



Morara & 2 others v Koske (Suing as the Legal Representative of the Estate of Michael Kichirchir Bor) & 2 others; Kipleitich (Interested Party) (Environment and Land Case E027 of 2024) [2025] KEELC 5396 (KLR) (16 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5396 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE E027 OF 2024**

**CK NZILI, J
JULY 16, 2025**

BETWEEN

**SAMMY MAGETO MORARA 1ST PLAINTIFF
JOSEPH OMBATI MAGETO 2ND PLAINTIFF
DENNIS BIGINGA NYATORI 3RD PLAINTIFF**

AND

**JOSEPH KIPRUGUT KOSKE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MICHAEL KICHIRCHIR BOR) 1ST DEFENDANT
GEORGE MWANGI 2ND DEFENDANT
PETER JOSEPH ODHIAMBO 3RD DEFENDANT**

AND

SARAH CHEPCHIRCHIR KIPLEITICH INTERESTED PARTY

RULING

1. Before the court is an application dated 14/5/2025, seeking civil warrants of arrest and committal of the respondents to civil jail, for disobeying orders of injunction issued on 2/8/2024 and on 3/4/2025. The grounds are set out in the affidavit of Sammy Mageto Morara, sworn on 14/5/2025. It is deposed that, though a surveyor's report dated 8/10/2024, attached as annexure SMM-1, the defendant was shown his land as claimed in a decree issued on Kitale ELC No. 76 of 2018, annexed as SMM-2 and later on ordered to stick to his land through an order dated 25/3/2025, attached as annexure SMM-3.



2. The applicant avers that in a contempt of court application dated 27/3/2025, parties compromised the application and an order was made annexed as SMM-4, which was served on the respondents with on 5/5/2025, as per attached annex as SMM-5, which unfortunately they have also flouted.
3. The application is opposed through a replying affidavit by Joseph Kiprugut Koske on 13/6/2025, grounds of opposition dated 13/6/2025 and preliminary objection dated 26/5/2025. He denies the alleged contempt of court and alleges that he is only occupying 6 acres of land from the original parcel number, in line with paragraph (iv) of the decree dated 27/2/2024 in ELC No. 76 of 2018. Further, the 1st respondent avers that in the said decree, the applicants were to vacate the 6 acres out of the original suit parcel.
4. As per the consent date 25/3/2025, the 1st respondent deposes that it was signed with the understanding that he will remain on the parcel of land that he has been occupying after the applicants were evicted and restrict himself to his land as per the decree. The 1st respondent deposes that he could not have entered into a consent to move out of his land, otherwise; it is the applicants who have misinterpreted the consent, which was not related to the fraudulent mutation by the defendant in ELC No. 76 of 2018, that were declared null and void by the said decree, as they were lis pendens, as per the judgment and decree attached as JKK-1 (a) and (b).
5. The 1st respondent deposes that he is occupying the decreed portion and has not encroached or occupied any other land that does not belong to him. The 1st respondent states that the survey report referred to was not conducted based on the said judgment and decree and therefore, does not give the court position of his land and also does not conform to the registered mutation, but the ones which occurred on 14/6/2022, before they were rendered null by the judgment in ELC No. 76 of 2018, at the instance of the defendant in the said case.
6. The 1st respondent avers that he was not a party to the said mutation. The 1st respondent deposes that the applicants are now realizing too late that the defendant in ELC No. 76 of 2018 sold to them parcels of land that are non-existent on the ground, hence the reason that they are occupying her portion on the ground, where they had been evicted from and now want to use fraudulent mutations to evict him. The 1st respondent denied any contempt of court, given that the registrar resurveyed the land to effect the decree, which has not been opposed against or reviewed. The 1st respondent says that the applicants cannot bring the suit as they were not the proprietors of Kapomboi/Kapomboi Block 3/Kobos 744, 745, 746 and 634.
7. The 1st respondents avers that the applicants became the registered owners of 744, 745, and 634 as per JKK-2, 3, 4, and 5, having the pendency of ELC No. 76 of 2018, whose decree rendered them void and were properly evicted and therefore, this suit seeks to defeat his decree in the earlier suit dated 27/2/2024, by reading it in isolation.
8. The applicants rely on written submissions dated 10/6/2025. Reliance is placed on Kenya Human Rights Commission -vs- Attorney General [2018] eKLR, Michael Sistu Mwaura Kamau -vs- Director of Public Prosecution & Others [2018] KECA 359 [KLR], Matafali -vs- Luteshi [2024] KEELC 1470 (KLR), Mose -vs- Kirwa [2024] KEELC 5134 [KLR], Kenya Tea Growers Association -vs- Francis Atwoli & Others [2012] KEHC 2757 [KLR], Gladys Vuldi & Another -vs- Daniel Kipkerer Rugut [2019] KEELC 3910 [KLR] and Felistus Muliro Nanjala -vs- Robert Koech & Others [2016] eKLR.
9. Contempt of court arises when a person refuses, fails or neglects to obey an order or direction of the court. Courts have the power to punish those who indulge in such acts. Such acts tend to undermine the dignity and the authority of the court and to bring disrepute and disrespect. A court exercises this power to uphold the majesty of the law and the administration of justice. See Samuel M.N. Mweru



