application was immediately heard the defendants would continue to defy the orders of the court. The defendants illegally and maliciously continue to defy the orders and are going to compromise the fair and expeditious disposal of the appeal. The defendants illegally, maliciously and unreasonably continue to defy the orders. They had constructed structured and/ or erected a dwelling place where the appellants now reside hence invaded their premises. They have equally constructed a five-course and erected a wall within the premises and these activities were still ongoing.
3. The application was supported by the affidavit sworn by Martin John Okech on the same date as the application. The depositions largely repeated the contents of the grounds in support of the application. The deponent added that he was the registered owner of parcel number, Kakasingri/ Kagutu/Waregi/1790 which formed part of the suit land. The present appeal originated from the Magistrates Court at Mbita in ELC No. 19 of 2018 in which the court delivered a judgment on 6th November 2019. By it the trial magistrate held that the occupation of the suit premises by the 1st, 2nd and 3rd Defendants was regular and lawful. It meant that the Judgment validated the sanctity of the titles the Applicants held.
4. The Appellants/Respondents being aggrieved appealed to this court. By its judgment rendered on 25th January 2022, this Court determined the Appeal in favour of the appellants.
5. The Applicant being in this satisfied with the judgment of this Court filed and Notice of Appeal dated 3rd February 2022 to the Court of Appeal. Then they prayed for stay of the judgement and execution of this honourable court through an application dated 11th February 2022. The applicants applied for extension of time in the Court of Appeal in Kisumu Civil Appeal in E092 of 2022. The application was granted through a Ruling delivered on 2nd December 2022. He annexed and marked MJO-1, a copy of the ruling.
6. The appellants filed an application dated 6th April 2023 seeking the Court of Appeal to rescind its order delivered on 2nd December 2022 which allowed extension of time to time to file the appeal out of time. The ruling was still pending.
7. The Appellants herein did not oppose or challenge the application for stay of execution and the extension of time. Upon the extension of time being granted the applicants filed and served the Record of Appeal to all the parties within the stipulated time. The applicants herein were served with theirs on 8th December 2022 via E-mail. In the meantime, the applicant had instructed his brother Michael Yiega to lodge a complaint to the local police on 26th February 2023 after the appellant trespassed onto his land and commenced construction of a house. He annexed and marked MJO-2, a copy of the photos on the structure throughout the land.
8. He added that he had kept his peace for so long hoping the Court of Appeal would dispose of the appeal, but the matter had taken a long time, hence necessitating the instant application. The appellants were aware of the orders of stay of execution. The deponent was still the bona fide owner of the suit land holding valid title which had not been cancelled, and the stay orders were still in existence.



The appellants were in contempt of the court order by erecting structures on the suit premises. Court orders were not made in vain, and her party must at all times abide by them.

9. The application was opposed through a Replying Affidavit sworn by Andrew Onyango Magany on 9th October 2024. He deposed that the application was misconceived, frivolous, undeserving and meant to waste the court's time. Further he and the co-Appellant were the decree-holders in Mbita ELC No. 19 of 2018 wherein judgment was delivered in their favour on the 6th of November 2019 and costs awarded to them, and the decree had not been set aside. He annexed and marked AOM-1, a copy of the decree. He added that the applicants filed an application dated 10th February 2022 and sought orders of stay of execution and not stay off the judgment. Therefore, as the Ruling of 10th May 2022 in favor of the applicant was with the condition that the applicants to formally file and serve the Record of Appeal within 60 days from the date in default the stay orders granted herein would automatically lapse, they lapsed upon that failure. He annexed and marked AOM-2 a copy of the ruling.
10. He deposed the further that the Applicants failed to file the Record of Appeal within the stipulated 60 days, and the orders granted 19th May 2022 automatically lapsed. Upon that lapse, the applicants rushed to the Court of Appeal in Kisumu in Miscellaneous Application number is E092 of 2022, seeking leave to file and serve their Record of Appeal out of time. He annexed and marked AOM 3 the Ruling of the Court of Appeal. He added that when the applicants approached the Court of Appeal to seek leave to file the appeal out of time he failed to reinstate and /or extend the stay orders which had lapsed. The applicant failed, in the instant application to avail an extended stay order as proof of service on the Respondents the order alleged to be breached.
11. Further, the applicant was applying a wrong principle of law by contending in paragraph (b) of the grounds of the application that the stay of execution reverted to the judgment at Mbita court, a judgment can only be quashed or affirmed by a competent court order and not stay orders in interlocutory proceedings. The applicant should not dangle the instrument of title in relation to the suit land, yet it was within this knowledge that the root of the same title was challenged and that was why he proceeded to their Court of Appeal, having lost the appeal in the High Court. Further, the orders of stay had lapsed at the expiry of 60 days due to non-compliance and no extension of the same had been made to stop him from executing and evicting the appellant.
12. The deponent (appellant) knew of his personal knowledge that the subject matter in the suit was ancestral land which is late father Alexius Magany Mathokore was the first registered owner during the demarcation as shown in the adjudication records while the 1st appellant was his mother who was married to the father in the 60s and the deponent was born and raised on the land, and had been cultivating it, and he and the family members were still thereon and still occupy the same to date. Hence detaining them in prison for building their houses where they had been all their lives without proof was an exercise in futility.
13. Further, the applicant having in mind that he had filed the instant application on 4th September 2024, he colluded with the police in Mbita Police Station to have him arrested on 28th September 2024 at 9:00 PM, have him booked in the said Police Station on allegations that he (deponent) had stolen his late father's death certificate and instead of him being arraigned in court the next day he was released at 9:00 PM of that following day at night without any charges being preferred. The applicants were out to intimidate the deponent by causing him to be arrested at will while assuming the judgment of the court, yet he did not have a decree in his favour as at now.
14. His further deposition was that annexures MJO-1 and MJO-2 (a), (b) and (c) did not support the instant application to constitute and meet the threshold of the application. It was clear from the foregoing that the applicant had failed to comply with the ruling delivered on 10th May 2022. The



