



Brookshill Limited & another v County Government of Kwale & 3 others; Mwadzugwe & 2 others (Interested Parties) (Environment & Land Petition 25 of 2021) [2024] KEELC 4862 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4862 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 25 OF 2021**

AE DENA, J

JUNE 20, 2024

BETWEEN

BROOKSHILL LIMITED 1ST PETITIONER

ASHBROOK LIMITED 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF KWALE 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

AND

SULEIMAN ALI MWADZUGWE INTERESTED PARTY

SALIM HUSSEIN OMAR INTERESTED PARTY

HATIBU MJAKA MTENGO INTERESTED PARTY

RULING

1. The Petitioners herein are aggrieved with the judgement of the court rendered on 3/5/2023 and have filed two applications the basis of this ruling. The same are dated 21/2/2024 and 1/3/2024.
2. The application dated 21/2/2024 seeks for the following orders;
 1. Spent
 2. Spent



3. That the Honourable court be and is hereby pleased to issue an order of temporary injunction restraining the 1st Respondent, their agents, officers, assigns or anyone howsoever claiming through them under, under them from evicting, entering, demolishing and in anyway howsoever dealing and/or interfering with the property LR No Kwale/Diani Beach Block/1526 and LR Kwale/Diani Beach Block/1527 pending the interparties hearing and determination of the application for injunction lodged in the Court of Appeal.
4. The costs of this application be provided for.
3. The application is supported by an affidavit sworn by Ayoob Mohamed Bashir a manager of the Petitioners who avers that on 6/2/2024 the 1st Respondent through its department of Environment Natural Resources & Urban Department issued a notice to vacate LR Kwale/Diani Beach Block/1527 alleging the same had been reserved for the Kwale County government projects.
4. That the notice fails to meet the mandatory provisions of Section 152E of the Land Act that requires the notice should not be less than 3 months. The Petitioners state that an appeal against the judgement of this court has been preferred at the Court of Appeal vide a Notice of Appeal filed on 17/5/2023. That it is in the interest of justice that the application for injunction pending appeal be allowed since the Court of Appeal can only render itself once a three-judge bench has been formed and which might jeopardize their position given the notice issued by the 1st Respondent.
5. In opposing the application, the 1st Respondent through the firm of Mazdayo Mrima & Jadi Advocates raised the following verbatim grounds of opposition; -
 1. That the application herein is misplaced, fatally defective, frivolous, vexatious and an abuse of the court process.
 2. That this Honourable court having heard and determined the petition herein vide its judgement delivered on 3rd May 2023 it therefore became functus officio thus the Honourable court does not have jurisdiction to issue the orders sought by the applicants herein.
 3. That the purported notice to vacate having purportedly been issued in execution of the judgement and decree delivered on 3rd May 2023 and this Honourable court being functus officio, then the court only be moved vide an application for stay of the decree and/or review of the same and not otherwise.
 4. That there are no proceedings known in law in which the Notice of Motion application herein can originate hence the application offends the provisions of Order 3 Rule 1 of the Civil Procedure Rules.
 5. That the mandatory orders sought in the instant application are contrary to Order 40 of the Civil Procedure Rules and cannot be granted by this Honourable court.
 6. That the application herein ought to be dismissed with costs.
6. The 2nd application is brought to court pursuant to the provisions of section 39 of the High Court [Organisation and Administration] Act 2015 and Section 39 and 40[1] of the Rules to the said Act. The Applicant further relies on section 3 of the Judicature Act and Articles 48,50[1] and 159[2] [a] of the Constitution of Kenya 2010. The same is for the following orders; -
 1. Spent
 2. That pending intepartes hearing and determination of the instant application, the honourable court be and is hereby pleased to issue an order of debarment of audience, against the 1st and



3rd Contemnors on any other matter in these proceedings save for responding to the contempt as alleged in the instant application, and demonstrating purging of the non-compliance with the orders of the court of 26th February 2024.

