



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC APPEAL E027 OF 2023

TERESIA WAITHIRA1ST
APPELLANT/APPLICANT

LUCY WANJIRU P.KUNGU 2ND
APPELLANT/APPLICANT

HANNAH NJERI GATHORO 3RD
APPELLANT/APPLICANT

WILLIAM NJOROGE KARANJA4TH
APPELLANT/APPLICANT

DOMINIC KIMANI WAITHIRA5TH
APPELLANT/APPLICANT

JOHN MWANGI WAITHIRA6TH
APPELLANT/APPLICANT

MERCY MUTHONI KAGWI 7TH
APPELLANT/APPLICANT

JUDY WANJIKU CHEGE 8TH
APPELLANT/APPLICANT

MARTIN WAINAINA WAITHIRA 9TH
APPELLANT/APPLICANT

VERSUS

HANNAH WAMBUI WAHIGI
ALIAS HANNAH WAMBUI MUHIGI.....
RESPONDENT

RULING

1) What I am called upon to determine is a Notice of Motion Application dated 20/03/2025 with a mixed bag of prayers being sought by the Applicant. The Applicant seeks the following prayers:

- a) Spent.
- b) THAT the time with which to comply with Court orders issued on 22/02/2024 be extended by 30 days from the date of grant of this prayer/order.
- c) THAT this Honorable Court be pleased to vary the Orders issued on 22/02/2024 to read that instead of the security money being deposited in the joint account, the same be deposited in the Court.
- d) THAT a temporary injunction be issued restraining the Respondent by herself, her agents servants employees or otherwise assigns and/or any person whatsoever action on her behalf and/or under her mandate and/or instruction from selling, dealing, interfering, alienating, disposing or otherwise in any manner whatsoever interfering with suit property RUIRU/RUIRU EAST BLOCK 2/3286 or in any way interfering with the Appellants/Applicants rights and interests pending hearing and determination of this application and the appeal herein.
- e) THAT this Honorable Court be pleased to cite **HANNA WAMBUI WAHIGI ALIAS HANNAH WAMBUI**

MUHIGI for contempt of the Court Order and Directions duly issued by the Honorable Court on 22nd February 2024 by deliberately proceeding mala fides to forcefully evict the Appellant/Applicant and destroyed their property commonly prescribed as **RUIRU/RUIRU EAST BLOCK 2/3286** rendering them homeless and affecting their livelihood.

f) THAT an order of committal to civil jail and or a warrant for levy of a fine be issued against **HANNA WAMBUI WAHIGI ALIAS HANNAH WAMBUI MUHIGI** for contempt of the Court order and Directions duly issued by this Honorable Court on 22/02/2024 by deliberately proceeding mala fides to forcefully evict the Appellant/Applicant and destroying their property rendering the homeless and affecting their livelihood.

g) THAT the Appellants/Applicants be compensated for the property and assets destroyed during the unlawful eviction.

h) THAT cost of this application be provided for.

2) That the Application is based on the grounds of the face of it and supported by the Affidavit sworn by John Mwangi Waithira on even date.

3) The application is opposed by the Respondent who filed a Replying Affidavit sworn by **HANNA WAMBUI WAHIGI ALIAS HANNAH WAMBUI MUHIGI** on 27/05/2025. The

Respondent avers that the injunctive orders sought over the suit property are in vain, the suit property having been subdivided in 2019 as evidenced from the mutation form dated 4/06/2019 which is attached to the Valuation Report filed by the Appellants/ Applicants in Court.

- 4) The Respondent further states that the Appellant/Applicant failed to comply with the Orders of Stay as issued by this Court on 22/02/2024 which Orders as made were conditional where the Appellants/Applicants were ordered to deposit a sum of Kesh 230,000 in a joint account of both Advocates within 30 days failing which the orders would lapse automatically and the orders did lapse on 23/03/2024.
- 5) That upon the orders lapsing the Appellant/Applicant's Counsel which was a new firm of Advocates engaged the Respondent's Counsel seeking to open a joint account but this law firm of **M/S Auma and Company Advocates** had not served the Respondent with a Notice for Change of Advocates. Further the request to open a joint account was made vide a letter dated 25/03/2024 and this was two days after the lapse of the stay order issued on 22/02/2024.
- 6) That the same firm of Advocates had sent a letter earlier dated 10/03/2024 but it was sent to the wrong address. Even then, the firm of Advocates was not properly on record only regularizing their appearance vide a Notice of Change of Advocates dated 25/03/2024 - again after the lapse of the stay order.

