

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. E046 OF 2024

NANCY WAKINI WACHIRA
APPELLANT

VERSUS

**BONIFACE MACHARIA MBOO (Suing as the legal representative of
the estate of ANNA MBOO KARIUKI Deceased)**
RESPONDENT

*(Being an appeal from the Ruling and Order of Hon. Charles Mwaniki K
(P.M) delivered on 9th May, 2024 in in Ruiru CM ELC Case No. E185 of
2023)*

JUDGMENT

1. The genesis of this appeal lies in an application dated 15th September 2023 in which the Respondent sought *inter alia* an order of injunction restraining the Appellant, her agents, employees, representatives or servants from constructing, developing, trespassing, occupying, utilizing, dealing and or in any manner whatsoever, interfering with the Respondent's peaceful and quiet enjoyment of land parcel number RUIRU/MUGUTHA BLOCK 1/2534 pending the hearing and determination of the main suit.
2. On 15th September 2023, the Court issued an *ex-parte* order of injunction against the Applicant pending the hearing of the

application and fixed the matter for *inter partes* hearing. After the *inter partes* hearing, the trial magistrate delivered a ruling dated 5th December 2023 confirming the order of injunction pending the hearing and determination of the main suit. The said ruling was delivered in open court in the presence of both counsels.

3. The Respondent subsequently filed an application dated 18th January 2024 pursuant to Order 40 Rule Rules (2), 3(1) and 7 of the Civil Procedure Rules, Sections 1A, 1B , 3A and 63 of the Civil Procedure Act seeking the following orders:

- i. That the orders given by this Honorable court on 5th December 2023 be varied to include an order directed to the Officer in charge of Station (O.C.S) Mugutha Station Ruiru, to supervise and ensure enforcement and compliance with the said orders given in this matter on 5th December, 2023.*
- ii. That the Honourable court be pleased to attach the Defendant/Respondent's property and/or detain her in prison for six (6) months as a punishment for the blatant breach and outright disobedience /contempt of the court orders given on 15th September, 2023 and 5th December, 2023.*
- iii. That the Defendant/Respondent be condemned to pay the costs of this application.*

4. The said application was opposed by the Appellant. In his ruling dated 9th May, 2024, the trial magistrate allowed the application and issued the following orders:

- i. The Defendant/Respondent is hereby fined Kshs.100,000/= to be paid within 7 days, in default of which she will be committed to serve a term of three (3) months in jail.*
 - ii. To ensure that there is no continuance of disobedience, prayer 2 of the Motion is granted.*
 - iii. The Defendant/Respondent is further condemned to pay the costs of this application.*
5. Aggrieved by the said ruling, the Appellant filed the instant appeal citing the following 9 grounds of appeal:
 - i. That the learned trial Magistrate erred in law by delivering a ruling that is contradictory, ambiguous as to its import and meaning and disproportionate to the circumstances at hand for penalizing the Appellant a fine of Kshs.100,000/= and in default, she be committed to civil jail for 3 months and still went ahead to allow the Respondent's prayer No. 2 of their Notice of Motion to jail the Appellant for 6 months, making a total of 9 months civil jail yet the Appellant is in actual possession of the suit property.*
 - ii. That the learned trial Magistrate erred in law by meting out punishment to the Appellant more than once thus subjecting the Appellant to double jeopardy.*
 - iii. That the learned trial Magistrate erred in the decision he reached holding the Appellant liable for contempt and punishment he imposed.*
 - iv. That the learned trial magistrate erred in law by finding that the Respondent had demonstrated disobedience of the trial court Orders by the Appellant to the required threshold. (sic)*

- v. *That the trial Magistrate erred in fact by failing to appreciate that the purported developments were done prior to and long before the trial court issued the injunctive orders.*
 - vi. *That the learned trial Magistrate erred in fact by failing to appreciate that the photographs adduced by the Respondent in the trial court do not have the date and stamp on the face of the photographs clearly indicating when the said photographs were taken and the status before and after the trial court orders were issued.*
 - vii. *That the trial Magistrate erred in law by relying on hearsay allegations made by the Respondent.*
 - viii. *That the learned trial Magistrate exercised his discretion erroneously in allowing the Respondent's Notice of Motion application dated 18th January 2024 despite compelling evidence placed before the trial court and case law in opposition to the said application.*
 - ix. *That the learned trial Magistrate erred in law by disregarding the numerous binding authorities cited by the Appellants' counsel and thereby basing the ruling on wrong principles.*
6. The appeal was canvassed through written submissions which were filed by both parties.

