



**Nduta [Suing as the Surviving Administrator of the Estate of Esther Gathoni - Deceased]
v Machua & another; Machua & another (Plaintiff); Nduta (Sued as the Surviving
Administrator of the Estate of Esther Gathoni - Deceased) & 3 others (Respondent)
(Environment & Land Case 48 of 2018) [2024] KEELC 1285 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1285 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 48 OF 2018**

**OA ANGOTE, J
MARCH 7, 2024**

BETWEEN

**JACINTA NDUTA [SUING AS THE SURVIVING ADMINISTRATOR OF THE
ESTATE OF ESTHER GATHONI - DECEASED) PLAINTIFF**

AND

**GRACE WAIRIMU MACHUA 1ST DEFENDANT
ANTHONY NGANGA KAMAU 2ND DEFENDANT**

AND

**GRACE WAIRIMU MACHUA PLAINTIFF
ANTHONY NGANGA KAMAU PLAINTIFF**

AND

**JACINTA NDUTA (SUED AS THE SURVIVING ADMINISTRATOR OF THE
ESTATE OF ESTHER GATHONI - DECEASED) RESPONDENT
BISHOP JOHN MACHARIA KAHIGA RESPONDENT
DOMINIC KIHURI MUTUA RESPONDENT
CHIEF LAND REGISTRAR RESPONDENT**



RULING

1. The 2nd Plaintiff/Applicant, in the counter-claim, Anthony Ng'ang'a Kamau, through a Notice of Motion dated 17th February 2023, has sought the following orders:
 - a. That this Honourable Court be pleased to find the Respondents in contempt of court and mete out appropriate punishment and remedial measures to be taken.
 - b. That the costs of this application be provided for.
2. The application is supported by the Supporting Affidavit sworn by the 2nd Plaintiff who deposed that he is the son and Administrator to the Estate of the late Rosemary Wamaitha Kamau (deceased) who was always the 2nd Plaintiff in this suit and that upon the death of her mother, Esther Gathoni, the 1st Respondent was made an Administrator to the estate and the issue of ownership and possession arose.
3. The 2nd Plaintiff/Applicant deposed that orders of preservation of the estate of Esther Gathoni were issued by Hon. Lady Justice Kalpana Rawal (as she then was) on 1st April 2008, by Hon. E. Obaga on 16th May 2019 and by Hon. Lady Justice Asenath Ongeru on 11th October 2019.
4. It is the Applicant's assertion that the 1st Respondent together with her immediate family members and surveyor went ahead to cause sub-division of Dagoretti/Mutuini92 (now NRB Block 48; 1697-1705) and shared the same among her family and sold their share to the 2nd and 3rd Respondents.
5. According to the 2nd Plaintiff in the counter claim, the 2nd Respondent/Purchaser has since built a boundary wall on his land; that he convened a meeting with the 2nd Respondent at the Chief's office and that despite being made aware of the court cases and court orders for preservation, he continues to build on the suit property.
6. It is the Applicant's case that on 17th November 2022, the 2nd Respondent brought on the suit property ballast and stones in preparation of erecting a building.
7. It was deposed that the 3rd Respondent was also served with all court orders but erected a boundary wall on the other piece of land and has made continuous development on the same.
8. It is the 2nd Plaintiff/Applicant's deposition that he conducted a search which showed that the 4th Respondent allowed the restriction to be lifted without a court order and without notice to the Applicants, himself or to his advocate on record, which was against the procedure laid down to warrant removal of a restriction on any land.
9. The 2nd Plaintiff/Applicant deposed that despite being duly served and knowledgeable of the said orders and notice of penal consequences, the Respondents have failed and/or refused to comply with the same; that this court has been and continues to be exposed to ridicule and disrepute and that the Respondents have refused to stop their dealings with the Applicant's parcel of land pending the hearing and determination of this case, Nairobi HCSC 2989 of 2004 and Nairobi Civil Appeal 45 of 2019 all pitted against the 1st Respondent.
10. In response, the 1st Defendant/Respondent filed her Grounds of Opposition dated 13th March 2023 in which she averred that the application has been overtaken by events and is unwarranted in the circumstances; that the application is res judicata and that Nairobi Succession Case No. 2989 of 2004



was heard and conclusively determined vide a judgement delivered by Hon. Justice R.E. Ougo on 9th November 2017.

