



**Wainaina & 2 others v Decon Enterprises Limited; Kamotho & another (Applicant)
(Environment & Land Case 455 of 2017) [2025] KEELC 591 (KLR) (17 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 591 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 455 OF 2017
JA MOGENI & AM COCKAR, JJ
FEBRUARY 17, 2025**

BETWEEN

PETER KIMANI WAINAINA 1ST PLAINTIFF

PETER NJOROGE NGANGA 2ND PLAINTIFF

SUSAN WANGARI MITHAMO 3RD PLAINTIFF

AND

DECON ENTERPRISES LIMITED DEFENDANT

AND

EUNICE WAMBUI KAMOTHO APPLICANT

CHARLES GITHII KAMOTHO APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated 5/11/2024 brought under Article 50 & 159 of *the Constitution*, Section 1A, 1B, 3A, 34 and 38 of the *Civil Procedure Act*, Order 22 (Rule 22 & 35), Order 40 Rule 3, Order 51 (Rules 1, 3 and 15 of the Civil Procedure Rules, Section 29 of the *Environment and Land Court Act* and all other enabling provisions of the Law), where the Applicant seeks:
 - a. Spent.
 - b. That pending the hearing and determination of the Application herein, this Honorable Court be pleased to issue an order restraining Galaxy Auctioneers whether by themselves, agents or servants from proceeding with the attachment and sale of the items listed in the proclamation notice dated 4th November, 2024 or any other item belonging to the Applicants herein.



- c. That this Honorable Court be pleased to stay execution of this Honorable Court's Decree issued on 26th July, 2018 pending the hearing and determination of the Application herein.
 - d. That this Honorable Court be pleased to grant stay of execution of the Judgment and Decree of this Honorable Court pending the Plaintiff's exhaustion of the procedure under Order 22 Rule 35.
 - e. That the Plaintiffs herein PETER KIMANI WAINAINA, PETER NJOROGE NGANGA and SUSAN WANGARI MITHAMO be summoned to appear before this Honorable Court to show cause why they should not be held in contempt of this Honorable Court's Ruling and Order issued on 30th September, 2024.
 - f. That upon being cited for contempt, this Honorable Court be pleased to commit the Plaintiffs herein PETER KIMANI WAINAINA, PETER NJOROGE NGANGA and SUSAN WANGARI MITHAMO to civil jail for a period of 6 months.
 - g. That this Honorable Court be pleased to give any other relief that this Honorable Court deems fit to meet the ends of justice.
2. The said Application is premised on the grounds on the face of it as well as the sworn Affidavit of Eunice Wambui Kamotho sworn on the 5/11/2024.
 3. On the 20/11/2024 when the matter came up for mention, parties agreed to canvass the Application by written submissions. The Court directed the parties to file written submissions within 30 days and interim orders in existence were extended until mention on 30/1/2025 when the Court was to issue further direction on disposal of the Notice of Motion.
 4. On 30/1/2025 the parties were directed to file and exchange written submissions and a Ruling date reserved.
 5. The gist of the Application is that the Court directed the Applicants in the Application dated 30/09/2024 through a Ruling allowing the Application dated 27/11/2023 to exhaust the procedure under Order 22 Rule 35 on cross examination of Directors in their attempt to realize the fruits of the Judgment in order to accord the Applicants an opportunity to be heard. The Applicant contends that the Plaintiffs on 28/10/2024 applied for reissue of warrants of attachment with respect to the Decree issued by this Court on 26/07/2018.
 6. That through Galaxy Auctioneers the Plaintiffs on 4/10/2024 proclaimed and attached the 1st Applicant's personal properties in blatant contravention of this Court's orders issued on 30/09/2024 and that the Plaintiffs are at an imminent loss of properties upon lapse of 7 days indicated in the proclamation notice.
 7. That if the attachment and sale were to happen, then the Plaintiff's proceed under Order 22 Rule 35 shall be rendered an academic exercise the Plaintiffs having been denied an opportunity to be heard. Thus that it is important that the Plaintiffs irregular, unprocedural and illegal attachment be stayed pending the hearing and determination of the Application pending the exhaustion of the procedure under Order 22 Rule 35.
 8. It is the Applicant's contention that the Plaintiff's failure to comply with the Ruling and orders delivered on 30/09/2024 is willful and deliberate and thus this Court being clothed with powers to punish for contempt should do so by granting the orders sought in the present Application.



