REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NUMBER E008 OF 2023

LILIAN GACHERI MWENDA……..……APPLICANT

VERSUS

JOSHUA KIRIMI MUKIAMA……RESPONDENT

RULING

1. Before me is the Notice of Motion Application dated the 10/11/2025; brought pursuant to the provision of **Section 5 of the Judicature Act, Chapter 8 Laws of Kenya; and order 40 Rule 3 of the Civil Procedure Rules 2010.** The reliefs sought at the foot of the application are as hereunder:

    i. ***That the application be certified as urgent and the same be heard expeditiously.***

    ii. ***That Joshua Kirimi Mukiama, the Respondent herein, be cited for contempt of the orders of this Honourable court issued on 8th May, 2024, the 6th November, 2024 and 4th December, 2024 by persisting this trespass on the Applicant's land Parcel number 2591.***

    iii. ***That upon citation for contempt, the aforesaid Joshua Kirimi Mukiama, the contemnor herein be sanctioned by committal to civil jail for six [six] months, payment of a deterrent fine and/or any further orders as this court shall deem appropriate.***

    iv. ***That this Honourable court pleased to use a restraining orders restraining the Respondent/contemnor whether***

individually and/or through his proxies or servants acting at his behest from encroaching within 100 meters from Applicant's land parcel number 2591 in order to protect the Applicant's right to exclusive us of her property and deter the Respondent from continued disobedience of court orders.

v. ***That the Officer Commanding Muthara Police Station be ordered to enforce and/or supervise the enforcement of orders of this court granted herein.***

vi. ***That costs of the application be provided for.***

2. The application is premised/anchored on the various grounds which have been highlighted in the body thereof. In particular, it has been contended that this court issued various orders dated 08/05/2024; 06/11/2024 and 04/12/2024 wherein the Defendant was restrained from trespassing onto the suit property. Nevertheless, it has been contended that despite the said orders, the Defendant has persistently disobeyed the orders culminating into the Defendant being cited for contempt. Moreover, it has been contended that the defendant was indeed found guilty and sentenced to serve three months in jail.

3. Furthermore, it has been posited that despite having been sentenced to jail, the defendant has upon being released reverted to the same conduct. The defendant is contended to have continued the offensive activities, by himself and through proxies. In particular, It has been stated that the Defendant has been using one Erastus Mutwiri to trespass onto the suit property; and also to commit other criminal acts, including theft of the Plaintiff's CCTVs camera.

4. Additionally, it has been posited that the defendant has also been grazing his cattle and flock on the suit property and as a result, the Plaintiff has suffered extensive damage and destruction of crops.

5. To this end, it has been averred that several reports/complains have mounted with the police at Muthara Police Station.

6. In view of the foregoing, the Plaintiff has contended that the acts or activities by the defendant constitute[s] and amounts to willful disobedience of lawful court orders. Consequently, the Plaintiff has implored the court to find and hold that the defendant is guilty of contempt and that same ought to be punished by way of committal to jail for a duration not exceeding six months.

7. The application beforehand is supported by the Affidavit of Lilian Gaceri Mwenda [the Plaintiff\Applicant]. Furthermore, the deponent has annexed assorted documents including: copy of the charge sheet relating to the charge against Erastus Mutwiri; the surety document; copy of OB report relating to the events that occurred on 28/10/2025; and copy of photographs [sic] showing Erastus Mutwiri carrying firewood.

8. The Defendant responded to the application *vide* the replying affidavit sworn on [sic] an undisclosed date. However, the Defendant has contended that same has previously been cited and punished for contempt. That upon being released from custody, same has never engaged in any act of trespass or at all. Furthermore, the Defendant has posited that the current application is induced by ulterior motives and a desire by the Plaintiff to ensure that the Defendant is permanently locked in jail. In addition, the defendant has posited that the criminal complaints

and the O. B report that have been exhibited by the Plaintiff form part of a concerted effort and scheme to portray the Defendant as a criminal.

9. The subject application came up for directions on 15/01/2026 whereupon the advocates for the plaintiff proposed to have the application canvassed by way of written submissions. In addition, the advocates sought to file and serve written submissions within 7 days.

10. With the concurrence of the Defendant, the court issued directions pertaining to the hearing and disposal of the application. In particular, the court directed that the application be disposed of by way of written submissions. Moreover, the court also prescribed the timelines for filing and exchange of submissions.

11. The plaintiff filed written submissions dated 15.01.2026 and wherein the plaintiff has adopted the grounds at the foot of the application; reiterated the contents of the supporting affidavit; and highlighted three [3] key issues.
12. The issues highlighted by the plaintiff are: the conduct of the defendant constitute and amounts to willful disregard of lawful court orders; the defendant deserves to be punished for contempt; and that the court ought to grant an order of permanent/perpetual injunction to restrain the defendant from interfering with the plaintiff's land.