applicant had failed to avail any court order vacating the judgement herein as delivered on 25th January 2022 hence (Respondent) and the co-appellant were the decree-holders. The applicant's interest was that of a purchaser of a portion of the suit land, a claim which the appellants/respondents were challenging regarding its validity at the time he alleged to have purchased the same from his late father, and this Court had found that he (father) had already died and that was the gist of the case. Further, the applicant had found the Respondents herein on the subject matter and should proceed with their appeal instead of resorting to intimidation by arrest with no tangible evidence. The application should be dismissed.

15. The Applicant filed a Further Affidavit which he swore on 22nd October 2024. He deposed that when a judgment is stayed or set aside, consequential orders arising therefrom stand stayed. He added that the arguments by the Respondent in paragraphs 5, 6 and 7 of the Replying Affidavit were similar to the ones dealt with in the last application for contempt of court whose determination was made vide a ruling. Further, in response to the claim that the Court of Appeal did not extend the orders he deposed that the Court of Appeal admitted the appeal out of time on the ground that the certified copies of the proceedings were typed out of the 60 days and a Certificate of Delay issued which enabled him to convince Court accordingly.
16. He deposed further that the subject matter was never ancestral land as claimed. He gave the reason for it being that the land was (situate in) a settlement scheme the late father Alexius Magany Mathokore was a settler on the same. After that he (Alexius Magany) sold to the Applicant two parcels of land being parcel Nos. 1790 and 1684 and move to his ancestral land in Migawi where he lived to his death in 2002. The 1st Appellant was not present during the transaction of purchase as she had abandoned her matrimonial home for many years, and the 2nd Appellant was raised by the step-mother, Regina Achola Magany.
17. He deposed further there was no collusion between the police at Mbita Police Station because it was within the applicant's knowledge about the forged certificate of death and he had reported the matter to the police under Occurrence Book (OB) No. 11/07/ 2018. The matter had been raised by the Applicant's advocates and was in the process of investigation. The second appellant was lying about intimidation as he trespassed onto the applicant's property after his father and family vacated. He trespassed first onto property number Kaksingiri/ Kagutu/Waregi/1478 purchased from one Samuel O. Mochama and recently onto parcel No. 1790 as evidenced by OB. No. 04/26/2023 whose contents he quoted.
18. He deposed that the applicant was going into the merits of the Appeal being filed out of time in the Court of Appeal, yet this Court was functus officio regarding that issue as the Court of Appeal admitted the appeal. The 1st appellant had earlier on trespassed onto parcel No. 1478, but he vacated, leaving his son George Otieno Magany to his own designs. Contrary to the allegation that the Respondent's father died in 1984, the Director of Criminal Investigation (DCI) Mbita had concrete evidence that the 1st Respondent's father renewed this identification card to a new generation one under S/No. 205118587, ID No. 1487414 produced on 10th March 1996 and dispatched to Suba Central. Further, additional evidence from relevant persons were the cause the 2nd Appellant's arrest. The Court at Mbita recommended, in the judgment, the prosecution of the 2nd Appellant for forgery of his father's certificate of death. Lastly, there was nothing to comply with since the judgment and execution of the same court were stayed.
19. The application was disposed of by way of written submissions. This Court will consider the arguments therein when and when necessary as it analyses the points or issues raised herein step by step.



