



**Komu (Suing through the Estate of Johnson Kamau Komu - Deceased)  
v Mwangi; Kirima & another (Interested Parties) (Environment & Land  
Case E117 of 2022) [2024] KEELC 258 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 258 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E117 OF 2022  
OA ANGOTE, J  
JANUARY 25, 2024**

**BETWEEN**

**LEAH NGENDO KOMU ..... APPLICANT**

**SUING THROUGH THE ESTATE OF JOHNSON KAMAU KOMU - DECEASED**

**AND**

**VIRGINIA MWANGI ..... RESPONDENT**

**AND**

**ANNE W KIRIMA ..... INTERESTED PARTY**

**TERESIA KIRIMA ..... INTERESTED PARTY**

**RULING**

1. The Plaintiff/Applicant has filed a Notice of Motion dated 1<sup>st</sup> February 2023, in which she has sought for the following orders:
  - a. That this Honourable court be pleased to issue an Order directed at the respondent to be summoned to show cause why she should not be punished for contempt of Court Order issued on 16<sup>th</sup> June 2022.
  - b. That the Directors of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the Director of Survey be committed to civil jail for six months for contempt of court of the order issued on 16<sup>th</sup> June 2022.
  - c. That in the alternative, Directors of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Director of Survey be fined Kshs. 10,000,000 for contempt of court of the order issued on 16<sup>th</sup> June 2022.
2. The application is based on the grounds that this court issued an order on 16<sup>th</sup> June 2022 restraining the Respondent from trespassing, putting construction materials on or in any way generally dealing



with 0.0142 acres in the property being plot no. 5908/8 Corner Shop No. 1, pending hearing and determination of this summons.

3. The Applicant deponed that on the weekend of 4<sup>th</sup> December 2022, the Respondent re-commenced construction on the demised property as shown in the annexures of the Plaintiff's Supporting Affidavit and that the Respondent does not appreciate the orders of the court which she has been served with.
4. The Applicant deponed that the Respondent is in contempt of the court order issued on 16<sup>th</sup> June 2022 and should be committed to civil jail for six months and or in the alternative be fined Kshs. 10,000,000 for contempt of court.
5. The Respondent has opposed the application in the Grounds of Opposition dated 18<sup>th</sup> May 2023 in which he averred that there is a pending matter pending before the High Court at Milimani ELC 1257 of 2017 [*John Otieno Obade & 299 Others vs Teresiah Wairimu Kirima and Anne Wangari Kirima*] in which the subject properties are known as LR No. 5908/8 and 6852/2 and that this matter is the mother file to several other matters which were consolidated being:
  - a. ELC 509 of 2014 *Naridai Muoroto Self Help Group v James Gatundu & 6 others*.
  - b. ELC No. 850 of 2014 *Paul Ndungu Kioi v Lawrence Kimondo Mutua and another*.
  - c. ELC 1318 of 2013 *Teresia Wairimu Kirima v Father Romea & another*.
  - d. *Teresia Wairimu Kirima v Virginia Mwangi & 2 others*.
6. It was deposed that the said consolidation was pursuant to a ruling by Justice Mutungi on 17<sup>th</sup> March 2015; that all the parties herein are already currently involved in that matter which has not been concluded and that this application is misguided, frivolous, scandalous and a blatant abuse of the court process and ought to be dismissed with costs to the Respondent.

### Submissions

7. Counsel for the Plaintiff/ Applicant submitted that this court issued an order of injunction restraining the Defendant/Respondent or his servants and agents from trespassing, putting construction materials or in any way dealing with the suit property and that the order was duly served upon the Respondent and an affidavit as proof of service was filed.
8. It was submitted by the Applicant's advocate that the mode of service was through Whatsapp; that the order of 27<sup>th</sup> April 2022 was confirmed on 15<sup>th</sup> June 2023; that the confirmed order was also served through the Respondent's Whatsapp and that while the Respondent stopped the construction, on the weekend of 4<sup>th</sup> December 2022, the Respondent commenced construction.
9. Counsel for the Respondent submitted that the standard of proof in contempt proceedings is higher than proof on the balance of probabilities. Counsel relied on the cases of Gatharia K. *Mutikika vs Baharini Farm Limited* [1985] KLR 227; *R vs Attorney General & Another Ex parte Mike Maina Kamau* and *Peter K. Yego & Others vs Pauline Wekesa Kode* Acc No. 194 of 2014, where the court stipulated the elements to be satisfied in an application for contempt of court.
10. It was the Respondent's Counsel's submission that at no point was the Respondent aware of the orders dated 16<sup>th</sup> June 2022; that the said orders were never served upon her and it cannot therefore be alleged that she deliberately and in mala fide disobeyed the orders of this court and that while the Applicant filed a return of service showing that they served the Respondent, the said screenshot does not disclose the number that was served with the order, leaving open the possibility that they saved any number using the name of the Respondent.



