



Waithaka & another v Waithaka & 3 others (Environment and Land Miscellaneous Case E275 of 2024) [2025] KEELC 4852 (KLR) (13 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4852 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS CASE E275 OF 2024**

TW MURIGI, J

JUNE 13, 2025

BETWEEN

ABEL KANGETHE WAITHAKA 1ST PLAINTIFF

CHARITY MURINGO WAITHAKA 2ND PLAINTIFF

AND

CATHERINE WAMUYU WAITHAKA 1ST DEFENDANT

JAMES MURIUKI KARIITHI 2ND DEFENDANT

JOSEPH KENYATTA OBALLAH 3RD DEFENDANT

ELSEBA ALUOCH ONYANGO 4TH DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 2nd November 2024 in which the Applicants seek the following orders: -
 - a. Spent.
 - b. That contempt of court proceedings be started against the 1st, 2nd, 3rd and 4th Defendants / Respondents herein and that they be punished by this Honourable Court as guided by the [contempt of Court Act](#).
 - c. That this court do hereby order that the Status quo and injunction orders issued by the High court on 31st October 2023 be maintained pending the hearing and determination of the application by the Plaintiffs herein.
 - d. That to preserve the property as is and maintain the status quo, this court do order the 2nd and 3rd Defendants to withdraw their private security agents/servants from the suit property pending the hearing and determination of this matter.



- e. That an injunction be hereby issued restricting the 2nd and 3rd Defendants and/or their agents from interfering/accessing in any manner whatsoever with the suit property pending the hearing and determination of the application by the Plaintiffs herein.
 - f. That the Commanding Officer Hardy Police Station enforce compliance.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicants sworn on even date.

The Applicants Case

3. 2th May 2023 in ELC Case No. 173 of 2023 they sought an order to restrain the sale and transfer of the suit property between the Defendants herein. That vide a ruling delivered on 31st October 2023, the 1st Defendant was restrained from disposing the suit property and that orders of status quo and preservation of the title were issued pending the hearing and determination of the suit. They further averred that the orders were served upon the 1st and 4th Defendants through their legal Counsel G.N Thiongo & Co Advocates. PARAGRAPH 2.
4. That on 24th April 2024, the Respondents in blatant breach of the court orders proceeded to subdivide and transfer L.R No. 2327/53.
5. The Applicants went on to state that the matter was subsequently heard and determined vide the judgment delivered on 17th October 2024. That after the 2nd and 3rd Defendants realized that the judgment was not in their favour, they deployed private security guards who denied them access to the suit property. The Applicants deposed that the 2nd and 3rd Respondents have deliberately disobeyed the orders issued on 31st October 2023.
6. They further deposed that the 1st Respondent had filed a Notice of appeal challenging the decision in ELC Case No. 271 of 2023. The Applicants are apprehensive that the appeal will be rendered nugatory if the orders sought are not granted.

The 1st Respondent Case

7. The 1st Respondent filed a replying affidavit dated 29th January 2025 in opposition to the application. She denied having entered into a sale agreement dated 29/09/2022 over the suit property. The deponent contends that the alleged subdivision was done on L.R No. 2327/132 and not on L.R No. 2327/53. She further contended that efforts by Applicants to register an inhibition against L.R No. 2357/53 on 13/3/2024 were rendered futile as the parcel was no longer in existence. She relied on the certificate of official search to state that as at 12/09/2022, 4.87 acres had been transferred from L.R No. 2357/53 giving rise to L.R No. 2327/131. She further stated that the Applicants are her biological children and denied having been served with the order issued on 31st October 2023.

The 2Nd And 3Rd Respondents Case

8. The 2nd and 3rd Respondents opposed the application through the replying affidavit of Joseph Kenyatta Oballah sworn on 6th February 2025 and the grounds of opposition of even date. The deponent averred that the application is misconceived and is intended to mislead this court to grant the orders sought. He further averred that L.R No. NAIROBI/BLOCK 192/1169 is registered jointly in his name and the 3rd Respondent.
9. The deponent denied having been served with the order dated 31st October 2023 or with the pleadings and judgment in Milimani ELC Case No. E173 of 2023. He averred that the order was brought to



his attention on 28th October 2024. He insisted that they were in possession of the suit property and confirmed that they had provided security for their property.

10. The deponent contends that the orders issued in ELC Case No. 173 of 2023 do not touch on the ownership of their property. He further contended that the application is defective since the Applicants have not specified their property under the prayers sought. According to the deponent, the application for contempt is untenable as it has been brought outside the statutory of timelines.
11. The Applicants filed a further affidavit in response to the replying affidavits and denied the contents thereof.
12. The application was canvassed by way of written submissions.
13. As at the time of writing this ruling, the Applicants had not filed their submissions as directed.