11. The 1st Defendant/Respondent averred that in the Succession Case, Samuel Saru and Elizabeth Wambui were granted letters of administration intestate of the Estate of Esther Gathoni (deceased), which were confirmed on 28th November 2005; that Samuel Saru subsequently died on 9th September 2007 and was substituted by Jacinta Nduta on 9th July 2008 by an order of Hon. Justice Kalpana Rawal and that Elizabeth Wambui, the co-administrator later died on 15th March 2015 leaving Jacinta Nduta as the sole of administrator of the deceased's estate.
12. She averred that she made Summons for Rectification of Grant and she was issued with a rectified Certificate of Confirmation of Grant on 1st December 2020, that she further made Summons for Further Rectification of Grant on 1st February 2021 which was confirmed and that a Certificate of Confirmed Grant Further Rectified was issued by Hon. Justice A.O. Muchelule on 23rd March 2021.
13. Ms. Nduta deponed that Machua Mbugua and Sammy Kamau Wokabi, as the initial objectors, filed Summons for Revocation of Annulment of Grant to the confirmation of the grant on 3rd October 2007; that Grace Wairimu (1st Plaintiff) is the wife to Machua Mbugua and Rosemary Wamaitha Kamau (deceased) was the wife to Sammy Kamau Wokabi and that the 2nd Plaintiff/Applicant is the son of Rosemary Wamaitha Kamau (deceased).
14. It was averred by the 1st Defendant that Rosemary Wamaitha Kamau appealed against the judgement of Justice Ougo in the Court of Appeal vide Civil Appeal No. 45 of 2019; that the appeal abated by operation of law and that she proceeded to distribute the deceased's estate as per the beneficiaries listed in the Certificate of Confirmed Grant.
15. The 1st Defendant/Respondent asserted that this application has been overtaken by events as she has no interest in the suit property since she discharged her duty as the administrator as ordered by the court and in accordance with the *Law of Succession Act*.
16. The 4th Respondent filed a Notice of Preliminary Objection dated 13th May 2023, in which he asserted that the 2nd Counterclaimant has been wrongly enjoined in this suit, and that he does not have locus standi to maintain the suit or to counterclaim against the Defendants.
17. The 4th Respondent also filed a Replying Affidavit dated 13th May 2023 in which he deposed that the suit property was first registered to Wamuhu Gitau on 18th November 1958 as a freehold interest; that on 3rd September 1977, Esther Gathoni was registered as a proprietor of the suit property out of a succession process whereby she was to hold the land as a trustee for herself and her sons: Samuel Saru, Karanja Kamau, Jane Mbaire, David Mungai and Nectar Ndichu and that a certificate to the land was issued in her name.
18. Mr. Gitonga asserted that on 18th July 2008, a restriction was registered on the suit property to the effect that no dealings should be registered until the order of the court in Succession Case No. 2989 of 2004 was registered; that on 30th July 2008, a court order restraining the administrators from transferring or in any way dealing with the suit property till the summons for 3rd October 2007 was heard and determined was registered and that on 4th October 2008, a Court order dismissing the summons for revocation was registered.
19. Further, it was deposed that on 9th July 2008, Esther Wambui, as the administratrix obtained a letter of consent to subdivide the suit property as per the grant of administration; that on 21st February 2018,



