



REPUBLIC OF KENYA



Muthui & 19 others v County Government of Kitui & 7 others (Environment & Land Petition 26 of 2021) [2025] KEELC 909 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 909 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND PETITION 26 OF 2021**

LG KIMANI, J

FEBRUARY 27, 2025

(FORMERLY MACHAKOS ELC. PETITION NO. E06 OF 2020)

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL
RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER ARTICLES
2, 10, 27, 28, 40, 43, 47 AND 70 OF THE CONSTITUTION**

AND

**IN THE MATTER OF RIGHTS TO PROTECTION, CONSERVATION
AND SUSTAINABLE USE OF TIVA RIVER IN KITUI COUNTY.**

BETWEEN

JOHN MUTHUI 1ST PETITIONER
RIXION KYALO LINA 2ND PETITIONER
VICTOR MULWA NZILU 3RD PETITIONER
FRANCIS MALUKI MUTIA 4TH PETITIONER
CHRISTOPHER KONDO KATHUMO 5TH PETITIONER
GEORGE KIVUSYU IKUTHU 6TH PETITIONER
NGOMO MWANZIA 7TH PETITIONER
ABEL SALU MUMU 8TH PETITIONER
JACOB MAVUSI KAVILI 9TH PETITIONER
PATRICK KIILU KITHAMBYO 10TH PETITIONER
SAMSON MWAKI MAVUSI 11TH PETITIONER
JULIUS NZOMO MUNYAO 12TH PETITIONER



GEOFFREY MWENZE MWEMA	13 TH PETITIONER
TIMOTHY WAMBUA MBUSYA	14 TH PETITIONER
JONATHAN MWANZA KIVUSYU	15 TH PETITIONER
MBUSYA KALELU	16 TH PETITIONER
WILLIAM KITHIIA MAVUSI	17 TH PETITIONER
PATRICK NDOLO	18 TH PETITIONER
FREDRICK SAKAYO KITHIIA	19 TH PETITIONER
DANLEWIS B. MWAVU MBULA	20 TH PETITIONER

AND

COUNTY GOVERNMENT OF KITUI	1 ST RESPONDENT
COUNTY EXECUTIVE COMMITTEE MEMBER, MINISTRY OF ENVIRONMENT AND NATURAL RESOURCES, KITUI COUNTY	2 ND RESPONDENT
COUNTY ASSEMBLY OF KITUI	3 RD RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY	4 TH RESPONDENT
COUNTY COMMANDER, NATIONAL POLICE SERVICE KITUI	5 TH RESPONDENT
KITUI COUNTY COMMISSIONER	6 TH RESPONDENT
PETER MULI KALUNGU	7 TH RESPONDENT
SAND TRANSPORTERS & ENVIRONMENT CONSERVATION GROUP	8 TH RESPONDENT

RULING

1. The Petitioners filed the Notice of Motion dated 29th May 2023 seeking the following orders:
 1. Spent
 2. This court do issue summons directed to the following persons to attend court and show cause why contempt of court proceedings should not be taken against them.
 - a. The County Secretary, County Government of Kitui.
 - b. The County Executive Committee Member for Energy, Environment, Forestry natural and mineral resources of the County Government of Kitui.
 - c. The Speaker, County Assembly of Kitui
 - d. The Clerk, County Assembly of Kitui
 - e. Honourable Daniel Kimanzi Muange



- f. Honourable Dominic Mwamisi Isumael
 - g. Honourable Cornelius Ngumbau Muthami
 - h. Honourable Christopher Nzioka Nzilu
 - i. Honourable Mark Kitute Nding’o
 - j. Honourable Kalamba Musau
 - k. Honourable Priscilla Martha Makumi
 - l. The Director General, National Environment and Management Authority
 - m. The Kitui County Commander, National Police Service and;
 - n. The County Commissioner, Kitui County.
3. That the following persons be cited for contempt of court and sentenced to a term in jail and/ or fined such amount as this Court may deem fit or both for disobeying this court’s engrained in the decree dated 22nd February 2023;
- a. The County Secretary, County Government of Kitui.
 - b. The County Executive Committee Member for Energy, Environment, Forestry natural and mineral resources of the County Government of Kitui.
 - c. The Speaker, County Assembly of Kitui
 - d. The Clerk, County Assembly of Kitui
 - e. Honourable Daniel Kimanzi Muange
 - f. Honourable Dominic Mwamisi Isumael
 - g. Honourable Cornelius Ngumbau Muthami
 - h. Honourable Christopher Nzioka Nzilu
 - i. Honourable Mark Kitute Nding’o
 - j. Honourable Kalamba Musau
 - k. Honourable Priscilla Martha Makumi
 - l. The Director General, National Environment and Management Authority
 - m. The Kitui County Commander, National Police Service and;
 - n. The County Commissioner, Kitui County.
4. That the respondents do pay the costs of this application.
2. The application is supported by the affidavit of Benjamin Mwikya Musyoki, formerly advocate for the Petitioners. The applicants state that the Respondents are in contempt of the judgement delivered by this Court on 22nd February 2023 and the decree issued on 6th April 2023. In the said judgement, the court found in favour of the petitioner & made several declaratory orders. Of relevance to the present application are orders that:



