



Mbindi v County Executive Committee Member for Lands, Urban/Physical Planning, Housing & Municipalities County Government of Bungoma & 2 others (Environment and Land Constitutional Petition E002 of 2024) [2024] KEELC 7542 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7542 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E002 OF 2024
EC CHERONO, J
OCTOBER 31, 2024
IN THE MATTER OF ARTICLE
10,20,21,22,23,24,25,27,35,40,47,50,60,159,162(2)
(B),232,258,259 AND 260 OF THE CONSTITUTION OF
KENYA 2010
AND
IN THE MATTER OF THE ALLEGED VIOLATIONS OF THE
RIGHTS PROTECTED UNDER THE CONSTITUTION
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA
2010(PROTECTION OF RIGHTS AND
FUNDAMENTALFREEDOMS)PRACTICE AND PROCEDURE
FREEDOMS PRACTICE AND PROCEDURE RULES 13,19 AND
23 OF 2013
AND
IN THE MATTER OF THE PHYSICAL AND LAND USE
PLANNING ACT NO. 13 OF 2019
AND
IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2013
AND
IN THE MATTER OF TITLE E. BUKUSU/N.KANDUYI/4632



BETWEEN

GODFREY JACOB MBINDI PETITIONER

AND

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR LANDS, URBAN/
PHYSICAL PLANNING, HOUSING & MUNICIPALITIES COUNTY
GOVERNMENT OF BUNGOMA 1ST RESPONDENT**

**THE GOVERNER, COUNTY GOVERNMENT OF BUNGOMA 2ND
RESPONDENT**

COUNTY GOVERNMENT OF BUNGOMA 3RD RESPONDENT

RULING

1. This ruling seeks to determine the Petitioners' Notice of Motion dated 22nd April, 2024 brought under the provisions of Section IA of the *Civil Procedure Act*, Section 5 of the *Judicature Act*, section 28 of the *Environment and Land Court Act* and Order 50 Rule 1 of the Civil Procedure Rules and Article 159 of *the Constitution* of Kenya, 2010 for the following orders;
 - a. That the application herein be certified urgent and heard on priority basis.
 - b. That the honorable court be pleased to find the ARCH. DOUGLAS SASITA WEKESA, the County Executive Committee Member responsible for Lands, Urban Planning, Housing and Municipality in the County Government of Bungoma and MR. KENNETH MAKELO LUSAKA Governor in the County Government of Bungoma in contempt of the court's order issued on 7/2/2024.
 - c. That consequent to prayer (2) herein above being granted, the honorable court be pleased to issue warrants of arrest to bring ARCH. DOUGLAS SASITA WEKESA, the County Executive Committee Member responsible for Lands, Urban Planning, Housing and Municipality in the County Government of Bungoma and MR. KENNETH MAKELO LUSAKA Governor in the County Government of Bungoma to court for committal to civil jail for disobedience of valid court orders.
 - d. That this Honourable Court be pleased to issue such other or further punitive orders in respect of the said contempt as may be necessary for the ends of justice to be met.
 - e. That the honourable court be pleased to order the Officer Commanding Bungoma Police station to provide security and assist in the implementation of the above orders upon their issuance.
 - f. That Costs of the application be borne by the Respondent.
2. The Petitioners case is that, on 7/2/2024, this Honourable Court issued conservatory orders prohibiting and/or restraining the Respondents jointly and severally, their agents, employees, officers and or any person acting on their behalf, authority, instructions and or directions from demolishing or in any way interfering with the petitioner/applicant's use and occupation of the building erected on land parcel number E.BUKUSU/N.KANDUYI4632 pending hearing and determination of the



said application inter-partes. The Applicants stated that the said Court order was extracted and served upon the Respondents on 8/2/2024 who acknowledged receipt of the same by rubberstamping and signing on the return copy. It is further alleged that the Respondents were at all times aware that the application dated 6/2/2024 was still pending and had been scheduled for Ruling on 23/5/2024. That despite being well aware that the orders issued by this Honourable court on 7/2/2024 were still in force, on Saturday 20/4/2024 at 3 am and without any lawful justification or excuse, the Respondents deliberately disobeyed the said court orders by descending on the suit property situate on LR E.BUKUSU/N.KANDUYI/4632 and demolishing the same occasioning massive losses to the Petitioner.

