



**Talam v Chepng'eno & 3 others (Environment & Land Case  
E001 of 2023) [2024] KEELC 6050 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6050 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE E001 OF 2023  
LA OMOLLO, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**JAMES ARAP TALAM ..... PLAINTIFF**

**AND**

**IRENE CHEPNG'ENO ..... 1<sup>ST</sup> DEFENDANT**

**KERICHO DISTRICT LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**KERICHO DISTRICT SURVEYOR ..... 3<sup>RD</sup> DEFENDANT**

**THE MINISTRY OF LANDS ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect of the 1<sup>st</sup> Defendant/Applicant's Notice of Motion application dated 16<sup>th</sup> August, 2023 and the Plaintiff/Applicant's Notice of Motion application dated 8<sup>th</sup> November, 2023.
2. The application dated 16<sup>th</sup> August, 2023 is expressed to be brought under Sections 1, 1A, 3, 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules. The application seeks the following orders;
  - a. That the Honourable Court be pleased to stay the proceedings herein until the costs in the previous suit to wit; Kericho HCELC no. E014 of 2023 are fully paid.
  - b. That the cost of this application be in the cause.
3. The application is based on the grounds on its face and the supporting affidavit of Franklin Obondo Koko counsel for the 1<sup>st</sup> Defendant/Applicant sworn on 16<sup>th</sup> August, 2023.



4. The application dated 8<sup>th</sup> November, 2023 is expressed to be brought under Section 5 of the *Judicature Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules. The application seeks the following orders;
  - a. That this Honourable Court be pleased to find that Irene Chepng'ene (sic) is in contempt of the order of the Court issued by this Honourable Court on 28<sup>th</sup> July, 2023.
  - b. That summons be issued against the Respondent to appear before Court and show cause why she should not be committed to civil jail for such term as the Court may deem just.
  - c. That the Honourable Court be pleased to issue an order that Irene Chepng'eno be committed to civil jail for a term of six (6) months until she purges her contempt and complies with the orders of the Honourable Court issued on 28<sup>th</sup> July, 2023 and or she be ordered to purge the contempt on terms this Court deems fit.
  - d. That in the alternative to prayer 3 above, this Honourable Court be pleased to impose a fine on Irene Chepng'eno of at least Kshs. 200,000/= and or any other punishment permitted under law.
  - e. That the costs of this application be borne by the Respondent.
5. The application is based on the grounds on its face and the supporting affidavit of one James Arap Talam sworn on 8<sup>th</sup> November, 2023.

#### **Factual Background.**

6. The Plaintiff/Applicant commenced the present proceedings vide the Complaint dated 18<sup>th</sup> July, 2023 where he seeks the following prayers;
  - a. A declaration that the resultant titles from Kericho/Kapsuser/933 upon subdivision are Kericho/[Kapsuser/5256](#) and Kericho/[Kapsuser/5257](#).
  - b. A declaration that the Plaintiff is the bona fide and legal owner of LR No. Kericho/[Kapsuser/5256](#).
  - c. A permanent mandatory injunction to restrain the 1<sup>st</sup> Defendant from encroaching, trespassing, developing, alienating, selling, transferring or in any other way interfering or dealing with the parcel of land known as LR No. Kericho/[Kapsuser/5256](#).
  - d. An order to evict the 1<sup>st</sup> Defendant, her servants, agents and or individuals claiming ownership from her from Kericho/[Kapsuser/5256](#).
  - e. An order for cancellation of the resultant titles Kericho/[Kapsuser/5256](#) and Kericho/[Kapsuser/5257](#) and further order the restoration of the title Kericho/Kapsuser/933 in the name of the Plaintiff James Arap Talam.
  - f. An order to the Land Registrar, Kericho compelling him to amend all entries made in the register of Kericho/Kapsuser/933 to the detriment of the Plaintiff by reinstating him as the sole owner of the suit land.
  - g. An order to the Land Registrar, Kericho compelling him to issue the Plaintiff with the title for Kericho/Kapsuser /933 as irrefutable proof of ownership of the land.
  - h. General damages.



