



**Tsuma v Tsuma (Environment and Land Appeal E048 of 2024)
[2026] KEELC 2089 (KLR) (23 March 2026) (Judgment)**

Neutral citation: [2026] KEELC 2089 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E048 OF 2024
FM NJOROGE, J
MARCH 23, 2026**

BETWEEN

MWAMKALE TSUMA APPELLANT

AND

TSUMA HEBA TSUMA RESPONDENT

JUDGMENT

1. The appellant, being dissatisfied by the ruling and order of Honorable RM Amwayi, P.M., in Principal Magistrates Court at Kaloleni in Environment and Land Case Number E012 Of 2021 appeals to this court on the following grounds namely, that the learned trial magistrate:
 - a. Misdirected herself in law and fact by finding that the appellant was in contempt of court whereas the evidence before the magistrate did not support that finding;
 - b. Erred in law and fact by failing to appreciate that the first to third defendants in that case have their own titles to land and have every right to utilize the same under Article 40 of *the Constitution*;
 - c. Erred in law and fact by failing to consider the first to third defendants' evidence placed before her showing that the plaintiff applicant was liable for harassment and material non-disclosure;
 - d. Erred in law and fact by misapplying herself when it comes to the standard of proof in a matter of contempt and instead lowered the standard to below that of a balance of probability



- e. Erred in rendering a ruling that conflicts with her findings in Environment and Land Case Number E008 Of 2024 that the appellant had bona fide titles and therefore they have a right to be heard;
 - f. Erred in law and in fact by extending the civil jail term applicable to the first appellant to 7 months, a sentence not supported by the law;
 - g. Made findings totally in supportable in law;
 - h. Erred in law and in fact in placing reliance on extraneous evidence and matters in arriving at her decision;
 - i. Deliver a ruling that was in the light of the facts presented before the court disproportionate inappropriate and unreasonable;
 - j. Failed to do Justice to the appellant.
2. It is proposed that the appeal herein be allowed and that the ruling and order delivered by Hon RM Amwayi in Principal Magistrates Court at Kaloleni and Environment and Land Case Number E012 of 2021 be set aside and that the costs of the appeal be borne by the respondent.
 3. The facts are that on 7th March 2023 the 1st -3rd defendants had been committed to civil jail for 30 days with the plaintiff being ordered to cater for their subsistence for failure to honour the decree with regards to payment of costs.
 4. An application dated 18th April 2024 which preceded an issuance of the impugned NTSC ruling, was filed by the plaintiff, seeking that the first defendant or his relatives or employees be summoned to appear in court to show cause why they should not be committed to civil jail and/or purge the contempt for disobeying the decree of court made on 25th May 2022. The application was heard and such Notice to Show Cause was issued, dated 27th May 2024, as per page 112 of the Record of Appeal, requiring the appellant herein to appear in court on 11th June 2024.
 5. The matter was back in court again on 25/6/2024 with a resultant Notice to Show Cause at the instance of the Plaintiff against the defendant/ judgment debtor. No replying affidavit was filed against the Notice to Show Cause. Parties were ordered to file written submissions on the NTSC. The matter was mentioned on 30th July 2024 and ruling was delivered on 20th August 2024 as scheduled.
 6. In the impugned NTSC ruling, the magistrate began by analyzing the defendant's submissions. The appellant had submitted that they had been arrested and committed to civil jail in relation to the decree in 2024, but had been released from prison because the plaintiff failed to honor his legal obligation for their upkeep. The appellant had also submitted that the court having given directions on the execution of the decree and the arrest and incarceration having occurred, the court had no jurisdiction to again entertain the NTSC or issue directions thereon. The appellant had cited the case of Shollei Versus Judicial Service Commission & Another (Application 10 (E016) Of 2022) {2023} KESC 8 (KLR) (CIV) 17th (February 2023) (Ruling).
 7. On his part the respondent had submitted that the Notice To Show Cause arose from the contempt proceedings against the first defendant pursuant to an application which had been allowed by the court; that the show cause notice was taken out against the appellant alone because he was the only one who had trespassed on to the suit land in breach of the decree, and he had been cited as having committed contemptuous acts, and the functus officio doctrine afforded him no defence. Further it was stated that the appellant had ignored the application for contempt and had not defended the same.



Analysis And Determination

8. The only issues arising for determination in the present appeal are follows:
 - a. Did learned magistrate err in law and in fact in issuing the orders that she gave on 20th August 2024?
 - b. Who should bear the cost of this appeal?
9. An examination of the orders issued on 20th August 2024 is necessary. The Learned magistrate stated as follows in her ruling:

“This court issued an order on 7th March 2023 committing all the defendants to civil jail for 30 days. It is clear that the order was in regard to payment of costs which the defendant had failed to pay. However, the present notice to show cause and summons is against the 1st defendant alone for trespassing on the suit land despite the court orders.

The first defendant has failed to show cause why he should not be committed to civil jail for continuing to disobey the decree of this court of 12th April 2022.

This court has carefully considered the materials on record.

