



**Mutua v Kang'e (Environment and Land Appeal E002 of 2023)
[2024] KEELC 431 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

**LG KIMANI, J
JANUARY 30, 2024**

BETWEEN

KALUNDI MUTUA APPELLANT

AND

SIMON MUTULI KANG'E RESPONDENT

JUDGMENT

1. The Appellant appeals to this court from the ruling of Honourable John Aringo SRM delivered on 14th December 2022 in Kyuso MC ELC Suit No. E004 of 2020 and sets forth the following grounds in his Memorandum of Appeal dated 16th December 2022:
 1. That the Learned Magistrate erred in law and fact in failing to appreciate that the Respondent's Application dated 14th November 2022 was in respect to the alleged disobedience of the order issued by the court on 5th October 2022 and not on the decree issued by the Court on 19th September 2022.
 2. That the Learned Magistrate misdirected himself in law and in fact in failing to appreciate that the order dated 5th October 2022 upon which the application for contempt was founded was not directed at the Applicant and the terms contained in the order did not require the Appellant to do or not do anything.
 3. That the Learned Magistrate erred in law and in fact in failing to acknowledge the fact that the Appellant having been evicted from the subject land and having offered no resistance to the eviction, the Appellant couldn't in any way have disobeyed the court order issued by the court on 5th October 2022.
 4. That the ruling by the Learned Magistrate was based on extraneous facts and matters not pleaded before him by the Respondent in his application for contempt dated 14th November



2022 and the Learned Magistrate erred in fact and law by ruling on matters outside the scope of the application before him.

The Appellant prays that the ruling delivered on 14th December 2022 be set aside and the sentence meted out to the Appellant be quashed.

The Case Before the Trial Court

2. The suit before the trial court was instituted by way of the plaint dated 21st October 2020. The plaintiff therein is the Respondent in this appeal and he claimed ownership of land number P/NO. Kyuso/ Kyuso 'A'/24 by purchase. He claimed that the defendant erected a house on the land without his consent. The Plaintiff sought a permanent injunction restraining the defendant from the suit property, an order that the defendant be evicted from the suit land and costs of the suit. Judgment was delivered on 19th September 2022 in favour of the Plaintiff.
3. The Plaintiff filed an application dated 28th September 2022 where he sought orders to be put in possession of the suit property by removal of the Defendant. He also sought that the court's bailiff and/or licenced auctioneers be directed to put the Plaintiff in possession and remove any person or structure bound by the judgement and final decree issued by the Hon Court on 26th September 2022. The Plaintiff also sought the assistance of the OCS Kyuso Police Station. The orders sought in the application were granted by the court on 5th October 2022. It is stated that the said orders were executed on 6th October 2022 and the Appellant was evicted from the suit land.
4. Subsequently, the Plaintiff filed an application dated 14th November 2022 which forms the subject matter of this appeal where he sought the following orders;
 1. Spent
 2. The Defendant (Appellant herein) be committed to civil jail for (6) six months for being in contempt of court
 3. The Defendant/ Respondent properties be attached and/or detained in prison for a term not exceeding (6) six months unless in the meantime the court directs otherwise.
 4. The OCS Kyuso Police Station supervises and gives security to the Plaintiff to access his property P/NO. Kyuso/kyuso 'A"/24
 5. The grounds in support of the application were that Defendant had disobeyed the court's order issued on 5th October 2022 which had been executed on 6th October 2022 and the Plaintiff put in possession of the suit property. The Plaintiff claimed that the Respondent was served with the order during execution by the Auctioneers.
 6. The Plaintiff/Applicant claimed that immediately after the defendant was served with the order and the same was executed, she denied the Applicant access to his property by chasing him together with nine (9) other people who were working on the Plaintiff's land.
 7. The Applicant claimed that the defendant was bound by the judgment and decree issued by the court on 19th September 2022, which was delivered in his favour.
5. The Trial Court delivered its ruling on 14th December 2022 noting that the Defendant was aware of the decree which had been given effect by execution through the police in broad daylight and cannot claim that he was not aware of them and not served with the order. The Court found that there was no doubt that the defendant was in contempt of court and ordered her to pay a fine of Ksh.50,000 or serve 6 months in prison in default for contempt of court. The Appellant filed an appeal against this ruling.