11. Counsel submitted that contrary to Order 5 Rule 22 C of the [Civil Procedure Rules](#), the evidence adduced by the Applicant constituting a screenshot of a Whatsapp conversation does not indicate the phone number that was served.
12. Consequently, it was submitted, there is no sufficient proof that it is the Respondent's last known and used telephone number as required by the law and that the affidavit of service is defective and therefore there is no proof of service of the orders upon the Respondent. Counsel relied on [Esther Nyaboke Ondara vs Susa Njeri & 3 others](#) [2021] eKLR.

### Analysis and Determination

13. Upon consideration of the Plaintiff's application and the Respondent's Grounds of Objection, the issues for determination before this court are:
  - a. Whether this suit is *sub judice*
  - b. Whether the Respondent is in contempt of court.
14. This suit was instituted by way of Originating Summons, in which the Applicant sought a declaration that he is the legal purchaser and owner of Plot No. 5908/8 corner shop no. 1, and a declaration that this Court be pleased to issue an order of injunction restraining the Respondent and her agents from trespassing, putting construction materials or in any way dealing with the suit property.
15. The Respondent has raised an objection to this suit, on the grounds that the same is *sub judice*. The law on *sub judice* is set out in Section 6 of the [Civil Procedure Act](#), as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

16. The rationale of the *sub judice* rule is to diminish the chances of courts of equal jurisdiction issuing conflicting decisions over the same subject matter. This was stated by the Supreme Court in [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others \(Interested Parties\)](#) [2020] eKLR as follows:

“The term ‘*sub-judice*’ is defined in [Black's Law Dictionary](#) 9<sup>th</sup> Edition as:

“Before the Court or Judge for determination.” The purpose of the *sub-judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”



17. On the basis of the above, the Respondent ought to have established that there is more than one suit over the subject matter herein; that both suits are pending before courts of competent jurisdiction and that the suits are between the same parties.
18. The Respondent has asserted that there is a matter pending before the this court being ELC 1257 of 2014 [*John Otieno Obade & 299 Others v Teresiah Wairimu Kirima and Anne Wangari Kirima*] in which the subject properties are known as LR No. 5908/8 and 6852/2 and that this matter is the mother file to several other matters which were consolidated being:
  - a. ELC 509 of 2014 *Naridai Muoroto Self Help Group v James Gatundu & 6 others*
  - b. ELC No. 850 of 2014 *Paul Ndungu Kioi v Lawrence Kimondo Mutua and another*
  - c. ELC 1318 of 2013 *Teresia Wairimu Kirima v Father Romea & another*
  - d. *Teresia Wairimu Kirima v Virginia Mwangi & 2 others*
19. This court takes judicial notice that the judgement in Milimani HCCC No. 1257 of 2014 (OS), in which six suits were consolidated, was delivered on 23<sup>rd</sup> October 2023, by which time this Ruling was pending delivery. Consequently, it is apparent that the Respondent's objection on the ground of *sub judice* has been overtaken by events.
20. In any case, while it is clear that the suit property herein constitutes the same subject matter as was in the High Court case, being LR. No. 5908/8, it was incumbent upon the Respondent to establish that the nature of the Plaintiff's claim is the same as that in the High Court. They therefore ought to have presented the pleadings from the High Court case. In the absence of the said pleadings, this court cannot find that the two matters involve similar issues of fact and law.
21. As to whether the parties in the High Court case and in this matter are the same, indeed, the Interested Parties herein are the common in the said matters. However, there is no evidence to show that the Applicant herein was a party to any of the cases before the High Court. This court therefore declines to find that this suit is *sub judice*.
22. Curiously, the Applicant in this suit sought orders against "the directors of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the Director of Survey". First, this suit, having been instituted by way of Originating Summons, has only one Respondent, who is clearly not a company.
23. Secondly, the Director of Surveys is not a party to this suit. The prayers in the current application were clearly recklessly drafted. The court will disregard the same and will simply consider whether the Respondent is in contempt of this court's orders issued on 16<sup>th</sup> June 2022.
24. The power of a court to hold a party in contempt is for the purpose of upholding the rule of law. That is what was stated in *Teachers Service Commission vs Kenya National Union of Teachers & 2 Others* [2013] eKLR:

"The reasons why the Courts will punish for contempt of Court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the Court or even the personal ego of the presiding judge...it is about preserving and safeguarding the rule of law."
25. Under Section 29 of the *Environment and Land Court Act*, the Environment and Land Court has been expressly clothed with jurisdiction to punish for contempt of court. This is in concurrence with



Section 5 (1) of the *Judicature Act* that vests in the superior courts the power, like those of the High Court of Justice in England, to punish any party who violates its orders.