- & Others -vs- National Land Commission & Others [2020] eKLR. Court order or directions remain binding against a party to whom it is addressed.
10. In *Mutitika -vs- Baharini Farm Ltd* [1985] KECA 60 (KLR) and *Shimmers Plaza Ltd -vs- NBK* [2015] eKLR, the court held that an applicant must prove the terms of the order, knowledge of the terms of the order, willful and deliberate failure to comply or obey such orders. See also *Kenya Tea Growers Association -vs- Francis Atwoli & Others* [2012] eKLR.
 11. Service of court processes is very critical as provided in Order 5 Rule 8 (1) of the Civil Procedure Rules. An applicant must prove that the alleged contemnor, even if not served with the order, was aware of the same. See *Woburn Estate Ltd -vs- Margaret Bashforth* [2016] eKLR.
 12. In *Samuel M. N. Mweru & Others -vs- National Land Commission & 2 others* [2020] eKLR, the court observed that a deliberate disregard is not enough, for the contemnor may genuinely, albeit mistakenly, believe he or she is entitled to act in the way claimed to constitute the contempt. The court said that the disobedience should be both willful and deliberate and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt of court. Further, the court said that an honest belief that non-compliance is justified or proper is incompatible with that intent.
 13. The 1st respondent has raised a preliminary objection that this court has no jurisdiction, since the suit is res judicata, the applicants title and sale agreements were nullified in a decree in Kitale ELC No. 76 of 2018, the said decree still stands, the title deeds held by the applicants were issued lis pendens, the mutation and title deeds relied upon were nullified, the plaintiffs were evicted from the suit parcels of land, the suit is an abuse of the court process and that the alleged consent did not in any way, set aside the existing decree.
 14. In the supporting affidavit by the applicants, sworn on 14/5/2025, annexure SMM-2 is a decree of this court dated 27/2/2024 for a suit between the 1st respondent and the interested party in this suit. The suit parcel of land No. Kapomboi/Kapomboi Block 3/Kobos/311 was decreed to the 1st respondent herein. Title L.R No. Kapomboi/Kapomboi Block 3/Kobos/743 was cancelled and directed to be registered in the name of the 1st respondent. The interested party and her agents, servants, or purchasers were directed to vacate the 6 acres of land comprised of the original L.R No. Kapomboi/Kapomboi Block 3/Kobos/311. Any sale(s) of the suit parcels of land made during the pendency of the suit were quashed and nullified. Annexure marked SMM-3 and SMM-4, are the order that the 1st respondent is said to have disobeyed. The second order was made in presence of the parties and their lawyers. Indeed, the parties signed the court file proceedings on that day.
 15. The applicants now say that the 1st respondent has disobeyed the order by failing to move out of their land. The 1st respondent on the other hand alleges misinterpretation of the court orders by the applicants; otherwise, he had a decree nullifying the title deeds allegedly issued to the applicants during the pendency of his suit, which were also based on sale agreements that the decree in his favour nullified or quashed. The 1st respondent avers that the suit before this court is an abuse of the court process and is also res judicata. Other than the photos attached as SMM-5, which lack a certificate of electronic production, there is nothing else to show how the 1st respondent has flouted the court orders.
 16. The 1st respondent has told the court that he has a valid decree of this court which has not been set aside, appealed against, or reviewed. The decree is dated 27/2/2024. The plaintiffs in this suit came to court by a plaint dated 18/7/2024, long after the decree was issued. In paragraph 3 of the plaint, they pleaded that on 26/6/2024, the defendant, without any reasonable cause, entered parcels L.R Nos. 643, 744, 745, and 746 forcefully, destroyed their property and kicked them out, yet they are the registered owners of the suit parcels of land. They seek for a declaration that they lawfully own



