



**Criticos & another v AIC Makutano & 66 others (Environment & Land Case 3 of 2024)  
[2024] KEELC 4732 (KLR) (Environment and Land) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4732 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND CASE 3 OF 2024**

**EK WABWOTO, J**

**JUNE 14, 2024**

**BETWEEN**

**BASIL CRITICOS ..... 1<sup>ST</sup> PLAINTIFF**

**KENYA TRADE AND DEVELOPMENT COMPANY LIMITED .. 2<sup>ND</sup> PLAINTIFF**

**AND**

**AIC MAKUTANO ..... 1<sup>ST</sup> DEFENDANT**

**MBUYUNI PRIMARY SCHOOL ..... 2<sup>ND</sup> DEFENDANT**

**DAVID KIOKO MUTUA ..... 3<sup>RD</sup> DEFENDANT**

**ALPHONCE MWAKA MASIKA ..... 4<sup>TH</sup> DEFENDANT**

**THOMAS MUTNGA ..... 5<sup>TH</sup> DEFENDANT**

**RONALD MUTISO MUTUA ..... 6<sup>TH</sup> DEFENDANT**

**RUTH MKUMBULU LELEWU ..... 7<sup>TH</sup> DEFENDANT**

**REBECCA NJICHA MTUA ..... 8<sup>TH</sup> DEFENDANT**

**OTHANIEL MNENE ..... 9<sup>TH</sup> DEFENDANT**

**ANDREW JUMAMOSI MASAMO ..... 10<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 11<sup>TH</sup> DEFENDANT**

**ADRIANA SHALI MSAFARI ..... 12<sup>TH</sup> DEFENDANT**

**MARION ATIENO MOON ..... 13<sup>TH</sup> DEFENDANT**

**DUNCAN JACOB MAGHAGHA ..... 14<sup>TH</sup> DEFENDANT**

**JANE WAITHIRA KAIRO ..... 15<sup>TH</sup> DEFENDANT**



JAMES FRED NEWTON WANDERA .....	16 <sup>TH</sup> DEFENDANT
MBUYUNI WOMEN GROUP ORGANIZATION .....	17 <sup>TH</sup> DEFENDANT
SABASTIAN LETIMIANE MWACHILA .....	18 <sup>TH</sup> DEFENDANT
PETRO CHIKIRA EDWARD .....	19 <sup>TH</sup> DEFENDANT
EDWARD RASHID MAKORE .....	20 <sup>TH</sup> DEFENDANT
JACKSON MATANO FUNDI .....	21 <sup>ST</sup> DEFENDANT
NZIOKI MUTUA MBULU .....	22 <sup>ND</sup> DEFENDANT
BAHATI KINYOKA .....	23 <sup>RD</sup> DEFENDANT
PROTUS A. SEBORU .....	24 <sup>TH</sup> DEFENDANT
MUSA SALERI FUNDI .....	25 <sup>TH</sup> DEFENDANT
JOSEPH SALERI FUNDI .....	26 <sup>TH</sup> DEFENDANT
DENNIS MWANGEKA MOMBO .....	27 <sup>TH</sup> DEFENDANT
JANET CHILUMO MBWANA .....	28 <sup>TH</sup> DEFENDANT
PASCAL SIO MTULA .....	29 <sup>TH</sup> DEFENDANT
MARTIN MRAMBA .....	30 <sup>TH</sup> DEFENDANT
NUHU LAYONI ABDULRAHAMAN .....	31 <sup>ST</sup> DEFENDANT
MWANATUMU HAMISI .....	32 <sup>ND</sup> DEFENDANT
JARED ONYANSI NYAUNDI .....	33 <sup>RD</sup> DEFENDANT
CLEMENT LENJO .....	34 <sup>TH</sup> DEFENDANT
ANNABEL RADUMA OJOO .....	35 <sup>TH</sup> DEFENDANT
LIVERSON MARORO .....	36 <sup>TH</sup> DEFENDANT
LINNET NGELE IDAWO .....	37 <sup>TH</sup> DEFENDANT
MWAKULOMBA P. SHETE .....	38 <sup>TH</sup> DEFENDANT
JOSEPH M. MWACHILA .....	39 <sup>TH</sup> DEFENDANT
GODWIN MWITI MUGIRA .....	40 <sup>TH</sup> DEFENDANT
ELINA JOHANA MWACHIA .....	41 <sup>ST</sup> DEFENDANT
CHALLA CHEMICALS INTERNATIONAL LIMITED .....	42 <sup>ND</sup> DEFENDANT
DENIS N MUNYI .....	43 <sup>RD</sup> DEFENDANT
MICHAEL WISO .....	44 <sup>TH</sup> DEFENDANT
ALFRED ISAACK MNYANYA .....	45 <sup>TH</sup> DEFENDANT
CORNEL KINYILI KONGO .....	46 <sup>TH</sup> DEFENDANT
CAROLINE EDINA ATIENO ADHOLA .....	47 <sup>TH</sup> DEFENDANT