26. Section 29 of the *Environment and Land Court Act* prescribes that it is an offence to refuse, fail or neglect to obey an order or direction of the court given under the *Act*. The section reads as follows:

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this *Act*, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

27. It is notable that the standard of proof in contempt matters is higher than that of ordinary civil matters. In the case of *Mutitika v Babarini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

“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...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. The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she wilfully acted in a manner that flouted the Court Order.”

28. This then means that the violation for which an alleged contemnor is cited must not only be precisely defined, but also proved to a standard which is higher than proof on a balance of probabilities, but not as high as proof beyond reasonable doubt.

29. This court in *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR, cited *Carey v Laiken*, 2015 SCC 17 (16th April 2015), where Cromwell J, writing for the Supreme Court of Canada, 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 wilful 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.”



30. In a similar vein, in *North Tetu Farmers Company Ltd vs Joseph Nderitu Wanjobi* [2016] eKLR, the court relied on the text titled 'Contempt in Modern New Zealand' which provides as follows:

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.”

31. On 16<sup>th</sup> June 2022, this court issued an order of injunction restraining the respondent either by herself, servants, employees and or agents from trespassing, putting construction materials or in any way generally dealing with (0.9142) acres in the suit property being, Plot No. 5908/8 Corner Shop No. 1 pending the inter-parties hearing and determination of this summons. There is no contention that these orders were clear and unequivocal, in directing what the Respondent ought not to do.

32. The Applicant has averred that it effected service on the Respondent by Whatsapp. The Respondent has however contended that he was not aware of the orders dated 16<sup>th</sup> June 2022; that the said orders were never served upon her; that while the applicant filed return of service showing that they served the Respondent, the said screenshot does not disclose the number that was served with the order, leaving open the possibility that they saved any number using the name of the Respondent.

33. The said return of service was however not filed in the Court Management System (e-filing platform) for this court's consideration. However, the Respondent has not disputed that indeed the Applicant filed a return of service which indicates that service was effected vide Whatsapp, which is a messaging application that uses the internet to send and receive texts, images, audio and video.

34. In staying abreast with the changes in telecommunication, the Civil Procedure Rules were amended through Legal Notice No. 22 of 2020. This Legal Notice introduced Order 5 Rule 22 C on service by way of mobile-enabled messaging applications. It provides as follows:

- “1) Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.
- (2) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
- (3) Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.
- (4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery receipt confirming service.”

35. The Respondent has averred that the screenshot attached to the Affidavit of Service does not indicate the phone number of the Respondent, but only indicates the name of the Respondent.



The Respondent persuasively argue that any number could have been saved under his name and that without any proof of service of the last known phone number of the Respondent, there is no evidence that the Respondent was served.

36. Having neglected to file before this court the Affidavit of Service to establish that service of the orders dated 16<sup>th</sup> June 2022 were effected upon the Respondent, this court cannot find that there was effective service of the court orders. Further, the court's record indicates that the Respondent's counsel was not present in court when the said orders were issued.
37. Further, the Applicant ought to have established that the alleged contemnor acted in breach of the terms of the order. The Applicant has annexed three photographs of the purported suit property, with workmen on site.
38. First, the Applicant failed to file the requisite Certificate of Electronic Evidence, as required under Section 106B(4) of the *Evidence Act*, to accompany all electronic evidence. Second, the photographs neither contain a date nor time stamp. There is also no evidence that the site in the photographs is indeed the suit property herein.
39. Having failed to prove that the alleged construction activities were taking place on the suit property following the issuance of injunctive orders by this court, the Applicant has fallen short of establishing that the Appellant is guilty of disobeying the orders of this court dated 16<sup>th</sup> June 2022.
40. In conclusion, the Applicant's application dated 1<sup>st</sup> February 2023 is dismissed.
41. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Ayugi holding brief for Ojienda for Plaintiff

No appearance for Respondent

Ms. Maingi holding brief for Omari for Defendants

Court Assistant -Tracy