- Wanyoike and Macharia Advocates wrote a letter to the Nairobi Land Registrar seeking to have the restriction placed on the suit property on 18th July 2008 removed, and that the restriction was removed.
20. It is the Chief Land Registrar's deposition that on 11th May 2020, the regional surveyor forwarded a mutation survey for the suit property to the Nairobi District Land Registrar requesting him to endorse and return the said mutation form; that on 20th April 2021, the Nairobi District Land Registrar wrote back to the Provincial Surveyor forwarding a certified copy of the mutation form and that according to their records, there is no indication that the order issued on 11th October 2019 in Succession Case No. 2989 of 2004 was presented for registration.
21. It was deposed by the 4th Respondent that the only way a land registrar is notified of the existence of a prohibition of dealings in a given piece of land is when the said restriction or court order is duly registered against the title in question, by making an entry in the land register.
22. It is the Land Registrar's evidence that by the time the said mutation or subdivision was registered, there was no such restriction or court orders registered to restrain the land registrar from registering the mutation form as presented by the surveyor and that there is no evidence before this court demonstrating personal service of the same. The parties filed submissions which I have considered.

Analysis and Determination

23. The issues for determination by this court is whether the Respondents are in contempt of the orders of this court.
24. The Honourable Attorney General has submitted that Section 5 of the *Judicature Act* was repealed by Section 38 and 39 of the *Contempt of Court Act*; that while the *Contempt of Court Act* was declared invalid under Kenya Human Rights Commission vs Attorney General & Another [2018] eKLR, under Section 20 of the *Interpretation and General Provisions Act*, Section 5 of the *Judicature Act* was not revived.
25. Section 20 of the *Interpretation and General Provisions Act* states that:
- “Where a written law repealing in whole or in part a former written law is itself repealed, that last repeal shall not revive the written law or provisions before repealed unless words are added reviving the written law or provisions.”
26. The *Contempt of Court Act* was however not repealed but was declared to be unconstitutional by the court in Kenya Human Rights Commission vs Attorney General & Another [2018] eKLR. In any case, the court does not have the constitutional mandate to repeal or amend laws, which is a preserve of Parliament.
27. This court in Jimi Wanjigi & Another vs Inspector General of Police & 3 Others [2021] eKLR, reached a similar conclusion. It stated that:
- “The *Contempt of Court Act* was not repealed in Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR. Instead, the Court declared the *Contempt of Court Act* unconstitutional. To the extent that the *Contempt of Court Act* was not repealed but was instead declared unconstitutional by a Court of Law, I find and hold that, the provisions of Section 20 of the Interpretations and General Provisions Act do not apply in the circumstances of this case. I say so because the duty to enact, amend and repeal laws is the preserve of the Parliament. If a Court decision is to take the place of Parliament, then the doctrine of separation of powers will be trampled upon. Once a statute has been declared



unconstitutional by a Court of Law, it is for the Parliament to enact another statute. It is that other statute which may make provisions repealing any earlier statute.

Having said so, in my view, upon the declaration of the unconstitutionality of the *Contempt of Court Act* by the Court, the law governing contempt of Court in Kenya reverted to the position before the enactment of the *Contempt of Court Act*.

It is on the basis of the foregoing that I agree with the Court's analysis in Samwel Mweru & Others vs. National Land Commission & 2 Others (2020) eKLR on whether after the *Contempt of Court Act* was nullified, the sections of the law it had nullified still stand repealed. I, however, note that the Court in that case, unlike in this case, did not expressly deal with Section 20 of the Interpretations and General Provisions Act.

The Court in Samwel Mweru's case (supra) invoked the inherent powers of the Court to avoid a lacuna in the law. The Court stated in part: -

"17. Courts derive their power from *the Constitution* and the statutes that regulate them. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Citing I H Jacob Current Legal Problems, Freedman C J M adopted the following definition of 'inherent jurisdiction'[13]

"... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them..."