- i. Costs and interest of the suit.
- j. Any other further relief that this Honourable Court may deem fit and just to grant.
7. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents entered appearance on 1<sup>st</sup> August, 2023 while the 1<sup>st</sup> Defendant/Applicant entered appearance on 17<sup>th</sup> October, 2023.
8. None of the Defendants have filed their Statements of Defence.
9. The application dated 16<sup>th</sup> August, 2023 first came up for directions on 18<sup>th</sup> October, 2023 when the Court directed that it be served upon on all the parties.
10. On 15<sup>th</sup> January, 2024 the Court directed that the applications dated 16<sup>th</sup> August, 2023 and 8<sup>th</sup> November, 2023 be canvassed by way of written submissions.
11. Both applications were mentioned severally to confirm filing of submissions. They two applications were finally reserved for ruling on 20<sup>th</sup> May, 2024.

The 1<sup>st</sup> Defendant/Applicant's contention in the application dated 16<sup>th</sup> August, 2023.

12. The supporting affidavit is sworn by Franklin Obondo Koko counsel for the 1<sup>st</sup> Defendant/Applicant on 16<sup>th</sup> August, 2023.
13. He contends that the Plaintiff/Respondent had instituted Kericho HC ELC No. E014 of 2023 against the 1<sup>st</sup> Defendant/Applicant and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents vide the Plaint dated 17<sup>th</sup> April, 2023.
14. He also contends that the 1<sup>st</sup> Defendant/Applicant filed a Memorandum of Appearance and Grounds of Opposition.
15. He further contends that when the matter came up for hearing of the Plaintiff/Respondent's application dated 17<sup>th</sup> April, 2023 on 12<sup>th</sup> July, 2023, the Honourable Court issued an order that the interim orders granted on 19<sup>th</sup> April, 2023 be set aside and the suit be marked as abated pursuant to Order 5 Rule 1(6) of the Civil Procedure Rules.
16. It is his contention that the Court also granted the 1<sup>st</sup> Defendant/Applicant costs and the Grounds of Opposition dated 11<sup>th</sup> July, 2023 were allowed.
17. It is also his contention that the 1<sup>st</sup> Defendant/Applicant filed her bill of costs dated 18<sup>th</sup> July, 2023.
18. It is further his contention that on 1<sup>st</sup> August, 2023, the 1<sup>st</sup> Defendant/Applicant was served with a new matter arising from the 'previous subject matter' involving the same parties.
19. He contends that the 1<sup>st</sup> Defendant/Applicant instructed him to enter appearance and file the present application seeking that this suit be stayed pending payment of costs of the previous suit.
20. He also contends that this Honourable Court has wide powers and discretion to issue the orders sought.
21. He ends his deposition by seeking that the present suit be stayed pending the payment of the 1<sup>st</sup> Defendant/Applicant's costs in Kericho HC ELC No. E014 of 2023.

Plaintiff/Respondent's Response to the 1<sup>st</sup> Defendant/Applicant's application dated 16<sup>th</sup> August, 2023.



22. In response to the 1<sup>st</sup> Defendant/Applicant's application dated 16<sup>th</sup> August, 2023, the Plaintiff/Respondent filed a Replied Affidavit sworn on 8<sup>th</sup> November, 2023.
23. He deposes that he was served with the 1<sup>st</sup> Defendant/Applicant's bill of costs and taxation notice filed in Kericho ELC Case No. E014 of 2023.
24. He also deposes that upon perusal, he realized that the 1<sup>st</sup> Defendant/Applicant had stated that the value of the suit property was Kshs. 20,000,000/= but failed to attach a valuation report to prove the same. The 1<sup>st</sup> Defendant/Applicant had calculated instruction fees at Kshs. 500,000/=.
25. He further deposes that he filed his submissions dated 5<sup>th</sup> October, 2023 in response to the said bill of costs and on 17<sup>th</sup> October, 2023, the Taxing Officer delivered a ruling where he relied on Paragraph 1(j) of Schedule 6 of the Advocates Remuneration Order and awarded the 1<sup>st</sup> Defendant/Applicant Kshs. 400,000/= as instruction fees.
26. It is his deposition that he was dissatisfied with the Taxing Officer's decision and so he filed a reference to the said ruling seeking for stay of execution and enforcement of any Certificate of Taxation arising from the said taxation.
27. It is also his deposition that he is advised by his advocates on record that stay of proceedings is a grave judicial action which interferes with the right of a litigant to conduct his litigation.
28. It is further his deposition that stay of proceedings infringes on his right of access to justice, right to be heard without delay, right to a fair trial and therefore, the test for stay of proceedings is high and stringent.
29. He ends his deposition by stating that the 1<sup>st</sup> Defendant/Applicant's application has been brought in bad faith, is meant to derail the present matter and that there is no just cause to warrant this Court to exercise its discretion and award the orders sought.