3. That pending the interpartes hearing and determination of the instant application, this honourable court be pleased to issue an order injunction, restraining and barring the ongoing demolition, vandalism, unlawful and unrestrained access of the Applicants properties LR NO Kwale/Diani Beach Block/1526 and LR Kwale/Diani Beach Block/1527.
4. That pending the inter parties hearing and determination of the instant application, this honourable court be and is hereby pleased to issue summonses requiring the personal attendance of the 1st and 3rd contemnors on a date time and place to be determined by this hon court for them to jointly and severally show cause why they should not be cited and punished for their wilful and deliberate continuing and aggravated disobedience and defiance of the orders of the honourable court of 26th February 2024.
5. That pending hearing and determination of this application, the Petitioners application dated 21st February 2024, the honourable court be pleased to order the office of the OCS Diani Police Station or through their servants, employees to enforce the order of temporary injunction issued on 26th February 2024 by providing security on properties LR NO Kwale/Diani Beach Block/1526 and LR Kwale/Diani Beach Block/1527.
6. That in default of attendance upon issuance of summons, under order 4 herein] the honourable court be and is hereby pleased to issue warrants of arrest against the 1st to 3rd Contemnors to be executed and enforced by the Officer Commanding Diani Police Station under the supervision and direction of the inspector general national police service.
7. That the honourable court be pleased to issue an order citing the 1st Respondents County Secretary and County Executive Committee Member for Environment, Natural Resources, and Urban Planning for contempt of its orders issued on 26th February 2024 and sentence each of them [subject to any mitigation] to a custodial sentence of not less than [1] year and each a monetary fine for the sum not less than Kshs 5 million.
7. The Notice of Motion is supported by an affidavit sworn by Ayoob Mohamed Bashir who in summary states that despite the temporary injunction orders issued on 22/2/2024 by the court and which were served upon the county secretary on 26/2/2024 have been blatantly disobeyed by the 1st Respondents actions of wilfully partly demolishing the buildings erected on the suit properties. The petitioners state that the 1st Respondent's actions have caused them disrepute and great prejudice. The Petitioners state that the unlawful destruction of property by the 1st Respondent was reported at Diani Police Station vide OB No 73 but to date no action has taken place. The court is urged to call out and punish the contemnors placing reliance on Republic v Speaker of the National Assembly and 4 others exparte Edward R O Ouko [2017] eKLR.
8. In opposing the application, the 1st Respondent filed grounds of opposition dated 6/3/2024 and which summarily stated that this court is functus officio having rendered its judgement over the matter. That the application offends the provisions of Order 40 rule 1 of the Civil Procedure Rules and the Applicants have not demonstrated any legal or equitable rights over the demised suit property. That in the circumstance the application ought to be dismissed with costs.
9. In response to the application, the County Secretary of the County Government of Kwale Sylvia Chidodo Leli swore a replying affidavit. She averred that she is aware the issues revolving around



LR Kwale/Diani Beach Block/1527 and 1526 have always been handled by the department of Environment, Natural Resources and Urban Planning at the county government of Kwale. That on 23/2/2024 her office received a letter dated 22/2/2024 but no order alluded to in the letter was attached. That on 26/2/2024 she received information from the County Attorney Mr. Salim Gomeni that he had been served with a court order in respect of the two suit properties. With the said information, she called the County Executive Member of the department Ms. Saumu Beja Mahaja and informed her of the order and which was immediately complied with. The deponent states that all activities on the suit properties have ceased since then.

10. An affidavit sworn by Saumu Beja Mwachaja the County Executive Committee Member for Environment, Natural Resources and Urban Planning at the County Government of Kwale further opposes the application. It is deponed that as at the time the orders of 26/2/2024 were being served, no order had been issued by the court to warrant any disobedience. That pursuant to the judgement issued by the court, the 1st Respondent was ensuring compliance with the decree thereto. That on 21/2/2024 the county sent surveyors to the plot for purposes of surveying and putting up beacons. That upon seeing the surveyors, it is the caretakers of the plot who started to remove the windows from the buildings on the suit properties and doors while insisting that the Petitioners had every right to do so. That upon service of the court order all the activities on the suit properties were stopped.
11. The Interested Party also filed grounds of opposition dated 6/3/2024. It is stated that following the judgement delivered on 3/5/23 this Honorable court became functus officio and cannot issue and or grant the orders sought in the application dated 21/02/24
12. The applications were canvassed orally on 19/3/24 when Mr. Mwangi represented the applicants, Ms. Jadi the Respondent Kwale County and Mr. Kariuki the Interested Parties. The orders sought on the face of the Notice of Motion offend Order 40 Rule 1 of the Civil Procedure Rules. That they are equitable remedies in nature and cannot be issued where the applicant has not demonstrated legal or equitable right over the demised property.
13. Briefly the Applicant submitted that the applicant has a right to appeal the judgement of the court. The while this court cannot reverse its own judgement it has powers under Rule 32(3) of the Mutunga Rules to grant orders of stay of the same to protect the property from further allocation to a third party. While judgement was obtained legally possession was being obtained illegally since the court never issued an eviction order. It is contended the registration of the title 1526 in the name of the Interested Party was a deviation from the judgement. On the contempt application it was submitted that the survey links the County to the demolition. That unless the Applicants are protected the County will commit unlawful acts. That in her replying affidavit Ms. Leli admits knowledge of the court order whereupon the survey was stopped. That the demolition can only have been undertaken by the beneficiary of the judgement. That Saumu Mahaja was using a confession and avoidance tactic. In response to the Interested Party grounds of opposition it was submitted that the Applicants were properly before court. That the court can still give stay to enable a party pursue appeal. It would be wrong to end up with an academic exercise.
14. Reiterating the grounds of opposition Ms. Jadi stated the court being functus officio could only be moved by way of application for review or stay of execution. That the orders of temporary injunction were erroneously granted and ought to be discharged. The court cannot re-open cases where it has rendered judgement. That there was no suit before court within which the application for injunction would be anchored. The Petitioners were informed of the process of execution of the judgement that also involved government agencies culminating into the issue of titles. The Respondents simply executed the judgement of the court and the applicants had no right/interest to protect.