- a) that the Respondents violated the Petitioners' constitutional rights with respect to sand harvesting and transporting around the areas of Ndumoni, Tanganyika, Nyanyaa and Tiva areas within Kitui County.
 - b) The judgement made a declaration that the 1st, 2nd, 4th, 5th and 6th Respondents violated the petitioners' rights under Articles 35(1) and (b) of the Constitution and directed the said Respondents to supply the information requested in the petitioners' advocates letters dated 7-08-2020 within ninety days from the date of judgement.
 - c) The Court further ordered the 1st, 2nd, 3rd and 4th respondents to comply with the Environmental Management and Coordination Act 8 of 1999 and the National Sand Harvesting Guidelines and ordered a report on this compliance to be filed within ninety days from the date of the judgment.
 - d) Conservatory orders issued retraining the Respondents from licensing, permitting, and allowing sand harvesting from Tiva River in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County pending filing of the reports.
3. Counsel for the Applicants stated that the decree was served upon the respondents as per the affidavit of service filed. They also wrote letters to the respondents asking them to supply the information ordered by the Court and to comply with the decree but there was no response.
 4. Counsel for the petitioners deposed that instead of complying with the court orders, the respondents and the persons cited escalated or assisted in escalating the sand harvesting activities. Examples of such acts are that leaders of the 3rd respondent encouraged residents to continue with sand harvesting activities as they boost their livelihoods.
 5. Further, the respondents have not shown any intention of rehabilitating the Tiva River but have encouraged further exploitation and degradation of the river in violation of orders 'f' and 'g' of the decree.
 6. Counsel for the Applicants made this application seeking the court's intervention and finding the respondents guilty of contempt of court. Stating that being leaders with high ranking in Kitui County, the Respondents should be at the forefront in obeying and observing the rule of law and that the court should not issue orders in vain.

The 1st and 2nd Respondent's Replying Affidavit.

7. Timothy Kyalo Mwange, the County Solicitor of the County Government of Kitui swore an affidavit in response to the application, deposing that the 1st and 2nd respondents have at all material times obeyed the court orders herein.
8. He deposed that vide Gazette Notice 5845 of 5th May 2023, the County Government of Kitui constituted a task force with a wide and diverse representation including the National Management Authority (NEMA) and where the 1st Petitioner herein is a member to review the existing situation and come up with a draft policy and bill to streamline sand harvesting and management in Kitui.
9. He stated that the Kitui County River Basins Sand Utilization and Conservation Policy, 2023 and a corresponding Bill was made and approved by the County Executive Committee(CEC) and was submitted to the 3rd Respondent for approval and enactment into law, which had yet to be done at the time of filing the reply hereto.



10. The County Solicitor challenged the application on the ground that it was brought under the [Contempt of Court Act](#) which was declared unconstitutional. Further, the applicants failed to follow several legal procedures and due processes while seeking the orders herein stating that the orders were not personally served on the alleged contemnors.

The 3rd, 8th, 9th, 11th, 12th, 13th and 14th Respondents' Preliminary Objection and Replying Affidavit.

11. The 3rd, 8th, 9th, 11th, 12th, 13th and 14th Respondents filed a notice of preliminary objection dated 25th August 2023 on the ground that the application is incompetent and factually defective having been brought under the wrong provisions of law.
12. Elijah A. Mutambuki, the Assembly Clerk, County Assembly of Kitui swore the affidavit in reply on behalf of the 3rd, 8th, 9th, 10th, 11th, 12th, 13th and 14th Respondents. He confirmed being aware of the judgment of the court which issued several declarations and orders.
13. He challenged the application contending that the best practice of law frowns upon counsel handling a case swearing an affidavit on contested matters. He further stated that there was no personal service of the decree and the decree does not bear the requisite penal notice. Further, there was no attempt to have the committee members named as the Respondents numbers 8-14 joined to these proceedings.
14. That the County Assembly, upon receiving the County Executive policy paper on river basins, sand utilization and conservation sometime after the judgment of the Court had been rendered, a committee embarked on a benchmarking exercise in Makueni and Kajiado Counties among other places to learn best practices on sand harvesting and management after which they prepared a report, the committee also visited the affected rivers and familiarized themselves with the relevant laws and guidelines and prepared a Bill on Sand harvesting.
15. The relevant Bill was forwarded to the Assembly and the Bill was undergoing public participation as required under Article 196 of [the Constitution](#) of Kenya. He deposed that the County Assembly had undertaken several activities in compliance with the decree.

