



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC LAND APPEAL E048 OF 2024

RAPHAEL MUREITHI

NGIGI.....APPELLANT

=VERSUS=

SAMUEL OTIENO OGEMBO.....

RESPONDENT

JUDGEMENT

1. By a Memorandum of Appeal dated 16th April 2024, the Appellant appealed against the ruling of Hon. S. Opande (PM) delivered on 19th March 2024 in Milimani Chief Magistrate's Commercial Courts- MCELC 09 OF 2023.

BACKGROUND

2. The Plaintiff/Appellant instituted this suit vide a Plaint dated 19th June 2023 and amended on 9th October 2024 seeking the following orders:-

- a) An order of permanent injunction restraining the Defendant whether by himself or his agents, servants, employees, representatives or anyone claiming under it from entering upon, trespassing upon, taking over, excavating, damaging, constructing on, developing, marketing, offering for sale, selling, transferring, alienating, charging, disposing or in any other manner howsoever from dealing or otherwise interfering with the Plaintiff's quiet enjoyment, possession and proprietorship rights of that property situate in Kariobangi, Ruaraka within Nairobi County and described as Plot No. 82 originating for Land Reference Number 31 Kariobangi.**
- b) A declaration that the Plaintiff is the legal owner of all that property situate in Kariobangi Ruaraka within Nairobi County and described as Plot Number 82**

originating from Land Reference Number 31 Kariobangi.

c) A declaration that the Defendant had unlawfully trespassed on the suit property without the consent of the Plaintiff and caused permanent and irreparable damages thereto.

d) An order directing the Defendant, his agents, assigns, tenants, and licensees to vacate the suit property.

e) An order granting the exclusive and vacant possession of the suit property to the Plaintiff.

f) An order directing the eviction of all tenants currently on the illegally constructed rental properties constructed on the suit property.

g) An order for rent or mesne profits totaling to Kshs 31,000/=per month which have accrued from the illegally constructed rental properties on the suit property as from July 2023 which was the first month that the Defendant licensed/let out the illegal constructed rental properties to either the date of

delivery of possession of the suit property to the Plaintiff or the date of total relinquishment of possession of the suit property by the Defendant with notice to the Plaintiff through issuance of an order by this Honourable Court and upon full compliance with prayer.

h) General damages for trespass against the Defendant, illegal demolitions conducted by the Defendant and for pain and suffering.

i) Exemplary damages for trespass against the Defendant.

j) An order of environmental restoration be hereby issued against the Defendant at his own costs to restore the environment to as near as it may be to its original state prior to his actions complained of herein.

k) Costs of this suit from the Defendant and interest thereon at court rates from the date of judgment until payment in full.

l) Any other relief that this Honourable Court may deem fit and just to grant in the circumstances of the case.

3. He also filed a Notice of Motion application dated 30th August 2023, seeking to cite the Defendant/Respondent for contempt of the status quo orders issued by Hon. Justice Oguttu Mboya on 6th July 2023 in **Milimani ELC E220 of 2023**.
4. The application was dismissed by Hon. S. Opande (PM) vide the ruling delivered on 19th March 2024, citing lack of proof of contempt.
5. Being aggrieved the Appellant appealed against the ruling on the following grounds:-

a. THAT the Learned Magistrate erred in law and fact by failing to hold that the Respondent was in contempt of the orders issued on 6th July 2023 by Hon Oguttu Mboya J, as it was uncontroverted that the Respondent was in continued interference with the Applicant's lawful usage and occupation of the suit property.

b. THAT the Learned Magistrate erred in law and fact by failing to find the Respondent in contempt of the orders issued on 6th July 2023 by Hon Oguttu Mboya J, despite the Respondent's admission of his illegal and contemptuous interference by illegally letting/licensing out/rent collection from the illegally constructed rental premises on the suit property.

c. THAT the Learned Magistrate erred in law and fact in failing to consider the material admissions of contempt of the orders issued on 6th July 2023 by Hon Oguttu Mboya J by the Respondent and evidence produced before the trial court in support of the Appellant's application for contempt of court against the Respondent.

d. THAT the Learned Magistrate erred in law and fact by failing to consider that the Respondent did not controvert the time stamped photographs taken on 16th July 2023 and produced as affidavit evidence in the supporting affidavit of Raphael

