Nthenge v Muoki & another (Environment & Land Case E005 of 2024) [2025] KEMC 126 (KLR) (3 June 2025) (Ruling)

Neutral citation: [2025] KEMC 126 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

ENVIRONMENT & LAND CASE E005 OF 2024

YA SHIKANDA, SPM

JUNE 3, 2025

BETWEEN

JOYCE KALONDU NTHENGE ..... PLAINTIFF

AND

CHARLES MAKAU MUOKI ..... 1ST DEFENDANT

NELSON GITHUKU ..... 2ND DEFENDANT

RULING

1. On 19/2/2024 the plaintiff herein filed an application dated 19/2/2024 seeking orders against the defendants. Subsequently, and before the application was heard, the defendants filed a notice of preliminary objection dated 7/12/2024 as well as a Replying affidavit sworn by the 1st defendant. On 9/12/2024, the court directed that the preliminary objection and application dated 19/2/2024 be argued together. The parties agreed to canvass the application and preliminary objection by way of written submissions. This Ruling therefore is in respect of both the preliminary objection and the application dated 19/2/2024 by the plaintiff. I will start with the preliminary objection. This is because, if the preliminary objection succeeds, there will be no need of considering the application.

The Preliminary Objection

2. The objection is premised on the following grounds:

    1. The Plaintiff's suit is Res Judicata or Res sub-judice as the subject matter herein was litigated upon between substantially the same parties and the same cause of action in Machakos HCCC No. 54 of 2005;

    2. The dispute at the High court aforesaid was referred to the Land Adjudication Tribunal and the adjudication process was not exhausted;

3. For the same reason, this court is not clothed with jurisdiction to entertain this case which falls within the relevant land adjudication tribunal under the *Land Adjudication Act* and *Land Consolidation Act*;

4. The suit is an affront to the doctrine of exhaustion and an abuse of the court process;

5. The cause of action relates to a project undertaken by the National Irrigation Authority who have not been joined as a party and the suit is bad in law for misjoinder and non-joinder of parties.

3. The defendants filed an affidavit in support of the preliminary objection.

Response by the plaintiff

4. The Plaintiff did not file a written response to the Preliminary objection.

Main issues for determination

5. In my opinion, the main issues for determination are as follows:

   i. Whether the preliminary objection was properly raised;

   ii. Whether the preliminary objection should be upheld.

Submissions

6. The parties did not file any submissions touching on the preliminary objection.

Analysis and determination

7. I have carefully considered the preliminary objection. The question of what constitutes a preliminary objection was well answered in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd v Westend Distributors Ltd [1969] E.A. 696 where at page 700 D – E Law J.A. stated: -

> " So far as I am aware, Preliminary objection consists of a pure point of Law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of Limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."
>
> At page 701 Sir Charles Newbold, P. said: -
>
> > " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion". (Emphasis supplied)

8. Similarly, in the authority of Oraro v Mbaja [2005] KEHC 3182 (KLR), the court had this to say:

> " A 'preliminary objection', correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary

objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo , that "where a Court needs to investigate facts, a matter cannot be raised as a preliminary point." This legal principle is beyond dispute, as there are diverse weighty authorities carrying the message."

9. To begin with, the 1st defendant filed an affidavit in support of the Preliminary objection. In the affidavit, the 1st defendant purported to "testify" to the facts of the case. The supporting affidavit was akin to his defence to the plaintiff's claim. A preliminary objection is on a pure point of law. It can neither be supported by an affidavit nor responded to by way of an affidavit. I will thus totally disregard the affidavit in support of the Preliminary objection. I have perused the notice of Preliminary objection. The 1st and 2nd grounds of the preliminary objection are based on sections 7 and 6 respectively, of the *Civil Procedure Act*. The defendants argue that the suit herein is Res judicata and at the same time Sub-judice.

10. It is obvious that evidence will have to be adduced for the court to determine whether or not the suit is res judicata or sub-judice. This is not a fact that can be ascertained from the pleadings. Issues of Res judicata and sub-judice cannot be determined by way of a Preliminary objection. They are points of law but not PURE points of law capable of determination by way of a Preliminary objection.

11. The other issues or grounds raised in the Preliminary objection will require evidence. They are not issues that can be ascertained from the pleadings. They are matters of fact to be ascertained through evidence. I find that the Preliminary objection is not based on any pure point of law capable of being raised as a preliminary objection. In the circumstances, the preliminary objection must of necessity fail.

