



**Muswii v Kivuva & 2 others (Environment & Land Case
266 of 2017) [2024] KEELC 1632 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1632 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 266 OF 2017
TW MURIGI, J
MARCH 13, 2024**

BETWEEN

MWONGA MUSWII PLAINTIFF

AND

MBULI KIVUVA 1ST DEFENDANT

MUSILA KIMIA 2ND DEFENDANT

COSMAS MAWEU 3RD DEFENDANT

RULING

1. By a Notice of Motion dated 4th July, 2022 brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), in addition to Order 41 Rule 3 of the Civil Procedure Rules, 2010 the Applicant seeks the following orders: -
 - i. That the 1st and 2nd Defendants/Respondents herein be cited for contempt of the orders of this Honourable Court issued on 19th January, 2021 and they be subsequently imprisoned for a period not exceeding six months.
 - ii. That this Honourable Court be pleased to issue an order for a repeat of the planting exercise of the destroyed sisal plants that were to mark the access road passing through land Parcels No. Nzai/Ikangavya/186, 187, 188, 172 and 173.
 - iii. That an order do issue directing the OCS Matiliku Police Station to offer security during the exercise.
 - iv. That costs of this application be borne by the 1st and 2nd Defendants/Respondents.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Mwonga Muswii sworn on even date.



The Applicant's Case

3. The Applicant averred that on 19/01/2021, this Court issued an order directing the Makueni County Surveyor to visit land parcel numbers Nzai/Ikangavya/186, 187, 189, 172 and 173 to establish the location of the road of access as per the survey plans/records by planting sisal plants.
4. That in compliance with the order, the Surveyor visited the parcels of land in the presence of the parties where he located and marked the road of access by planting 44 sisal plants. That on 21/05/2022, the 1st and 2nd Defendants/Respondents together with their authorized agents destroyed the boundary features marking the road of access.
5. According to the Applicant, the 1st and 2nd Respondents are in contempt of this court's order and should be punished accordingly. He asserted that court orders are not made in vain and are meant to be complied with. He urged the court to cite the Respondents for contempt of court and punish them accordingly

The 1st and 2nd Respondents Case

6. The 1st and 2nd Respondents opposed the application through the replying affidavit of the 1st Respondent sworn on her own behalf and on behalf of the 2nd Respondent. She averred that the Surveyor created a road of access when there was already one in existence as per the cadastral map. She further averred that the new road of access hived off two acres from her land and awarded the same to the 3rd Defendant.
7. She denied the allegations that they destroyed the boundary features placed by the Surveyor and insisted that the sisal plants were blown away by wind since they had dried up. She urged the Court to dismiss the application.
8. The application was canvassed by way of written submissions.
9. The Applicant's submissions were filed on 27/03/2023.
10. In his submissions, the Applicant reiterated the contents of his affidavit in support of the application. He urged the court to allow the application as prayed.
11. As at the time of writing this ruling, the 1st and 2nd Respondents had not filed their submissions as directed.

Analysis and Determination

12. Having considered the application, the respective affidavits and the submissions by the Applicant, the only issue that falls for determination is whether the 1st and 2nd Respondents are in contempt of the court order issued on 19/01/2021
13. The Black's Law Dictionary 9th Edition defines contempt of court as follows:-

“conduct that defies the authority or dignity of the court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment,”



14. In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another Ibrahim J (as he then was)* stated as follows:-

“It is essential for the maintenance of the Rule of Law and order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect to whom an order is made by the court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

15. The law guiding the present application is Order 40 Rule 3(1) of the Civil Procedure Rules which provides as follows:-

In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

16. Section 5 of the *Judicature Act* confers jurisdiction on the superior Courts to punish for contempt and provides that;

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 such 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.

17. The High court of South Africa in the case of *Carla Burchell v Barry Grant Burchell Eastern Cape Division Case No 364 of 2005* held that in order to succeed in civil contempt proceedings, an applicant has to prove:-

- i. The terms of the order
- ii. Knowledge of these terms by the respondent
- iii. Failure by the respondents to comply with the terms of the order.