- L.R Nos. Kapomboi/Kapomboi Block 3/Kobos/634, 744, 745, and 746, a permanent injunction and general damages for trespass. The plaintiffs also obtained a temporary injunction dated 2/8/2024.
17. In a supplementary affidavit dated 6/9/2024, the plaintiff admitted that the suit parcels of land were a resultant subdivision of L.R No. Kapomboi/Kapomboi Block 3/Kobos/311, the subject matter in ELC No. 76 of 2018.
 18. In an amended defence and counterclaim dated 3/3/2025, the 1st defendant pleads that the suit parcels of land were nullified in ELC No. 76 of 2018, a lawful eviction occurred according to the said decree, the sale and transfers were *lis pendens* and it was fraudulently done to defeat his suit. The defendant seeks nullification and cancellation of the four titles held by the plaintiffs; they should vacate the land given the decree, and the 6 acres of land revert to him. In a reply to defence dated 3/9/2024, the plaintiffs admit the alleged forceful takeover and term it as an unlawful eviction, since they are duly registered and lawful owners of the suit parcels of land, that ELC No. 76 of 2018 was specific to 6 acres out of 12 acres and the defendant has a title for parcel No. 743.
 19. The plaintiffs did not file any defence to the counterclaim. A preliminary objection is a pure point of law raised on the assumption that the point pleaded by one party is admitted. See *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696.
 20. *Res judicata* is duly invoked if:
 - (a) There is a final decision by a court of competent jurisdiction.
 - (b) It was heard and determined on merits.
 - (c) The subject matter and the title are the same.
 - (d) Parties are the same or litigating under the same title.
 21. In *Attorney General & Another -vs- E.T.* [2012], the court observed that, courts must guard against litigants who evade *res judicata*, by introducing new causes of action to seek the same remedy before the court and that the test is whether the second suit is trying to bring before the court in another way and in a new form for a new cause of action which has been resolved by a court of competent jurisdiction. In *Omondi -vs- NBK & Others* [2001] EA 137, the court said parties cannot evade the doctrine by merely adding other parties or new cause of action; otherwise; there would be no end to litigation over the same issue by allowing parties to give a cosmetic face lift in the same issue or matter.
 22. In *Henderson -vs- Henderson* [1843] - 60 ALLER 378, the court held that the parties are required to bring forward their whole case and should not litigate in installments, regardless of whether there was inadvertence, negligence, or mistake such that part of the suit was omitted.
 23. The purpose of *res judicata* was discussed in *Independent Electoral & Boundaries Commission -vs- Maina Kiai & 5 Others* [2017] KECA 477 (KLR). The court held that *res judicata* ensures finality or closure of suits and avoids a re-opening of issues and suits already determined by a competent court, to avoid wastage of time and resources. The court said that without *res judicata*, the judicial process would be rendered a nuisance and brought to disrepute and calumny.
 24. The applicants admit the existence of the former suit and decree before this court. Out of the decree, the 1st respondent succeeded against the interested party who, during the pendency of ELC No. 76 of 2018, caused subdivisions of the title, the subject matter of the suit, as per annexures JKK-2, 3, 4, and 5 on 5/10/2022. *Lis pendens* was defined in *Ruth Kinyua -vs- Patrick Thuita Gachure & Another* [2-15] eKLR, as the jurisdictional power or control acquired by a court over property while a legal action is