The Application Dated19/2/2024

12. The application was filed by the plaintiff under a certificate of urgency. It was brought pursuant to the provisions of Order 40 rule 3(1) and Order 22 rule 28(1) of the Civil Procedure Rules and sections 1A and 3A of the *Civil Procedure Act*. The application seeks the following main orders, the others having been spent:

    1. The Honourable court be pleased to order the arrest and committal to jail and/or fine the respondents herein who are in contempt of an order of this Honourable court issued on 29/1/2024;

    2. The Honourable court be pleased to order that the entering within the suit property known as parcel No. 998 Kathyaka settlement scheme and the continued constructions therein by the respondents is contempt of court pending the hearing and determination of the application;

    3. Costs of this application be borne by the respondents.

    The application is supported by the affidavit of the applicant and is premised on the following general grounds:

        i. This court on 29/1/2024 issued an order against the respondents to stop any further constructions on the disputed land known as parcel No. 998 Kathyaka settlement scheme;

        ii. Despite being served with the said court order, the respondents have continued to enter and construct on the applicant's land in total disregard of the court order;

        iii. The respondents have demonstrated that they are not ready to obey the court order. They were aware of the court order having been served with the same on 30/1/2024;

iv. The respondents/contemnors have intimidated and threatened the applicant to abandon her suit;

v. It is in the interest of justice and for the preservation of this court's dignity that the orders sought in this application be granted;

vi. This Honourable court has powers to punish the respondents for contempt.

13. In the affidavit in support of the application, the applicant reiterated the grounds on the face of the application and attached documents to buttress her case.

Response by the defendants/respondents

14. The respondents opposed the application by filing a replying affidavit sworn by the 1st defendant/respondent. The defendants denied having entered the suit premises after the orders of the court were issued. They argued that the applicant had not exhibited proof that they entered the suit property after the orders had been granted. That there was no proof of continued construction. The respondent further argued that there was nothing in the photo exhibited by the applicant to show that the presence of the respondents at the alleged construction site. That the photograph did not indicate the place, date and time it was taken and the same was not accompanied by a certificate of electronic evidence.

15. The respondents deposed that there was no evidence to show that they had violated the orders of the court and that the applicant had not met the threshold for granting of the orders sought. It was further deposed that the project precipitating the application was being undertaken by the National Irrigation Authority who have not been joined to the suit. The 1st respondent deposed that the suit property being claimed by the applicant lies within plot No. 35 which belongs to the 1st respondent's family and that no sub-division was ever done. That plot No. 998 does not exist on the ground and was a fraudulent creation by the applicant an unscrupulous surveyor.

Main issues for determination

16. In my view, the main issues for determination are:

i. Whether the respondents are in contempt of the orders issued herein;

ii. Whether the respondents ought to be punished by the court;

iii. Who should bear the costs of the application?

Submissions by the plaintiff/Applicant

17. The applicant submitted that it was a fundamental principle of the rule of law that court orders must be obeyed. The applicant relied on the provisions of Order 40 rule 3 of the Civil Procedure Rules. That the orders of the court were clear and binding on the respondents. The applicant argued that the respondents were served with a copy of the order and were thus aware of the same. The applicant raised certain issues claiming that they were contained in the replying affidavit but upon perusal of the same, I find no such facts. These are facts indicating that the applicant signed an agreement allowing the drilling project and further indicating that she intended to withdraw the suit. The applicant must have addressed the wrong affidavit which was not filed in respect of the instant application. The applicant contended that she had demonstrated that the respondents had disobeyed court orders and urged the court to cite and punish the respondents. The applicant quoted certain authorities but failed to annex copies thereof.

Submissions by the respondents

18. The respondents submitted that the applicant did not meet the threshold for granting the orders sought. That the standard of proof was beyond a balance of probabilities but below reasonable doubt. The respondents argued that they were not served with the orders of the court and as such, they were not aware of the same. That the applicant had not demonstrated that the project was underway or in existence and that the same was being conducted on the suit property. The respondents also referred to matters not deposed in the replying affidavit in opposition to the instant application. It would appear that both parties got mixed up and addressed a replying affidavit relating to the application dated 29/1/2024. The respondents urged the court to dismiss the application. Just like the applicant, the respondents quoted authorities but did not bother to annex copies thereof.

Analysis and determination.

19. The Black's Law dictionary, 10th edition defines the term contempt as:

    1. The act of state of despising.

    2. The quality, state or condition of being despised.

    3. Conduct that defies the authority or dignity of a court or legislature.

    It has also been defined as:

    .....a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such body ."-Edward M. Dangel, Contempt, at 2 (1939).

20. The Black's Law dictionary, 10th edition further defines civil contempt as the failure to obey a court order that was issued for another party's benefit.