- 7) That the Appellants/ Applicants were evicted from the suit property on 27/03/2024 under the supervision for security of the OCPD Juja Police Station and OCS Theta Police Stations. From the OB produced by the Appellant/Applicant it does not disclose which property was maliciously damaged and by whom. Thus, the Appellants/Applicants claim for contempt falling below the threshold of establishing contempt of Court.
- 8) According to the Respondent the Appellants/Applicants have brought this application after undue and inordinate delay which is about 1 year and 7 days after the lapse of the stay application.
- 9) It is the contention of the Respondent that there has been deliberate delay in listing the main Appeal dated 6/04/2023 for hearing for a period of more than two (2) years now. That as a matter of fact there is no Record of Appeal filed and served to ensure the said Appeal shall be heard. The Respondent avers that litigation must of necessity come to an end.
- 10) Thus, the Respondent states that once the Court dispenses with the current appeal it should list the main appeal for hearing on a priority basis.
- 11) On the orders sought the Respondent contends that they are overtaken by events since all Appellants/Applicants as already stated were evicted from the suit property on 27/03/2024. Further that there will be no prejudice to be suffered by the Appellants/Applicants if the Court dismissed

this application since they have not shown any irreparable loss they will suffer which cannot be compensated by monetary payment.

12) Parties were directed to file submissions on 18/11/2025.

Analysis and Determination

13) As already pointed out the Appellants/Applicants have made a mixed bag of sorts of an application seeking a myriad of prayers. To start with it is clear that the orders they seek to extend which were issued by this Court on 22/02/2024 lapsed.

14) It is not in dispute that the conditional stay of execution granted on 22/02/2024 lapsed automatically on or about the 23/03/2024 after the Appellants/Applicants failed to avail the Kshs.230,000.00 to be deposited in a joint interest earning account in 30 days. It follows therefore that after the lapse of the conditional stay order on or about 23/03/2024, the Appellant was at liberty to execute the Judgement of the Court delivered on 28/03/2023 **Thika CM ELC No. 23 OF 2018.**

15) It is a fact that by the time this instant application was filed the Respondent had already executed the Judgment by evicting the Appellants/Applicants on 27/03/2024. That as the conditional stay orders issued lapsed on or about the 23/03/2024 there was no application made to extend time before it expired, it follows that by the time the instant application was filed on 20/03/2025, there was no stay order

in existence whose time could be extended, or which could be varied as sought under prayer 3 of the Notice of Motion Application.

- 16) I am wholly in agreement with the decision in the case of **Timon Otieno Mboga v Kenya Forest Service [2016]eKLR** that a conditional order whose time has expired before an application to extend its lifespan, is a dead order and cannot subsequently be extended.
- 17) The alternative would be for the party to consider seeking for a fresh order, but whether the Appellants/Applicants would succeed or not depends on the facts to be presented to the Court. In this suit, there was therefore no stay order in existence by the 20/03/2025 when the instant application was filed, capable of being reinstated, extended or varied.
- 18) The Appellants/Applicants have not attempted to explain the delay in filing of the application, other than blaming the Advocates of the Respondents who they claim to have contacted vide a letter and email on 15/03/2024 and 18/03/2024 but this does not explain why this application was filed one year after the lapse of the conditional stay. The Appellants/Applicants application is undoubtedly without merit and should be dismissed.
- 19) It therefore follows that the application for injunction would only issue if the Appellants/Applicants have a legal claim to the suit property. However, from the facts the

Appellants/Applicants were evicted from the suit property on 27/03/2024. They have not shown the irreparable loss that they stand to suffer nor offered any security that would be critical in a case such as this one.