JOHN J SWAI .....	48 <sup>TH</sup> DEFENDANT
JOHN MUTUA MWANGI .....	49 <sup>TH</sup> DEFENDANT
MARK NGWATI MBITHI .....	50 <sup>TH</sup> DEFENDANT
CHEMOMOBO TECLAH MUKHEBET .....	51 <sup>ST</sup> DEFENDANT
ERASTUS A MAROO .....	52 <sup>ND</sup> DEFENDANT
PAUL MWASARU MWAZUMO .....	53 <sup>RD</sup> DEFENDANT
JESMILY WAKESHO MWAZUMBO .....	54 <sup>TH</sup> DEFENDANT
NIORAM HOLDINGS LIMITED .....	55 <sup>TH</sup> DEFENDANT
JAPHET MNDAMBO BASHARI .....	56 <sup>TH</sup> DEFENDANT
TOLOWA RAMAITA .....	57 <sup>TH</sup> DEFENDANT
RENNISON A. MWADIME .....	58 <sup>TH</sup> DEFENDANT
RUTH KAMEME .....	59 <sup>TH</sup> DEFENDANT
JACKSON KIMIRI MSUYA .....	60 <sup>TH</sup> DEFENDANT
MATENGE K NGAU .....	61 <sup>ST</sup> DEFENDANT
MUTUA MBITHI MBURU .....	62 <sup>ND</sup> DEFENDANT
EPHRAIM NGORIO SIMEON .....	63 <sup>RD</sup> DEFENDANT
BENSON KISOMBE MSULA MBEDE .....	64 <sup>TH</sup> DEFENDANT
LAND SETTLEMENT FUND BOARD OF TRUSTEES (FORMERLY KNOWN AS THE SETTLEMENT FUND TRUSTEES) .....	65 <sup>TH</sup> DEFENDANT
THE CHIEF LAND REGISTRAR .....	66 <sup>TH</sup> DEFENDANT
THE DISTRICT LAND REGISTRAR, TAITA TAVETA .....	67 <sup>TH</sup> DEFENDANT

## RULING

1. The Plaintiffs have moved this court *vide* an application dated 27<sup>th</sup> November 2023 seeking to cite Japhet Mdambo Bashari the 56<sup>th</sup> Defendant for contempt of the orders of this court given on 9<sup>th</sup> November 2020.
2. The application is premised on the grounds on its face and on the supporting affidavit sworn on 27<sup>th</sup> November 2023 by Basil Criticos. It was averred that the 56<sup>th</sup> defendant has deliberately and wilfully disobeyed clear orders that were granted by this court on 9<sup>th</sup> November 2020. The orders were clear that no new person would be allowed to enter the land and or carry out any development thereon pending hearing and determination of the suit.
3. It was also averred that the 56<sup>th</sup> Defendant is one new such person who was not on the suit property as at 9<sup>th</sup> November 2020 when the orders were granted barring any new person not on the suit property from entering the same. The 56<sup>th</sup> Defendant being aware of the said orders chose to deliberately and wilfully disobey them through the following actions; illegally fencing a portion of the suit property,



illegally ploughing the illegally fenced portion of the suit property, illegally planning crops on the illegally fenced and ploughed portion of the suit property, illegally placing a large blue container on the illegally fenced portion of the suit property whose contents are unknown illegally placing construction materials on the illegally fenced portion of the suit property.

4. It was further averred that the Plaintiffs through their Advocate on record wrote to the 56<sup>th</sup> Defendant asking him to immediately cease any interference with the suit property and further demanded that he complies with the orders of the court of 9<sup>th</sup> November 2020 to keep away from the suit property and thus the 56<sup>th</sup> Defendant had actual and personal knowledge of the court orders of 9<sup>th</sup> November 2020.
5. The Plaintiffs also filed written submissions in support of the application upon which Learned Counsel Mr. Obok in highlighting the same urged the court to cite the 56<sup>th</sup> Defendant for contempt of the orders issued herein.
6. The 56<sup>th</sup> Defendant filed a Replying Affidavit sworn by Japhet Mndambo Bashari on 16<sup>th</sup> January 2024. It was deponed that he was not a party to this suit as at 9<sup>th</sup> November 2020 when the said orders were issued. It was stated that he was joined to these proceedings on 16<sup>th</sup> September 2022 and that the Plaintiffs had also filed another suit Mombasa ELC No. 143 of 2022 [Kenya Trade & Development Co. Ltd v Japhet Mndambo Bashari](#) which was dismissed and as such there are no injunctive orders against him upon which he can be cited for contempt. He also stated that he has been in occupation of Plot No. Taita/Taveta/Lake Jipe Settlement Scheme/779 since 1999 way before 2022 and before issuance of titles on 6<sup>th</sup> February 2015. Counsel for the Defendant also made oral submissions in support of the application.
7. Having considered the application and submissions made by Counsel for the parties, the main issue for consideration is whether Japhet Mndambo Bashari, the 56<sup>th</sup> Defendant is in contempt of the orders issued by this court on 9<sup>th</sup> November 2020.
8. The law relating to contempt of this court is found in section 5 of the [judicature Act](#), section 29 of the [Land Act](#) and The Practice Directions on Proceedings in the Environment and Land Court.