The 5th and 6th Respondents' Replying Affidavit

16. Leah K. Ngutu, the County Police Commander, of Kitui swore an affidavit in response to the application. She confirmed that on 22nd February 2023, this Court issued orders inter alia a declaration that the 1st, 2nd, 4th, 5th and 6th Respondents have violated the Petitioners' rights under Article 35(1) and (b) of this Constitution by failing to supply information requested for by the Petitioners and ordered that the said information be provided within ninety days from the date of judgment.
17. She, however, denied that the decree was personally served upon the 5th and 6th respondents but admitted receiving a letter dated 20th April 2023 from the Petitioners' advocates seeking to be supplied with information as per the the court's judgement. She found out that the information was not within the custody of the office hence the inability of the said office to comply with the Court order. They instructed the office of the Attorney General to respond to the said letter and through the letter dated 30th May 2023 the following reasons were given:
 - a. Registers at the Kwa Vonza and Kanyonyoo barriers are maintained by the County Government revenue officers and;
 - b. The office of the County Police Commander does not deploy the administration police officers that provide security at the barrier and hence they are not under their command.



- c. The County Police Commander has never deployed any police officer to give security, protect, or escort sand harvesters and traders and their trucks entering and leaving the Tiva River at Ndumoni, Tanganyika and Nyanyaa areas.
18. The Kitui County Police Commander deposed that the failure to comply with the court order was not deliberate as the information to be supplied is not within the custody of her office.

The Petitioners' Submissions

19. Counsel for the Petitioners submitted that the Court herein rendered judgment on 22nd February 2023 and issued a Decree in favour of the Petitioners who are residents of areas next to and near a major river known as Tiva River where sand harvesting is done.
20. They relied on the cases of A.B & another v. R.B(2016)eKLR and Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi(2016)eKLR on the grounds for citing one for contempt of court.
21. Counsel highlighted that the judgment was not appealed, set aside and/or reviewed and that the decree was served upon the respondents. The Petitioners submit that the 1st, 2nd, 4th, 5th and 6th respondents have disobeyed the court order in three ways, one by continuing to allow the activities which the court restrained them from doing.
22. Further, the 1st and 2nd respondents have disobeyed the court decree by failing to file a report on plans to rehabilitate the affected areas within ninety(90) days, which period was to lapse on 24th May 2023. The Petitioners' advocate's letter following up on the information ordered to be supplied was not replied to the report was not filed and the respondents had not sought leave for an extension of time to file the said report.
23. Regarding the 5th and 6th respondents claiming not to be in possession of the information ordered to be supplied, the Petitioners submitted that they did not dispute being in possession of this information during the hearing.
24. It was also submitted that the speaker of the 2nd respondent and the clerk are the accounting officers of the 2nd respondent and that the cited members are said to be in the committee in charge of environmental affairs and were fully aware that the law had not been implemented. The Petitioners therefore submit that they should be cited for being in disobedience of court orders and be found to be in contempt of court.

1st and 2nd Respondent's Submissions

25. The 1st and 2nd respondents submit that the alleged 1st and 2nd contemnors should not be cited for contempt as they have not disobeyed any court orders and have fully complied with the directions of the Court.
26. Counsel reiterated the facts deposed in their replying affidavit on the establishment of a task force on sand harvesting and the passing of Kitui County County River Basins Sand Utilization and Conservation Policy, 2023 and a corresponding Bill that was approved by the County Executive Committee (CEC).
27. Counsel submitted that the element of intentional disobedience is necessary for a party to be cited for contempt of court and relied on the holding of the Court in Samwel M. Mweru & others v. National Land Commission & 2 others(2020)eKLR. They submit that the process of compliance to regularize sand mining and harvesting is underway and is a bureaucratic process that cannot happen overnight.



28. Secondly, it was submitted that the applicant made the application under the *Contempt of Court Act* which was declared unconstitutional and failed to follow several legal procedures and due process when seeking the orders herein by failing to serve the alleged contemnors personally. They relied on the procedure for service of contempt of Court proceedings as set out in the case of Ochino and another vs Okombo and 4 others(1989)KLR as well as the case of Sam Nyamweya & 3 others v. Kenya Premier League Limited & 2 others(2015)eKLR.
29. Counsel submitted that the 1st and 2nd respondents would suffer great prejudice if cited for contempt of court when formal compliance was not adhered to. That the application is premature, uncalled for and did not follow due legal and formal procedure.