The Appellant's Submissions

6. Counsel for the Appellant submitted that the trial court order issued on 5th October 2022 was never served upon the Appellant and there is no affidavit of service to show how and to whom it was served. Relying on the elements of civil contempt of court as enumerated in the case of Katsuri Limited v Kapurchand Depar Shah (2016)eKLR, the Appellant submitted that knowledge and proper notice of the orders is one of the elements. Counsel also submitted that the standard of proof in contempt is higher than that of civil proceedings as the offence is in the nature of criminal proceedings. Counsel relied on the case of Gatharia K. Muitikika v Bharini Farm Limited (1985)KLR 227.
7. Regarding obedience to the court orders, the Appellant submitted that the said orders of 5th October were duly executed on 6th October 2022 the Appellant was removed from the suit property the Respondent was put in possession and the auctioneers removed the structures on the same date, therefore there was no contempt of court. The appellant denied chasing the Respondent and his workers from the suit land and stated that there was no evidence to show the same or that she planted crops on the suit land. Counsel for the Appellant relied on the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & others (2013) eKLR cited with approval in Obare Mochache Walter v Samwel Apoko Onkwani & 2 others (2018) eKLR
8. It is also submitted that the issue of disobedience of the decree could not have been raised at this ruling as it was dealing with a different application and parties are bound by their pleadings and relied on the cases of Obare Mochache Walter v Samwel Apoko Onkwani & 2 others (2018) eKLR and North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others (2014) eKLR.
9. The Appellant's Counsel submitted that the Honourable trial magistrate erred in determining unpleaded issues and thereby denied the Appellant an opportunity to be heard on the matter in violation of natural justice and the Constitution and that no evidence was ever produced before the court to demonstrate that the Appellant disobeyed any court orders and relied on the case of Sheila Cassat Issenberg & another v Antony Macatha Kinyanjui (2021) eKLR.

The Respondent's submissions

10. The Respondent submitted the elements necessary for proof of civil contempt as was given by Mwitwa J in the case of Sheila Cassat Issenberg & another v Antony Macatha Kinyanjui (2021) eKLR and the finding of Mativo J. in Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties);ex-parte Applicant Pravin Galot(2020)eKLR that the order should be construed by its language and must be read as a whole to ascertain it's intention. Their submission is that the court intended to permanently restrain the defendant from dealing with the suit property which was clear and express.
11. On the element that the alleged contemnor must have had actual knowledge of the court order, the Respondent relied on the Court of Appeal case of Shimmers Plaza Limited v National Bank of Kenya Limited (2015) eKLR where it was held that knowledge of a court order suffices and there was no need for personal service as well as the holding in the case Basil Criticos v Attorney General & 7 others (2012) eKLR.
12. The Respondent highlighted that the Appellant and her advocate were present in court when the judgment was delivered and read out and that she was aware that she was required not to interfere with the plaintiff's use of the property.



13. On intentional disobedience, the Respondent submitted that while had contracted 9 workers to assist him in clearing the land, the Appellant suddenly showed up and became disruptive and claimed that she was the owner of the land while she had already been evicted from the land and was aware that she should not be on the suit land.
14. Regarding the costs of the appeal, counsel for the Respondent quoted from Section 27(1) of the Civil Procedure Act and the Supreme Court that costs follow the event in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* (Sup. Ct Petition No.4 of 2012;(2014) eKLR) as well as the case of *Cecilia Karuru Ngayuv Barclays Bank of Kenya & another* (2016) eKLR.

Analysis and Determination

15. This appeal relates to the ruling of the trial Magistrate Honourable John Aringo SRM delivered on 14th December 2022 in Kyuso MC ELC Suit No. E004 of 2020. The application that gave rise to the ruling and order appealed from was filed by the Respondent herein under Notice of Motion dated 14th November 2022 where he sought orders that the Defendant (Appellant herein) be committed to civil jail for (6) six months for being in contempt of court. He also prayed that the Defendant's properties be attached and/or detained in prison for a term not exceeding (6) six months unless in the meantime the court directs otherwise and that the OCS Kyuso Police Station supervise, and give security to the Plaintiff to access to his property P/NO. Kyuso/kyuso 'A"/24. The prayers sought were granted by the Court.
16. In the court's view, the grounds of appeal set out in the Memorandum of Appeal can be consolidated and dealt with together as one issue of "Whether the Appellant committed contempt of court orders and whether she was rightfully found to be in contempt by the trial court."
17. Before the enactment of the nullified Contempt of Court Act which was declared unconstitutional, the first port of call with respect to the procedure for institution contempt of Court proceedings in this country was and therefore is section 5 of the Judicature Act Cap 8 Laws of Kenya. That section provides:
 - "(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.
 - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court."
18. Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. Under Rule 81.4 of the English Civil Procedure Rules (Amendment No. 3) Rules, 2020 provides for the requirements of a contempt application and provides that:
 - "(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) confirmation that 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.”