13. Though the Defendant participated in the taking of the directions, same did not file written submissions. Moreover, the Defendant intimated to court that same shall now be relying on the replying affidavit.

14. Having reviewed the notice of motion application dated the 10/11/2025; the supporting affidavit thereto; the replying affidavit sworn in opposition; and the written submissions by/on behalf the Plaintiff, I come to the conclusion that the determination of this application turns on three [3] key issues.

15. The issues are: Whether the plaintiff has proved/established contempt to the requisite standard; Whether the order of permanent/perpetual injunction can issue on the basis of an application or otherwise; and what reliefs [if any] ought to be granted.

16. Regarding the first issue, it is imperative to highlight that accusations pertaining to and concerning contempt of court are serious and grave issues. To this end, whenever the issue of contempt is raised, it calls upon the court to interrogate the allegations/accusations and thereafter make appropriate findings.

17. Additionally, there is no gainsaying that the claimant raising and propagating the plea of contempt, is called upon to tender and adduce plausible; cogent; concrete; compelling; and credible evidence to demonstrate contempt. Furthermore, it is common ground that owing to the likelihood of the cite [Contemnor] being committed to jail, the

claimant is called upon to prove the claim/plea of contempt to the intermediate standard, namely; the standard above balance of probability, but below beyond reasonable doubt. [See the holding in the case **Mututika Versus Baharini Farm Limited [1985] eLRL].**

18. The question that does arise is whether the plaintiff has proven and established contempt to the requisite standard. To start with, the plea of contempt is premised on four [4] key aspects. Firstly, it has been contended that the defendant has been committing the offensive acts through one namely; Erastus Mutwiri. In this regard, it has been submitted that the said Erastus Mutwiri trespassed onto the suit land and even stole CCTV cameras belonging to the Plaintiff.

19. Furthermore, it has been submitted that arising from the trespass and theft of the CCTV cameras, the said Erastus Mutwiri, was arrested and charged with a criminal offence at Tigania Law Court. In addition, it has been averred that the Defendant thereafter went to and stood surety to Erastus Mutwiri. In this respect, it has been submitted that the Defendant is therefore guilty of contempt by aiding and abetting the commission of willful acts.

20. My answer to the foregoing submission is simple. It is instructive to posit that the actions complained of are actions of [sic] one Erastus Mutwiri. In addition, the acts complained of are criminal in nature. The acts have led to Erastus Mutwiri being arrested and charged.

21. However, the question that does arise is whether the acts of Erastus Mutwiri, which are contended to be criminal in nature, can be transferred to and be blamed on the Defendant.

22. It is trite and established that criminal acts [if any] are personal on the culprit. Such acts are not transferable to a third party. Moreover, it is not lost on me that the doctrine of vicarious liability does not apply in criminal law and in the criminal justice system. To this end, I am afraid that the aspect of the contempt application, touching on the activities of Erastus Mutwiri, are misconceived. Same cannot ground the citation of the Defendant.

23. The next aspect that has been relied upon relates to the Defendant having trespassed on to the suit property; grazed his cattle thereon; assaulted a worker of the plaintiff; and occasioned destruction of the plaintiff's crops. This aspect of the application is premised on the O.B report made to Muthara Police Station and the Agricultural Assessment Report.

24. Nevertheless, the O. B report[s] which have been tendered and relied upon relates to events of assault and not trespass onto the suit property. In addition, even assuming that O.B reports relates to trespass, no evidence was tendered to show that the Defendant has since been arrested and charged with [sic] trespass onto the suit property.

25. In my humble view, the O B reports made to the police by and on behalf of the Plaintiff; and the Agricultural Officer Assessment Reports, do not suffice to prove the occurrence of trespass.

26. In any event, the plaintiff herein did not address the court on the extent of investigation [if any] that has been taken to connect the Defendant to the commission of the offences relative to the O. B reports.

27. The 3rd aspect that underpins the plea of contempt is anchored on the photographs that have been annexed as exhibits LGM 8. The photographs show the picture of a man carrying firewood. The Person carrying the firewood is said to be one Erastus Mutwiri. However, the photographs do not demonstrate whether it was taken on the suit property or elsewhere. More critically, the photographs in question have not been accompanied by the requisite electronic certificate in line with the provisions of **Section 106 B of the Evidence Act Chapter 80 Laws of Kenya.** For coherence, the provision **of Section 106 B of the Evidence Act** are couched in mandatory terms.

28. The importance of the electronic certificates as pertains to the electronic evidence was underscored in the case **of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] KECA 397 (KLR).**

29. The court stated as hereunder:

> *65.**"Section 106B** of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer."*
>
> *66.In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely*

on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the Evidence Act in its entirety:

"106B (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

> ***(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;***
>
> ***(b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed***

into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—

(a) by combination of computers operating in succession over that period; or

(b) by different computers operating in succession over that period; or

(c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities."

67. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person's activities using a computer or some other electronic devise and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.