The 3rd, 8th, to 14th Respondents' Submissions.

30. Counsel for the 3rd and 9th -14th Respondents submitted that contempt of court manifests willful and intentional disregard of a lawful court order and the standard of proof applied is higher than in an ordinary civil suit but not beyond reasonable doubt as in criminal cases.
31. They submitted that the power of the Court to punish for contempt is from section 5 of the *Judicature Act* 2012 as read with rule 81.1-5 of the English Procedure (Amendment No.3) rules 2020 and Article 162(2) of *the Constitution* of Kenya 2010. However, Counsel noted that the applicant has approached the court under section 28 of the *Contempt of Court Act* No.46 of 2016 which has been declared unconstitutional in the case of Kenya Human Rights Commission v. Attorney General & 2 others (2018)eKLR and Order 40(1) of the Civil Procedure Rules(2010) which gives directions on injunctions.
32. Further, Counsel submitted that the power to detain a convicted contemnor for 6 months has not been invoked and is not available in a situation like this that arises out of a petition filed under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure rules 2012. The right provision is Section 5 of the *Judicature Act* CAP 8 Laws of Kenya which was referred to by Hon. Justice G.V Odunga in HCC E025 of 2021 Hon. Dr. Alfred Mutua-vs- Boniface Mwangi.
33. Counsel relied on the case of HCC No.E018 of 2021 DKG vs EG as cited with approval in the case Samuel N.M Mweru & others -vs- National Land Commission and 2 others on the substantive elements of contempt of court. They submitted that the terms of the court orders are very clear and the respondents have exonerated themselves by taking positive steps to comply with court orders by proposing a regulatory framework on sand harvesting in Kitui County.
34. It is therefore their submission that nothing has been laid before the Court to demonstrate that the 3rd and the 9-14th Respondents are in contempt of the orders of the Court to the required degree for them to be cited as such and that the application is bad in law, has been brought prematurely and ought to fail.
35. Regarding the matter of costs of the application, Counsel relied on Rule 26(i) of *the Constitution* of Kenya (protection of rights and fundamental freedoms) Practice and Procedure Rules 2013 which leaves the award of costs to the discretion of this Honourable Court and suggested that each party should bear their own costs.

Analysis and Determination

36. The Court has considered the application herein, the replies by all the parties and the submissions by Counsel. The court is of the view that the following issues arise for determination.
 - a. Whether the application is filed under the correct provisions of the law.



- b. Whether the Counsel for the applicants can competently swear the affidavit in support of the application herein.
- c. Whether the Respondents are guilty of contempt of the court judgement dated 22nd February 2023.
- d. Are the Applicants entitled to the orders they seek?
- e. Who will bear the costs of the application?

A. Whether the application is filed under the correct provisions of the law.

37. The instant application seeks to have the cited persons found guilty of contempt of court for disobeying this Court's orders issued in the judgment delivered on 22nd February 2023. The suit was filed by the Petitioners who are residents of areas known as Ndumoni, Tanganyika, Tiva and Nyanyaa in Kitui Central and Kitui Rural Constituencies of Kitui County which are next to and near a major river known as Tiva River where sand harvesting is done.
38. Judgment was delivered on 22nd February 2023 and this Court issued the following orders:
- a. A declaration be and is hereby issued that the 1st, 2nd, 3rd and 4th Respondents have violated Article 10 of *the Constitution* in the manner in which they have dealt with the issuance of permits, and licenses and allowed sand harvesting activities in Tiva River in Kitui County especially in Ndumoni, Tanganyika, Nyanyaa and Tiva areas.
 - b. A declaration be and is hereby issued that the 1st, 2nd, 3rd and 4th Respondents have infringed and violated the constitutional rights of the Petitioners as persons living in Ndumoni, Tanganyika, Nyanyaa and Tiva areas as provided in Article 42 of *the Constitution* by failing to follow the existing laws and guidelines and/or pass, enact or legislate laws, regulations and rules or guidelines to govern and regulate sand harvesting in Kitui County.
 - c. A declaration that the 1st, 2nd, 3rd and 4th Respondents have violated the provisions of Articles 60(1)(c), 60(1)(e), 69(1)(a), 69(1)(f), 69(1)(g), 69(1)(h), 69(2) and 201(a) of *the Constitution* in the manner they have handled and dealt with sand harvesting activities on Kitui, especially in Ndumoni, Tanganyika, Nyanyaa and Tiva areas.
 - d. A declaration that the 1st, 2nd, 4th, 5th and 6th Respondents have violated the petitioners' rights under Articles 35(1) and (b) of *the Constitution* by failing to supply the information requested for vide the petitioner's advocates' letters dated 7-08-2020 and an order is hereby issued directing the said Respondents to supply the information requested within ninety days from the date of judgement.
 - e. A declaration is hereby made that the petitioners are entitled to participate in making, formulating, developing laws, rules, regulations and guidelines to govern sand harvesting activities in Kitui County.
 - f. An order is hereby issued directed at the 1st, 2nd, 3rd and 4th Respondents to comply with the *Environmental Management and Co-ordination Act* No. 8 of 1999, The National Sand Harvesting Guidelines and all other provisions of the law regulating harvesting and transporting of sand and a report on compliance be filed in court within ninety days from the date of judgement. The said report to include measures taken to rehabilitate and restore the River Tiva in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County.