3. It was further stated that ARCH. DOUGLAS SASITA WEKESA who is the County Executive Committee Member responsible for Lands, Urban Planning, Housing and Municipality in the County Government of Bungoma and MR. KENNETH MAKELO LUSAKA who is the Governor in the County Government of Bungoma are personally liable for the actions. That the Actions of the Respondents to deliberately disobey the orders of this court issued on 7/2/2024 are not only detrimental to the Petitioner/Applicant but also a threat to the rule of law and brings the dignity of this Honourable court into disrepute and ridicule. That the conduct of the Respondents amounts to disobedience of lawful court orders and are setting an alarming and bad precedent which militates against the administration of justice and the rule of law in general together with the integrity and/or dignity of this court. That it is in the interest of orderly administration of justice and peaceful co-existence that the orders sought herein are granted as the same will not prejudice the Respondents or make them suffer any hardship.
4. In response to the said application, the Respondents filed grounds of opposition and a replying affidavit sworn by Arch. DOUGLAS SASITA WEKESA on 9th May, 2024. In his Replying affidavit, the deponent denied that on Saturday 20th April, 2024 at 3 am, they disobeyed this court's order and descended on the suit property situate on LR E.BUKUSU/N.KANDUYI/4632 and demolished the same. He deposed that the Petitioner has not discharged his legal and evidentiary burden of proof required under the law to warrant the grant of the serious offence of contempt of Court.
5. It was further deposed that the Petitioner/Applicant ought to appreciate in totality the activities, operations and preparations made towards the events of 1st June, 2024 which was a national holiday marking the commemoration of Madaraka Day which took place at the Masinde Muliro Kanduyi-Stadium and the import of Article 6 of the Constitution, 2010 as it distinguishes the County Government from the National Government. The Respondents stated that the organization of such a national function is the mandate of the National Government as provided for under the Public Holidays Act Cap 110 Laws of Kenya which is a function organized by the Ministry of Interior and Co-ordination of National Government in collaboration with other National Government ministries and agencies. He contends that there were multiple activities that the National Government undertook which is outside the mandate and oversight of the County Government.
6. It was further deposed that the 2nd, 3rd and 4th Respondents/Respondents are legal phantoms and cannot sue or be sued and further that they are incapable of disobeying or breaching any orders of this Court and therefore, cannot be held in contempt. It was argued that the Petitioner's Application is devoid of any evidentiary prove and this Court cannot therefore exercise its jurisdiction to grant such orders which has draconian consequence.
7. When the said application came for directions, the parties agreed to canvass the same by way of written submissions which were to be filed and served within given timelines.