Jurisdiction

21. Section 10 of the Magistrates Court Act provides in part as follows:

> "(1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.
>
> (2) A person who, in the face of the Court —
>
> (a) assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;
>
> (b) interrupts or obstructs the proceedings of the Court; or
>
> (c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence.
>
> (3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.

(4) In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which—

(a) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;

(b) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or

(c) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court." (Emphasis supplied)

22. Section 63(c) of the *Civil Procedure Act* provides that in order to prevent the ends of justice from being defeated, the court may, if it is so prescribed, grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold. Order 40 rule 3 of the Civil Procedure Rules provides:

"(1) 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.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit."

23. The foregoing confirms that this court has jurisdiction to punish for contempt of its orders in case of breach.

Standard of proof

24. In the authority of Republic v Mohammed & another [2018] KESC 51 (KLR),the Supreme Court held as follows:

"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."

25. 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."

26. The foregoing implies that the standard of proof in contempt proceedings is higher than a balance of probabilities but below beyond reasonable doubt.

Ingredients of contempt

27. The Supreme Court of India held in Indian Airports Employees Union v Ranjan Catterjee & Another [AIR 1999 SC 880: 1999(2) SCC: 537, that:

> " ...in order to amount to "civil contempt" disobedience must be willful. If disobedience is based on the interpretationof court's order, notification and other relevant documents, it does not amount to willful disobedience."

28. Similarly,the Supreme Court of India in Mahinderjit Singh Bitta v Union of India & Others1 A NO. 10 of 2010 (13th October, 2011) held that:

> " In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution."

29. The emphasis as shown in the above cases is that there must be "willful and deliberate disobedience of court orders."There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it. The Cromwell J, writing for the Supreme Court of Canada in Carey v Laiken,2015 SCC 17(16th April 2015), expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:

i. The order alleged to have been breached must state clearly and unequivocally what should and should not be done. This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning;

ii. The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine;

iii. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

30. Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand available at ip36.publications.lawcom.govt.nzhave authoritatively stated as follows:-

> " 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."

31. The applicant attached a copy of the order on her supporting affidavit. The terms of the order are clear and unambiguous. The plaintiff/applicant attached a copy of an affidavit of service by one Caxton Mwangangi Syengo. The supporting affidavit indicates that the "respondent" was served on 30/1/2024. It is not clear which of the respondents was served on 30/1/2024. On the other hand, the affidavit of service indicates that both respondents were served on 29/1/2024. I have carefully perused the affidavit of service. The process server did not disclose how he knew where to find the 2nd defendant/ respondent. He does not disclose how he knew the 2nd defendant so as to serve him. Furthermore, the process server did not disclose how he knew where to find the 1st defendant/respondent at Kibwezi town. He does not even disclose the particular place in Kibwezi town where he purportedly found the 1st defendant/respondent and served him.

32. There is no indication of how the process server was able to identify the 1st defendant/respondent. It is not indicated that the defendants/respondents were known to the process server before. However, the record reveals that the defendants filed a replying affidavit to the application dated 29/1/2024, which gave rise to the orders in issue. The defendants attached a copy of an agreement together with a copy of the orders in issue herein. The replying affidavit was filed on 12/2/2024, before the instant application was filed. This clearly proves that the defendants/respondents were aware of the existence of the restraining order against them.

33. Did the defendants act in breach of the orders? The plaintiff relies on a photograph attached to her supporting affidavit. It is not clear who took the photograph and under what circumstances. It is also not clear when the photograph was taken and where. The source of the photograph is unclear and so is its authenticity. The plaintiff did not even state that she saw the defendants acting in breach of the orders of the court nor when they did so. As already indicated, the standard of proof in contempt proceedings is higher than a balance of probabilities. These are quasi-criminal proceedings which cannot be proven by a mere photograph whose source is unknown. Besides, as already indicated, there is no proof of where the photograph was taken and when. Nothing in the photograph links the respondents to whatever is going on. I am not convinced that the respondents acted in breach of the orders of the court.

34. In the authority ofGatharia K. Mutikika v Baharini Farm Ltd [1985] KLR 227, the court observed that:

> " The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be

satisfactorily proved... I must be higher than proof 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, in criminal cases. it is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

35. As pointed out earlier, an application of this nature has a bearing on the liberty of a person and such an order ought to be granted in the clearest circumstances as evidently demonstrated by the authorities cited herein. In the instant application, I am not satisfied that that standard of proof has been attained.

Disposition

36. The upshot of the above considerations is that both the preliminary objection and application dated 19/2/2024 are devoid of merit. I proceed to dismiss them. Since both parties have lost in their endeavours, each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 3RD DAY OF JUNE, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.