Section 5 of the [Judicature Act](#) provides as follows;

“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.”

Section 29 of the [Environment and Land Court Act](#) provides 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”.

Practice direction 43 on Proceedings Relating to the Environment and the Use and Occupation of, and title to Land and Proceedings in Other Courts (Gazette Notice No. 5178) provides that non-compliance with the relevant provisions of the CPR, orders, and/or directions issued by a judge shall attract sanctions including but not limited to the imposition of costs, fines, striking out of pleadings, the dismissal of a suit and/or meting out punishment prescribed in the ELC Act or any other Statute as the court may deem fit bearing in mind the overriding interest of justice.

9. This application is seeking prayers that the 56<sup>th</sup> Defendant be found to be in contempt. What constitutes contempt of court?



10. In the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, the Learned Judges of Appeal went to great lengths in tracing the foundations of law on contempt as practiced in Kenya. They state;

“*Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others*, (supra) when dealing with the same issue concerning the applicability of English Law of contempt in our Courts had this to say:

“Following the implementation of the famous Lord Woolf’s Access to Justice Report, 1996’, the Rules of the Supreme Court of England are gradually being replaced with the *Civil Procedure Rules, 1999*. Recently on 1 st October, 2012 the *Civil Procedure* (Amendment No. 2) Rules, 2012 came into force and part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court of England in its entirety.”

Consequently, a careful consideration must be had to the provisions of the *Contempt of Court Act* of 1981 Act and PART 81 of *Civil Procedure* (Amendment No. 2) Rules, 2012 with regard to contempt proceedings in Kenya.

11. Part 81 provides for four different natures or forms of violations under contempt of court. They are;
- i. Committal for “breach of a judgment, order or undertaking to do or abstain from doing an act” provided for under Rule 81.4.
  - ii. Committal for “interference with the due administration of justice” (applicable only in criminal proceedings) provided for under Rule 81.11.
  - iii. Committal for contempt “in the face of the court”, provided for under Rule 81.16.
  - iv. Committal for “making false statement of truth or disclosure statement.” provided for under Rule 81.17.

12. For what it is worth, I have demonstrated that the willful disobedience of any judgment, decree, direction, order, or other constitutes contempt of court.

14. In effect, an applicant seeking to cite another for contempt is held to very high standards of proof, higher than in civil cases. He must prove the following:

- a. That there is in existence of an order/ judgement that is clear unambiguous and binding.
- b. That the Defendant/Respondent has knowledge of the said order/ Judgement
- c. That the Defendant/Respondent has acted in breach of the said orders
- d. That the Defendant/Respondent’s conduct is deliberate.

13. In the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR Mativo J (As he then was) stated that;

“...The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and *mala fide*.’”

14. An allegation of contempt of court is a serious matter since it puts the liberty and or property of the contemnor at grave risk. It is for that reason that the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See *Mutitika*



*v. Babarini Farm Limited* [1985] KLR 229 and *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR.

15. Looking at the circumstances in the present application, this court issued its orders on 9<sup>th</sup> November 2020. The said orders was issued against the Defendants who were on record and it was as follows:

“An order of status quo be and is hereby issued to the effect that no new persons shall be allowed to enter the land and carry out any development herein pending the hearing and determination of the suit”

16. The 56<sup>th</sup> Defendant was not a party to the suit though he was already in occupation of the same, these facts have not been disputed and or controverted by the Plaintiffs. Hence therefore the said orders as at the time of issuance could only have applied to the parties on record. Further the Court is unable to confirm whether the 56<sup>th</sup> Defendant's actions were deliberate and in breach of the said orders.

17. In the absence of evidence showing the existence and satisfaction of the ingredients necessary to prove contempt, the application fails.

### **Conclusion**

18. In view of the foregoing and considering the evidence adduced herein, this court is not satisfied that he Plaintiffs have met the threshold for grant of the orders sought and in the circumstances the Plaintiffs application dated 27<sup>th</sup> November 2023 is hereby determined as follows;

- a. The application is dismissed.
- b. Each party to bear own costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 14<sup>TH</sup> DAY OF JUNE 2024.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of:-**

**Mr. Obok for the Plaintiffs/Applicants.**

**Ms. Juma h/b for Mr. Mutubia for 7<sup>th</sup> and 12<sup>th</sup> Defendant.**

**Ms. Mwaniki h/b for Busaidy for 13<sup>th</sup> Defendants.**

**N/A for the 56<sup>th</sup> Defendant.**

**N/A for the other parties.**

**Court Assistant; Patrick Maina.**