Appellant's Submissions

7. In his submissions dated 19th September 2025, learned counsel for the Appellant identified two issues for determination; whether the learned trial Magistrate erred in law and in fact in finding the

Appellant guilty of contempt without sufficient evidence and who should bear the costs of the appeal.

8. It was counsel's submission that there was insufficient evidence to prove that the Appellant had disobeyed the court order and was therefore guilty of contempt of court. Counsel placed reliance on the case of **Katsuri Limited v Kapurchand Depar Shah (2016 KEHC 6447 (KLR))** where Mativo J (as he then was), cited the book 'Contempt in Modern New Zealand' where the authors 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;*
- b) *The defendant had knowledge or proper notice of the terms of the order;*
- c) *The defendant acted in breach of the terms of the order and;*
- d) *The defendant's conduct was deliberate.*

9. It was counsel's submission that once the Appellant became aware of the court order, he stopped dealing with the suit property. He was of the view that the evidence relied upon by the trial court in concluding that the Appellant had breached the terms of the order fell short of the requisite standard applicable in contempt proceedings, which is higher than on a balance of probabilities.

10. Counsel took issue with the photographs that were annexed to the Respondent's supporting affidavit stating that they did not have a digital date and time stamp on their face so as to show when they were taken and the status before and after the court orders were issued.
11. He relied on the cases of **Regina Odero Pundo v Christine Orimbo & Another (2021) eKLR** and **Rophina Imo Amai v Lawrence Isogo Karani (2020) eKLR** where the court dismissed an application for contempt on the grounds that the photographs were undated.
12. He discredited the Certificate of electronic evidence exhibited by the Respondent and faulted the trial Magistrate for finding that the date and time stamp of the photographs was not challenged.
13. Additionally, counsel relied on the cases of **Mutitika v Baharini Farm Ltd (1985) eKLR** and **Woburn Estate Limited v Margaret Bashford (2016) eKLR** where the courts emphasized that since contempt proceedings are quasi-criminal in nature as they involve the loss of a person's liberty, the alleged breach must be precisely defined in order to prove contempt. The court has further held that the power to punish for contempt must be exercised sparingly. See the case of **Sheila Cassat & Another v Antony Machatha Kinyanjui (2021) eKLR**.
14. With regard to costs, counsel submitted that costs follow the event and that the Respondent should be condemned to pay costs.

Respondent's Submissions

15. Learned counsel for the Respondent filed his submissions dated 13th October, 2025. He pointed out that the Appellant had left out a crucial ruling and order issued by the trial Magistrate on 27th August 2024 yet it was central to the Appellant's case, as he intended to mislead the court. He therefore took the liberty of filing an Additional Record of Appeal dated 18th August 2025 in which he included the ruling on the application for review of the orders issued on 9th May 2024.
16. In the said ruling, the trial Magistrate corrected what he found to be an error on the face of the record in his earlier ruling dated 9th May 2024 by

stating as follows:

“To ensure that there is no continuance of the disobedience, prayer 1 of the motion is granted.”
17. Counsel then proceeded to analyze each of the grounds of appeal. He started by submitting that grounds 1 and 2 in the Memorandum of Appeal had been overtaken by events in view of the ruling delivered on 27th August 2024.
18. With regard to grounds 3, 4 and 7 counsel submitted that the finding that the Appellant was liable for contempt was well founded. He referred to the averments in the Respondent's supporting affidavit as well as the affidavit of Nicholas Sumba Advocate sworn on 18th January 2024 together with the annexures to both affidavits.

19. He pointed out that in her Replying Affidavit, the Appellant had not stated that the suit property was fully developed at the time the application for injunction was filed in order to render the application for injunction irrelevant.
20. With regard to ground 6, counsel submitted that the photograph exhibited at page 237 of the Record of Appeal which is annexed to the affidavit in support of the application for contempt bears the date when the photograph was taken, being 22.12.23. It shows that a new gate had been installed.
21. He added that this was different from the photographs at page 27-30 (Annexure 'BMM2') annexed to the affidavit in support of the application for injunction which shows that no major developments had been done on the suit property.
22. He submitted that there was an explanation in paragraphs 5-12 of the affidavit in support of the contempt application on the dates when the photographs were taken and this is further supported by the Certificate of production of electronic evidence. It was therefore his submission that it was possible to tell the status of the suit property before and after the alleged contempt.
23. Counsel dismissed grounds 8 and 9 in the Memorandum of appeal which alluded to the fact that the trial Magistrate had disregarded the authorities cited by the Appellant. It was counsel's submission that the said authorities were irrelevant as they were inconsistent

with the circumstances of the application for contempt that was before the court.