Murithi Ngugi dated 30th August 2023 evidencing the status of the property situate in Kariobangi Ruaraka within Nairobi County and described as Plot No. 82 originating from Land Reference Number 31 Kariobangi that evidenced the continued contemptuous acts by the Respondent after issuance of orders of 6th July 2023 by Hon Oggut Mboya J.

e. THAT the Learned Magistrate erred in law and fact in failing to consider the evidence adduced before the trial court, evidencing the significant environmental change of the suit property through the Respondent's continued contemptuous acts.

f. THAT the Learned Magistrate egregiously infringed on the Appellant's right to a fair hearing by failing to consider the evidence produced by the Appellant.

g. THAT the Learned Magistrate erred in law and fact in dismissing the application dated 30th

August 2023 seeking to cite the Defendant/Respondent for contempt of court.

6. The Appellant prays for:-

a) The Ruling of Hon. S. Opande (PM) delivered in Milimani MCELC No.09 of 2023 on 19th March 2024 be wholly set aside.

b) The application dated 30th August 2023 be allowed as prayed.

c) This Hon. Court be and is hereby pleased to issue an order for costs on a full indemnity basis of the appeal

7. The Appeal was canvassed by way of written submissions.

THE APPELLANTS SUBMISSIONS

8. The Appellant filed his submission dated 17th February 2025.

9. On behalf of the Appellant, Counsel outlined the following issues for the court's determination:-

a. Whether the Learned Magistrate erred in law and fact by failing to consider that the Respondent was in contempt of the orders of status quo over and in respect of the suit property by furthering construction on the suit property?

b. Whether the Learned Magistrate erred in law and fact by failing to consider that there was an admission of contempt of court orders on the part of the Respondent?

c. Whether the Appellant has proved his case against the Respondent on a balance of probabilities?

10. Counsel submitted that the purpose of issuing the status quo orders of 6th July 2023 was to preserve the suit property and to maintain the current state of affairs. It was submitted that the Respondent would immediately stop any further demolitions, excavations, and interference. However, the Respondent failed to comply with the orders. To buttress this point, Counsel relied on the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** and **Mugah v Kunga [1988] KLR 748,**

11. It was submitted that the Respondent admitted in his replying affidavit dated 12th October 2023, that he is actively, openly, and physically occupying the suit property, where he has made significant developments, including erecting a gate and constructing a perimeter wall around the suit property.

Counsel relied on the case of **Choitram & another v Nazari (Civil Appeal 8 of 1982) [1984] KECA 47 (KLR) (20 January 1984) (Judgment)** to submit that the Learned Magistrate should have entered judgment against the Respondent based on his admission.

12. Counsel pointed out that in the contempt application, the Appellant produced time-stamped photographs taken on 16th July 2023, which showed ongoing construction of houses on the suit parcel, that were not there before the issuance of the status quo orders on 6th July 2023 thus, the Learned Magistrate erred in concluding that there was no evidence in support of the contempt.
13. Counsel also cited the case of **Republic v National Environment Tribunal, Ex parte Palm Homes Limited & Another [2013] e KLR** as well as **Fatuma Abdi Jillo v Kuro Lengesen & another [2021] KEELC 2312 (KLR)** to argue that, in addition to safeguarding the substratum of the subject matter, courts of law have also recognized status quo orders as a case management tool to prevent prejudice to the parties.

14. To buttress his submission, Counsel relied on the following authorities:-
- a) **Republic v National Environment Tribunal, Ex-parte Palm Homes Limited & Another [2013] e KLR**
 - b) **TSS Spinning & Weaving; Company Ltd vs NIC Bank Limited & another [2020] e KLR.**
 - c) **Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another [2020] e KLR.**

THE RESPONDENT'S SUBMISSIONS

15. The Respondent filed his submissions dated 13th September 2025.
16. On his behalf, Counsel outlined the following issues for the court's determination:-
- a. *Whether the Appellant proved beyond reasonable doubt that the Respondent willfully disobeyed the status quo order.*
 - b. *Whether the Learned Magistrate erred in law or fact in her application of the legal principles governing contempt and status quo orders?*

c. Whether the Appellant is entitled to the orders sought in the Appeal?