Issue, Analysis And Determination

20. I have considered the application, the law and the rival submissions by the parties whose claims are clashing. Only two issues commended themselves to me for determination. The first one is whether the application is merited. The second one is who to bear the costs of the application.
21. At this preliminary stage, this Court is of the humble view that it would be easier to understand the contention in the instant application by first giving the chronology of events leading to the application. Thus, this Court notes that it delivered its judgment herein on 25th January 2022. In it the Court decreed as follows, “The appeal is hereby allowed; the judgment of Mbita ELC No. 19 of 2018, dated 6th November 2019 is hereby set aside; and the costs is awarded to the appellant.”
22. It is therefore important for the Court to compare its decree with the contents of that of the trial court in order to understand that which was set aside. In the lower court, on 6th November 2019, the learned trial magistrate in Mbita SRMC No. 19 of 2018 stated as follows, “in the premises the prayers of the plaintiffs are undeserved. Consequently, I hereby dismiss the plaintiffs’ suit with the costs to the defendants. It is so ordered.”
23. The question is, what did the trial court dismiss? The answer is found in the Plaintiff’s pleadings. It was the plaintiffs’ claim. In it the reliefs sought are summarized as follows,
 - a. A declaration that all entries in the register/ records of the 5th, 4th and 5th defendants’ offices purporting subdivide and transfer parcel number Kaksingiri/K.Waregi/43 from the deceased’ names Alexius Maganya Mathokore first, second and third defendants are null and Void;
 - b. An order directed to the 4th and 5th defendants to rectify the register accordingly and cancel all irregular entries therein after 17th March 1984 save for that of Alexius M. Mathokore;
 - c. An order of eviction and demolition of all 1st to 3rd defendants’ structures constructed on the suit parcel of land;
 - d. An order of permanent injunction against the first, second and third defendants, either by themselves or their servants and or agents from entering and or trespassing onto the subject parcel of land, and the fourth and 5th defendants to be restrained from transferring or in any way alienating the suit parcel of land from the deceased’s family; and
 - e. Costs of this suit.
24. After the appeal was heard and determined in favour of the Appellants, now Respondents, the Applicants filed an application seeking stay of execution. They did so vide an application dated 10th February 2022. Specifically, they sought orders that the court be pleased to order a stay of execution in this case pending the hearing and determination of the appeal filed by the 1st, 2nd and 3rd Respondents in Environment and Land Court at Homa Bay. Further, the costs of the application to abide the outcome of the appeal.
25. When the court heard the application, it delivered a Ruling on 10th May 2022. The learned trial judge found that the applicants had met the requirements of the grant of an order sought. He granted them in the following terms, basically. That pending the hearing and determination of the appeal as envisaged in the Notice of Appeal dated 3rd February, 2022 and as stated in paragraph 1(d) above the Applicants to formally file and serve the Record of Appeal within 60 days from the date of the ruling in default, the stay orders granted hearing would lapse automatically. The costs of the application be in the cost of the appeal.



26. It appears, and it is admitted by the applicants, that after the Ruling of 10th May 2022 was delivered, they did not file a Record of Appeal within the 60 days granted. Upon that they moved the Court of Appeal sitting in Kisumu in Misc. Application No. E092 of 2022. The Court of Appeal delivered its Ruling over the application on 2nd December 2022. At paragraph 10 of the Supporting Affidavit, a copy of the ruling was said to be annexed to the Supporting Affidavit and marked MJO-1. But when the Court carefully considered the annexure, it found that it was a copy of the Order issued by this Court on 10th February 2022. This variance seems to be the basis for the submission by the Respondents and their contention that the annexures MJO-1 and MJO-2 (a), (b), (c) do not support the instant application.

27. The Applicant did not seek to cure the anomaly by filing any annexure to the Further Affidavit filed as stated above. However, the respondents introduced a copy of the ruling of the Court of Appeal in Kisumu as annexure AOM 3. But the copy was not as clear and legible in some of the pages as to be fully beneficial to the Court. But it appears that the Ruling was delivered by the Hon. Francis Tuiyott JA in the said application on 2nd December 2022. This Court has, in the interest of justice, perused the Ruling in the electronic Kenya Law Reporting (eKLR) and noted that it is reported as *Ouma & 2 others v Magany & another (Civil Application E092 of 2022) [2022] KECA 1362 (KLR) (2 December 2022)* (Ruling). In the Ruling the learned Judge of Appeal ordered as follows,

“The notice of motion dated July 15, 2022 is hereby allowed. The applicants shall within 14 days hereof institute and serve the appeal upon the respondents. Costs of the application shall abide the outcome of the appeal. Dated and delivered at Kisumu this 2nd day of December, 2022.”

This ends the summary this Court wished to give as background to the instant application.