24. Counsel relied on the decisions in **Civil Appeal No. 247 of 2008, Freight in Time Ltd v Image Apparels Ltd** and **Dr. Fred Matiangi, Cabinet Secretary, Ministry of Interior & Coordination of National Government v Miguna Miguna & 4 Others (2018) eKLR** for the proposition that court orders must be obeyed and that persons who disobey court orders should not be granted audience until they purge the contempt.
25. He concluded that the Appellant had displayed impunity that was beyond comprehension and urged the court to dismiss the appeal with costs to the Respondent.

ANALYSIS AND DETERMINATION

26. This being a first appeal, section 78 of the Civil Procedure Act mandates this court to re-evaluate, re-assess and re-consider the evidence that was adduced before the trial court and arrive at its own findings.
27. In the case of **Selle and Another v Associated Motor Boat Company Ltd and Others (1968) E.A 123**, the court held as follows:

“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of a re-trial and the principles upon which this court acts in

such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, re-evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect”.

28. Additionally, in the case of **Musa Cherutich Sirma v Independent and Electoral Boundaries Commission & 2 Others (2019) eKLR**, the Court held that:

“In reiterating the above position, we affirm that we would only interfere with the Appellate Court’s exercise of discretion if we reach the conclusion that in exercise of such discretion, the court acted arbitrarily or capriciously or ignored relevant facts or completely disregarded the principles of law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the court’s exercise of discretion.”

29. The court also appreciates that it will not ordinarily interfere with the trial court’s findings unless the said findings were based on no evidence at all or on misapprehension of the law and facts or it is shown that the trial court acted on wrong principles. See the case of **Mbogo v Shah (1968) E.A 93**.

ANALYSIS AND DETERMINATION

30. Having considered the ruling dated 9th May 2024 , the Memorandum of Appeal and the entire Record of Appeal as well as the rival submissions and relevant authorities, the following issues fall for determination:

- i. Whether the Appellant was liable for contempt of court.
 - ii. Whether the appeal should be allowed.
31. Before I delve into the merits of appeal, let me address the issue of the Additional Record of Appeal filed by the Respondent together with his submissions. Although I appreciate that it was important to bring the ruling on the application for review of the orders issued on 9th May, 2024 to the attention of the court, I must point out that it was the duty of counsel for the Appellant to seek leave of the court to file a Further Supplementary Record of Appeal as the said ruling has a bearing on the appeal. It matters not that the ruling was perceived to be unfavourable to the Appellant.
32. I will now proceed to determine if the trial magistrate was right in arriving at the conclusion that the Appellant was liable for breach of the injunctive orders.
33. The power of the court to punish for disobedience of injunctive orders is provided under Order 40 Rule 3 of the Civil Procedure Rules stipulates as follows:
 - (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.*
34. In addition to the above-mentioned provision, this court has special jurisdiction to punish for contempt or disobedience of its orders

donated under section 29 of the Environment and Land Court Act which provides that:

“29. 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 both.”

35. The rationale for punishing for contempt was explained in the case of the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR**, the court observed that:-

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is 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.

34. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors. The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.

35. *A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with...*

36. Furthermore, in the case of **Dr. Fred Matiangi, Cabinet Secretary, Ministry of Interior & Coordination of National Government v Miguna Miguna & 4 Others (2018) eKLR** the court emphasized that courts must deal firmly and decisively with any party who decides to disobey court orders. In the said case, the court cited the case of **Hadkinson v Hadkinson (1952) All ER** where it was held that once a party is found to have breached, disobeyed or violated court orders, such a person will not be given audience before the court until he first purges the contempt.

37. In order to make a case for civil contempt the applicant must prove certain elements which were set out in the case of **Katsuri Limited v Kapurchand Depar Shah (2016) KEHC 6447 (KLR)**. In the said case, Mativo J (as he then was) cited the book *Contempt in Modern New Zealand* where the authors 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, unambiguous and were binding;*
- b) The defendant had knowledge 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."

38. I will now proceed to determine if the above requirements were met.

39. On 5th December 2023 the trial magistrate delivered a ruling in which she issued the following orders:

1. 'A temporary injunction is issued restraining the Defendant/Respondent, her agents, employees, representatives and/ or servants from constructing, developing, trespassing occupying, utilizing, dealing and/or in any manner whatsoever interfering with the Plaintiff/Applicant's peaceful and quiet enjoyment of the land parcel no. RUIRU/MUGUTHA BLOCK 1/2534 pending the hearing and determination of this suit.

