



Musiega & another (Suing as personal representatives of the Estate of Joash Adamba) v Musya & 4 others (Environment and Land Case 137 of 2020) [2025] KEELC 8618 (KLR) (10 December 2025) (Ruling)

Neutral citation: [2025] KEELC 8618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 137 OF 2020
SM KIBUNJA, J
DECEMBER 10, 2025**

BETWEEN

**GEORGE ADAMBA MUSIEGA 1ST PLAINTIFF
JUDITH LIVEHA 2ND PLAINTIFF
SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF JOASH
ADAMBA**

AND

**JOEL MUSYA 1ST DEFENDANT
PAMELA AURA OGOLA 2ND DEFENDANT
PAUL ONGIDI AMOLO 3RD DEFENDANT
OCEAN BAY GROUP OF SCHOOLS 4TH DEFENDANT
ALFRED NYADIMO AGUNGA 5TH DEFENDANT**

RULING

1. The plaintiffs moved the court through the notice of motion dated 30th January 2025 seeking for inter alia:
 - a. The 2nd & 5th defendants and their advocates be found to be in contempt of court ruling of 30th October 2024 and be committed to civil jail for six (6) months and or be fined accordingly.
 - b. That the 2nd & 5th defendants and their advocates be denied audience until they purge the contempt.



- c. That an order be issued for OCPD/OCS at the nearest Police Station to the suit property to provide security to accompany the plaintiffs and their valuer as they undertake valuation at the suit property.
2. The application is premised on the five (5) grounds marked (A) to (E) on its face and supported by the affidavit of George Adamba, the first co-plaintiff, sworn on 30th January 2025, deposing inter alia that their application dated 8th November 2023 to be allowed access to the suit property to do valuation was allowed vide the court ruling of 30th October 2024, that was delivered in the presence of 2nd defendant's who also held brief for the 5th defendant's counsel; that the their advocates have contacted the 2nd & 5th defendants advocates through emails that have not been responded to, and phone calls to agree on a suitable date and time for the valuation exercise but only empty promises were given that they will seek instructions from their clients; that the 30 days period given by the court for the exercise has lapsed, and the delay is detrimental to their rights to justice; that the 2nd & 5th respondents' defiance to the court order has gravely undermined the court's dignity and authority and they should be punished, and hence this application; that the order directed the 2nd & 5th defendants "to allow the plaintiffs and their valuer access the suit property to conduct a valuation exercise within thirty (30) days on a date and time to be agreed upon between their counsel."
3. On his part the 5th defendant filed the notice of motion dated 14th February 2025 seeking for "review and/or vary and/or set aside" the orders of 30th October 2024 directing the 5th defendant to grant the plaintiffs access to the suit property. The application is based on the three (3) grounds on its face marked (1) to (3) and supported by the affidavit of Alfred Nyadimo Agunga, the 5th defendant, deposing inter alia that from the pleadings, the suit property was in possession of the 2nd defendant, and that he is finding it hard to comply with the said orders.
4. The 2nd defendant filed the notice of motion dated 21st March 2025 seeking for "review and/or vary and/or set aside" the orders made on 30th October 2024 directing her to grant the plaintiffs access to the suit property. the application is premised on the three (3) grounds on its face marked (1) to (3) and supported by the affidavit of Pamela Auma Ogola, the 2nd defendant, deposing to among others that she is unable to comply orders and seeks for their review on the ground that orders for valuation for purposes of quantification of damages and mesne profits were based on a fishing expedition to benefit a party contrary to the rule and principle of impartiality; that by granting the access orders the court entered into the arena of litigation, yet it should not assist a party to mount a claim; that no prejudice will be suffered by any party if her prayers are granted while she would be prejudiced if the orders are not reviewed.
5. The plaintiffs opposed the 2nd & 5th defendants applications through the replying affidavit of George Adamba sworn on the 25th March 2025, in which he among others deposed that none of the two applications have met the threshold for review under Order 45 of the Civil Procedure Rules; that the 5th defendant has not disputed that the 2nd defendant is his wife and he has not shown that she has denied him access to the suit property; that as per his earlier deposition of 8th November 2023 for the joinder, the 5th defendant has been in possession of the suit property and was undertaking constructions and or other activities that prompted the 1st defendant to sue him in CMCC No. 1895 of 2015, where orders were issued to stop him from the construction on 27th September 2018; that the 2nd & 5th defendants did not oppose the plaintiffs application dated 8th November 2023 for access to the suit property for valuation and are estopped from claiming that it will prejudice them; that the court granted their prayer to amend the plaint to include a prayer for mesne profits from 2017 and it is only fair they be allowed to conduct a valuation on the contested suit property; that as no error on the face of the record or any



new material or evidence that was not in the knowledge of the 2nd & 5th defendants when the order was made has been presented to the court, their applications should be dismissed with costs.

6. The learned counsel for the plaintiffs, filed their submissions dated the 13th June 2025, while that for the 2nd and 5th defendants filed theirs both dated the 21st July 2025, which the court has considered.

