



REPUBLIC OF KENYA
THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC LAND APPEAL NO E034 OF 2025

HENRY MUSAU MWANIA.....
APPELLANT

VERSUS

AGNETA **KAVINDU.....**
.....RESPONDENT

JUDGMENT

**[Appeal from the ruling of Hon. M. A. Nanzushi SPM,
delivered on 9/06/2025 in Mavoko CM's Court, MCELC Case
No. E022 of 2023, Henry Musau v Agneta Kavindu]**

1. This judgment arises from a post-judgment ruling by the learned trial magistrate, who was considering the notice of motion dated 7th November 2024, in which the respondent had instituted contempt proceedings after judgment against the appellant for failing to comply with the terms of the court's decree issued on 9 April 2024. In the contempt proceedings,

she had sought the court to find the appellant in contempt of the court orders issued on 9th April 2024, commit him to civil jail for a period of six months, and compel him to comply with the orders of the court.

2. In the judgment and decree, the trial court, in dismissing the appellant's case and allowing the respondent's counterclaim, granted the following reliefs in favour of the respondent: she was declared a joint owner of all that property referred to as Plot No. 51, Phase 1, Mlolongo ("**suit property**"), together with the respondent; she was given unconditional access to the suit property; she was declared entitled to 50% of the monthly rent collected from the rental houses erected on the suit property; and lastly, the appellant was directed to henceforth deposit 50% of the monthly rent collected from the rental houses erected on the suit property and the respondent was granted the costs of the suit and interest thereon.
3. This motion, supported by the grounds therein, along with the supporting affidavit and annexures, including the decree, notice of entry of judgment to the appellant, and a return of service by the process server indicating these documents were served and deposited on 7 November 2025.
4. The appellant opposed the motion through his replying affidavit deposited on 27 January 2025. In this affidavit, he

made general assertions on the incompetency of the motion and stated that it was premature and legally untenable as it seeks to enforce a judgment otherwise than in accordance with the relevant provisions of the **Civil Procedure Rules** and that it did not meet the requisite legal criteria for contempt as envisaged in **Section 5(1)** of the **Judicature Act**.

5. Further, that nothing had been placed before the court to demonstrate that any contemptuous act(s) as alleged by the respondent had been committed and that a Notice to Show Cause (“NTSC”) had never been served and allegations by the respondent that a court order was served and that there was an undertaking to settle the assessed costs were misleading, false, made in bad faith, and amount to hearsay. The respondent had failed to prove that the decree was breached, disobeyed, or violated, warranting the commencement of contempt proceedings. He also sought leave to cross-examine the respondent on the allegations raised in the affidavit in support of the application.
6. Although not included in the record of appeal, the lower court record reveals that the respondent filed a further affidavit in rejoinder to the motion, which was deposed on 17 February 2025. In it, she stated that she was aware that the respondent had, on several occasions, visited her counsel’s offices to

discuss the judgment and decree and also sought his cross-examination.

7. On considering the motion, the trial court stated that it had reviewed the motion, annexures and its decisions, presumably the judgment, and found the motion to be meritorious. It ordered the appellant to purge the contempt within 30 days; failure to do so, NTSC to follow.
8. This decision did not augur well with the appellant, and he moved this court by filing an application dated 25 June 2025 seeking a stay of execution. Still, that application is now overtaken by events. He also filed a memorandum of appeal on the instant date and raised several grounds: -

a) The trial court erred both in law and fact by holding the appellant guilty of contempt when no evidence whatsoever was presented by the respondent to establish the alleged contempt.

b) The trial court erred in law by requiring the appellant to purge a contempt that was non-existent.

c) The learned trial Magistrate erred in law by not carefully applying the relevant law on contempt before reaching her decision.

d) The trial court was clearly mistaken in finding the appellant guilty of contempt, yet no due process was observed.

e) The trial court erred in law by disregarding and/or failing to make any reference to the appellant's submission dated 18 February 2025, which cited decisions from higher courts that could have helped it reach a fair and impartial ruling.

9. Thus, the appellant urged this court to set aside the impugned ruling and all consequential orders and substitute it with an order dismissing the motion dated 7 November 2024. He also sought the costs of the appeal.

10. Thereafter, the appeal was canvassed through written submissions filed by the respective parties' counsel, with the appellant's filed by **Ms. L. N. Ngolya & Co. Advocates** dated 11 December 2025 and the respondent's by **Ms. B.M Mung'ata & Co. Advocates** dated 6 February 2026.

11. Nonetheless, it is important to address certain preliminary issues that arose in the submissions. In his submissions, the appellant contended that an improper legal procedure was used to initiate contempt proceedings. Although this matter was raised as an issue before the trial court and canvassed, it was not presented as a ground of appeal, and therefore, it was inappropriate for the appellant to raise this issue in his submissions. In arriving at this, this court is guided by the Court of Appeal decision of **Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited) [2019] eKLR**, which held that in an appeal, a party is not at liberty to change the nature of his case surreptitiously at the submissions stage.
12. The appellant also raised the ground of appeal that the learned trial magistrate neglected to consider his submissions. While this court concurs with the appellant's claim, it is emphasised that no prejudice has been caused, as he was given an opportunity to re-argue his case before this court.
13. Turning to the respondent's submissions, she contended that the appellant had raised new grounds of appeal by contending that he was never served with the decree and notice of entry of judgment. However, and respectfully, the court disagrees with counsel for the respondent, as **ground (c)** of the appeal questions the trial court's appreciation of the law on contempt

proceedings, and one such requirement of the law on this ground is the service of the order one is alleged to be in contempt of.