Applicants Submissions

8. The Petitioners filed their submissions dated 17th May, 2024 and submitted on four grounds. The first ground is whether the terms of the order were clear, unambiguous and binding on the Respondents and was submitted that the orders issued on 07.02.2024 were in clear and unambiguous terms prohibiting and restraining the Respondents jointly and severally, their agents, employees, officers and or any person acting on their behalf, authority, instruction and or directive, from demolishing or in any way interfering with petitioner's/applicant's use and occupation of the building erected on land parcel number E.BUKUSU/N. KANDUYI/4632 pending hearing and determination of the said application inter-parte. It was the applicant's contention that no issue was raised by the Respondents in respect to clarity and concreteness of the terms of the orders issued by this Honourable court on 07.02.2024. Reliance was placed in the case of Fred Matiang'i. The Cabinet Secretary. Ministry of Interior and Co-ordination of National Government vs. Miguna Miguna & 4 Others (2018) eKLR.
9. On Whether the Respondents deliberately acted in breach of the terms of the court order, the Petitioner/Applicant contends that on the night of Saturday 20.04.2024 at 3am, the Respondents through their agents, employees or people acting under their instructions, descended on the suit property and demolished the structures thereon and that the Respondents' actions were in blatant breach of the orders of this court made on 07.02.2024. He submitted that the orders of this court prohibited/restrained the Respondents jointly and severally, their agents, employees, officers and or any person acting on their behalf, authority, instruction and or directive, from demolishing or in any way interfering with the petitioner's/applicant's use and occupation of the building erected on the suit property pending the hearing and determination of the said application inter-parte. The Petitioner/Applicant annexed photographs showing the remains of the suit property after the impugned demolition. It was his contention that the Respondents' actions in demolishing the building erected on land parcel number E.BUKUSU/N. KANDUYI/4632 was a deliberate breach of the orders made on 07.02.2024 for which the Respondents must be punished.

Respondents Submissions

10. On their part, the Respondents filed submissions dated 22nd May, 2024 where they submitted on one issue whether the Petitioner had established that the Respondents failed to comply with the orders of this Court and should therefore be held in contempt. They referred to Section 107(1) of the [Evidence Act](#) which requires that he who alleges must prove. They submitted that in *Githaiga & 5 Others vs. Kiru Tea Factory Company LTD (2023) eKLR*, the court observed that contempt proceedings are quasi-criminal proceedings which require an applicant to establish a higher standard of proof in order to succeed. They further submitted that the statements in paragraph 6 and 7 of the affidavit in support of the application do not meet the threshold for the grant of the orders sought. They also submitted that the Petitioner has failed to prove that the Respondents disobeyed the orders of this court and is therefore undeserving of the orders sought and that the allegations in the application are merely speculative. It was also submitted that the compensation sought which is special damages, although pleaded was not strictly proved. The Respondents referred to the following cases in opposition to the application; *Mbui & another v Mbui (Environment & Land Case 154 of 2017) [2022/ KEELC 2203 (KLR) (27 May 2022) (Ruling)*, *Samuel M. N. Mweru & others v National Land Commission & 2 others [2020] eKLR* and *James Mumi Mucheru v National Bank of Kenya Ltd [2019/ eKLR]*. In conclusion, they urged the Court to dismiss the application with costs.



Analysis And Determination

11. I Have considered the application, the Replying Affidavits, the submissions and applicable law and in my view, the following issues distil for this court’s determination;
- a. Whether the Respondents are in contempt of the orders of this court issued on 7/2/2024.
 - b. Who shall bear the costs of the application?

Whether the Respondents are in contempt of the orders of the court dated 7/2/2024.

12. The Petitioner has brought the present application seeking an order that this court finds the Respondents in contempt of the injunctive orders of this court issued on 7/2/2024. It is not in contestation that in the said orders, this court granted a conservatory order prohibiting and restraining the Respondents jointly and severally, their agents, employees, officers and or any person acting on their behalf, authority, instructions and or directive, from demolishing or in any way interfering with the Petitioner’s use and occupation of the building erected on land parcel number E.BUKUSU/ N.KANDUYI/4632 pending inter-parte hearing and determination of the said application dated 6/2/2024 (now determined).

13. Order 40 Rule 3 of the Civil Procedure Rules sets out the consequences of breach of injunctive orders as follows:

“Consequence of breach [Order 40, rule 3.]

In cases of disobedience, or of 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.”