The Plaintiff/Applicant's Contention in his application dated 8<sup>th</sup> November, 2023.

30. The Plaintiff/Applicant contends that on 26<sup>th</sup> July, 2023 he filed an application seeking that the 1<sup>st</sup> Defendant/Respondent be ordered to maintain the status quo with respect to the suit property. He also sought that the Defendants/Respondents and any other persons acting under their instructions be restrained from transferring, assigning, advertising for sale, disposing off or interfering in any other manner with land parcel No. Kericho/[Kapsuser/5256](#).
31. He also contends that on 27<sup>th</sup> July, 2023 the Court granted one of the orders sought in his application which was issued on 28<sup>th</sup> July, 2023.
32. He further contends that on 31<sup>st</sup> July, 2023, the 1<sup>st</sup> Defendant/Respondent was personally served with the summons to enter appearance, the application & supporting affidavit sworn on 18<sup>th</sup> July, 2023, the Plaint and the accompanying documents together with the Court order issued on 28<sup>th</sup> July, 2023.
33. It is his contention that the 1<sup>st</sup> Defendant/Respondent was served at her place of work which is at KCB Bank, Kericho branch and she directed that the same be served upon the firm of Obondo, Koko & Company Advocates who act on her behalf.
34. It is also his contention that on the same day, the firm of Obondo, Koko & Company Advocates were served with the said documents and they accepted service by stamping and signing them.
35. It is further his contention that the 1<sup>st</sup> Defendant/Respondent's counsel explained to the process server that he had instructions to receive documents on behalf of the 1<sup>st</sup> Defendant/Respondent.



36. He contends that on 2<sup>nd</sup> August, 2023 an affidavit of service was filed in Court to show that the order was served within seven days.
37. He also contends that despite service, the 1<sup>st</sup> Defendant/Respondent has failed to comply with the order of status quo.
38. He further contends that he lives on the property adjacent to the suit property and has on several occasions observed the 1<sup>st</sup> Defendant/Respondent and/or people working under her instructions willfully disobeying the orders of this Court by continuing to construct permanent structures on the suit property and making developments thereon.
39. It is his contention that he is advised by his advocates on record that pursuant to Section 106 B (4) of the Evidence Act, in order for electronic evidence to be admissible, it must be accompanied by a certificate of production of electronic evidence which must be signed by a person holding a position 'with respect to the management of the devises'. That in the absence of such a certificate, the electronic evidence is inadmissible.
40. It is also his contention that the 1<sup>st</sup> Defendant/Respondent is in contempt of Court.
41. It is further his contention he stands to suffer prejudice if the orders sought are not granted.
42. He ends his deposition by stating that unless the orders sought are granted, he is apprehensive that the 1<sup>st</sup> Defendant/Respondent will continue to deliberately and willfully disobey the orders of the Court. The 1<sup>st</sup> Defendant/Respondent's Response to the Plaintiff/Applicant's application dated 8<sup>th</sup> November, 2023.
43. The 1<sup>st</sup> Defendant/Respondent filed a Replying Affidavit sworn on 11<sup>th</sup> January, 2024 and filed on 12<sup>th</sup> January, 2024.
44. She deposes that the Plaintiff/Applicant's application is full of false hoods and is meant to hoodwink the Court into issuing orders that are underserving.
45. She also deposes that she is advised by her Advocates on record that the order she allegedly disobeyed is ambiguous, vague and nothing in its contents has been disobeyed.
46. She further deposes that the said order does not specify the subject matter which she is to desist from doing any acts to and it is therefore unenforceable.
47. It is her deposition that she has not committed any act as alleged by the Plaintiff/Applicant to warrant this Court to find her as a contemnor.
48. It is also her deposition that she is advised by her advocates on record that it is a requirement under the law that for a party to be cited for contempt, the said party must be personally served with the said order. She deposes that she was not served with the said order as shown in the affidavit of service annexed to the Plaintiff/Applicant's application.
49. It is further her deposition that nothing in the photographs annexed to the Plaintiff/Applicant's supporting affidavit show that she committed any acts in violation of the vague Court order.
50. She deposes that the said photographs do not show or demonstrate comparison of the area or site prior to the issuance of the order and after the order was issued to articulate the actions that she is alleged to have committed in violation of the Court order.