19. Contempt of a court order is a serious offence and is in the nature of criminal proceedings and, therefore, proof against a contemnor is higher than the balance of probability. This is because the liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order if he were to succeed. This was aptly stated by the court in the case of Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [2021] eKLR relied on by both the Appellant and the Respondent where the court cited with approval the case of Gatharia K. Mutikika v Baharini Farm Limited [1985] KLR 227 Petitioners that:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It 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 criminal cases. It is not safe to extend it to offences 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 to 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 party of the judge 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... 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 contempt is alleged to or has been committed, and or 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.”

The Court went on to quote with approval as follows:

“The Cromwell J, writing for the Supreme of Canada in *Carey v Laiken*, 2015 SCC 17 (16th April 2015), expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:

- i) The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.



- ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
- iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. (emphasis)”

20. Arising out of the above authorities and legal provisions, the first question to be answered is whether the court order stated clearly and unequivocally what the Appellant should and should not do. The Appellant contends that the application dated 14th November 2022 related to the order issued on 5th October 2022 and not to the judgment and/or Decree. She faulted the trial Court stating that the ruling was based on extraneous facts and matters not pleaded before him in the Respondent’s application for contempt dated 14th November 2022 and as such the Learned Magistrate was accused of erring in fact and law by ruling on matters outside the scope of the application before him.
21. The terms of the order issued on 5th October 2022 read as follows:
1. That the Plaintiff/Applicant be and is hereby put in possession of the property No. P/ NO.Kyuso/Kyuso ‘A’/24(the subject of the matter) herein by the removal of the defendant/ respondent from the suit property.
 2. That the Court’s bailiff and/or licensed auctioneers be and is hereby directed to put the Plaintiff/Applicant in possession and remove any person or structure bound by the judgment and decree issued by this honourable court on 26th September 2022.
 3. That orders (1) and (2) herein be effected with the assistance of the OCS Kyuso Police station.
 4. That the costs of the application and the exercise of the removal/eviction of the defendant/ respondent’s structure be borne by the defendant/respondent.
22. It is clear that this court order was made in furtherance of the execution of the trial court’s judgement and decree and was not a novel or extraneous matter to the application and the suit. The said order is very clear as to what was expected of the Appellant in that she was to be removed from the suit parcel of land and the Respondent put in possession of the same. The said order also referred to the judgment and decree of the court and directed the removal of any person or structure bound by the judgment and decree issued by this honourable court on 26th September 2022.
23. Further, the judgement and decree of the court issued a permanent injunction restraining the defendant and others from interfering with the suit parcel of land which the decree stated was the property of the Respondent herein.
24. It is thus the finding of this court that the court order in issue was clear unambiguous and unequivocal.
25. The other issue for consideration is whether the Appellant had actual knowledge of the order. The Appellant contended that she was not served with the court order of 5th October 2022. The requirement in the case of *Gatharia K. Mutikika v Baharini Farm Limited* (supra) is whether the party alleged to have breached the order had actual knowledge of the order. The Respondent relied on the court of appeal holding in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR:

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case



such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case."

26. The Respondent submitted that the Appellant together with her advocate on record were present in court when the judgment was delivered and read out and that she was aware that she was required to vacate the suit property and not interfere with the plaintiff's use of the property. From the record of proceedings before the trial court, the judgment was read out in open court on the 19th of September 2021, it shows that both the Plaintiff and the defendant were present.
27. Further, the court record shows that on 5th October 2022 when the application dated 28th September 2022 came up before the trial court for inter partes hearing both parties were present and the Appellant told the court "I have my Advocate". The trial Court went ahead and granted the orders sought in the said application in terms of prayer 1, 2, 3, and 4. In the circumstances, the Appellant cannot claim that she was not served with the order and claim that she had no knowledge or was not aware of the order of the court.
28. The court concludes that the Appellant had knowledge of and was aware of both the judgement of the court and the order issued on 5th October 2022. Indeed the court finds that since the Appellant was present in court when the order was made, there was no requirement for personal service of the order. The Court agrees with the holding of Lenaola J (as he then was) in the case of *Basil Criticos v Attorney General & 8 others & 4 others* [2012] eKLR when he held as follows:

"The law has changed and as it stands today knowledge supersedes personal service and for good reason. This has recently been held in *Kenya Tea Growers Association vs Francis Atwoli & 5 Others*, Petition No.64 of 2010 where I opined as follows;

"In the case before me, I am more than satisfied that even at the higher level of beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the Court Order had stopped it. He went further to interpret it as made without jurisdiction and that only the "Workers Court", (the Industrial Court) had jurisdiction to determine the matter. He did not do so once but on a number of occasions as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding." The point above is that where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it."