The 1st And 4th Respondents' Submissions

14. The 1st and 4th Respondents filed their submissions dated 27th March 2025.
15. On behalf of the 1st and 4th Respondents, Counsel reiterated the contents of the replying affidavit in support of his submissions. Counsel submitted that the 1st Respondent had produced documents to show that parcel No Nairobi/BLOCK 192/1169 registered in the name of the 2nd and 3rd Respondents was curved out of L.R No 2327/132. Counsel further submitted that the 1st and 4th Respondents were not in breach of the court order as the title for L.R. No. 2327/53 had long been extinguished. Counsel further submitted that the 1st and 4th Respondents were not personally served with the order dated 31st October 2023.

The 2nd And 3rd Respondents Submissions

16. The 2nd and 3rd Respondents filed their submissions dated 1st April 2025. On behalf of the 2nd and 3rd Respondents, Counsel outlined the following issues for the court's determination: -
 - a) Whether there was proper service of the order dated 31st October 2023?
 - b) Whether the prayer for contempt of court is time barred?
 - c) Whether the Applicants have satisfied the conditions for the grant of an injunction?
 - d) Whether the application is merited?
17. On the first issue, Counsel submitted that apart from the WhatsApp screenshot dated 28th October 2024, the Applicants did not adduce any evidence to show that they served the order upon the 2nd and 3rd Respondents or that 2nd Respondent is the owner of the mobile number. Counsel argued that even if service was effected which is denied, the order was overtaken by events.
18. On the second issue, Counsel relied on Section 34 of the [*Contempt of Court Act*](#) to submit that the alleged contempt is time barred.
19. On the third issue, Counsel submitted that the Applicant has not satisfied the conditions for the grant of an injunction set out in the case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358.
20. Counsel further submitted that the Applicants have not establish a prima facie as no suit has been filed. It was submitted that the application herein is premature as the Applicants have failed to comply with the statutory procedure for execution.



21. On irreparable injury, Counsel submitted that the Applicants have not demonstrated that they will suffer irreparable loss which cannot be compensated adequately by an award of damages. Counsel argued that the balance of convenience tilts in favour of the 2nd and 3rd Respondents because they registered owners of NAIROBI/BLOCK 192/1169.

22. From the foregoing, Counsel submitted that the Applicants are not entitled to the orders sought.

Analysis And Determination

23. Having considered the application, the respective affidavits and the rival submissions, the issue that arises for determination is whether the Applicant is entitled to the orders sought.

24. The Applicants are seeking to have the Respondents punished for contempt of the court order issued on 31st October 2023.

25. The Black's Law Dictionary 9th Edition defines contempt of court as follows:-

“conduct that defies the authority or dignity of the court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment,”

26. In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another* [2005] eKLR Ibrahim J (as he then was) stated as follows:-

“It is essential for the maintenance of the Rule of Law and order that the authority and 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. It is the plain and unqualified obligation of every person against or in respect to whom an order is made by the 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.”

27. Order 40 Rule 3(1) of the Civil Procedure Rules which 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.

28. Section 5 of the *Judicature Act* confers jurisdiction on the superior Courts to punish for contempt and provides that;

1. The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
2. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

29. The High Court of South Africa in the case of *Carla Burchell v Barry Grant Burchell Eastern Cape Division Case No 364 of 2005* held that in order to succeed in civil contempt proceedings, an 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.
30. Back home, in the case of Samuel M.N. Mweru & Others v National Land Commission & 2 Others (2020) e KLR the court set out the elements to be proved in an application for contempt of court as follows:-
- “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 knowledge.
 - c. The defendant has acted in breach of the terms of the order; and
 - d. The defendant’s conduct was deliberate.
31. The first issue for determination is whether the terms of the order were clear. It is not in dispute that on 31st October 2023, the court vide its ruling issued the following orders: -
- a) An order of preservation of title for L.R 2327/53(Original No. 2327/45) pending the hearing and determination of the main suit.
 - b) An interim injunction barring the defendant from disposing of the suit property pending the hearing and determination of the suit.
 - c) Status quo prevailing as at the time of filing this suit be maintained.
32. The order was unambiguous as it restrained the 1st Respondent from disposing the suit property pending the hearing and determination of the main suit amongst other orders. To this end I find that the order issued on 31/10/2023 was clear and unambiguous.
33. The next issue for determination is whether the Respondents were served or had proper notice of the order. The Applicants averred that the order was served upon the 1st and 4th Respondents through their Advocate. They further averred that the order was served upon the 2nd and 3rd Respondents through the WhatsApp platform. In this regard, the Applicants produced a screenshot of the WhatsApp message forwarded to the 2nd Respondent mobile number on 28th October 2024.
34. The 1st Respondent contends that she was not served with the order. The 2nd and 3rd Respondents contended that they were served with the order one year after it was issued.
35. The application herein emanates from the orders issued on 31st October 2023 in ELC Case No. E173 of 2023. The record shows that the 2nd and 3rd Respondents were not parties in Milimani ELC Case No. E173 of 2023. Indeed, the WhatsApp screenshot shows that the order was forwarded to the