- g. Conservatory orders be and are hereby issued restraining the Respondents either by themselves or through their agents, servants, employees, proxies or any other person from licensing, permitting, allowing or in any other way exploiting resources more particularly sand harvesting from Tiva River in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County pending filing of the reports herein.
- h. Prayers e) and f) of the petition dated 11th September 2020 are disallowed.
- i. Costs of the Petition are awarded to the Petitioners to be paid jointly and severally by the 1st, 2nd, 3rd, 4th, 7th and 8th Respondents.
39. The preliminary objection by the 3rd, 8th -14th Respondents dated 25th August 2023 comes up for determination of whether the application has been brought under the wrong provisions of the law and whether it ought to be struck out as a result. This issue was also raised by the other Respondents.
40. In the now famous case of Mukisa Biscuit Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696. Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that:-
- “A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”
41. In my opinion, the preliminary objection is based on a point of law. The Notice of Motion application is filed under Section 28 of the Contempt of Court Act, Order 1 rule 10, Order 8 rule 3 and order 40 rule 1(a) of the Civil Procedure Rules, 2010. It is true as stated by the Respondents that the Contempt of Court Act was declared unconstitutional by the High Court sitting at Nairobi in the case of Kenya Human Rights Commission v Attorney General & another [2018] eKLR where Mwita J held that:
- “Having considered the petition, the response, submissions, the constitution and the law, I am persuaded that sections, 30 and 35 of the Contempt of court Act are unconstitutional. I, however, find that the entire fails the constitutional test of validity for lack of public participation and for encroaching on the independence of the judiciary.”
42. The application herein is also stated to be filed under Order 1 rule 10 and Order 8 rule 3 of the Civil Procedure rules. Order 1 rule 10 addresses joinder and substitution of parties while Order 8 rule 3 is on service of amended defence or counterclaim. Order 40 rule 1(a) deals with injunctions. The Notice of Motion is indeed based on the wrong provisions of law as the application seeks to institute contempt of court proceedings against the named persons.
43. However, courts have found that failure to cite the correct provisions of law is not fatal and would not per se warrant dismissal of the application. The Court of Appeal through the finding of P. N. Waki JA, M. Warsame JA and F. Sichale JA in the case of Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) Civil Appeal No. 212 of 2015 [2019] eKLR held as follows: -
- “Lastly, having established that the respondent’s application dated 17th December 2010 had been brought under the wrong law, we agree with the court’s finding that the irregularity



was not serious enough to prevent the court from exercising its discretion, hearing and determining the said application on its merit. Taking note that the rules of procedure should be used as handmaids of justice but not to defeat it, the court weighed the issues before it and found that there would be no injustice visited on the appellant in the spirit of Article 159 (2)(d) of *the Constitution* and Sections 1A and B of the *Civil Procedure Act*.”

44. The court thus finds that filing the current application under the wrong provision of the law is not serious enough to prevent the court from exercising its discretion to hear and determine the matter.

B. Whether the Counsel for the applicants can competently swear the affidavit in support of the application herein.

45. The Petitioners’ former Advocate now the Hon. Justice Benjamin Mwikya Musyoki swore the affidavit in support of the instant application. Counsel for the 1st and 2nd Respondents objected to the affidavit.

46. Order 19 Rule 3 of the Civil Procedure Rules provides for matters to which affidavits are to be confined and states that

1. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

2. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.

47. The Court of Appeal sitting at Mombasa in the case of Ibrahim & another v Muhsin & another (Civil Application E058 of 2024) [2024] KECA 862 (KLR) took the following position on the matter of advocates swearing affidavits instead of their clients:

“The general rule is that advocates should not swear affidavits in contested matters. Where the client is available to swear to the disputed facts, the depositions in the affidavit of the advocate, may amount to hearsay unless their sources and grounds for belief are disclosed. More importantly, an advocate who swear an affidavit in contested matters potentially of exposes himself to playing the role of both advocate and witness should they be called upon to take the witness stand in order to be cross-examined on the said affidavits.....