9. The Application is opposed vide a Replying Affidavit sworn on 8/11/2024 by Titus Koceyo from the firm of Advocates on record for the Plaintiffs. He stated that on behalf of the Plaintiffs he had issued instructions to the Auctioneer Galaxy Auctioneers to execute a Court Decree which was pending satisfaction.
10. That the Application does not disclose any cause of action and that the Plaintiffs had no deliberate intent to disobey the Court orders since the law firm had already informed Galaxy Auctioneers vide an email dated 16/10/2024 of the stay of execution of the Decree against the Respondents to wait for further Court directions as evidenced by the copy of the email marked as annexure 'TOK 1'.
11. That the Applicant's failure to extract the Court order and serve upon the Plaintiffs occasioned the action by the Auctioneer to proceed with execution. Infact there has been no proof that the Applicant neither extracted the Court order nor served it.
12. The Respondent contends that the Court of Court proceedings is not maintainable in the absence of the order alleged to have been disobeyed and there must be proof of deliberate disobedience since the Plaintiff and auctioneer had no knowledge of the existence of the order.
13. The Respondent states that they had informed the auctioneer of the existence of a stay order and to await further Court directions as evidenced by the letter marked as annexure 'TOK 2'. Since the Applicant on 4/11/2023 forwarded to the Applicant the Court Ruling without the order.
14. Thus the Respondent contends that the Applicant's Application is devoid of merit since it is the Advocate of the Plaintiffs who directed the Auctioneer to execute and also the same one who gave instructions to the Auctioneer informing them that there is a stay. So it is his contention that there is no willful disobedience of any Court order as alleged by the Applicant.
15. The Applicants filed their Application dated 15/01/2024 and the Plaintiffs/Respondents filed theirs dated 25/11/2024. Have considered this submissions in writing my Ruling.

Analysis and Determination

16. From my reading of the Application and the response I have zeroed into the following to be the issues for determination:
 - a. Whether the Application for contempt of Court is merited.
 - b. Whether the Plaintiff/Applicant should be accorded stay of execution of the Court's order.
 - c. Who pays the costs of this Application
17. The Applicants submitted that the Court's Ruling delivered on 30/09/2024 directed the Plaintiffs to exhaust the procedure under Order 22 rule 35 on cross-examination of Directors and a date for mention was issued. The Applicant contends in their submission that they contacted the Plaintiff's office although they did not file any documents to support the averment that they contacted the Plaintiff's office to inform them of the Court's Ruling.
18. On their part the Plaintiffs/Respondents had submitted and adduced evidence vide annexure 'TOK - 1' and 'TOK - 2' that they were not present in Court and remained unaware of the Ruling till 4/11/2024 when the Applicants forwarded a Ruling without an order and vide their email dated 8/11/2024 which they attached they advised the auctioneers to suspend further execution. Meaning the order was never served on the Plaintiffs and also this being the case, then the Plaintiffs did not willfully and deliberately disobey the Court order.



19. The High Court in the case of Kenya Human Rights Commission Vs. Attorney General & Another [2018]eKLR, declared the Contempt Act unconstitutional and the applicable law on Applications of contempt in Kenya is Section 5 of the Judicature Act. Section 5 of the Judicature Act provides that:-

- “(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.
- (2) An order of the High Court made by way of punishment for contempt of Court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

20. In my reading of the Application I note that the Application did not cite Section 5 of the Judicature Act as being the law under which the Application was brought. However since our key mandate is delivery of justice I will not focus on form but on substance. Contempt of Court under the Black's Law Dictionary 10th Edition as follows:

“Contempt (also termed as contempt of Court, judicial contempt) is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

21. Setting out the basis for the need to respect Court orders, Justice S.N. Riechi in the case of Patrick Wanyonyi Munialo Vs. County Executive Committee (CEC) Member for Water & Natural Resources Bungoma County & 3 Others; Nzoia Water Services Co. Ltd (Interested Party); Kennedy Kilali Wekesa & 2 Others (Contemnor) [2019]eKLR stated:

“The rationale for contempt of Court proceedings is grounded on the need to protect the authority and dignity of our Courts which is essential for the maintenance of rule of law and order in society. Its objective is to uphold the dignity and authority of the Court, ensure compliance with orders of the Court; ensure observation and respect the due process of law and multiply public confidence in the administration of Justice.”

22. The litmus test required for an Application for contempt to succeed was spelled out by Justice Mativo in North Tetu Farmers Co. Ltd Vs. Joseph Nderitu Wanjohi [2016]eKLR who held in part as follows:

“Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated 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.



Although the proceedings are civil in nature, it is well established that an Applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, the fact that the liberty of the Defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the Applicant to prove that the Defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order.”