7. The issues arising from the three notices of motion for the court's determinations are as follows:

- a. Whether the plaintiffs have established that the 2nd & 5th defendants have disobeyed the orders of 30th October 2024, and if so, whether they should be cited and sanctioned for contempt of court.
- b. Whether the 2nd & 5th defendants have met the threshold for the orders of 30th October 2024 to be reviewed, set aside or varied.
- c. Who pays the costs in each of the three applications?

8. The court has carefully considered the grounds on the three applications, affidavit evidence, submissions by the learned counsel, superior court decisions cited and come to the following determinations:

- a. The 2nd & 5th defendants have not disputed that the plaintiffs served them with their contempt application dated the 30th January 2025. At the time of preparing this ruling, I perused the court record, both physical and CTS, and have not seen any response filed by the 2nd & 5th defendants in opposition to the said application. What I have seen are the two applications dated the 14th February 2025 and 21st March 2025 by the 2nd & 5th defendants respectively, both seeking review of the order dated 30th October 2024, that is the foundation of the plaintiffs' contempt application. It is trite that where a contempt application has been filed, then the court should give it priority to be heard and determined, as the dignity and authority of the court is under threat or challenge. That though the court directed all the three applications to be canvassed together through written submissions so as to fast track the proceedings, the court will proceed to determine the contempt application first before reverting to those for review. In any case, the contempt application was filed first.
- b. Contempt of court was discussed in the case of Republic versus Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited J.R. No. 390 of 2014 where the court held as follows:

“Section 39 (2) (g) of the Act enjoins the Chief Justice to make Rules to provide for, among other things, the procedure relating to contempt of court. However, the rules to regulate the commencing and prosecuting of contempt of court applications under the Act are yet to be made. The law that previously applied in this regard was the *Contempt of Court Act* of 2016, until the decision of the High Court (J. Chacha Mwita) made on 9th November 2018 in Kenya Human Rights Commission v Attorney General & Another, [2018] e KLR. The said decision declared the *Contempt of Court Act* of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of the *Constitution*, and for encroaching on the independence of the Judiciary. I am in the circumstances obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court's orders. It was in this respect observed in Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya, HCMCA No. 13 of 2008, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot



be a gap in the application of the rule of law. In addition, where there is a lacuna with respect to enforcement of remedies provided under the *Constitution* or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the *Civil Procedure Act* to grant such orders that meet the ends of justice and avoid abuse of the process of Court. The applicable law as regards contempt of court existing before the enactment of the *Contempt of Court Act* was restated by the Court of Appeal in Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the *Judicature Act* which provided that:

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 that power shall extend to upholding the authority and dignity of subordinate courts.

This section was repealed by section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.”

As pointed out above, there is no dispute that the 2nd & 5th defendants were served with the contempt application.

- c. Having made a finding that the 2nd & 5th defendants were served with the contempt application, the next aspect to consider is whether the plaintiffs have established that the alleged contemnors has been in wilful disregard or disobedience of the court orders of 30th October 2024. In the case of Econet Wireless Kenya Ltd versus. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J (as he then was) stated:

“It is essential for the maintenance of the rule of law and order that the authority and the 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 of whom, an order is made by a 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”.



In the case of Samuel M. N. Mweru & Others versus National Land Commission & 2 Others [2020] eKLR the court held that:

- “ 38. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’[40] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.[41] Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).[42]
39. These requirements – that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces.[43] Honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa,[44] underlined the importance to the Rule of Law, of compliance with court orders in the following terms: -

Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. the *Constitution* states that the rule of law and supremacy of the *Constitution* are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

The renditions in the above superior court decisions shows clearly that it matters not that the alleged contemnors believe that the order was “irregular or void”. I dare add that it matters not that the alleged contemnor was aggrieved, dissatisfied, or unhappy with the order or the court that issued it. As stated in the case of *Econet Wireless Kenya Ltd versus. Minister for Information & Communication of Kenya & Another* [supra], “It is the obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged”. The truth of the matter is that the order of 30th October 2024 is still in



force and has not been discharged, and therefore, the 2nd and 5th defendants were and still are under a legal duty to obey it.

- d. The threshold of proof of disobedience of court orders is quite strict, and a refusal to obey must not only be wilful, but also replete with mala fides. In the case of Peter K. Iyego & 2 Others versus 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.”

The plaintiffs have tendered proof that is uncontested or rebutted that their advocates have severally contacted the advocates on record for the 2nd & 5th defendants through unanswered emails and telephone to agree on a suitable date and time for the valuation exercise, but only unkept promises were given. In the absence of any affidavit evidence in reply to the contempt application, the court takes the factual materials presented by the plaintiffs as unchallenged, and I have no difficulty in finding that the plaintiffs have proved that the 2nd & 5th defendants wilfully and deliberately disobeyed the court orders issued on 30th October 2024, and the prayer that they be cited for contempt succeeds.