14. In the case of Econet Wireless Kenya Limited Vs Minister for Information and Communication of Kenya Authority [2005] eKLR Hon Justice Ibrahim (as he then was) stated as follows: -

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void. (emphasis)

15. It is imperative to also note that the burden of proof with respect to contempt proceedings is higher than proof on a balance of probabilities in civil claims. In the case of Refrigerator & Kitchen Utensils Ltd –Vs- Gulabchand Popatial Shah & Others Civil Appln. No. 39 Of 1990, the Court of Appeal, while approving the standard of proof in contempt cases as set out in the case of Gatharia Mitika & Others –Vs- Bahrain Farm Ltd, Civ. Appln.No.24 of 1995 held that in cases of alleged contempt, the breach for which the contemnor is cited must not only be precisely defined but proven to a standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. This is because, as already stated, the charge of contempt of Court is an offence of a criminal character and a party may lose his liberty is found guilty.



16. In *Gatharia K. Mutikika – vs Baharini Farm Ltd* [1985] KLR 227 it was held that-

“...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 part 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.” (own emphasis)

17. In the light of the gravity of the personal consequences that would ordinarily flow from a finding of contempt proceedings, the key elements to prove in a matter of contempt is knowledge of the orders of the court and establishment of the alleged contravention of the court’s orders by the contemnor. In *Oilfield Movers Ltd – Vs – Zahara Oil & Gas Limited* [2020]eKLR the court stated -

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.....”

18. The court of Appeal has also held that it is sufficient to prove that the advocate of the alleged contemnor was present in court when such orders were made. This was the holding in *Shimmers Plaza Limited vs National Bank of Kenya* (2015) eKLR where the court held as follows:

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him/her to report back to the client all that transpired in court that has a bearing on the client’s case.”

19. It follows from the decisions cited above that before allowing the present application for contempt, I must satisfy myself beyond any shadow of doubt that the Respondents and/or their employees or agents willfully disobeyed the order of this court issued on 7/2/2024. In this case, there can be no doubt that the Respondents were well aware of the Orders of this Court issued on 7/2/2024. In my considered view, it is precisely after service of the Petition and the Notice of Motion dated 6/2/2024 that the Respondents entered appearance and filed a replying affidavit in opposition to the Petition and the present Notice of Motion. The issue that now remains for determination is whether the Applicant has established that indeed there was a contravention of the said orders and whether it was done willfully and intentionally. In *Mahinderjit Singh Bitta – Vs Union Of India & Others* 1a No 100 Of 2010 the Supreme Court of India stated as follows: -

“In exercise of its contempt jurisdiction the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is



expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution (own emphasis)

20. From the court record, the Applicant has annexed photographs to the Supporting Affidavit showing the alleged acts of contempt by the Respondent's agents. These photographs do not indicate the time and date taken. However, they are said to have been taken in the wee hours of 5th May, 2024. The said images do not also show whether the demolished structures were taken on the disputed land or another property all together. Again, the machinery used to carry out the said destruction/demolition has not been properly identified or linked to the Respondents by way of motor vehicle registration search or any other recognized mode of identification. The Petitioners have not also disclosed the identity of the individuals said to have conducted the alleged demolition/destruction complained of and their relation to the Respondents. With regard to the 3rd Respondent, it is not clear who the Petitioners seeks to be committed to civil jail for contempt as the 3rd Respondent is the County Government of Bungoma which is a body corporate and therefore cannot be cited for contempt.
21. Further, this Court finds that the Petitioners failed to engage professional services of a Surveyor to prepare a report on the change of the status of the suit property after the alleged demolition of the structures. It is only such a report that would demonstrate to this court that the demolitions of the structures were in respect of the suit property and not another property all together. The Petitioners seem to have diverted their minds into carrying out a valuation of the suit property in a bid to establish the damage occasioned which in my view is immaterial at this stage.
22. In the present circumstances, I find that the burden of proof has not been discharged by the Petitioner/Applicant and the application must therefore fail.
23. The upshot of my finding is that the Notice of Motion application dated 22nd day of April, 2024 is devoid of merit and the same is hereby dismissed with each party to bear their own costs.
24. Orders accordingly.

DATED,SIGNED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF OCTOBER, 2024.

.....
HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. Mr. Maloba for the Petitioner/Applicant.
2. Mr. Wesonga for the Respondents.
3. Bett C/A.