68.The Evidence Act does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.

69. *In this case as we have said the electronic record was made by one Denis Kongo, a freelance photojournalist. He, however, did not annex to his affidavit sworn on 11th December 2014 the required certificate. The averments in that affidavit themselves did not meet the above stated threshold of sub-section 106B(2) of the Evidence Act. Those averments therefore fell short of the required certificate. In the circumstances, we agree with counsel for the appellants that the electronic evidence of Denis Kongo was inadmissible and the learned Judge erred in relying upon it."*

30. In my humble, albeit considered view, the photographs *vide* Exhibit LGM8, have no probative value. The photographs are merely cosmetic and aesthetic. Same are ornamental in nature and merely serve decorative purposes. Simply put, the photographs are meaningless in the eyes of the law. To this end, same cannot therefore be relied upon and or referenced for purposes of establishing contempt.

31. The final aspect that anchors the application for contempt is premised on the flash disk annexed as LGM 13 A. The said flash disk was sent to court in its raw form. Furthermore, the flash disk was never played before the court and in the presence of the defendant. Having never been played before the court and the defendant having not been afforded the opportunity to interrogate its contents [if any], the said flash disk cannot be relied upon to found contempt.

32. Further and at any rate, it is not lost on me that the no evidence can be relied upon and taken into account by a court of law, until and unless the adverse party, in this case the defendant, has been afforded due opportunity to interrogate same and where appropriate, afforded opportunity to cross examine the maker. Where such opportunity is not

availed to the adverse party, reliance on such evidence contravenes **Article 50 of the Constitution**.

33. *In a nutshell*, it is my finding and holding that the plaintiff herein has neither proven nor established contempt to the requisite standard. Barring repetition, it is imperative to highlight that the standard of proof is higher than the balance of probabilities.

34. The standard of proof in matters of contempt was settled in the case of **Mutitika v Baharini Farm Ltd [1985] KECA 60 (KLR).**

35. The court stated thus:

> *"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. It is not safe to extend it to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved*
> *"with such strictness of proof ... as is consistent with the gravity of the charge."*

36. The next issue for determination relates to whether an order of permanent/perpetual injunction can issue on the basis of an application, either in the manner sought or otherwise. The Plaintiff herein has sought a restraining order to restrain the defendant whether by himself or agents from encroaching within a 100 meters of the Plaintiff's land. The order is not indicated to be pending the determination of the suit. In any event, it

is common ground that the subject suit was heard and disposed of *vide* Judgment delivered on 08.05.2024.

37. To the extent that the orders of injunction are not tied to an existing suit, the bottom line is that same are intended to exist in perpetuity.

38. The question that does arise is whether such kind of an order can issue on the basis of [sic] an application.

39. The answer to the question is simple. In any event, the answer is derivable from the holding of the court in the case of **Kenya Power & Lighting Company Ltd v Habib [2018] KEHC 5027 (KLR).**

40. The court stated as hereunder;

> *"A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.*
> *9.A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the*

court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties."

41. To my mind, the prayer of permanent or perpetual injunction, whose term limit is not prescribed cannot issue or be granted, either in the manner sought or at all. In any event, the grant of such an order would be contrary to the established norm. Moreover, the impleading of the said prayer was based on misapprehension of the law on injunctions.

42. In the case of **The Headmaster, Kiembeni Primary School versus The Pastor Baptist Church, Kiembeni [2005] eKLR**, the court [per Maraga – J as he then was] stated thus:

> *"I have also seen in other cases in which parties make applications for interlocutory injunctive order similar to the one made in this matter which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders. Such practice is to be highly discouraged. Courts on their part should be wary of such applications bearing in mind the fact that Order 39 does not provide for grant of permanent injunctions at interlocutory stage. See also* ***Shah _v Shah (1981) KLR 374."***

43. Turning to the last issue, namely; what reliefs if at all ought to be granted. The Plaintiff has sought to have the Defendant cited and punished for contempt. However, while discussing issue number one, I have found

and held that the plaintiff has not established contempt to the requisite standard. It then means that the prayer for contempt falls flat on the ground.

44. The other relief that was sought touched on and concerned the grant of an order of permanent/perpetual injunction. I have pointed out that such an order cannot issue on the basis of an application. Moreover, such an order falls outside the purview of **Order 40 of the Civil Procedure Rules.**

FINAL DISPOSITION.

45. From the foregoing analysis, it must have become apparent that the subject application is meritless. It does not satisfy the requisite threshold. Same is a sure candidate for dismissal.

46. In the upshot, the final orders are:

68. The Application dated 10.11.2025 be and is hereby dismissed.

69. Each party shall bear own costs.

2. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 12TH DAY OF FEBRUARY, 2026.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of-:

Hussein - Court Assistant

Mr. Maheli for the Plaintiff/Applicant

Joshua Kirimi Mukiama – Defendant/Respondent present in person.