17. On the first issue, Counsel relied on the case of **Gatharia K. Mutikika v. Baharini Farm Limited [1985] KLR 227** and the case of **Vulpine Investments Limited v. Posstone Limited & another [2021] eKLR** to submit that Contempt of court is a quasi-criminal offence that carries a severe penalty, and as such, the standard of proof is proof beyond a reasonable doubt, thus the learned Magistrate correctly applied this standard and found that the Appellant's evidence, consisting of photographs from a single date did not meet this threshold.
18. Counsel further submitted that the Appellant did not admit to being in contempt in his replying affidavit, as alleged. Counsel maintained that the Respondent only claimed his bona fide ownership and ongoing developments, which do not constitute an admission of acts committed after the court order. It was argued that for an admission to be recognized in a judgment, it must be explicit and unambiguous. To support this, he relied

on the case of **Chotiran & Another v. Nazari [1984] KECA 47 (KLR).**

19. Regarding the second issue, Counsel submitted that the learned judge did not clearly describe the state of affairs at the time of the status quo as fortified in the case of **Thugi River Estate Limited & another Vs National Bank of Kenya Limited & 3 others [2015] eKLR.**

20. Counsel further submitted that it is not enough to show a change in circumstances; it must also be shown that the contemnor knowingly acted in breach, as held in **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR.** Counsel submitted that the Respondent's Replying Affidavit and Grounds of Opposition in the lower court demonstrated that his occupation and development of the suit land were based on a bona fide claim of ownership.

ANALYSIS AND DETERMINATION

21. Having considered the Appeal and the submissions by the parties herein, the only issue for determination is whether the appeal is merited. The Appellant claims that the Respondent is

in contempt of the status quo orders issued on July 6, 2023, in Milimani ELC E220 of 2023, now known as Milimani MCELC No. 09 of 2023 by Oguttu Mboya J.

22. He alleged that the Respondent's ongoing interference with the suit parcel undermines the status quo orders and urged the court to dismiss the ruling of Hon. Opande.

23. Court orders are not issued in vain. Obedience to court orders has been described as the foundation of stability, safety, and progress in any society. In **Wildlife Lodges Limited v Narok County Council & 3 others [2011] eKLR**, the Court of Appeal stated:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...”

24. The orders issued by Justice Oguttu Mboya were essentially status quo orders. To illustrate the state of the suit property at the time of the orders, the Appellant argued that there was only one house belonging to him, which was already occupied by his tenant. However, after the status quo orders were issued, the Respondent unlawfully began constructing houses on the suit property, built a new gate, and erected a perimeter wall around the suit property.
25. Counsel for the Respondent, on the other hand, argued that the Appellant failed to provide clear evidence of the “state of affairs” on July 6, 2023, thereby rendering the purported “after” photographs from July 16, 2023, irrelevant. The learned magistrate concurred with this assessment.
26. Based on the evidence presented before me, I note that the status quo orders issued by Hon. Justice Oguttu Mboya on July 16, 2023, are not included in the record of appeal. Consequently, this court lacks information about the content of those orders and the position that was supposed to be upheld.

27. The Court of Appeal stated as follows in **Mukuha v Gashwe & 14 others [2023] KECA 1482 (KLR)**

“Oftentimes, this Court has emphasized the need to make clear the actual factual position in relation to the subject matter whose status quo is to be maintained. The order should leave no room for more than one clear interpretation.”

28. It was also alleged that in his replying affidavit dated October 12, 2023, the Respondent admitted that he is actively, openly, and physically occupying the suit property, where he has made significant investments and improvements, including erecting a gate and building a perimeter wall around it.

29. For the court to determine whether the contents of the Respondent’s replying affidavit were an admission, it must consider what the order for maintaining the status quo entailed. As previously stated, the order itself was not produced. However, looking at it within the context of the parties' pleadings, the actual status quo on the ground when the order was issued remains unclear. The status of the land before and after July 16, 2023, was not clearly established by the Appellant.

30. In the case of **Dean v Dean [1987] 1 FLR 517** cited in **Titus Musyoki Nzioka v John Kimathi Maingi & Another (2013) eKLR**, the Court stated as follows;

“An application for contempt of Court or its antecedent orders has to establish clearly and precisely exactly of what the Respondent was in contempt of.”

31. In the circumstances, the Appellant has failed to prove the contempt alleged to the standards set in **Mutitika v Baharini Farm Ltd [1985] eKLR**, where the Court of Appeal stated;

“...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. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases...”

32. In the end, I find that the Appeal is devoid of merit and the same is hereby dismissed with costs.

**JUDGEMENT SIGNED, DATED, AND DELIVERED VIA
MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER, 2025.**

.....
HON. T. MURIGI
JUDGE

IN THE PRESENCE OF: -

In the absence of the parties

Ahmed - Court Assistant

ORIGINAL