23. With the above in mind, the Court must then consider whether the Plaintiffs are indeed in contempt as alleged by the Applicant.
24. Flowing from the foregoing discussion, it is apparent that one of the elements that must be proved for a case on contempt to succeed is that it must be proved that the Plaintiffs/Respondents had knowledge of or proper notice of the terms of the order. In this case, not only the service of the order but also the knowledge of the Court order is disputed by Plaintiff/Respondents who contended that they had not been served with the order. It is their case that they were not aware of the order of the Court. The Applicant on the other hand maintained that they had informed the Plaintiffs of the order, infact the Applicant did not say they served them but that they informed the Applicants through their office.
25. The Court of Appeal had this to say on the issue of proving service of orders, in the case of Mwangi Wang'onde Vs. Nairobi City Council (Appeal No. 95 of 1998) quoted with approval in the case of Wycliffe Sayia Okungu Vs. Joel Kayeri Risamira & 3 Others [2016]eKLR :

“As a general rule no order of Court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or to abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if it is disobeyed, he is liable to the process of execution to compel him to obey it. This requirement is important because the Court will only punish for breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the Defendant has proper notice of the terms and that a breach of the injunction has been proved beyond reasonable doubt.”
26. Contempt of Court being quasi-criminal in nature, the elements must be proved beyond reasonable doubt, at least higher than the standard in civil cases - North Tetu Farmers Co. Ltd (Supra). Further, in the case of Re Breamblevale Limited [1969] 3 ALL ER 1062 Lord Denning MR held in part as follows:

“Contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man has asked about (his failure to produce certain books belonging to the company as ordered by the Registrar), he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.”
27. In this case, and considering that the Applicant did not provide the proof of service and stated that they informed the Plaintiffs at their office, the Court is not satisfied that they were duly and properly served with the Court orders and the penal notice. The Court also notes that when service was disputed by the Plaintiffs, the Applicant did not address the Court and come out clearly on whether and how service was effected.



28. The upshot of the above is that there is doubt in the mind of the Court as to whether service of the Court orders and the penal notice were effected as alleged by the Applicant. Accordingly, the Court finds no merit on the first issue of contempt of Court against the Plaintiffs.
29. On whether the Applicant should be accorded stay of execution, I am invited to consider Order 42 rule 6 and peruse the grounds of stay of execution as I exercise my discretionary powers on whether to stay the execution or not.
30. The Applicants never disclosed whether they have proffered an appeal or not for the matter. In their Application they never addressed themselves to the principles of granting of stay of execution.
31. There are three conditions for granting of stay order pending appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which:-
- a. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - b. The Application is brought without undue delay; and
 - c. Such security as the Court orders for the due performance of such Decree or order as may ultimately be binding on him has been given by the Applicant.
32. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the Applicant to demonstrate what kind of substantial loss they will suffer if the stay order was not made in their favour.
33. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma Vs. Abuoga* (1988) KLR 645 where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
34. No evidence was provided by the Applicants on the issue of irreparable loss if the order of stay was not granted.
35. On the second condition, upon perusal of the Court record, this Court finds that the Applicant filed the Application for stay of execution on 5/11/2024 more than five (5) years after delivery of the Judgment on 26/07/2018 although it was one month after the Ruling that has brought about the Application for contempt. There was no explanation as to why it had taken such a long time to file the Application. It therefore cannot be said that the said Application was made without unreasonable delay and the Applicant is guilty of laches. I find that the Applicants did not come to Court with clean hands.
36. On the last condition as to provision of security, the Applicant in their submissions made no mention of how they will fulfil or adhere to this principle and I see no need of elaborating further.
37. The Applicants also brought this Application under Section 1A, 1B and 3A of the [Civil Procedure Act](#). The said sections are clear to the effect that they provide that:
- “(1) The overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;



- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);
- (3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act, and to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court.”

38. Section 1B provides a follows:-

- “(1) For the purposes of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –
- a. the just determination of proceedings;
 - b. the efficient disposal of the business of the Court;
 - c. the efficient use of the available judicial and administrative resources;
 - e. the timely disposal of the proceedings, and all the proceedings in the Court, at a cost affordable by the respective parties; and
 - f. the use of suitable technology.”

39. Section 3A. provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

40. Having found that the conditions necessary for grant of orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules have not been met by the Applicant and further, having regard to the above captioned provisions of the law as stipulated under Section 1A, 1B and 3A of the *Civil Procedure Act*, I find that this Court is not inclined to grant the order of stay of execution so sought. In the circumstances, the Application dated 5/11/2024 is hereby denied and dismissed with costs to the Plaintiffs.

41. Given the above, I make the following Orders:

- a. The Notice of Motion Application dated 5/11/2024 is unmerited and is dismissed.
- b. The costs of the Application are granted to the Plaintiff/Respondent.

Ordered accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 17TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE



In the presence of:

Ms. Kariuki holding brief for Mr. Koceyo for 1st, 2nd and 3rd Plaintiffs

Ms. Amadi holding brief for Ms. Wanyonyi for the Defendant

Mr. Melita - Court Assistant

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MOGENI J

JUDGE