29. The next issue for consideration is whether there is evidence of contempt. The Appellant contends that there was no evidence of the alleged acts of contempt. According to the affidavit in support of the application for contempt, the Appellant accused the Respondent of denying him access to his property together with nine people who were working in the suit property. He stated that the said conduct was in contempt of the order of the court and the Respondent was deserving of punishment by the court. The Appellant filed a replying affidavit where she made various allegations of continuous harassment by the Respondent since the court gave a go-ahead to have her evicted from the land by using police officers. She stated that she was evicted from the land on 6th October 2022.



30. The Appellant further stated that she had been accused of threatening to kill the Respondent and had appeared before the DCI on 27th October 2022 but the case went cold when her Advocate intervened. She denied chasing the Respondent from the suit land and stated that since being evicted from the suit land she had not returned to the land and that it beats logic for the Respondent to claim that she had denied him access to the land when her houses had been demolished. She further stated that there was no proof of when and how she had denied the Respondent access to the suit land as she no longer stays on the suit land.
31. The Appellant submitted that the threshold of proof for civil contempt is higher than a balance of probabilities as they are in the nature of criminal proceedings as they relied on the case of Mutitika v Baharini Farm Ltd (supra) where the court of appeal found that:
- “We agree with Mr. Khaminwa’s submissions in this respect. 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 an 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 ...”
32. On this issue, the court has considered the seriousness of a finding of guilt in contempt of court proceedings as was found in the above case of Gatharia K. Mutikika v Baharini Farm Limited (supra). The offence must be proved satisfactorily and such proof must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The court also found that the guilt of the person accused has to be proved with such strictness of proof as is consistent with the gravity of the charge and that recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice.
33. It is the Court’s view that the allegations of contempt made by the Respondent were brief and quite lacking in details and particulars. For instance, the Respondent did not give the date and time of the offence, the persons that were chased from the suit land by the Appellant were not stated and no reason was advanced as to why their names could not be given. The Respondent did not also give the form in which the chasing took and as submitted by the Appellant the Respondent needed to show how one person was able to chase away ten people from the land.
34. In the court’s view, the standard of proof in a contempt of court case required more information and/or evidence to be adduced than what the Respondent adduced. It is noted that the Respondent’s Counsel tried in submissions to give details of what they claim happened when the Respondent allegedly took some people to clear the suit land. This information was not contained in the application before the trial court and in the supporting affidavit of the Respondent. In the case of Obare Mochache Walter v Samwel Apoko Onkwani & 2others [2018] eKLR the court found as follows on the question of unpleaded issues;
- “I have considered the evidence on record and the submissions filed on behalf of the parties. In his submissions, the petitioner introduces specific issues that were not pleaded. Faced with a similar scenario, the court in the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others [2013] eKLR stated as follows:



“It is established law that parties must confine themselves to their pleadings. A court of law will be seen to deviate from disputed issues if it engages in matters that are not specifically pleaded in the plaint. The court is therefore not bound to render any opinion on any new issues raised in the submissions.”

35. The Court finds that the extra information stated by the Respondent in submissions by Counsel is not properly before the court and cannot be relied upon in arriving at the court’s decision. The Court further finds that the evidence adduced of the acts stated to constitute contempt of court was not sufficient to show that the Appellant against whom allegations were made, intentionally committed the acts she was accused of or that she indeed committed the said acts at all. The court thus finds that the trial court erred in finding the Appellant in contempt of court.
36. The upshot of the above findings is that the appeal herein succeeds and the following orders are made.
1. The appeal herein is hereby allowed.
 2. The trial Court’s ruling delivered on 14th December 2022 be and is hereby set aside and the sentence meted on the Appellant is hereby quashed.
 3. Costs of this appeal are hereby awarded to the Appellant.

DELIVERED, DATED AND SIGNED AT KITUI THIS 30TH DAY OF JANUARY, 2024

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court and virtually in the presence of-

Musyoki: Court Assistant

M/S Mwikali for the Appellant

Omari for the Respondent.

