



REPUBLIC OF KENYA



KENYA LAW
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**Ouko v Odundo & 2 others (Environmental and Land Originating Summons
61 of 2021) [2025] KEELC 7564 (KLR) (31 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 61 OF 2021
FO NYAGAKA, J
OCTOBER 31, 2025**

BETWEEN

MARTIN GUYA OUKO PLAINTIFF

AND

AGUNGA ODUNDO 1ST DEFENDANT

RICHARD OTIENO NDIGA 2ND DEFENDANT

ABAYO MIRIAM OCHIENG 3RD DEFENDANT

RULING

Introductions

1. The Plaintiff/Applicant filed the instant application dated 20th February, 2025 seeking the following orders:
 1. That the plaintiff herein be cited for being in contempt of court orders given on the 30th day of January, 2023.
 2. That upon grant of prayer 1 above, the court may be pleased to order the sequestration of so much of the plaintiff's properties as in the opinion of the court may be sufficient to answer to the contempt or to order the plaintiff to serve a prison sentence of not more than Six (6) months or both.
 3. That the court may be pleased to make such other orders or directions as it may deem fit to meet the ends of justice.
 4. That the costs of this application may be provided to the 3rd Defendant.
2. The Application was based on the grounds set out on the face of it and supported by the depositions in the Affidavit of Abayo Miriam Ochieng, the 3rd Defendant, sworn on 20th February, 2025. She



stated that being aggrieved by the judgment and decree of the court given on 27th September, 2022, she instructed her advocates to file an appeal against the same.

3. Further, that upon filing of the Notice of Appeal, her advocates made an application for stay of execution of the orders. The court, vide its ruling delivered on 30th January, 2023, allowed the application. She further stated that she complied with the condition that she deposits Kshs. 15,000 with the court as security for the due performance of the decree.
4. She went on to state that the Respondent despite being aware of the stay orders had since entered the suit land and destroyed her house and trees. She added that there was suspicion that the Respondent had sold the land to third parties who have been entering the land through the Respondent's authority.
5. She also stated that the Respondent's action exhibited willful defiance and disobedience of the court orders which is a challenge to the dignity and court's authority. She stated that it was in the interest of justice that the orders sought in the application be granted.

Response

6. The Plaintiff filed a Replying Affidavit which he swore on 18th March 2025. He deposed that the application was an abuse of the process of the court. Further, the applicant was guilty of non disclosure of information before the court. He added that he was declared the owner of the suite parcel of land which he had acquired by virtue of adverse possession. That his family had been in possession of the land, cultivating it since the 1970s, while the Respondent gained entry a few months after the institution of the suit and erected a mabati structure on it. He added that the allegations that he tried to evict the applicant by destroying her house and cutting down trees growing in the suit land were mere lies.
7. He deposed further that it was true the applicant had erected a mabati structure on a portion of the suit parcel of land. It was occupied by the applicant's agent, one Milkah Akinyi Omollo. The agent had only been occupying the structure while the Respondent and his family had been ploughing the remaining portion of the land. His further deposition was how they had coexisted from the time judgment was delivered. He added that he had never tried to evict the applicant or ever destroyed the structure he built. The structure was still intact. He had annexed and marked MGO 2 copies of the pictures showing the structure of the house located on the suit land. He swore that he was baffled that he had destroyed the house which still existed on the ground. He had never tried to evict the applicant.
8. His further deposition was that his family had been an occupation of the land since the 1970s, and they were the ones who invested most in plowing and planting trees. He added that the applicant was very much aware of the destruction of the original trees which were planted by his family, which the applicant's family destroyed. He attached and marked MGO 3 a copy of a Crop Damage Assessment dated 28th March 2013.
9. He deposed that the trees the applicant referred to as being on the ground were not trees planted hence the applicant was bringing issues that did not touch the current issues, and which occurred a long time ago. He added that the applicant had never plowed or planted trees on the suit land. Further, he added that he had never sold any portion of the land. That the land was still registered in his name, and no transfer had been undertaken to any third parties. He annexed and marked MGO-4, a copy of the current certificate of official search.
10. He deposited that he had never disobeyed any court orders despite the fact that he was restrained from enjoying the fruits of his labor since the applicant filed an appeal in 2023.



