



**Nyamari & 2 others v Kisii County Government (Environment & Land Case 206 of 2016) [2024] KEELC 4847 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4847 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 206 OF 2016**

**M SILA, J  
JUNE 13, 2024**

**BETWEEN**

**ELIAS OKINDO NYAMARI ..... 1<sup>ST</sup> PLAINTIFF**

**JOVINALIS NYAMWENO ..... 2<sup>ND</sup> PLAINTIFF**

**JOYCE BIYAKI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KISII COUNTY GOVERNMENT ..... DEFENDANT**

**RULING**

(Application alleging that the respondent has disobeyed the decree of the court by making a road through the land of the applicants; evidence provided being a photograph and an OB number; no report indicating where the road has actually passed and in which parcel of land; proof of contempt being beyond a balance of probabilities; no sufficient evidence to hold the respondent in contempt; application dismissed).

1. The application before me is that dated 27 February 2024 and filed on 5 March 2024 by the plaintiffs/decree holders. The application seeks the following orders :-
  - a. That the defendant's/respondent's County Secretary be summoned to appear in court and show cause why he should not be punished for disobedience of a court order issued by this court.
  - b. That the Hon court be pleased to punish the defendant's/respondent's County Secretary for a period not exceeding 6 months for willful violation and or disregarding a court order issued rightly by this court.
  - c. Costs of this application be allowed.



2. The respondent did not file anything in reply to the application.
3. From the record, I can see that the applicants commenced suit through a plaint filed on 18 July 2016. They averred to be the owners of the land parcels Bassi/Boitangare/888, 2182 and 2009. Their complaint was that in the month of July 2016, the defendant sent officers and tractors to create a road passing through their land. In the suit, they wished to have the defendant permanently restrained from this activity without following the laid down process of compulsory acquisition and compensation. The court directed the Land Registrar and Surveyor to make a report which was done. The report did articulate that there is a road but the defendant had also created another road traversing the land parcels of the plaintiffs. On 26 May 2021, judgment was entered pursuant to that report and the court (Onyango J) ordered as follows :
  - a. The excavation of the road should follow the dimensions of the road provided in the map. Any further excavation that is not in conformity with the map of Boitangare registration section shall cease forthwith.
  - b. A permanent injunction is hereby issued restraining the defendant by itself, its agents, servants, employees or anyone acting on behalf from creating a new road through land parcel No. Bass/Boitangare/1888.2182, and 2009 without following the laid down procedure for compulsory acquisition and compensation.
  - c. That costs of this suit shall be borne by the defendant.
4. In the present application, the plaintiffs' complaint appears to be that the defendant has defied the above orders. The supporting affidavit is sworn by Elias Okindo Nyamari. He has deposed that on 25 February 2024 at about 5 pm, the defendant again entered the land parcels of the plaintiff (sic) and destroyed crops. It is deposed that on 26 February 2024 at 9.15 hours, the applicants made a report at Itumbe Police Station. It is averred that the defendant has totally refused to respect the decree herein.
5. I have considered the application. As I have said, it is one where the applicants allege a disobedience of the decree of this court and wish to have the defendant's officer punished for the said disobedience. The burden of proof is therefore on the applicants. In essence, they need to demonstrate that indeed there is a road created by the defendants which is in disobedience of the decree of the court. Have the applicants supplied this court with sufficient material to demonstrate that the defendant has caused creation of a road in disregard of the decree ? I am afraid not.
6. All that the applicants have annexed is a copy of the decree, a photograph, and an OB number. There is no report from any surveyor or other expert to inform this court where the alleged road has been created, and importantly, to show that the road has not followed the map as indicated in the decree, but has instead taken a path that goes through the land of the applicants. Even the applicants themselves have not said in which land this allegedly offensive road has passed, or which particular land, of the three suit parcels of land, is affected. There is nothing to inform this court that this particular land has been affected in this way and to this extent. A mere photograph by itself, without elaboration, cannot tell this court that a particular road is on particular land. Neither does the OB number.
7. In the case of *Mutitika vs. Babarini Farm Limited* [1985] KLR 229, 234 the Court of Appeal espoused the standard of proof in contempt cases and 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.”



8. A court cannot hold somebody to be in contempt of a decree based on mere allegations and casual averments. There must be concrete proof that supports the claims of disobedience. Such proof as pointed out in the above authority, needs to be higher than a balance of probabilities. I am afraid that I do not have sufficient evidence to the required standard to hold the defendant in contempt. For this reason, I have no option but to dismiss this application. It is hereby dismissed, but since the defendant did not feel the need to respond to it, there will be no orders as to costs.
9. Orders accordingly.

**DATED AND DELIVERED THIS 13 DAY OF JUNE 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Mr. Sagwe for the applicants

Mr. Oirere for the respondent

Court Assistant : David Ochieng'