- 2nd Respondent on 28th October 2024. A perusal of the order shows that it was directed to the 1st Respondent and not 2nd and 3rd Respondents who in any event were not parties in the suit.
36. As for the 1st Respondent, this court finds and holds that she was aware of the terms of the orders as the ruling was delivered in the presence of her Advocate. I also find that the terms of the order were clear in terms of the parcel numbers and the injunctive order.
37. On whether the Respondents deliberately breached the court order, the Applicants have a duty to prove their case beyond the balance of probabilities. This is because contempt of court is in the nature of criminal proceedings and the liberty of the subject is usually at stake.
38. The Applicants must prove wilful and deliberate disobedience of the court order if they are to succeed as was held in the case of *Gatharia K. Mutitika v Baharini farm Ltd (1985) KLR* where the court held that:-
- “ A contempt of court is an offence of a criminal nature. A man may be sent to prison. It must be proved satisfactorily.....It must be higher than prove on a 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 criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal nature.”
39. In the case of *Peter K.Yego & Others v Pauline Wekesa Kode ACC NO. 194 OF 2014* the court held that:-
- “It must be proved that one had actually disobeyed the court order before being cited for contempt”
40. In the matter at hand, the Applicants asserted that the Respondents subdivided and transferred the suit property in breach of the court order. They further asserted that the 2nd and 3rd Respondents have denied them access to the suit property. On her part, the 1st Respondent denied having entered into a sale agreement with the 2nd and 3rd Respondents over the suit property.
41. The Applicants produced a sale agreement dated 22nd September 2022 which shows that the 1st and 4th Respondents entered into a sale agreement with the 2nd and 3rd Respondents. The sale agreement also shows that the 1st and 4th Respondent sold half an acre to the 2nd and 3rd Respondents which was to be excised from L.R No. 2327/53 (ORIGINAL No. 2357/45). Pursuant to the sale, the 1st and 4th Respondents executed the transfer of interest on 18th June 2024 and the same was registered on 10th October 2024 while the order was still in existence.
42. The Applicants have clearly demonstrated that the 1st and 4th Respondents transferred half an acre from the suit property to the 2nd and 3rd Respondents in blatant breach of the court order. Court orders are not made in vain and are meant to be complied with.
43. The 2nd and 3rd Respondents contended that the alleged contempt was overtaken by events by dint of Section 34 of the *Contempt of Court Act*. In *Kenya Human Rights Commission vs Attorney General & another*, the *Contempt of Court Act* was declared by unconstitutional. The *Contempt of Court Act* is no longer operative from the date of judgment declaring it unconstitutional. From the foregoing, I find that the application is not statute barred.
44. In the end, this court finds and holds that the 1st Respondent is in contempt of the order dated 31/10/2023.



45. The Applicants are seeking for an injunction to restrain the 2nd and 3rd Respondents from accessing or interfering with the suit property. These are substantive orders which ought to have been made in a suit. As a general rule, a suit can only be instituted by way of a Plaint, Petition or an Originating Summons. A miscellaneous application is not legally recognised as an originating process. It can only be filed within a suit. For the Applicants to seek injunctive orders, there must be in existence a suit upon which this application can be hinged on.
46. On whether the court should maintain the status quo issued by the court on 31st October 2023 and order the 2nd and 3rd Respondents to withdraw their security from the suit property, it is clear that the Respondents were not parties in ELC Case No. E173 of 2023. The judgment delivered on 17th October 2023 speaks for itself.
47. In the end, I find that the application partially succeeds in the following terms:-
- a) The 1st Respondent is found to be in contempt of the court order issued on 31st October 2023.
 - b) Each party to bear its own costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF JUNE 2025.

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Court assistant – Ahmed

1st applicant in person

Kuchio holding brief for Thiongo for the 1st and 4th Respondents.