2. Cost so this application shall be in the cause.

3. Parties to comply with order 11 of the Civil Procedure Rules, 2010. Mention on 22nd January 2024 for pre-trial directions with a view to take a hearing date for the main suit.'

40. The terms of the order of injunction are clear and unambiguous and binding on the Appellant.

41. According to the proceedings of the lower court, the said ruling was delivered in the presence of counsels for both parties. It is not in dispute that the Appellant was subsequently served with the said order and he was therefore aware of terms of the order.

42. Regarding the question of breach of the orders, it is the Respondent's case that despite being served with the said order, the Appellant proceeded with construction and this is what prompted the Respondent to file the application dated 18th January 2024 seeking that the orders given by the court on 5th December 2023 be varied to include an order directed at the OCS Mugutha Police Station, Ruiru to supervise and ensure enforcement and compliance with the said orders dated 5th December 2023.
43. The Respondent also prayed for an order that the Court be pleased to attach the Appellant's property and/or detain her in prison for six months as a punishment for the blatant and outright disobedience of the court orders given on 15th September and 5th December 2023.
44. In his affidavit in support of the application dated 18.1.24 the Respondent averred that despite having been served with the order of injunction dated 5th December 2023, on the 22nd December 2022, the Appellant had in blatant breach of the said order continued with the construction. He annexed photographs of the developments on the suit property both before ("BMM 2" and "BMM 3") and after ("BMM 4"). I have perused the photographs marked as "BMM3" and they bear the date 16.12.23 while the ones marked BMM 4 bear the date 22.12.23.
45. The Respondent also annexed a Certificate of Production of Electronic Evidence describing the equipment used and the dates

when the photographs were taken. This is corroborated by the Affidavit of Nicholas Sumba Advocate sworn on 18th January 2024, in which he depones that he accompanied his client to the suit property on 16th December 2023 and noted that there was fresh cement at the gate. This averment was not controverted by the Appellant.

46. It is therefore not true as submitted by counsel for the Appellant that it is not possible to tell when the photographs were taken. In the premises, I am unable to fault the trial magistrate for arriving at the conclusion that that there was sufficient evidence that the Appellant continued with the development of the suit property after the injunctive orders were issued.
47. As to whether the Appellant's conduct was deliberate, there is nothing to suggest that the Appellant misunderstood the court order and it is therefore clear that his conduct was deliberate.
48. The Appellant has also taken issue with the Ruling and orders issued on 9th May 2024 and complained that the ruling was contradictory, ambiguous as to its import and meaning, and disproportionate to the circumstances at hand for penalizing the Appellant to pay a fine of Kshs.100,000/= and in default, she be committed to civil jail for 3 months.
49. The Appellant further complained that by allowing prayer No. 2 of the Respondent's Notice of Motion, the Appellant was liable to be

jailed for a total period 9 months. She argued that this would amount to double jeopardy.

50. The said order reads as follows:

“ORDER

‘THIS MATTER coming up for ruling on 9th may 2024 before Hon. C. Mwaniki, Principal Magistrate.

IT IS HEREBY ORDERED AS FOLLOWS:

- 1. THAT the Defendant/Respondent be and is hereby fined Kshs. 100,000/= to be paid within 7 days, in default of which she will be committed to a term of (3) three months in civil jail.*
- 2. THAT to ensure that the orders there is no continuance of the disobedience, prayer 2 of the motion is granted to attach the Defendant/ Respondent’s property and/or detain her in prison as a punishment for the blatant breach and outright disobedience/contempt of the court orders given herein on 15th December 2023.*
- 3. THAT the Defendant/Respondent is further condemned to pay the costs of the application.*
- 4. THAT mention on 12/6/24 for pre-trial conference*

Given under the hand and seal of this Honourable Court this 9th day of May 2024.”

51. Order 2 as framed means that in addition to imposing a fine of Kshs.100,000/=, the Appellant’s property would be attached or she would be liable to imprisonment for a term of six months.

52. Although I agree that Order No.2 created some ambiguity, I am aware that the Respondent applied for review of the said order and this ground should therefore not form the subject of this appeal. In any case, this order only relates to the punishment and does not change the fact that the Appellant disobeyed the initial court order of injunction.

53. All in all, I am not satisfied that there are sufficient reasons to warrant any interference with the decision of the trial court. I therefore find no merit in the appeal and I dismiss it with costs to the Respondent.

Dated, signed and delivered virtually at Thika this 22nd day of January 2026.

.....
J. M ONYANGO
JUDGE

In the presence of:

1. Mr Mwangi for Mr. Kimani for the Appellant
2. Mr Sumba for the Respondent

Court Assistant: Hinga