28. It is worth noting that the prayers the Applicants sought in the instant application were couched or drafted in a manner pre-emptive in nature. The applicant sought to have the 1st and 2nd appellants detained in prison for a time not exceeding 6 months for disobeying court orders dated 10th May 2022. In my understanding the prayer presupposed about the 1st and 2nd Appellants/ Respondents were already guilty of the offence of contempt of court or adjudged guilty of the offense warranting their imprisonment or detention as prayed. But as things stand, and it is not in dispute, that the applicants did not pray that the Respondents be found guilty of contempt of court. Secondly, there is no order, in my humble view, that they had been adjudged guilty of the offence of contempt of court.

29. With regard to prayer 3, which in essence is the main (unspent) prayer, it presupposes that there was already an order that this Court did direct to the Respondents to pull down their structures. Further, it implied that there was a demand, or the court had found that structures complained about were erected in contravention of orders of the court.

30. That said, punishment for contempt of court is provided under Section 29 of the *Environment and Land Court Act*. The provision reads as follows:

“... Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years or to both.”

31. Thus, unlike punishment for contempt as was generally understood by many to be limited to a sentence of imprisonment of up to only six months or a fine as moderate as conventionally believed, this Court has the power to order the imprisonment of a contemnor to a sum of up to Kshs. 20,000,000/= or



imprisonment of a period of two years. And there is no dearth of authorities about the definition and ingredients of contempt of court.

32. In the case of *Nelson N Obiba v Hira Mokono Nyambwatania; Attorney General (Interested Party)* [2022] eKLR this Court laid down the definition of the term contempt of Court as follows:

“In Black’s Law Dictionary, 11th Edition, Thompson Reuters, 2019, Bryan A. Garner defines contempt as disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or impair the respect due to such a body”.

33. From the definition, it is clear that a party, whether served with a court order or not, is bound to obey it. The key ingredient in this instance is that he has knowledge of the existence of the order. A court of law does not issue orders in vain: once issued they must be obeyed, respected and/or fulfilled.

34. Regarding obedience of orders of the Court, in the case of *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR the Court emphasized as follows: “Article 159 of *the Constitution* recognizes the judicial authority of courts and tribunals established under *the Constitution*. Courts and Tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with *the Constitution* and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.”

35. In the matter, his Lordship, Chacha Mwita J noted further that,

“In *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & Another* CCT 19/11(75/2015). Nkabinde, J observed that:-“The rule of law, a foundational value of *the Constitution*, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As *the Constitution* commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

36. He added that in the case of *Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2)* [1975] 48 D.L.R (30), the Court stated that;

“To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrong can be ignored, then



there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.”

37. The parties should not lose sight of the point that for one to be found guilty of the Contempt of Court, the party applying for such an order must prove four (4) elements. These are (a) the existence of a valid order of the Court (b) the order must be served or constructively in the knowledge of the alleged contemnor, (c) the suspect must have done an act or acts contrary to the order, (d) the contemnor's the actions of violation must be deliberate. Therefore, a court must satisfy itself from the facts presented that the contemnor willfully and deliberately disobeyed the court order he was aware of. Hence the Court must satisfy itself beyond any shadow of a doubt that the alleged contemnor committed the act complained of with full knowledge or notice of the existence of the order.
38. Regarding the instant application, it is clear beyond peradventure that what the Judge of Appeal allowed in the application for extension of time was the institution and service of the Record of Appeal upon the Respondents within 14 days. He did not reinstate the orders of stay of execution that had automatically lapsed at the expiry of the 60 days granted by this court.
39. Be that as it may, it is clear to me that time when the Applicants defended the suit in the trial court, they filed a claim which the finding of the trial court found they were undeserved. When the appeal arising from the said judgment was delivered by this court, it set aside the findings of the trial court. It follows that when those findings (of the trial court) were set aside, the entire judgment, including any recommendations made therein, were set aside. Further, it means that when the Application dated 11th February 2022 on the stay of the execution of the judgment of this Court granted, the execution was of the lower court's judgment and the payment of the costs thereof. However, when the orders lapsed after sixty (60) days, the Respondents were at liberty to execute the decree of this court (and that pertaining to the changed position of the lower court as per this Court's final finding), which has not been stayed up to this date. What that means is that there is no judgment in favor of the applicants as at this point whether in the lower court or this one. Further, there is no order in place which the Respondents disobeyed, to warrant an application for contempt of court against them to succeed.
40. It follows that the instant application is without merit. It is hereby dismissed with costs to the Respondents.
41. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 22ND DAY OF JANUARY, 2025.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of

Mr. Olewe for the Respondents/ Applicants

Ms. Nyagol Advocate for the Appellants/ Respondents

