



Muli v Chief Land Registrar & 15 others; Kithuku & 7 others (Applicant) (Environment and Land Constitutional Petition 13 of 2018) [2024] KEELC 958 (KLR) (27 February 2024) (Ruling)

Neutral citation: [2024] KEELC 958 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 13 OF 2018
CA OCHIENG, J
FEBRUARY 27, 2024**

**IN THE MATTER OF: ARTICLES 2, 10, 20, 22, 23, 24, 48,
165(3) AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 28,
29, 31, 40, 47, 48 AND 50(1) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS) RULES, 2013**

**IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012, THE LAND REGISTRATION
ACT, NO. 3 OF 2012, THE LIMITATION OF ACTIONS ACT, THE SURVEY ACT**

BETWEEN

AMBROSIAH NDITI MULI PETITIONER

AND

THE CHIEF LAND REGISTRAR 1ST RESPONDENT

THE DIRECTOR OF SURVEY 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

THE NATIONAL LAND COMMISSION 4TH RESPONDENT

MATUNGULU YATTA RANCHING CO. LTD 5TH RESPONDENT

PHILIP MULWA NZIOKA 6TH RESPONDENT

PATRICK KALELI MUTISO 7TH RESPONDENT

JOHNSTONE MWAKA LUMBI 8TH RESPONDENT

DAVID KIMEU KILONZO 9TH RESPONDENT

DAMARIS NDUKU JOSEPH 10TH RESPONDENT



THOMAS MUTUKU NTHUVA 11TH RESPONDENT
ROSE WAYUA MAINGI 12TH RESPONDENT
PAUL MUINDI MUTULI 13TH RESPONDENT
HENRY WAMBUA KINYONGE 14TH RESPONDENT
CHRISTINA NTAAMBA WAMBUA 15TH RESPONDENT
LEONARD KIMEU NDAMBUKI 16TH RESPONDENT

AND

REGINA MWETHYA KITHUKU APPLICANT
DIANA MUSANGA MUIA APPLICANT
ALEXANDER G. MUTINDA MWINI APPLICANT
PETER MUTUA KIIO APPLICANT
MAGDALINE NDUKU MAKAU APPLICANT
DOMINIC MUAMBI MUASYA APPLICANT
SERA KAMENE WILLIAM APPLICANT
JAPHETH SIMON MUSYOKI MBUTHU APPLICANT

RULING

1. Through a Notice of Motion Application dated the 24th May, 2023, the 5th -16th Respondents (excluding the 11th) and all the Interested Parties sought for the following orders against the Petitioner:-
 1. That this Honourable Court does commit the Petitioner herein, Ambrosiah Nditi Muli, to civil jail for disobedience of the observance of the status quo orders issued herein.
 2. That the costs of this Application be provided for.
 3. That this Honourable Court does issue any other orders that it may deem fit to grant in the circumstances.
2. The Application is premised on the grounds on the face of it and supported with the Affidavit of Dominic Ndunda Mutuku, one of the director's of the 5th Respondent. The deponent averred that the Petitioner had instituted the present suit via a Petition dated the 31st July,2018 and simultaneously filed an Application dated the 31st July 2018, upon which Honourable Justice C. Mbogo ordered:-
 - a. That the Application dated 31st July, 2018 be and is hereby certified urgent.
 - b. That an order of injunction be and is hereby issued restraining the Respondents whether by themselves, employees, servants and/or under agents or otherwise assigns and/or any person whatsoever acting on their behalf and/or under their mandate and/or instructions from attempting to evict or evicting the petitioner, alienating, advertising for sale, offering for sale, selling, taking possession of , leasing, transferring, charging or otherwise in any manner whatsoever interfering with the petitioners peaceful occupation and use of land parcels



Ndalani/Ndalani Block 1/134, 154, 155, 156, 157, 158, 160, 324, 545, 546, 1109, 1112, 1113, 1115, 1116, 1518 and 1519 for 45 days.