11. He acknowledged that indeed he had instituted proceedings for execution before this Court on the grounds that he should execute the decree as he was under the impression that the applicant had not complied with the previous court order. It was after he filed the application that the applicant decided to inform about the appeal he had appeal. After the hearing the court directed that there be a stay of execution to remain in force awaiting the outcome of their appeal. It was not true, therefore, that the deponent had tried to evict the applicant whom he urged that he be restrained from uttering such words. He added that the two had coexisted on the land which had been used by him all the time. The applicant had never complained before about him ploughing the land.
12. He added that it was the applicant who indirectly wanted to evict him from the suit land through the instant application so that he starts utilizing the same at the Respondent's expense. He added that the application was a mere sham and meant to delay the hearing of the appeal. He added further that judgment was delivered in his favour and since then it was more than a year yet the applicant was yet to file the Record of Appeal. Further, the applicant was intent on delaying and frustrating the enjoyment of the fruits of his labor. The application was devoid of merits and should be dismissed.
13. Since the two adverse parties gave unclear and conflicting facts about the existing situation regarding the instant application, the court, in the interest of justice, decided to summon the Area Assistant Chief and the Village Elder to give neutral and clear information about the state of things.
14. The Area Assistant Chief, one Eric Otieno Achola, testified on 4th April 2025. He stated that he did not know Abayo Miriam Ochieng in person but had heard of her. He knew she was one of the parties in the suit. He confirmed that the suit land was parcel number 390. He had visited it two months before the date of testimony.
15. He added that there was a government surveyor who had been brought by one Martin Ouko to determine the boundary of the suit land. The surveyor did the work and left. The land was not vacant. It had a maize plantation on it, a fence and Nappier grass which was planted across the parcel. Also, it had a semi-permanent house with iron sheets on both walls and the roof. He added that when he visited the place, he did not get into the house.
16. His observation from the outside was that the house was a bit old, but it did not have any breakage thereto. The doors and windows were intact. It did not know who planted the maize or Napier grass. He stated that he had never seen Abayo Miriam in that area. He did not know who built the house.
17. On the date of the survey, there were two government surveyors, himself and several coworkers of the surveyor together with police officers from Kosele Police Station and many neighbors. He added that the presence of the officers was to keep peace. The surveyor was only to establish the boundaries of parcel No. 390. At the time of the survey, the semi-permanent structure was not occupied, but the doors were intact.
18. On cross examination he said that at the survey time they went round the parcel of land during the survey. At the time they only looked at the house (from the outside). He concluded that it was okay based on what he saw from the front side.
19. He added that before the institution of the Court case, the Plaintiff, Martin Guyo Falco had been using the land. He had known him for quite a long time. He knew Martin had been using the land for quite a while. He could not tell how long that had been. He indicated that the survey was for a specific parcel of land.
20. The Village Elder, one Wilson Aria Arua testified on the same date that he hailed from Kanyuma Village where the land was situate. He knew the parcel number as Karabach/390. He had visited it in the course



of the month he gave evidence, that was in April. When he visited it, he saw it had been cultivated and there was a house on it. The house had been built some time back. It was a mud house. It had iron sheets or mabati on it. It was a semi-permanent one. When he visited, he saw it was. He did not see anywhere where the house was broken. It had doors.

21. He added that there was a footpath near the property. He passed on that footpath. He did not go to the land to inspect the property. He did not go onto the property. The footpath did not pass through it. He saw from the side bananas growing. He added that Martin Guyo Ouko had planted on the land before and even at the time of the suit.
22. He added that he was a neighbor to the parties. He had known Martin had been using the land for a long time. He was present when the surveyors came to the land. He knew some of the people who were present and others he did not know.
23. On cross examination he stated that there were trees planted. They had grown to the size of those that can make poles. He did not look this second time to confirm whether the trees were there or not when he went back.