28. In the same vein, the court in Republic vs Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR also held that this court can exercise its inherent jurisdiction to avoid a lacuna in the law where a statute is declared to be unconstitutional. It held that as follows:

- "34. The *Contempt of Court Act* is however no longer operative as from the date of the judgment declaring it unconstitutional in Kenya Human Rights Commission v Attorney General & Another (supra). I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court of Act, to avoid a lacuna in the enforcement of Court's orders. It was in this respect observed in Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.
35. In addition, where there is a lacuna with respect to enforcement of remedies provided under *the Constitution* or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the *Civil Procedure Act* to grant such orders that meet the ends of justice and avoid abuse of the process of Court."



29. This court therefore finds that the application is not defective as Section 5 of the *Judicature Act* remains legally operational.

30. 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.”

31. 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.

32. 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.”

33. It is critical to note that the standard of proof in contempt matters is higher than that of ordinary civil matters. In the case of *Mutitika vs Baharini 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 willfully acted in a manner that flouted the Court Order.”

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

35. This court in *Sheila Cassatt Issenberg & Another vs Antony Machatha Kinyanjui* [2021] eKLR, citing *Carey vs 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 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.”

36. In a similar vein, in *North Tetu Farmers Company Ltd vs Joseph Nderitu Wanjohi* [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.”

37. The orders that were issued by the court were for preservation of the Estate of Esther Gathoni, which were issued by Hon. Lady Justice Kalpana Rawal (as she then was) on 1st April 2008, by Hon. Justice E. Obaga on 16th May 2019 and by Hon. Lady Justice Asenath Ongeru on 11th October 2019.

38. On 1st April 2008, in the case of Nairobi High Court Succession Cause No. 2989 of 2004 In the Matter of the Estate of Esther Gathoni (Deceased), Hon. Justice Kalpana Rawal issued the following orders:

- a. That Jacinta Nduta be substituted to replace Samuel Saru who died on 9th September 2007;
- b. That a joint Grant of Letters of Administration issued be in the names of Elizabeth Wambui and Jacinta Nduta
- c. ..
- d. The Administrators be restrained from transferring or in any way dealing with the said property till Summons for Revocation or Annulment of Grant dated 3rd October 2007 is heard and determined.

39. This court order was registered against the suit property's title on 30th July 2008. This preceded a restriction which was registered on the suit property on 18th July 2008, to the effect that no dealings shall be registered until the order of the court in Succession Cause No. 2989 of 2004 was registered.

40. The 4th Respondent has presented the judgement and order issued by Hon. Justice R.E Ougo which clearly indicates that the issue of the Summons for Revocation Or Annulment of Grant was heard and determined on 9th November 2017.

41. The court found that the objectors had failed to show that the administrators failed to disclose material facts to the court at the time of obtaining the grant. The court dismissed the application and found