51. She also deposes that she is advised by her advocates on record that contempt proceedings are quasi-criminal in nature and it would have therefore been prudent that the photographs attached by the Plaintiff/Applicant be processed or taken by a gazetted officer for them to be admissible in Court pursuant to Section 78(1) of the *Evidence Act* which also requires the said officer to produce a certificate.
52. She further deposes that the Plaintiff/Applicant has not laid down a basis or foundation for the admissibility of the annexures and has failed to state the weight of the evidence, the reliability of the manner in which they were generated, stored and the manner in which the originator of the annexures was identified. The said elements are key in establishing authenticity thus admissibility.
53. It is her deposition that in Kericho HC ELC No. 1 of 2014, which was the previous case, there was no existing order that forbade repair, furnishing and construction of new structures.
54. It is also her deposition that the photographs annexed to the application show the existing structures that have been on the property long before the Court issued the orders on 27<sup>th</sup> July, 2023. No new structures have been constructed and therefore the Plaintiff/Applicant is misleading the Court.
55. It is further her deposition that the annexed photographs do not have any digital date stamps to prove they were taken at a particular date when construction was ongoing and therefore no one can tell when the photographs were taken.
56. She deposes that the stones shown in the photographs have been on the suit property long before Kericho HC ELC No. 14 of 2023 was filed.
57. She also deposes that there has been no new construction on the suit property since the Court issued orders on 27<sup>th</sup> July, 2023.
58. She further deposes that at the time Kericho HC ELC No. 14 of 2023 was dismissed, the classroom structures had already been completed and what was done after, was the plaster on the inside of the classroom and the paintwork which was completed before the present suit was filed.
59. It is her deposition that the construction was done by other parties and that there were no orders forbidding them. That before the Plaintiff/Applicant misleads this Court into punishing an innocent party, it needs to be appraised with the history of the matter.
60. It is also her deposition that the suit property hosts a primary school that was on the suit property before the present suit was filed.
61. It is further her deposition that on 9<sup>th</sup> January, 2014 Wesley Ruto sued the Plaintiff/Applicant herein in Kericho HC ELC No. 1 of 2014 over the suit property and judgement was delivered on 2<sup>nd</sup> September, 2016.
62. The 1<sup>st</sup> Defendant/Respondent deposes that judgement in the said matter could not be enforced by the Plaintiff/Applicant herein and so he filed an application for review dated 17<sup>th</sup> January, 2020 which was dismissed.
63. The 1<sup>st</sup> Defendant/Respondent also deposes that on 17<sup>th</sup> April, 2023 the Plaintiff/Applicant filed a fresh suit being Kericho HC ELC No. 14 of 2023 which was also dismissed on 12<sup>th</sup> July, 2023.
64. The 1<sup>st</sup> Defendant/Respondent further deposes that she is advised by her advocates on record that the balance of proof in contempt proceedings is higher than the one in Civil proceedings and that the Plaintiff/Applicant has failed to meet the said threshold.