20) The case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A. 358**, established three fundamental principles that an Applicant must satisfy to be granted an interlocutory (temporary) injunction:

a) **Prima facie case with a probability of**

success: The Applicant needs to show an arguable case with a high likelihood of succeeding at trial, demonstrating a clear right that is likely being infringed.

b) **Irreparable injury:** The Applicant must demonstrate that they would suffer harm that cannot be adequately compensated by monetary damages if the injunction is not granted.

c) **Balance of convenience:** If there is doubt about the adequacy of damages, the Court considers which party would face greater inconvenience or loss from the grant or refusal of the injunction.

21) As it were the Appellants/Applicants were already evicted from the suit property so in the instant application we have Applicants who failed to meet the conditions for a stay order to become operational and who are now seeking a temporary injunction and they have not presented any new

facts. This to me is an abuse of the Court process, particularly since a temporary injunction is an equitable remedy that requires the Appellants/Applicants to act with diligence and meet specific conditions,

- 22) An injunction being an equitable remedy, it requires diligence and it is not granted to those who are indolent like the Appellants/Applicants herein. It is my opinion that considering the principle of "**incurably bad**", a legal process based on a failed or void order is considered "**incurably bad.**" So, this new application is founded on nothing, and it would be unjust to allow the application for injunction.
- 23) At the same time the Appellants/Applicants claim that the Respondent should be cited for contempt for having disobeyed Court order issued on 22/02/2024.
- 24) The Respondent does not deny evicting the Appellants/Applicants but she avers that the eviction was on 27/03/2024 which was after the lapse of the conditional stay order that had been issued by the Court.
- 25) The Court observes that the law of contempt is meant to ensure that the dignity of the Court is upheld. However, the burden of proof that the alleged contemnor is in contempt rests with he who alleges. The standard of proof is higher than the standard of proof in civil cases but not beyond reasonable doubt.

26) The Court in **Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another {2005} 1KLR 828 Ibrahim J** (as he then was) stated as follows: -

"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 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."

27) Contempt proceedings are *quasi-criminal* in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. This principle was reiterated in the case of **Gatharia K. Mutikika vs Baharini Farm Ltd {1985} KLR 227** where it was held as follows: -

"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 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."

- 28) At the same time, in **Peter K. Yego & Others vs Pauline Nekesa Kode Nakuru HCCC No No. 194 of 2004** the Court recognizing that contempt of Court is criminal, held that it must be proved that one has actually disobeyed the Court Order before one is cited for contempt. The Applicant in an application for contempt must prove beyond peradventure that the Respondent is guilty of contempt.
- 29) Although the proceedings are civil in nature, it is well established that an Applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, the fact that the liberty of the Defendant could be affected means that the standard of prove is higher than

the standard in civil cases. It is incumbent on the Applicant to prove that the Defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order. The prayer sought is for committal for contempt. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort.

- 30) In the instant case it is not disputed that the Court had issued a stay order which however was conditional and predicated upon the action of the Appellants/Applicants depositing money in a joint account run by Counsel for the Appellants and the Respondent. Indeed, time was of essence in the Court Order which pegged the order to a 30 day time frame, which time lapsed before the Appellants/Applicants could fulfill the requirements leading to lapse of the stay order.
- 31) Since there was no order in existence, there was no act of contempt for one to hold onto because the Respondent was at liberty to execute.
- 32) I have considered the evidence on record and do find it insufficient to reach the conclusion that the Respondent is guilty of contempt for any actions taken. The application is otherwise dismissed with costs to the Respondent.

33) The Appellant is directed to file and serve the Record of Appeal within 30 days from the date hereof. Mention for directions on disposal of Appeal will be on **9/03/2026**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 28TH DAY OF JANUARY, 2026.

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**MOGENI J
JUDGE**

In the presence of:-

1st - 9th Appellants/Applicants - Absent

Mr. Oguye holding brief for Mr. Kimani for the Respondent

Mr. Melita - Court Assistant

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**MOGENI J
JUDGE**