- c. That the officer commanding Yatta Police Station maintain law and order for 45 days.
 - d. That the mention to be on 24th September, 2018 before Judge Angote for directions.
3. That on 12th September, 2018, pursuant to an Application dated the 24th August 2018, Honourable Justice O. Angote ordered that:-
- a. That the Preliminary Objection filed by the Respondents dated 10th September, 2018 to be heard first.
 - b. That file numbers HCCC No. 2346 of 1978 (Nairobi), HCCC No. 2347 of 1978, (Nairobi), HCCC No. 72 of 1986 (Nairobi), HCCC No. 134 of 1978 (Nairobi) and HCCC No. 78 of 2009 (Machakos) as mentioned in the Preliminary Objection to be transferred to this court.
 - c. That the Respondents' advocates to liaise with the ELC Deputy Registrar, Nairobi to have those files transferred to this court.
 - d. That in the meantime, the prevailing status quo as at 10th August, 2018 to be maintained meaning that the Petitioner and the Respondent continue to occupy the respective suit properties they were occupying without offering them for sale, charging, alienating or constructing any new structures on the said land pending the hearing and determination of the Preliminary Objection dated 10th September, 2018 except the ongoing construction on parcel number 545.
 - e. That mention on 25th October, 2018 for further directions.
4. The deponent stated that on or about early July, 2022, the Petitioner herein in disobedience of the status quo orders issued herein embarked on construction, which necessitated the advocate for the 5th, 6th, 7th, 9th, 14th and 15th Respondents and all the nine (9) Interested Parties to write to her vide a letter dated the 13th July, 2022, which was received by her advocates on the same date. He claimed that despite the letter dated the 13th July, 2022, the Petitioner did not stop the construction which necessitated the same advocate to write another letter dated the 1st August, 2022 which was received by the Petitioner's advocates on the same date, following which the Petitioner stopped the construction. He contended that on 16th September, 2022, pursuant to the orders issued by the court, the parties visited the suit land in the company of the Deputy Registrar and following which the Deputy Registrar filed a report dated the 19th September, 2022, in court. He explained that during the said visit, wherein the Petitioner including her advocate were present, it was noted that the Petitioner's homestead had three (3) old structures, a pit latrine, and a new house (under construction). He stated that on 21st September, 2022 when the matter came up for hearing, the matter was taken out of the cause list because many parties had not filed their responses to the Petition and the court directed that the Petition be heard on the 17th October, 2022 whereas the Respondents' case was to be heard on the 23rd November, 2022. He explained that on the 21st September, 2022 at the conclusion of the matter, the Petitioner through her advocate requested that she be allowed to complete the construction of the house of her deceased son so that her daughter in law would have a place to reside. However, the Court declined to allow the prayer sought but directed all the parties to observe the status quo orders for the sake of peace and order. He reiterated that despite such crystal-clear orders, the Petitioner has continued with the construction even after another letter was issued to her, dated the 30th March, 2023.



5. The Petitioner opposed the instant Application by filing a Replying Affidavit where she deposed that the Applicants' were misleading the Court. She explained that the Orders issued on 10th August, 2018 prohibited the parties from constructing any new structures on the suit property. She contended that she had not constructed any new structures nor disposed off the suit property in any way. She argued that the Applicants' had not proffered any evidence showing the alleged construction. She challenged the photos produced by the Applicants stating that they did not meet the threshold for adducing electronic evidence. She insisted that the structures in her homestead were the same structures that were thereon as at 12th September, 2018 and that she had only roofed one of the structures which had a leaking roof. She contended that as per the Valuation Report dated the 20th June, 2018, the said house had a roof hence no material change to the said house has been done. She reiterated that Article 159 of the *Constitution* required the courts' to exercise judicial authority in view of the principles of the *Constitution*, which include observance of human dignity and that keeping the house in habitable state is a right to human dignity which ought to be observed. She reaffirmed that maintaining the house does not in any way amount to contempt of court and that on the contrary, the Applicants' have withheld information that some of the Interested Parties have also been undertaking construction on the suit properties. She annexed photos of the said constructions and prayed that the Application be dismissed with costs.
6. The Applicants' filed a Further Affidavit sworn by Dominic Ndunda Mutuku where he reiterated his averments as per the previous Affidavit and claimed that the 9th Interested Party had constructed washrooms on his parcel of land when he came from Ghana, but he had been stopped after the advocates informed him of the orders for the maintenance of status quo. He insisted that the Petitioner had continued constructing a house with disregard to the said orders, even after receiving a letter dated the 30th March, 2023. He did attach photos of the roofed house and a certificate of electronic record.
7. The Application was canvassed by way of written submissions.

Submissions by the Applicants

8. The Applicants in their submissions reiterated their averments as per the affidavits and argued that the Petitioner had knowledge of the status quo Orders but deliberately acted in breach of the said orders. They made reference to the court orders and submitted that the said orders were made in the presence of all the parties and several letters had been written to the Petitioner. They further submitted that on the 21st September, 2022, the Petitioner had prayed to be allowed to complete the house but the court had directed that status quo be observed, hence her continued construction was in breach of the said orders. To support their arguments, they relied on the following decisions: *Samuel M.N Mweru & Others v National Land Commission* [2020] eKLR.