65. It is her deposition that the Plaintiff/Applicant's application is full of false allegations which he has failed to prove with evidence.
66. It is also her deposition that the photographs annexed to the application do not demonstrate any construction of new structures on the suit property after the order was issued.
67. It is further her deposition that there is no corroborating evidence from any independent witness to demonstrate that she had failed to comply with Court orders and therefore the Plaintiff/Applicant's application is vindictive.
68. She deposes that she is a law-abiding citizen and has not disobeyed any Court order.
69. She also deposes that she is informed by her advocates on record that the Plaintiff/Applicant's Advocates informed the Court on 18<sup>th</sup> October, 2023 and on 22<sup>nd</sup> November, 2023 that the order which had been served did not contain the parcel number where the status quo was to be maintained and was therefore ambiguous and incapable of being obeyed.
70. She ends her deposition by stating that it is not her position in law to fill in the blanks for the Plaintiff/Applicant and correct his mistakes especially in the present contempt proceedings as the law requires that for an order to be complied with, it must be specific in its contents. She should therefore not be punished for the mistakes of the Plaintiff/Applicant.

The Plaintiff/Applicant's Response to the 1<sup>st</sup> Defendant/Respondent's Replying Affidavit.

71. The Plaintiff/Applicant filed a Supplementary Affidavit sworn on 13<sup>th</sup> February, 2024 on 16<sup>th</sup> February, 2024.
72. He reiterates that the 1<sup>st</sup> Defendant/Respondent was served with the pleadings in the present matter and she directed the process server to serve the firm of M/S Obondo Koko & Co. Advocates.
73. He deposes that both the application and the supporting affidavit state that the land in dispute is LR No. Kericho/[Kapsuser/5256](#) which is registered in the name of the 1<sup>st</sup> Defendant/Respondent.
74. He also deposes that prior to the filing of the present suit, he had filed Kericho HC ELC Case No. 14 of 2023 which abated due to lack of summons.
75. He further deposes that the 1<sup>st</sup> Defendant/Respondent acknowledges in her replying affidavit that there has been a long-standing dispute over the suit property with the initial suit being Kericho HC ELC No. 1 of 2014 where Wesley Ruto had sued him.
76. It is his deposition that before judgement in the aforementioned matter was delivered, Wesley Ruto who is the 1<sup>st</sup> Defendant/Respondent's father in law transferred the suit property to the 1<sup>st</sup> Defendant/Respondent. The said transfer was meant to defeat the Court's judgement which was delivered in his favour.
77. It is also his deposition that the 1<sup>st</sup> Defendant/Respondent is privy to the said judgement as evidenced by her replying affidavit.
78. It is further his deposition that the 1<sup>st</sup> Defendant/Respondent is dishonest as she claims to be compliant with the Court order and in the same breath states that the Court order did not have the parcel number with regards to which the status quo was to be maintained and was therefore incapable of being complied with.
79. He deposes that the 1<sup>st</sup> Defendant/Respondent's claim that she was not personally served is false as the affidavit of service filed by the process server known as Benard Obiero states that he went to the 1<sup>st</sup>



Defendant/Respondent's work place where he met with her and after explaining the purpose of his visit, was directed to the firm of M/S Obondo Koko & Company Limited.

80. He also deposes that contrary to the assertions by the 1<sup>st</sup> Defendant/Respondent, the pictures annexed to his application show the presence of construction stones on the suit property which was evidence that there were building activities still going on despite the existence of the Court order.
81. He further deposes that as a result of the disobedience of the Court order, his grandson Vincent Rotich was assaulted when he confronted the construction workers and chased away with a machete which incident was reported at Jericho Police post and booked in the occurrence book as OB No. 07/10/05/2023.
82. It is his deposition that he annexed to his supporting affidavit a certificate of electronic evidence sworn by Mr. Okeyo Duncun Odhiambo a Court process server where he stated the date when the photographs were taken, the devices used and their serial numbers.
83. It is also his deposition that the 1<sup>st</sup> Defendant/Respondent is economical with the truth by claiming that the primary school has been existence long before the suit was filed and yet she did not produce any evidence to show that the primary school was licensed or has been operational prior to the issuance of the order.
84. It is further his deposition that the 1<sup>st</sup> Defendant/Respondent admits to be in contempt of Court by failing to present any proof that she completed the plaster on the inside of the classroom and paint work after Kericho HC ELC No. 14 of 2023 was dismissed and before the present suit was filed.
85. He deposes that he has been advised by his Advocates on record that they have fully complied with the provisions of Section 78 of the *Evidence Act*.
86. He also deposes that he is advised by his advocates on record that the purpose of contempt of Court proceedings is to protect the honor and dignity of the Court.
87. He ends his deposition by stating that it is the obligation of every person against whom an order has been made to obey it unless it is discharged and any person disobeying the order would be deemed to be in contempt.