- that it had no merit. It held that the certificate of grant dated 28th November 2005 shows that the administrator apportioned the parcel of land as per the beneficiaries listed.
42. The orders issued on 1st April 2008 therefore lapsed on 9th November 2017 and are not binding on the parties herein. It is also critical to note that the Certificate of Confirmation of Grant was issued on 28th November 2008, rectified on 1st December 2020 and further rectified on 23rd March 2021.
 43. The Applicant has also claimed that the parties are bound by the orders issued on 16th May 2019 by Hon. Justice E. Obaga in the case of ELC Suit No. 48 of 2018. The Applicant has annexed a ruling dated 16th May 2019 delivered by Justice Obaga where he dismissed an application by the Plaintiff/Applicant which sought to restrain the Defendants from trespassing on the suit land or continuing any other dealings on the land. The application also sought to remove all cautions registered against the suit property.
 44. Judge Obaga declined to grant the prayer for the removal of all cautions registered against the title. As such, the restrictions were to subsist to the conclusion of the summons for revocation. The court in conclusion, found no merit in the applicant's application and dismissed the same with costs to the Respondents.
 45. The Court in this matter issued negative orders, which do not require a party to do anything or to refrain from doing anything. These orders were therefore not binding on the Defendants.
 46. Lastly, on 11th October 2019, Justice Asenath Ongeri in Succession Cause No. 2989 of 2004 In the Matter of the Estate of Esther Gathoni (Deceased) issued the following orders:
 - “(i) The application dated 24.1.2019 is res judicata since the issue of removal of the restriction was canvassed in ELC Suit No. 48 of 2018 and the Ruling was delivered on 16.5.2019 rejecting the said prayer.
 - (ii) This matter is still pending in ELC Suit No. 48 of 2018 where the ownership for the suit property is yet to be determined and therefore it is in the interest of justice that the suit property is preserved pending the determination of the said suit.”
 47. Judge Ongeri in the decision above, declined to issue any orders with respect to the restriction as the same issue had been determined by Judge Obaga.
 48. Indeed, at the time these two decisions were being made, the cautions registered on the suit property had been lifted. The 4th Respondent has established that the restrictions registered on the suit property on 18th and 30th July 2008, were lifted following a letter dated 21st February 2018 seeking their removal by the 1st Defendant's Advocates, Wanyoike & Macharia Advocates.
 49. The Advocates attached to the letter copies of the order and judgement by Ougo J on 9th November 2017, dismissing the application for revocation of the grant.
 50. Therefore, the lifting of the restriction was not in breach of the orders of this court. Rather, the impact of the orders of this court of 11th October 2019 was to preserve the suit property as it was at the time. This application for contempt of court can only be considered with respect to the orders dated 11th October 2019.
 51. The second element for contempt is whether the Respondents had knowledge of or proper notice of the terms of the order. These orders were issued in Succession Cause No. 2989 of 2004, in which the 1st



Defendant, Grace Wairimu Machua and Rosemary Wamaitha Kamau (the mother of the 2nd Plaintiff/Applicant) are parties.

52. The 1st Defendant/Respondent, Jacinta Nduta, has not denied that she had knowledge of the content of these orders or notice of the same. The Plaintiff has however not established that the 2nd, 3rd and 4th Respondents had notice of the same. Upon consideration of the record of the court, the 2nd, 3rd and 4th Respondents were not party to this suit when these orders were issued.
53. Further, the 2nd Plaintiff/Applicant has not provided a return of service as evidence to establish that these Respondents were served with the orders of the court dated 11th October 2019. Therefore, as to whether the Respondents acted in breach of the orders and whether their actions were deliberate, this court must find that this was not the case.
54. The current status of the suit property is that it has been subdivided and issued with new registration numbers. The 4th Defendant has established that Elizabeth Wambui, the co-administrator of the estate of Esther Gathoni obtained consent for subdivision of the suit property from the Dagoretti Land Control Board on 9th July 2008. This preceded the registration of the restriction against the title of the suit property on 18th and 30th July 2008.
55. Following the lifting of the restrictions, the 4th Respondent has shown that on 11th May 2020, the regional surveyor forwarded a mutation survey for the suit property to the Nairobi District Land Registrar requesting him to endorse and return the said mutation form and on 20th April 2021, the Nairobi District Land Registrar wrote back to the Provincial Surveyor forwarding a certified copy of the mutation form.
56. A survey was conducted on 7th May 2020 in the presence of Jacinta Nduta and Elizabeth Wambui and the mutation was registered on 20th April 2021.
57. This court has established that at the time these activities took place, the restriction on the title had been lifted and that the office of the Land Registrar had no notice as to the orders of preservation issued on 11th October 2019.
58. The 2nd Plaintiff's application for contempt of court against the Respondents therefore lacks merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 7TH MARCH, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Kubai for 4th Defendant/Respondent

Ms Kinii for Applicant/2nd Defendant

Ms Kimani holding brief for Njenga for 2nd Defendant

Jacinta Nduta Plaintiff in person

Court Assistant - Tracy