G Orders

Accordingly, this court finds that:

 - a. The plaintiff’s NTSC is merited;
 - b. Warrants of arrest to issue against the 1st defendant;
 - c. The 1st defendant is hereby committed to civil jail for 6 months from the date of arrest;
 - d. The plaintiff to cater for his subsistence.”
10. The first ground is that the court misdirected itself in finding that the appellant was in contempt whereas the evidence did not support that finding. This court is of the view that the finding as to contempt was made in a ruling on an application dated 18th April 2024 which is not being appealed in the present appeal. In that application it was stated that the appellant had, despite the orders of the court, proceeded to place beacons, demarcate and cultivate on, the plaintiff’s land. I have perused the Record of Appeal and I have seen no replying affidavit to that application which implies that the allegations therein were not controverted in any manner by the appellant. The appellant only came in later after the Notice To Show Cause had been issued pursuant to that application, and filed an affidavit dated 19th June 2024 opposing the Notice To Show Cause. In this court’s view he was too late in doing so. The juncture at which he ought to have opposed the application and proved that he was not in contempt of court was during the hearing of the application itself not at the Notice To Show Cause stage. The resistance to the Notice To Show Cause while the substantive orders issuing the Notice To Show Cause had not been set aside was unreasonable. It is like failing to attend court leading to a formal proof of one’s case, and then resisting the implementation of the decree without setting aside the ex parte judgment first. Ground number (a) (c) (g) (h) and (i) of the Memorandum of Appeal therefore lack merit and are for dismissal.
11. This court does not see how ground number (b) is related to the issue of the Notice to Show Cause.



12. Regarding ground number (d) the appellant appears to be complaining about the standard of proof in a matter for contempt, which, according to him, was unnecessarily lowered by the magistrate. However, the very first thing to note even in addressing this complaint is that the application dated 18th April 2024 was not opposed by the appellant. The learned magistrate did not have any material from the appellant before her and had to issue her decision on the basis of information given only by the respondent herein. She did not have much to go by. Matters before her were matters of fact. She did not have any basis for saying that they were not true or were incorrect; this was simply because there was no opposition from the appellant. In that regard I do not see how she can be faulted for having upheld the factual claims by the respondent here in and for having arrived at the orders that she did. However, it is vital to note that she also cautioned herself that committal to civil jail deprives an individual of liberty which is a fundamental freedom, and it must be therefore done as an absolute last resort, and she cited the case of *Elijah Momanyi P/A Anassi Momanyi and Company Advocates Versus Bartera Maiyo 2006 eKLR*. She stated as follows at paragraph 15 of her ruling:

“I have read the Affidavit of Service sworn on 20th of May 2024 and it is clear that the first defendant was served with a Notice to Show Cause why he should not be committed to civil jail for continuing to place beacons, demarcating and cultivating the suit land in breach of the court orders.”

13. Since the acts complained of had been set out in the application and had not been opposed, the learned magistrate was not bound to go out on a fact-finding mission outside the record before her to establish whether they were correct or not. She relied on the supporting affidavit for evidence to support those facts. I have perused the affidavit dated 18th April 2024 sworn by Tsuma Heba Tsuma, the respondent herein. Paragraph 12 states that the appellant herein sent Omar Mwamkale and Sabori Mbaji to plough and cultivate the land. Paragraph 12 exhibits pictures of the activities of the appellant or his agents cultivating on the land. Paragraph 13 speaks of the warnings that the respondent gave to the appellant and his kin for breach of the court order. Paragraphs 14, 15, and 16 speak of how the matter was escalated to the Rabai Police Station, it is alleged that the police investigated the matter and they realized that the appellant and his kin were guilty of nuisance. Though no Police OB extract is attached to that supporting affidavit, this court also notes that there is no opposition to those assertions even now. This court is of the view that perchance the assertions had been incorrect, it was for the appellant, herein, who had been duly served, to file a response denying the same and putting the respondent herein to strict proof, which did not happen. I therefore find that the trial magistrate did not lower the standard of proof required in contempt cases at all, but that she acted reasonably on the evidence that was before her and came to the right conclusion. Besides, the learned magistrate correctly reasoned that the prior jail term served by the appellant and others was on the basis of failure to pay costs; she differentiated it from the jail term proposed in the current NTSC for trespassing on the suit land. Ground number (d) must therefore fail.

14. I have found no submissions in respect of ground number (e) in the Memorandum of Appeal and it has not been urged and it therefore fails for lack of supporting arguments and evidence.

15. Regarding ground number (f), it is correct that a jail term of 7 months exceeds the 6 months envisaged by the law in contempt convictions; However, going back to the ruling dated 20th August 2024, this court fails to see where in that ruling it has been stated that the appellant has been committed to civil jail for 7 months. Instead, paragraph (c) in the orders issued at page 4 of the ruling states as follows:

“(c)The first defendant is hereby committed to civil jail for 6 months from the date of arrest.”



16. Ground (f) is also therefore for dismissal for want of substantiation.
17. Consequently, the entire appeal before lacks merit and it is therefore dismissed with costs to the respondent

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 23RD DAY OF MARCH 2026.

**MWANGI NJOROGE,
JUDGE, ELC, MALINDI.**