#### **Issues for determination.**

88. On 16<sup>th</sup> February, 2024 the Plaintiff filed submissions in respect to the 1<sup>st</sup> Defendant/Applicant's application dated 16<sup>th</sup> August, 2023 and submissions in support of his application dated 8<sup>th</sup> November, 2024.
89. The 1<sup>st</sup> Defendant did not file any submissions.
90. The Plaintiff/Respondent in his submissions filed in response to the 1<sup>st</sup> Defendant/Applicant's application dated 16<sup>th</sup> August, 2023 identifies the following issues for determination;
  - a. Whether this Court should grant stay of proceedings.
  - b. Whether the 1<sup>st</sup> Defendant/Applicant's application is an abuse of the Court process.
91. On the first issue, the Plaintiff/Respondent relies on the judicial decision of Re Global Tours & Travel Ltd HCWC No. 43 of 2000 as was cited in Kenya Wildlife Service vs James Mutembei [2019] eKLR and submits that the 1<sup>st</sup> Defendant/Applicant's application has been filed as a delaying tactic.



92. The Plaintiff/Respondent submits that judicial time is precious and should not be wasted on proceedings which would end up as an academic exercise. He relies on *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR and submits that the 1<sup>st</sup> Defendant/Applicant's application should be dismissed in order to prevent wastage of precious judicial time.
93. On the second issue, the Plaintiff/Respondent relies on *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002* [2009] eKLR 229 and submits that he has already filed a reference against the ruling of the taxing officer which is still pending before this Court.
94. The Plaintiff/Respondent also relies on the judicial decision of *Ephraim Miano Thamaini vs Nancy Wanjiru Wangui & 2 Others* [2022] eKLR and submits that the 1<sup>st</sup> Defendant/Applicant's application is an abuse of the Court process and should therefore be dismissed with costs.
95. The Plaintiff/Applicant in his submissions filed in support of his application dated 8<sup>th</sup> November, 2023 identifies the following issues for determination;
  - a. Whether the ingredients for succeeding in contempt of Court proceedings have been met.
  - b. Whether the Plaintiff/Applicant's prayers in the application dated 8<sup>th</sup> November, 2023 ought to be granted.
96. With regard to the first issue, the Plaintiff/Applicant relies on Section 5 of the *Judicature Act*, the judicial decisions of *Econet Wireless Kenya Limited vs Minister for Information and Communication of Kenya Authority* [2005] eKLR, the Supreme Court of India's decision in *F.T.N Gadavarman Thiru Mulpad v Ashok Khot and anor* [2005] 5 SCC as was cited in *MNN v JMM* [2022] eKLR, *Wildlife Lodges Ltd vs County Council of Narok and another* [2005] 2 EA 344 (HCK), *Cecil Miller v Jackson Njeru & another* [2017] eKLR and submits that the 1<sup>st</sup> Defendant/Respondent has continued to construct structures on the suit property despite the orders of the Court.
97. It is the Plaintiff/Applicant's submissions that the 1<sup>st</sup> Defendant/Respondent should be held in contempt of Court because of her actions.
98. With regard to the second issue, the Plaintiff/Applicant relies on *Hadkinson vs Hadkinson* (1952) 2 ALL ER 56 as was cited in *Republic v County Government of Kitui Ex parte Fairplan Systems Limited* [2022] eKLR, *Teachers Service Commission vs Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013* and submits that it is essential for maintenance of the rule of law and order that the authority and dignity of the Courts be upheld at all times.
99. The Plaintiff/Applicant relies on the Constitutional Court of South Africa's judicial decision of *Burchell v Burchell Case No. 364 of 2005* as was cited by the Court of Appeal in *A.B & another v R.B Civil Application No. 4 of 2016* [2016] eKLR and seeks that the orders sought in his application be granted as prayed.