Submissions by the Petitioner

9. The Petitioner in her submissions denied being in contempt of any court orders but insisted that she had simply fixed a leaking roof to ensure that the house was in a habitable state. She categorically outlined the meaning of 'new' as per the *Black Law's Dictionary*, stating that the said construction was already existing at the time the orders were issued and it is only the roof which was being fixed. She further submitted that the Applicants' were also in contempt of the subject court orders, since they had periodically been threatening her about her occupation of the said property, with some of them continuing with construction on the suit property. She reiterated that the Applicants' had not met the threshold for grant of orders of contempt of court.



10. To support her arguments, she relied on various decisions including *Samuel M.N Mweru & Others v National Land Commission* [2020] eKLR and *Republic v County Government of Kitui Ex parte-Fair Plan Systems Limited* [2022] eKLR.

Analysis and Determination

11. Upon consideration of the Notice of Motion Application dated the 24th May, 2023 including the respective Affidavits and rivalling submissions, the only issue for determination is whether the Petitioner is in contempt of the status quo Order.
12. The Applicants' claim the Petitioner is in contempt of the status quo Order as she has constructed a permanent structure on the suit property. The Petitioner denied being in contempt of the status quo order and contended that she was only roofing an already existing house which was in want of repair. She argued that as per the Valuation Report of June 2018, the alleged house had already been constructed, before issuance of the impugned orders.
13. I wish to reproduce an excerpt of the Order issued by Justice Angote on 12th September, 2018:
- (iv) That in the meantime, the prevailing status quo as at 10th August, 2018 to be maintained meaning that the Petitioner and the Respondent continue to occupy the respective suit properties they were occupying without offering them for sale, charging, alienating or constructing any new structures on the said land pending the hearing and determination of the Preliminary Objection dated 10th September, 2018 except the ongoing construction on parcel number 545."
14. In the case of *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi* (2016) eKLR Justice Mativo (as he then was) when dealing with contempt of court stated that:
- "writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated 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 - (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.’"
15. While in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 Others* (2020) eKLR, Justice Mativo (as he then was) observed that:-

"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’ } A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith). These requirements – that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the



deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities." Emphasis Mine

16. From a reproduction of the impugned status quo Order above, I find that it was unambiguous as it directed parties to maintain status quo pending the hearing and determination of the Preliminary Objection. From the Court Record, I note the Preliminary Objection dated the 10th September, 2018 was dismissed with costs on the 24th April, 2020 and impugned status quo Order was never extended. As per the evidence on record as produced by the Applicants, they indicate an ongoing construction which has eventually been roofed. It is alleged that the Petitioner continued with the construction despite the orders of the court as well as various correspondence from the Applicants' Advocate. The Petitioner has vehemently denied this position. From the photographs presented, I note one with an unfinished house and another with a roofing to the said house. I opine that the burden of proof was upon the Applicants' to prove that the construction of the house commenced and was finalized after the status quo order, had been issued but this is not the case herein.
17. Based on the facts as presented while associating myself with the quoted decisions, I find that the Applicants' have failed to tender adequate evidence to prove how the Petitioner was in contempt of the status quo Order. It is my considered view that the Applicants' have failed to demonstrate how there was willful and mala fides disobedience of the said status quo Order, as the Petitioner has confirmed she was simply fixing a roof to an already existing structure. On the claim of the oral orders issued in open court on 21st September, 2022, I note as per the Court Record, there were specific orders issued on the said date with respect to the hearing of the Petition. I also note that the Applicants' acknowledge that one of them had constructed 'washrooms' on the suit property, but the Petitioner never sought to cite them for contempt. Nevertheless, this court is of the view that the maintenance of status quo did not imply that actions which support a decent living were also excluded, like roofing an already existing house including construction of a washroom. Further, there is no demonstration of Petitioner's deliberate and intentional violation of the court's dignity or authority. I opine that the Applicants' allegations herein have not met the threshold required in contempt proceedings as envisaged by the law as the standard of proof in the said proceedings is higher than the balance of probabilities and almost beyond reasonable doubt.
18. It is against the foregoing that I find the Notice of Motion Application dated the the 24th May, 2023 unmerited and will proceed to dismiss it.
19. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27TH DAY OF FEBRUARY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Mrs. Wangui holding brief for Kyongera for 5th – 16th Respondents



(except 11th Respondent) and nine (9) Interested Parties

Kuria for 1st – 3rd Respondents

Muoki for Petitioner

Court Assistant – Simon/Ashley