Submissions

24. The application was disposed of by written submissions. The Applicant filed their dated 18th June 2025. The applicants gave the introduction of the case and. Raised the four issues for determination, which were.
 - a. Whether there was a valid and binding court order
 - b. Whether the plaintiff had the knowledge of their said order.
 - c. Whether the plaintiff willfully and deliberately disobeyed the court order.
 - d. Whether the plaintiff's actions amount to contempt of court.
25. Regarding the first issue about the existence of a valid court order. The applicant stated that on 30th January 2023, the Court granted orders of stay of execution pending the hearing of the appeal, being No. COACA No. E0277 of 2023.
26. He relied on the case of Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKR and that of Republic v. Ahmed Abdul Fathi Mohammed & another 2018 eKLR. He submitted that he had provided photographic evidence and a detailed Affidavit to show how the plaintiff entered the suit parcel of land No. 390, cut down trees and demolished houses and ploughed the land in total defiance of the court orders. He added that this evidence was buttressed by that of the village elder who appeared before the court and stated that he witnessed the plaintiff cultivating the land and planting crops. Further, he saw trees that had been initially planted had now been cut down. That he was present when the plaintiff brought a surveyor to the suit property.
27. Further, he relied on the case of the Teachers Service Commission v. The Kenya National Union of Teachers & 2 others [2013] eKLR. He also relied on the cause of Econet Wireless Kenya Limited v. The Minister for Information and Communication of Kenya & another [2005] eKLR, and Mutitika v Bharani Farm Limited [1985] KLR, 227, and Africa Management Communication International Limited v. Joseph Mathenge Mugo & another [2014] eKLR; and Ochino and another v. Okombo & 4 others [1989] KLR, 165. He concluded that the plaintiff had committed contempt of court and should be found guilty.



28. The Plaintiff/ Respondent argued vide a written set of submissions dated The Respondent filed his submission is dated 14th April 2025. In them, he began by submitting that for an application of contempt to succeed, the elements that were discussed in the case of *Efficient Dynamics and Supplies Limited v. Great Cafe Limited*, Environment and Land case E006 of 2023 [2024] KEELC 773 (KLR) (21st February 2024) should be established. He then reproduced the order which was granted on 30th January 2023 which essentially was that the court had granted orders of stay as sought in the application. He added that there was no doubt that the order of stay of execution was in existence, clear and unambiguous. He gave the issues to be resolved which was whether there was a breach of the order and if there was, then whether the Respondent's conduct was deliberate. He relied on the case of *Peter K. Iyego & 2 others vs Pauline Wekesa Kode* (Acc No. 19 of 2024).
29. On whether the Respondent was in violation of the court order, he submitted that he was not. He added that he had never sold the parcel of land. He evidenced it through a certificate of official search. He added that he had been in occupation of the suit land since 1970s. He had been cultivating the land from then on. He referred the Court to the applicant's annexure MGO 1 to argue that it showed the house was intact.
30. He added that there was no order that restrained him from cultivating the parcel of land. Therefore, the defendants/ applicants could not allege that the cultivation was a violation of a court order.
31. He added that the Assistant Chief and the Village Elder testified to the effect that there was a mud house located on the suit parcel of land. It was fairly old. When they saw it, the structure was in a good condition. He referred the court to Annexure MGO 2 which was annexed to the applicant's Affidavit. He added that the photos were taken on 12th March 2025 and they showed that the structure was still in good order.
32. About the use of the land, he admitted that he had been in possession of the suit land, and the applicant had never ploughed it. Further, the trees which had been cut down were cut down in the year 2013 and since then there had never been any trees that had been cut down. He relied on section 107(1) of the *Evidence Act*. He also relied on the case of *Sang v Keter & 5 others* (Environmental Land case number E010 of 2023) [2024] KEELRC 2376 KLR (1st October 2024) (Ruling). He also relied on the case of *Kiricho v Kiricho & 6 others* (Family Miscellaneous Application 8005 of 2022) [2024] KEHC 9853 (KLR) (26 July 2024) (Ruling). He concluded that there was not any sufficient evidence to warrant a finding that there was contempt of court.