14. Accordingly, as this is a first appeal, the authority of this court is set out in **Order 42 Rule 32** of the **Civil Procedure Rules**. Additionally, the court shall be guided by the principles articulated in the well-cited case of **Selle v Associated Motor Boat Company Ltd [1968] EA 123**, which encapsulates the guiding principles as follows: an appellate court shall not interfere with the challenged decision unless it is convinced that the learned trial magistrate misdirected herself and consequently arrived at an erroneous decision, exercised her discretion improperly, and thereby caused injustice through such an erroneous exercise.
15. With regard to the matter presently under consideration, this court has meticulously examined the records, the impugned ruling, the grounds, and the competing submissions. Thus, it is the considered opinion of this court that the remaining grounds of appeal can be sufficiently consolidated into a single issue, namely, **whether the learned trial magistrate erred in law in concluding that the appellant was in contempt of court**. We shall proceed accordingly.

16. Now, concerning the legal framework for contempt proceedings, it must be noted that **Section 5** of the **Judicature Act** is bereft of the procedure for instituting contempt proceedings, and consequently, this court has to seek recourse in the practice applicable in the High Court of Justice in England and Wales. These procedures were well considered in the Court of Appeal decision of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR**. Hence, it is prudent for this court to stipulate the relevant law. **Rule 81.4** of the **England and Wales Civil Procedure Rules**, which deals with the ingredients of contempt applications, provides thus: -

“(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.

(2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—

(a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

(b) the date and terms of any order allegedly breached or disobeyed;

(c) confirmation that any such order was personally served, and the date it was served,

unless the court or the parties dispensed with personal service;

(d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;

(e) whether a penal notice had been added to the front of any order allegedly breached or disobeyed included a penal notice;

(f) the date and terms of any undertaking allegedly breached;

(g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;

(h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

(i) that the defendant has the right to be legally represented in the contempt proceedings;

(j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;

(k) that the defendant may be entitled to the services of an interpreter;

(l) that the defendant is entitled to a reasonable time to prepare for the hearing;

(m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;

(n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;

(o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;

(p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;

(q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;

(r) that the court's findings will be provided in writing as soon as practicable after the hearing; and

(s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.”

17. Moreover, with respect to this court’s jurisdiction to entertain contempt proceedings, the same is derived from **Section 29** of the **Environment and Land Court Act**. Having laid down the relevant law, it is now necessary to consider the prevailing jurisprudence on contempt proceedings as pronounced in our various courts. In this regard, as held in the Supreme Court of Kenya decision of **Republic v Ahmad Abolfathi Mohammed & Sayeed Mansour Mousavi [2018] KESC 51 (KLR)**, contempt proceedings are quasi-criminal and they must be exercised with utmost care and only as a last resort; an applicant must establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the court order.
18. Further, as stated in the decision of **Aaron Gitonga Ringera & 3 Others vs. P. K. Muite & Others, Nairobi HCCC No. 1330 of 1991**, which was cited with approval and summarized in **KAR v JR [2023] KEHC 18588 (KLR)**, the ingredients in contempt proceedings are that: (a) there must be an existing court order capable of being disobeyed; (b) the alleged contemnor must have been made aware of the

existence of the court order; and (c) there must be shown to be a breach (disobedience) of the said court order.

19. Usually, and as stated in the decision of **Mutitika v. Baharini Farm Limited [1985] KLR 229, 234**, which was cited with approval in **Republic v Ahmad (Supra)**, the standard of proof in contempt proceedings is higher than proof on the balance of probabilities, almost but not exactly, beyond a reasonable doubt. Therefore, this is the measurement against which the proceedings before the trial court will be considered.

20. The 1st step is proof of service. However, it is evident from the impugned ruling that the learned trial magistrate did not address this aspect. Accordingly, it is incumbent upon this court to scrutinise whether proper service was ever effected. According to the record and submissions received, the appellant asserted that he was never served with a decree, while the respondent contended otherwise, citing the return of service sworn by Alex Wambua Muthenya on 7 November 2025.

21. From the record, the appellant was represented by the firm of **M/s. Evans Muli & Co. Advocates** from the commencement of the suit until 20 January 2025, when his current law firm was granted leave to come on record for him. Given that counsel represented the appellant, the decree

should have been served upon his erstwhile counsel as the authorised agent in the proceedings until such time that the said law firm was discharged from representing the appellant. However, this was not so.

22. Furthermore, upon careful examination of the return of service which purported to demonstrate that the appellant was personally served with the decree, this court, in agreement with his counsel, is not convinced that the appellant was indeed served, as among other reasons, the time of service is not specified, or does it specify whether the process server personally knew the appellant or the identity of the individual who personally identified him. **Refer to Order 5, Rule 15(1) of the Civil Procedure Rules and Form No. 4 of Appendix A.**

23. Therefore, this court must find and conclude that the appellant was never served with the decree. It also finds that, in the absence of service of the decree, the legal threshold for finding him in contempt was never reached. It further finds that the learned trial magistrate erred in declaring the appellant guilty of contempt and erred in allowing the notice of motion dated 7 November 2024.

24. Ultimately, for the reasons and findings stated above, the appeal is allowed. The ruling rendered by the trial court on 9

June 2025 is hereby set aside and substituted with an order dismissing the notice of motion dated 7 November 2024. It is well-established law that costs follow the event, but due to the nature of the relationship between the parties, each party shall bear their own costs of the appeal.

Judgment accordingly.

Delivered and Dated at Machakos this 28th day of April, 2026.

**HON. A. Y. KOROSS
JUDGE
28.04.2026**

**Judgment delivered virtually through Microsoft Teams
Video Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant

Mr. Watuka for respondent.

Mr. Ngolya for appellant.