- pending, intending to stop any alienation of property before a judgment or decree is issued to defeat the same course of proceedings.
25. In *Mawji -vs- US International University & Another* [1976] KLR 183, the court held it is necessary for final adjudication of matters before the court and in the general interest of public policy, good and effective administration of justice. The court observed that a purchaser of a property actually in litigation *pendente lite*, is affected in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.
 26. Applying the foregoing case law, the 1st respondent alleges that he is not guilty of contempt of court, otherwise, he mistakenly signed the consent hoping that the decree in his favour could not be affected and that to interpret the consent otherwise, could defeat the interests of justice especially when the title deeds held by the applicants are already invalidated by the said decree.
 27. The applicants did not file a supplementary affidavit to refute the averments on the implications of the decree, *vis-à-vis* the two court orders issued herein. It is a trite law that parties should make full disclosure and should not obtain court orders through deceit and non-disclosure of material facts. In *Motor Vessel Lilian "S" -vs- Caltex Oil (K) Ltd* [1989] eKLR, it was observed that a party who obtains *ex parte* orders through concealment or non-disclosure of material facts ought to be deprived of such benefit by having such orders set aside. Order 40 Rule 7 of the Civil Procedure Rules speaks of such behavior.
 28. From the pleadings, it is clear that the applicants were aware of the decree issued against the interested party and its implications to this suit. This court cannot sit on appeal of its judgment in a suit over the same title or issues that was litigated on the merits to finality. The decree is clear on the mother title, the resultant sale agreements, transfers and registration that occurred during the pendency of the suit.
 29. A preliminary objection can be brought at any time. It must be a pure point of law, where the facts are not contested. See *BWM -vs- JMC* [2018] eKLR. The 1st defendant has tendered evidence to sustain the plea of *res judicata*, abuse of court process, and *lis pendens*. See *United Insurance Co. Ltd -vs- Scholastica A. Odera, Kisumu HCA No. 6 of 2005*, and *Quick Enterprises Ltd -vs- Kenya Railways, Kisumu HCC No. 22 of 1999*.
 30. The 1st respondent has demonstrated when the decree was made and the time the applicants acquired their title deeds. It cannot be heard from the mouths of the applicants that they were not aware of the decree and or for then to term the forceful eviction as unjustified. The applicants seek damages for trespass and a permanent injunction, while aware that the said eviction and nullification of the sales, transfers, registration of titles that they hold from the judgment debtor in the former suit were sanctioned and nullified by this court.
 31. Court decrees are not made in vain. A party cannot shut its eyes to one court order and seek to obtain an opposite order. That would amount to a mockery of the court and an abuse of the court process. The applicants should have sought the setting aside of the former decree, review and or have sought joinder post judgment. They could also have sued the interested party separately for recovery of the consideration paid. The decree in the former suit covered issues or facts that are part of the subject matter in litigation. The interested party did not raise a defence that third parties would be affected.
 32. The judgment was in *rem*. it determined the title to the property and the rights of the parties, not merely as between themselves but also against all persons at the time who were dealing with them or with the property upon which the court had adjudicated. See *Kamunya & Others -vs- Attorney General & Others* [2007] 1 EA 116.



33. The upshot is that I find the preliminary objection dated 26/5/2025 merited. The suit is dismissed with costs to the defendant. The application by the plaintiffs is dismissed with costs. All existing orders are hereby vacated. File marked as closed.

34. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 16TH DAY OF JULY 2025.

In the presence of:

Court Assistant - Dennis

Ashioya for the 1st defendant present

Barongo for the plaintiff present

HON. C.K. NZILI

JUDGE, ELC KITALE.