This Court in *Pattni v Ali and Others* [2005] 1 EA 339; [2005] 1 KLR 269 held that:

“Whereas it is right that advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so as this accords with the spirit of the best evidence rule and in view of the provisions of Order 18 rule 2, with common sense and it would be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one to become a witness, there is otherwise no express prohibition against an advocate who on his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot find his client but has information, the sources of which he can disclose and state the grounds for believing the information.”



48. Similarly, P.Nyamweya JA in the case of Turea Limited t/a Dr. Mattress v Mohamed (Civil Application E030 of 2022) [2022] KECA 1271 (KLR) concluded that:

“On the affidavit filed in support of the application that was sworn by the Applicant’s advocate, under Rule 9 of the Advocates Practice Rules, it is not the mere swearing of an affidavit by an advocate that renders it defective, but the swearing of an affidavit on contentious issues of which he or she has no knowledge of. The said rule has a proviso that expressly states so as follows: “Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears”.

49. G.V Odunga J(as he then was) agreed with the above position in the case of Republic v Nairobi City County Government & 6 others Ex Parte Mike Sonko Mbuvi [2015] eKLR

“Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed.”

50. It is clear from the above precedents that the advocate having conduct of this matter on behalf of the Applicants was not barred from swearing the supporting affidavit especially where the matters deposed to are agreed, uncontested or on purely legal positions. The mere swearing of an affidavit by an advocate does not render the affidavit defective.

51. In the present case, and having perused the affidavit sworn by Counsel, the court is of the view that the affidavit contains some general averments of uncontested matters that were obviously within the knowledge of Counsel. This includes paragraphs 1- 7, 11, 13 14 and 15 of the affidavit.

52. However, paragraphs 8, 9 and 10 of the affidavit, Counsel swore to contested matters and he did not state whether the matters were within his own knowledge and if based on information and belief, he did not show the sources of the information or grounds for the belief.

53. The matters deposed to in the said paragraph 8, 9 and 10 involve the conduct of the persons cited in the Notice of Motion herein dated 29th May 2023 at paragraphs 2 (e) to (k) and paragraph 3 (e) to (k).

54. The court finds that the averments deposed to at paragraphs 8, 9 and 10 of the supporting affidavit sworn on 29th May 2023 do not comply with the provisions of the law on affidavits and the same are hereby struck out.

C. Whether the Respondents are guilty of contempt of the court judgement dated 22nd February 2023.

55. The court agrees with the Respondents that the Contempt of Court Act was declared unconstitutional by the High Court in the case of Kenya Human Rights Commission v Attorney General & another [2018] eKLR. The position of the law prior to enactment of the Contempt of Court Act was section 5 of the Judicature Act Cap 8 Laws of Kenya which 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.”

56. From the foregoing, 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 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."

60. Contempt of a court order is a serious offence and is in the nature of criminal proceedings and therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake. The applicant must prove wilful 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 which stated 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 part 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 on 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.”



57. 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.”

58. Counsels for the Respondents contend that their clients were not personally served with the Court Decree as required. According to the affidavit of service of Alex Kilonzo Mwendwa dated 14th April 2023, the Decree was served at the Kitui County Assembly and stamped by a secretary, the County Attorney’s office and the firm of A.M Kilonzi. The respondents contend that the individual persons cited were not served personally with the Decree.

59. However, the Court of Appeal holding in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR held as follows:

“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.”

60. Similarly, Lenaola J (as he then was) in the case of *Basil Criticos v Attorney General & 8 others & 4 others* [2012] eKLR 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 occasion 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.”