18. The first issue for determination is whether the terms of the order were clear. The record shows that on 19/01/2021, this Court issued an order in the following terms: -

1. That the County Surveyor Makueni County do visit the land parcels number Nzaiu/ Ikangavya/186, 187, 188, 189, 172 and 173 herein and establish the location of road of access as per the survey plans and/or records by planting sisals.
2. That the OCS Makueni County do supervise and or give security during the exercise.
3. That the costs of this application to be provided.



19. The order was unambiguous as it directed the County Surveyor Makueni County to visit the aforementioned parcels of land and establish the location of the road of access as per the survey plans by planting sisal plants.
20. The next issue for determination is whether the 1st and 2nd Respondents had proper notice of the order. The Applicants averred that the Respondents were present when the Surveyor visited the site with a view to locate and mark the road of access. The 1st Respondent admitted as much in her replying affidavit. I am therefore satisfied that the 1st and 2nd Respondents were aware of the terms of the order. I also find that the order was clear in terms of the parcel numbers.
21. On whether the 1st and 2nd Respondents deliberately breached the court order, the Applicant has a duty to prove his case beyond the balance of probabilities. This is because contempt of court is in the nature of criminal proceedings and the liberty of the subject is usually at stake. The Applicant must prove wilful and deliberate disobedience of the court order if he is to succeed as was held in the case of *Gatharia K. Mutitika v Baharini farm Ltd (1985) KLR* where the court held that:-

“A contempt of court is an offence of a criminal nature. A man may be sent to prison. It must be proved satisfactorily.....It must be higher than prove 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 nature.”
22. In the case of *Peter K Yego & Others v Pauline Wekesa Kode ACC No. 194 of 2014* the court held that:-

“It must be proved that one had actually disobeyed the court order before being cited for contempt”
23. In the present case, the Applicant asserted that the 1st and the 2nd Respondents uprooted the boundary features marking the road of access. The County Surveyor Makueni County, complied with the court order and filed his report vide the letter dated 19/04/2021. The Surveyor’s report produced as Exhibit (MM2(b) states as follows in part:- “The objective of the exercise was to fill sisal plants to mark the road passing on the above mentioned parcels of land. The exercise was successfully executed and 44 plants were planted to mark the road of access.”
24. It is crystal clear that the District Surveyor located and marked the road of access by planting 44 sisal plants
25. The order was directed at the County Surveyor Makueni County and not to the 1st and 2nd Respondents.
26. The Applicant is aggrieved because the 1st and 2nd Respondents destroyed the boundary features placed by the Surveyor to mark the road of access.
27. Section 21 (1) and (2) of the *Land Registration Act, 2012* provides for consequences for interference with boundary features as follows:-
 1. Any person who defaces, removes, injures or otherwise impairs a boundary feature or any part of it unless authorized to do so by the Registrar commits an offence and is liable on conviction to imprisonment for a term not exceeding two years or to a fine not exceeding two hundred thousand shillings or to both.



2. Any person convicted of an offence under subsection (1), whether or not any penalty is imposed upon the person, is liable to pay the cost of restoring the boundary feature, and the cost shall be recoverable as a civil debt by any person who is responsible under this section for the maintenance of the feature.
28. A reading of the above provisions shows that the consequences of interfering with boundary features can only follow upon conviction in a criminal court. From the foregoing, I find that this court is not the appropriate forum to seek redress for the alleged offences.
29. In the end, I find that the Applicant has not demonstrate that the 1st and 2nd Respondents are in breach of the Court order dated 19/01/2021 in order to cite them for contempt of court.
30. The upshot of the foregoing is that the application dated 4th July 2022 is devoid of merit and the same is hereby dismissed with no orders as to costs.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF MARCH, 2024.

In the presence of:-

Court assistant Kwemboi.