Analysis and Determination

33. This Court has considered the application and the main issue for determination is whether the Respondent should be cited for contempt of court.
34. Section 29 of the *Environment and Land Court Act* provides that;

“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”



35. In the case Samuel M. N. Mweru & Others V National Land Commission & 2 Others [2020] eKLR the court held as follows:

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove the terms of the order, knowledge of these terms by the Respondent, failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.

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:

the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

the defendant had knowledge of or proper notice of the terms of the order the defendant has acted in breach of the terms of the order; and the defendant's conduct was deliberate.”

36. In the case of Micheal Sistu Mwaura Kamau V Director of Public Prosecutions & 4 others [2018] KECA 359 (KLR) the court held as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the *Contempt of Court Act* and the ruling of the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & another (supra)*. Secondly, as this Court emphasized in *Jihan Freighters Ltd v Hardware & General Stores Ltd* and in *A.B. & another v R. B.* [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt.”

37. It is not in contention that on 27th September, 2022 this court delivered judgment in favour of the Respondent against the Applicant. It is also not in dispute that the Respondent appealed the said decision vide Kisumu COACA NO. E277 OF 2023. The Applicant made an application for stay of execution and this court vide its ruling on 30th January, 2023 granted the stay orders on condition that the Applicant deposits Kshs. 15,000 with the court which the Applicant complied.
38. The Applicant contends that the Respondent, despite being aware of the orders of stay execution, has interfered with the suit property and destroyed the Applicant's house and trees in disregard of the court orders. In her supporting affidavit, the Applicant annexed photographs that showed the destruction of the suit property.
39. This court is of the further considered opinion that the stay orders of 30th January, 2023 were clear and unambiguous which the Respondent had knowledge of. The only question that follows is whether, indeed, they were disobeyed.



40. The applicant provided photographic evidence, annexure MGO 2, to show the destruction of the house on the suit property. Notably, the photos showed that the house though old was still standing or in position. It has doors but the verandah was wearing out.
41. The Respondent denied ever destroying the house. Indeed, his denial was in tandem with the evidence of the Area Assistant Chief and the Village Elder both of whom testified that they knew the suit land well, they had visited it albeit at different times prior to their testimony but after the application was made and from their observation, the house was intact, as per its old condition. As for the trees, they stated that they did not witness any destruction as alleged. Additionally, they stated that all along it was the Respondent who used to cultivate the land. They also stated that contrary to the allegations of the applicant that he Respondent) had subdivided the land and sold it, what the Respondent did in relation to the complaint was that he had invited a surveyor who visited the land, in the presence of the two witnesses and many other villagers, to establish the boundaries of parcel number 390.
42. The court has carefully and deeply analyzed the evidence, both by affidavit and the oral testimony of the Area Assistant Chief. There is no doubt in my mind that the Respondent has not interfered with the suit land since the time when the orders complained of herein were issued. The testimony of the area Assistant Chief is clear that the structure the applicant said was interfered with was intact when he saw it. This was the evidence of the village elder too. Moreover, the applicant contended that there was suspicion that the Respondent may have sold part of the suit land to third parties who had been visiting the land.
43. It is the humble view of this Court that mere suspicion, whether in civil or criminal matters, in not evidence that a court can use to make a finding of any nature before it. More so, it cannot found a conviction of the nature of contempt proceedings. The applicant wanted this Court to aid her in settling long standing scores. That would be an abuse of the process of the court hence unacceptable.
44. The totality of the evidence as from both affidavit evidence and the testimony of the two officers is that the applicant has not proved her allegations to the required standard. It is my opinion that based on the evidence tendered before this court, the only conclusion is that the Respondent had no intention of disrespecting the subsisting court orders. The application dated 20th February, 2025 is not merited. Consequently, the application dated is hereby dismissed with costs to the Respondent.
45. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM
THIS 31ST DAY OF OCTOBER, 2025.**

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Ms. Odhong holding brief for Ms. Wanyangu for 3rd Defendant/Applicant

Ms. Kimberly holding brief for Ms Obwanda for Respondent.