61. The court agrees with the above position of the law that knowledge of the judgment or order by an advocate of the alleged contemnor suffices for contempt proceedings.
62. The court record shows that on the date when the judgement was delivered, the following Advocates appeared in court: B. M. Musyoki for the petitioners, Azangalala holding brief for Katunga Mbuvi for 1st and 2nd respondents and Nyawira for the 5th and 6th Respondents.
63. Following the above-cited legal authorities, the 1st, 2nd, 5th and 6th Respondents were represented by advocates on record whose responsibility it is to inform their clients of the court proceedings and outcome thereof. Concerning the 3rd Respondent, the affidavit of service of Alex Kilonzo Mwendwa shows that the Decree was served on the Kitui County Assembly and stamped by a secretary. The firm of A.M Kilonzi Advocates was also served on behalf of the 7th and 8th Respondents.
64. However, the affidavit of service filed does not show that the decree herein was served on the 4th Respondent the National Environment Management Authority and the said respondent was not represented during delivery of the judgement. The court is thus satisfied that no evidence was shown that the 4th Respondent was aware of the judgement and decree of the court. They therefore cannot be cited for contempt of court when they were not served with the decree. The defence of the other Respondents that they were not personally served does not hold.
65. On whether the Respondents are guilty of contempt of the court judgement dated 22nd February 2023, the Respondents have been accused of contempt mainly of orders (d), (e) (f) and (g) of the decree herein. Order (d) of the Decree directed the 1st 2nd 4th 5th and 6th Respondents to respond to the petitioner’s advocates’ letters dated 7-08-2020 and to supply the information requested within ninety days from the date of judgement. The said letter had requested copies of all licenses, permits and authorizations of sand dealers and traders as well as the inventory of the vehicles used for sand harvesting, and other documents about sand harvesting in Kitui County.
66. The 1st and 2nd Respondents did not address the issue of whether or not they supplied the Applicants with the information requested as directed by the Court within the ninety days or at all. The only conclusion the court can make is that they did not comply with the order and are therefore found guilty of contempt of the said order (d) of the judgement of the court dated 22/2/2023.
67. The 5th and 6th Respondents stated with regard to contempt of order number (d) of the decree that the information sought from the office of the County Commander, Kitui, was not in the custody of the said office hence there was an inability by the said office to comply. It was further stated that the said office instructed the Attorney General’s office to reply to the letter by counsel for the Applicants expressing their inability to provide the information sought. The letter from the office of the Attorney General was attached dated 30th May 2023. The Court notes that the said letter and the affidavit explain extensively the offices responsible for the various tasks and that have custody of the various documents.
68. The Court finds that the said letter was adequate as a response to the letter by the counsel for the Applicants dated 7th August 2020 and in compliance with the court decree herein.



69. The Applicants cited the Respondents for noncompliance with Order (f) of the decree herein. The said Order was directed at the 1st, 2nd, 3rd and 4th Respondents to comply with the *Environmental Management and Co-ordination Act* No. 8 of 1999, The National Sand Harvesting Guidelines and all other provisions of the law regulating harvesting and transporting of sand and a report on compliance be filed in court within ninety days from the date of judgement. The said report was to include measures taken to rehabilitate and restore the River Tiva in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County. However, no report has been filed in Court to date.
70. The 1st and 2nd respondents stated that they had complied with the judgement and decree and had created a task force Vide Gazette Notice 5845 of 5th May 2023, to review the existing situation and come up with a draft policy and bill to streamline sand harvesting and management in Kitui which was yet to be enacted into law at the time.
71. The Counsel for the 3rd Respondent filed in court The Kitui County River Basin Sand Utilization and Conservation Act which was passed into law before this application was set for ruling. The Act was assented to by the Kitui County Governor on 1st March 2024. Its purpose is to regulate sand Utilization and Conservation in the County while ensuring sustainable exploitation of sand resources, environmental conservation, equitable sharing of accruing benefits and for connected purposes.
72. This court in the judgement of 22nd February 2023 stated:
- ‘The Respondents have the responsibility of abiding by the National Guidelines on Harvesting of Sand and the *Environmental Management and Co-ordination Act* and enacting a law or regulations to ensure sustainable exploitation of sand from Tiva River.
- In my opinion, the Respondents herein have evidently failed to comply with existing laws and guidelines pertaining to harvesting of sand from Tiva River. The 3rd Respondent has also failed to pass laws and regulations which will regulate the exploitation of sand from Tiva River in an unsustainable manner within the County of Kitui. There is therefore a large gap in management and regulation of sand harvesting activities in River Tiva, and there is a need to address this.”
73. The 1st 2nd and 3rd Respondents have shown to the court the efforts they made to enact county laws for regulating sand harvesting in Kitui. However, from the extracts from the judgement of the court and also orders (B) and (F), it is clear that the court directed compliance with the law existing at the time of the judgment and filing of a report within 90 days from the date of the judgement.
74. The court finds that the 1st, 2nd, 3rd and 4th Respondents failed to comply with the court's orders by failing to show compliance with the *Environmental Management and Co-ordination Act* No. 8 of 1999, The National Sand Harvesting Guidelines and all other provisions of the law regulating harvesting and transporting of sand. They also failed to file a report on compliance within ninety days from the date of judgment or at all. The Respondents also failed to show that they had taken measures to rehabilitate and restore the River Tiva in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County and report on the measures taken within ninety days from the date of the judgement. The court thus finds the Respondents to be in contempt of the said court order. By failing to comply with the order to file the aforesaid report, the respondents also violated order (g) thereof.
75. The Respondents defended themselves stating that they were not personally served and that the process of creating the Kitui County River Basin Sand Utilization and Conservation Act and the effort to bring it into law amounts to goodwill and cannot count as willful disobedience of a court order.