### **Analysis and determination.**

100. I have considered the applications dated 16<sup>th</sup> August, 2023 and 8<sup>th</sup> November, 2023, the responses thereto and the submissions filed.
101. It is my view that the following issues arise for determination;
  - a. Whether the present proceedings should be stayed until the costs awarded in Kericho HC ELC case No. E014 of 2023 are paid.



- b. Whether the 1<sup>st</sup> Defendant/Respondent is in contempt of this Honourable Court.
- c. Whether the 1<sup>st</sup> Defendant/Respondent should be committed to civil jail or whether she should be issued with a notice to show cause why she should not be committed to civil jail.

**A. Whether the present proceedings should be stayed until the costs awarded in Kericho HC ELC case No. E014 of 2023 are paid.**

102. In Halsbury's Law of England, 4th Edition. Vol. 37 at pages 330 and 332 it is stated thus;

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases..” (Emphasis mine)

- 103. The 1<sup>st</sup> Defendant/Applicant in her application dated 16<sup>th</sup> August, 2023 is seeking that this Court stays the present proceedings until the Plaintiff/Respondent pays the taxed costs in Kericho HC ELC No. E014 of 2023.
- 104. In response, the Plaintiff/Respondent argues that he has filed a reference against the taxed costs in Kericho HC ELC No. E014 of 2023 and that the 1<sup>st</sup> Defendant/Respondent is only seeking to delay the present proceedings.
- 105. It is not disputed that the Plaintiff/Respondent herein had commenced Kericho HC ELC No. E014 of 2023 against the 1<sup>st</sup> Defendant/Respondent.
- 106. It is also not disputed that the said suit abated and the 1<sup>st</sup> Defendant/Respondent herein was awarded costs. The costs were taxed by the Taxing Officer on 17<sup>th</sup> October, 2023 as per the copy of the ruling annexed to the Plaintiff/Respondent's Replying Affidavit.
- 107. It is further not disputed that the Plaintiff/Respondent herein filed a reference on the said taxed costs which reference is pending determination.
- 108. In the circumstances, I decline to grant an order staying the present proceedings pending the payment of costs awarded in Kericho HC ELC No. E014 of 2023.

**B. Whether the 1st Defendant/Respondent is in contempt of this Honourable Court.**

109. Section 5(1) 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 that power shall extend to upholding the authority and dignity of subordinate Courts.”

110. Section 29 of the Environment and Land Court further provides 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.”



111. In the judicial decision of *North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi* [2016] eKLR the Court cited with approval the book *Contempt in Modern New Zealand* which sets out elements of civil contempt 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)
- (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.”
112. The Plaintiff/Applicant in his application dated 8<sup>th</sup> November, 2023 is seeking that the 1<sup>st</sup> Defendant/Respondent be found to be in contempt of the Court orders issued on 28<sup>th</sup> July, 2023.
113. The orders issued on 28<sup>th</sup> July, 2023 were with respect to the Plaintiff/Applicant’s application dated 18<sup>th</sup> July 2023. Among the orders issued by the Court was an order that the parties were to maintain the status quo pertaining as at 18<sup>th</sup> July, 2023.
114. The Plaintiff/Applicant’s application is on the grounds that despite the orders issued by the Court, the 1<sup>st</sup> Defendant/Respondent has continued construction on the suit property.
115. Annexed to the Plaintiff/Applicant’s application is a copy of an affidavit of service sworn by Benard Obiero on 2<sup>nd</sup> August, 2023. He deposes that he received the order issued on 28<sup>th</sup> July, 2023 together with the pleadings in the present matter and that he personally went to serve the 1<sup>st</sup> Defendant/Respondent herein but she directed him to serve the documents upon the firm of Obondo Koko & Company Advocates.
116. He further deposes that he served the said firm of Advocates with the pleadings and the Court order issued on 28<sup>th</sup> July, 2023.
117. It is important to note that, the said firm of Advocates is on record for the 1<sup>st</sup> Defendant/Respondent herein.
118. The Plaintiff/Applicant has also annexed photographs that are intended to show construction on the suit property. The photographs are of building stones deposited under trees.
119. In response, the 1<sup>st</sup> Defendant/Respondent submits that she was not personally served with the Court order issued on 28<sup>th</sup> July, 2023 and further submits that the said Court order does not specify the property in respect of which the status quo order was given. The 1<sup>st</sup> Defendant/Respondent does not however dispute that the photographs annexed by the Plaintiff/Applicant are of the suit property but submits that they lack a time and date stamp.
120. It is the 1<sup>st</sup> Defendant/Respondent’s submission that the construction of the school on the suit property was done prior to the issuance of the orders of status quo on 28<sup>th</sup> July, 2023.