15. On the application for contempt is urged there was no court order served upon Saumu Beja Mahaja and Ms. Chidodo Leli prior to 26/2/24 when the court order was issued and served upon the County Attorney. That there was no demolition. That what is being referred to demolition was a systematic removal of windows by the caretakers and not the county. Had there been a demolition the ground would be different including the presence of bulldozers. The county vehicles seen in the photos were in tandem with survey exercise. That there was no evidence of personal service upon the contemnors. The court was referred to *Ochino & Another Vs. Okombo & 4 Others* (1989) eKLR. The property having reverted to the County following the judgement, nothing stops the County from allocating the same to any Applicant.
16. Mr. Kariuki referred the court to *Katana Changi Vs. the Ministry of Lands & Settlement & 4 Others* (2014) eKLR where Angote J. held that once a court determines a suit on merit it cannot revisit the issue in any subsequent application unless it is moved by application for stay or review. The application before court is an injunction pending appeal which is an equitable remedy and cannot issue where there is no interest. Further it ought not to have taken the Applicants until February 2024 to file an application before the Court of Appeal. That the order for stay pending appeal should be before the Court of Appeal and not this court. The court was referred to the Court of Appeal decision in *Ephraim Mbae Thurania & 2 Others* (2007) KLR. That Rule 32 of the Mutunga Rules is clear that a second appeal shall not serve as a stay of decree or order appealed. That the said Rules don't apply in the present case. There is no place in law where stay and injunction are used interchangeably. On the allocation of the land to the Interested Party it was submitted that the suit property reverted to the County who after due process allocated it. If the Applicants were aggrieved then this was a matter for another forum. That the doors to the Ark were closed and cannot be re-opened.
17. In further response it was submitted by Mr. Mwangi that the judgement arose from a Constitutional Petition and the Applicant cannot be limited to the Civil Procedure Rules. That the Applicants were not asking for fresh hearing to warrant a fresh hearing. The doctrine of *functus officio* does not apply. The case of *Butt Vs. Rent Restriction Tribunal* was relied upon. Further that in the case of *Shimers Plaza* which was decided after *Ochino* (*supra*) the court held that knowledge of the order was sufficient ground to a finding of contempt of court.

Determination

18. The jurisdiction of this court to grant the orders sought in the application for injunction has been questioned by both the Respondent and Interested Party and I must deal with this issue at the earliest opportunity for jurisdiction is everything and without it the court cannot determine placed before it see the case of *Owners of Motor Vessel Lilian Vs Caltex Oil Kenya Ltd* [1989] eKLR. This is mainly on the basis that this court is *functus officio*. Let me state that the fact that the law envisages a party approaching it for an application for review of its judgement or order clearly indicates that it would not be *functus officio* looking at it from this perspective and I agree with the Applicant submissions that it does not apply.
19. But having stated the above, the application before me is brought substantively under the provisions of Section 152E and 152F of the *Land Act* which provisions I have reviewed. Section 152E is on Eviction Notice to unlawful occupiers of private land while 152F is on application to court for relief and is to the effect that any person or persons served with a notice in terms of sections 152E may apply to court for relief against the notice. The notice served in the present proceedings was served pursuant to a decree of this court. It is claimed that the eviction notice is wrongly procured because the court did not issue an order of eviction. While section 152F provides the much needed buffer for evictees to apply to the High Court for relief it is my view the said provisions did not envisage circumstances where notice



would be issued pursuant to a court decision. To me what was envisaged is a scenario where there is no suit and therefore fresh proceedings would commence the application to the court for relief. On this basis therefore, the application as filed under these proceedings cannot stand.