76. Counsel for the 1st and 2nd Respondents relied on one of the elements of contempt of court being wilful disobedience as Mativo J (as he then was) held in the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR:

“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. The honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa underlined the importance of the Rule of Law, of compliance with court orders in the following terms:-

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of the state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

77. The Court is of the view that although the 1st 2nd and 3rd Respondents did demonstrate goodwill by going through the process of collecting information and data necessary to enact the Kitui County River Basins Sand Utilization and Conservation Act, and further by passing the said law, they were still in disobedience of the court’s orders.

78. The court thus finds that the Notice of Motion dated 29th May 2023 partly succeeds and makes the following findings;

- a. On the 1st issue, challenging the application on the ground that it was filed under the wrong provision of the law, the court finds that filing the current application under the wrong provision of the law is not serious enough to prevent the court from exercising its discretion to hear and determine the application on merit.
- b. On the 2nd issue challenging the advocate having conduct of this matter swearing the supporting affidavit, the court finds that the mere swearing of an affidavit by an advocate does not render the affidavit defective especially where the matters deposed to are agreed, uncontested and matters within the knowledge of the Advocate or on purely legal positions. However, the court finds that the averments deposed to at paragraphs 8, 9 and 10 of the supporting affidavit sworn on 29th May 2023 do not comply with the provisions of the law on affidavits as the same raise issues that are contested and the Advocate did not disclose the source of the information or grounds for belief.
- c. Having struck out paragraphs 8, 9 and 10 of the supporting affidavit, the court finds that the claim against the persons appearing at paragraph 2 (e) to (k) and paragraphs 3 (e) to (k) of the application herein are unsupported and the same have no merit and are dismissed.
- d. The court also finds that the 4th Respondent NEMA was not present or represented at the time when judgment was read in court. The applicant also failed to show that they were served with



the decree of the court. In the circumstance the orders sought against them cannot stand and the same is dismissed.

- e. With regard to contempt of order No. (d) of the decree herein, the court notes that the 1st and 2nd Respondents did not address the issue of whether or not they supplied the Applicants with the information requested as directed by the Court within the ninety days from the date of judgement or at all. The only conclusion the court can make is that they did not comply with the order and are therefore found guilty of contempt of the said order (d) of the judgement of the court.
- f. On the same issue of contempt of order No. (d) of the decree herein, the 5th and 6th Respondents explained that the information sought from the office of the County Commander, Kitui, was not in the custody of the said office hence there was an inability by the said office to comply. The said letter and the affidavit in reply explain extensively the offices responsible for the various tasks and that have custody of the various documents. The Court finds that the said letter was adequate as a response to the letter by the counsel for the Applicants dated 7th August 2020 and in compliance with the court decree herein.
- g. The court finds that the 1st, 2nd & 3rd Respondents failed to comply with the court's orders No. (b) and (f) of the decree herein by failing to demonstrate compliance with the Environmental Management and Coordination Act No. 8 of 1999, The National Sand Harvesting Guidelines and all other provisions of the law regulating the harvesting and transporting of sand. They also failed to file a report on compliance within ninety days from the date of judgment or at all. The said Respondents also failed to demonstrate measures taken to rehabilitate and restore the River Tiva in areas or sites near Ndumoni, Tanganyika, Nyanyaa and Tiva in Kitui County and report on the measures taken within ninety days from the date of the judgement or at all. The court thus finds the Respondents to be in contempt of the said court orders.

79. The final orders of the Court are that;

1. The claim against the persons appearing at paragraph 2 (e) to (k) and paragraph 3 (e) – (k) of the application dated 29/5/2023 is hereby dismissed.
2. The claim against the 4th Respondent National Environment Management Authority (NEMA) is hereby dismissed.
3. The following persons are hereby cited for contempt of court for disobeying orders No. (b), (d) and (f) of this court's judgment dated 22nd February 2023 and the decree thereof;
 - a. The County Secretary, County Government of Kitui.
 - b. The County Executive Committee Member for Energy, Environment, Forestry natural and mineral resources of the County Government of Kitui.
 - d. The Clerk, County Assembly of Kitui.
4. The Court further directs that summons be issued to the above- mentioned persons to appear before the judge at Kitui ELC for mitigation and sentencing on 2nd April 2025.

RULING READ, DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 27TH DAY OF FEBRUARY 2025

No appearance for the Applicants.

Nyawira for the 5th & 6th Respondents.



Appollo Muinde for the 3rd Respondent.

Court assistant: Kendi

LADY JUSTICE L. G. KIMANI

JUDGE- ELC