121. In *Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227, it was held as follows;

“A contempt of Court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a 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 criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature. However, 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 party 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... it is competent for the Court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

122. On the issue of service, there is an affidavit of service on record that shows that the 1<sup>st</sup> Defendant/ Respondent was served with the said Court order and she directed it to be served upon her advocates on record.

123. The suit property in the present case is Kericho/[Kapsuser/5256](#). The status quo orders were issued in respect of the suit property. That being the case, the 1<sup>st</sup> Defendant/Respondent’s argument that the Court order was ambiguous for failure to specify the property in respect of which the orders were given cannot hold.

124. As mentioned in the preceding paragraphs, this Court in its orders issued on 28<sup>th</sup> July, 2023 ordered the parties to maintain the status quo as at 18<sup>th</sup> July, 2023. It is not clear what the status quo as at that date was.

125. The Plaintiff/Applicant deposed that the 1<sup>st</sup> Defendant/Respondent continued construction after the Court issued orders on 28<sup>th</sup> July, 2023 while the 1<sup>st</sup> Defendant/Respondent deposed that the said construction was done before the status quo orders were issued.

126. In the circumstances, this Court is unable to determine if and when the alleged construction was carried out or is still being carried out.

127. In *Sheilla Cassat Issenberg & another v Antony Macharia Kinyanjui* [2021]eKLR the Court held as follows;

“But even as Courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind that the power to punish for contempt is a discretionary one and should be used sparingly. That is why the Court observed in *Carey v Laiken* (supra), that if Courts were to find contempt too easily, “a Court’s outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect the Court’s contempt power should be used cautiously and with great restraint. It is an enforcement power of last resort rather than first resort.” [Emphasis Mine)



128. Considering that the status quo as at 18<sup>th</sup> July, 2023 was not defined and/or is not explicitly set out and further considering that the Plaintiff/Applicant has failed to prove that the alleged construction was carried out and/or continues to be carried out after issuance of the orders of status quo, my view is that the Plaintiff/Applicant has failed to demonstrate that the 1<sup>st</sup> Defendant/Respondent is in contempt of the orders of this Honourable Court.

**C. Whether the 1st Defendant/Respondent should be committed to civil jail or whether she should be issued with a notice to show cause why she should not be committed to civil jail.**

129. Given my finding on issue (b) above, the question of committal to Civil jail and/or issuance of a notice to show cause is not ripe for determination.

**Disposition.**

130. The upshot of the foregoing is that I find that both applications lack merit. Consequently, I make orders as follows:

- a. The 1<sup>st</sup> Defendant/Applicant's Notice of Motion application dated 16<sup>th</sup> August, 2023 is hereby dismissed with costs.
- b. The Plaintiff/Applicant's application dated 8<sup>th</sup> November, 2023 is hereby dismissed with costs.

131. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Miss Wangui for Gitonga for the Plaintiff/Applicant/Respondent

Mr. Koko for the 1<sup>st</sup> Defendant/Applicant/Respondent

Court Assistant; Mr. Joseph Makori.