20. Further the court is invited to grant orders of injunction pending the interparties hearing and determination of the application for injunction lodged in the Court of Appeal. The application before the court of Appeal is dated 20/2/24 and is filed under Article 164(3) of *the Constitution* of Kenya 2010 and Section 3A and 3B of the *Appellate Jurisdiction Act*, and Rules 5(2) (b) of the Court of Appeal Rules 2022. The Applicants have already moved the Court of Appeal for orders of injunction restraining the County Government of Kwale from evicting, demolishing and or interfering with the properties herein pending the inter partes hearing and determination of the said application. The Applicants had the opportunity under the Civil Procedures Rules to approach this court for stay of execution. Having submitted themselves to the jurisdiction of the Court of Appeal then clearly this Court cannot entertain the application before it. My hands are tied and I must not progress.
21. If I may add this court has power to grant a temporary injunction pending appeal in the exercise of its appellate jurisdiction. under the provisions of Order 42 Rule 6(6). Unfortunately, it is not sitting under its appellate jurisdiction in the instant proceedings but as the court that issued the decree.
22. On the application dated 1/3/2024 the main issue for determination is whether the Respondents are in contempt of the court orders issued on 26/2/24. Section 5(1) of the *Judicature Act* grants the High Court and the Court of Appeal the power to punish for contempt. It 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.
23. The Black's Law Dictionary 9th Edition, defines contempt as:
- The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.
24. Section 29 of the *Environment and Land Court Act* is clear to the effect that;
- “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’
25. Mativo J. restated the test for establishing contempt in Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR where he stated –
40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove
- (i) The terms of the order,
- (ii) Knowledge of these terms by the Respondent,
- (iii) Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of wilfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements



of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated: -

“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.”

26. The nature and purpose of contempt proceedings was summarised in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR where Mativo J stated thus; -

“Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest”.

27. In the instant case, the court rendered its judgement on 3/5/2023. The same was in favour of the Respondents as against the Petitioners herein. In enforcing the judgement, the 1st Respondent carried out survey activities on the suit properties as stated and were in the process of undertaking survey when they were served with the injunction orders granted by this court. Guided by the caselaw cited above I must address whether the Respondents had knowledge of or proper notice of the terms of the order.// The Petitioners allege that despite being served with the order, the 1st Respondent continued with destruction of the property on the suit land and hence the application for contempt.

28. The averments raised by the Petitioners are contested by affidavits filed by the 1st Respondent. The same do not dispute the allegation that they had taken over the suit property but contend that this was in execution of the judgement of the court culminating to the property reverting to the County and issue of title. The 1st Respondent states that at the time of surveying the property, no order had been issued by this court. That immediately the order was served upon them they ceased their actions and left the suit properties.

29. Indeed it is important to address the issue of service of the orders against the date of the orders. I say so because knowledge and service of the orders go in tandem. Upon review of the affidavits and annexures thereto this court is in agreement with the 1st Respondent on the fact that injunction orders had not been issued by the time the County Government proceeded to survey the land after the judgment of the court. This is considering that the orders are clearly issued on 26/ 2/24. The next question would be the Respondents remain on the land after service of the said orders having knowledge of the orders? From the record, the court is not convinced that any evidence has been tendered in proof of allegations that despite the injunction orders being served upon the 1st Respondent, they continued being on the land. I’m also not convinced that it has been proved the said demolitions were undertaken by the County



given the systematic way the same were undertaken as shown in the photos as opposed to demolitions as we understand them in the Kenyan contest. This is considering that the burden of proof is slightly higher.

30. The court is further guided by the dictum in Sheila Cassatt Issenberg & another – Versus - Antony Machatha Kinyanjui [2021] eKLR, that: -

“.....in cases of Contempt 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...

31. Based on the foregoing this court is inclined to giving the 1st Respondent a benefit of doubt. The court is well aware of the fact that the 1st Respondent has admitted to being aware of the orders and that immediately the same were served no further activities have been undertaken on the suit properties.

32. The upshot of the foregoing is that the applications dated 21/2/2024 and 1/3/2024 are hereby dismissed. For the avoidance of doubt the same collapse with the orders of the court issued on 26/2/2024. There shall be no orders as to costs.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 20TH DAY OF JUNE 2024.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Andiwo for the Applicant/Petitioner

Ms. Jadi for the 1st Defendant/Respondent

Mr. Kariuki for the Interested Party

Mr. Daniel Disii - Court Assistant.