- e. That it is noted that the counsel on record for the 2nd & 5th defendants have not bothered to explain any challenges they may have faced in getting their respective clients to comply with the orders of 30th October 2024. Under section 1A of the *Civil Procedure Act* chapter 21 of Laws of Kenya advocates/counsel, as officers of the court, have a duty, just like the litigants they represent “to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.” The two main prayers in the plaintiffs’ contempt application is for 2nd & 5th defendants and their advocates be found to be in contempt of court ruling of 30th October 2024 and be committed to civil jail for six (6) months and or be fined accordingly; and for the 2nd & 5th defendants and their advocates be denied audience until they purge the contempt. It is therefore surprising that neither the counsel for the 2nd defendant nor that for the 5th defendant found it necessary to advise their respective clients and or themselves to file a rejoinder to the said application.
- f. Now going to the 2nd & 5th defendants review applications dated the 14th February 2025 and 21st March 2025, the starting point should be they have no audience as the plaintiffs’ application has been found to be meritorious and one of the payers is to deny them audience until they purge the contempt. I however find it necessary for posterity’s sake to consider whether the two applications or any of the two has merit. Review of court orders is guided by Order 45(1) of the Civil Procedure Rules that provides that:

- “ 1. Any person considering himself aggrieved-
- i. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - ii. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires



to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.”

The record confirms that the ruling of 30th October 2024 was delivered in the presence of Mr. Kenga, learned counsel for the 2nd defendant who was also holding brief for Mrs Chengo for the 5th defendant.

- g. I have perused the two applications and the submissions thereof, and there is definitely no iota of any “new and important matter or evidence which, after the exercise of due diligence, was not within [the 2nd & 5th defendants’] knowledge or could not be produced by [them] at the time when the decree was passed or the order made.” They have also not pointed out any “mistake or error apparent on the face of the record” that could be the basis of review. The 5th defendant has simply said that he is unable to comply with the orders as the person in possession of the suit premises is the 2nd defendant. The 2nd defendant has on her part blamed the court for issuing the order that will assist the plaintiff and claimed that she is unable to comply with it as it will prejudice her.
 - h. Considering the 2nd and 5th defendants are reportedly husband and wife, I am not convinced that their claims satisfies the ground of “any other sufficient reason”. The orders of 30th October 2024 were issued after a merit inter parties hearing of the plaintiffs’ application dated 8th November 2023 in which they had sought for inter alia joinder of 5th defendant; leave to amend plaint; and order for supervised access to the suit property for valuation. If the 2nd & 5th defendants were dissatisfied or aggrieved with the ruling, one would have expected them to file an appeal within the statutory period or seek for review without undue delay. No appeal was filed and the two applications for review were filed after they were served with contempt application. I would not hesitate to term the two review applications as knee jerk reactions, merely meant to delay the compliance with the court orders of 30th October 2024 and cause unnecessary delay to this proceedings. The two applications by the 2nd and 5th defendants have no merits.
 - i. From the factual materials presented to the court, no appeal was filed against the ruling of 30th October 2024, and it was not until after the plaintiffs filed and served their contempt application dated 30th January 2025, that the 2nd and 5th defendants filed their review applications dated the 14th February 2025 and 21st March 2025, about a month apart.
 - j. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where there is good reasons to order otherwise. That as the plaintiffs have successfully prosecuted their contempt application while the 2nd & 5th defendants are unsuccessful in their review applications, the plaintiffs will have the costs.
9. Flowing from the foregoing determinations, on the three applications, the court finds and orders as follows:
- a. That 2nd & 5th defendants applications dated the 14th February 2025 and 21st March 2025 are without merit and are dismissed with costs.
 - b. The plaintiffs’ application dated the 30th January 2025 has merit and is allowed in the following terms:



- i. That the 2nd & 5th defendants are found to be in contempt of court, having disobeyed the court order of 30th October 2024, by failing to give the plaintiffs and their valuer access to the suit property to do valuation.
 - ii. That the 2nd & 5th defendants are each fined Kshs.100,000 (one hundred thousand) to be paid within fourteen (14) days, in default warrants of arrest to issue, and upon arrest be committed to civil jail for six (6) months each.
 - iii. That the court will not grant the 2nd & 5th defendants and their advocates any further audience until after they purge the contempt, by complying with the court order within the next thirty (30) days.
 - iv. That should the 2nd & 5th defendants fail to comply with the court order within the next thirty (30) days, the Officer Commanding Police Station that is nearest the suit property, to provide security for the plaintiffs, their counsel and valuer, to access the suit premises to do a valuation, within sixty (60) days from today, upon the applicable fee if any being paid.
- c. The 2nd & 5th defendants to bear the plaintiffs' costs in the application.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10TH DAY OF DECEMBER 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiffs : M/s Gitau for Wandabwa

Defendants : Mr Kenga for 2nd Defendant and holding brief for M/s Chego for 5th Defendant.

KALEKYE-COURT ASSISTANT.

S. M. KIBUNJA, J.

ELC MOMBASA.

