



**Mussaji & another v Mussaji (Environment & Land Case 149 of 2019)  
[2024] KEELC 6104 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6104 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 149 OF 2019  
NA MATHEKA, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**SHABBIR IBRAHIM MUSSAJI ..... 1<sup>ST</sup> PLAINTIFF**

**ONALI EBRAHIM MUSSAJI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MOIZ EBRAHIM MUSSAJI ..... DEFENDANT**

**RULING**

1. The application is dated 4<sup>th</sup> November 2023 and is brought pursuant to Section 3, 4, (1) (A), 5 (B), 23(A), 25 and 28 (6) of the contempt of Court Act, Section 13 and 29 of the Environment and Land Court Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 1(A), 1(B) 3 And 3(A) of the Civil Procedure Act seeking the following orders;
  1. That this Application be certified as urgent and be heard ex parte in the first instance and service of this Application be dispensed with in the first instance.
  2. That the Honourable Court be pleased to find the Defendant in contempt of Court for refusing, failing or neglecting to obey the Orders issued by the Honourable Court on vide the Judgement dated 17<sup>th</sup> May 2022 and the Decree dated 3<sup>rd</sup> August 2023.
  3. That pending the inter parties hearing and determination of this Application the Defendant be arrested and an order of committal be made against the Defendant herein to prison for such period as this Honourable Court may deem fit and just in that the said Defendant has disobeyed the Orders issued by the Honourable Court as aforesaid.
  4. That pending the inter parties hearing and determination of this Application the Defendant be ordered to effect payment of the sum of Kshs.20,000,000.00 in that the said Defendant has disobeyed the Orders issued by the Honourable Court as aforesaid.



5. That an injunction do issue against the Defendant preventing the Defendant from further collecting rent or in any other way dealing with the Suit property pending the hearing and determination of this Application and the suit.
  6. That the Honourable Court grants any other order or further orders geared towards protecting the dignity and authority of the Honourable Court deemed expedient in the circumstances.
  7. That the costs of this application be borne by the Defendant.
2. This application is premised on the Supporting Affidavit of Shabbir Ibrahim Mussaji the 1<sup>st</sup> Plaintiff herein, the following grounds that the Plaintiffs obtained a Judgement in their favour on 17<sup>th</sup> May 2022 to the effect that they were deemed to be the Landlords in respect of all tenancies that currently existed at the time of the judgement and which would exist post the Judgement. That the Plaintiffs were further declared to be equally entitled to all rents and other income that would be derived from the suit properties being Mombasa/B1ock XVI/252, Mombasa/B1ock XVI/253, Mombasa/B1ock XVI/1388 and Mombasa/B1ock XVI/1390. That the Honourable Court further made Orders to the effect that the Plaintiffs and the Defendant would have equal rights with respect to possession and other dealings involving the suit properties and should the Defendant do anything without the consent of the Plaintiffs, then the Defendant's actions shall be void and of no consequence in law. That pursuant to the said judgement which was delivered on 17<sup>th</sup> May 2022, the Honourable Court issued a Decree dated 3<sup>rd</sup> August 2022. That the Defendant is in blatant disregard of the Court orders and directions despite being fully aware of the said Judgement, Orders and/or Directions as they were issued in the presence of his Advocates on record.
  3. The respondent's Advocate admits that the Court has indeed delivered its judgment as exhibited and or annexed on the Replying Affidavit but the Applicant has not shown how the Respondent is in contempt of the said judgment since the said judgment apportioned the right to both the Plaintiffs and the Defendant equally. That at no time has the Defendant been informed or given prior notice of any contempt and allowed to defend himself or purge the same before this application is filed but instead, he has been ambushed with a contempt application without indicating what he is required to do or directed to do which he has not done as per the court order if any or judgment. That the contempt application involves personal service upon the alleged contemnor and service on the same should be done personally on the party to the suit and or on the application and such service must be confirmed by an affidavit of service indicating how service was affected.
  4. This court has considered the application and submissions therein. The Black's Law Dictionary (Ninth Edition) defines contempt of court as;
 

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
  5. This application is anchored on section 63 (c) of the [Civil Procedure Act](#) which provides that;
 

“63) In order to prevent the ends of justice from being defeated, the court may , if it is so prescribed:-

    - (c) Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold”



6. Pursuant to section 63(c) aforesaid, it is provided under order 40 Rule 3(1) of the Civil Procedure Rules that;

“3(1) in case of disobedient 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”

7. In the case of *Teachers Service Commission vs Kenya National Union of Teachers & 2 others* (2013) eKLR the court stated as follows;

“The reason why courts will punish for contempt of court then is to safe guard 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. Neither is it about placating the Applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.”

8. Contempt of court is a grave matter as it concerns the dignity of the court when law and order is threatened and the fact that liberty and fundamental rights and freedoms of the alleged contemnor are at stake. The standard of proof is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. In the case of *Republic vs Ahmad Abolfathi Mohammed & Another* (2018) eKLR, the Supreme Court stated as follows:

“We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. 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”

9. In the instant case it is on record that the Court delivered judgement against the defendant on the 17<sup>th</sup> May 2022 ordering that the plaintiffs and the defendant were to share the rental income of the suit premises therein. The parties are siblings. This judgement has not been stayed or appealed against. All persons upon whom a court order is served or who are aware of a court order have a duty to obey it. The only avenue available for a party who is not satisfied with an order of the court is to approach the court seeking variation or setting aside, this has not been done. The defendant’s Advocate Mr. Mkan states that the defendant was not personally served and that in any event he has not disobeyed any court order and is not in contempt. Ian M. Ireri a process server has sworn an elaborate affidavit of service dated 11<sup>th</sup> March 2024 how he attempted to personally serve the Defendant from Mombasa to Diani in vain. I find that the Defendant was being mischievous and evasive and in any event his Advocate appeared in court on the hearing date and has been in conduct of the matter. I am satisfied that service



was sufficient and the defendant is fully aware of this matter. I find that this application is merited and I make the following orders;

1. That the Defendant is to comply with the court order issued on 3<sup>rd</sup> August 2022 within the next 60 (sixty) days after service of this order failure of which the will be cited for contempt and be directed to pay a fine of Kshs. 50,000/= and in default, the Defendant to be committed to civil jail for a period of one (1) month.
2. That costs of this application to the applicant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

