



**Namianya & 2 others v CECM Lands, Urban Planning, Housing and Municipalities - Bungoma County & 5 others (Constitutional Petition E003 of 2024) [2024] KEELC 7440 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7440 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**CONSTITUTIONAL PETITION E003 OF 2024**

**EC CHERONO, J**

**OCTOBER 31, 2024**

**IN THE MATTER OF ARTICLES 2,3,22(1),28 AD 40, 162(2)(B) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF PUBLIC NOTICE DEVELOPMENT CONTROL/ENFORCEMENT**

**BETWEEN**

**ROSE NANDAKO NAMIANYA ..... 1<sup>ST</sup> PETITIONER**

**REDEMPTA NABANGALA ..... 2<sup>ND</sup> PETITIONER**

**HARRIET NAFULA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**CECM LANDS, URBAN PLANNING, HOUSING AND MUNICIPALITIES - BUNGOMA COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR - BUNGOMA COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY GOVERNMENT OF BUNGOMA ..... 3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY FOR YOUTH AFFAIRS SPORTS AND ARTS ..... 4<sup>TH</sup> RESPONDENT**

**THE HONOURABLE COUNTY ATTORNEY ..... 5<sup>TH</sup> RESPONDENT**

**THE COUNTY ATTORNEY - BUNGOMA COUNTY ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling seeks to determine the Petitioners Notice of Motion application dated 25<sup>th</sup> May, 2024 brought under the provisions of Sections 2,4(1) (a). 5. 28 and 34 of the [Contempt of Court Act](#) No. 46



of 2016, Sections 1A and 3A of the Civil Procedure Act, Cap 21, Order 40 Rule 1, 2,3 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 5 of the Judicature Act, Article 159 (2) (e) of the Constitution of Kenya together with all enabling provisions of the law seeks the following orders;

- a. Spent.
  - b. This Honourable Court be pleased to issue summons against the Respondents to appear before this court and show cause why they should not be committed to civil jail for search term as the court may deem fit.
  - c. This court be pleased to find the Respondents be cited for contempt of court orders issued on 14<sup>th</sup> February, 2024 and 25<sup>th</sup> April, 2024 and further be committed to civil jail for a term of six (6) months until they purge the contempt and comply with the orders of this Honourable court.
  - d. This Honourable Court be pleased to grant leave to the Petitioners to file the latest valuation of the demolished properties.
  - e. This Honourable Court be pleased to order the 3<sup>rd</sup> Respondent to deposit monies equivalent to the value of the property as per the valuation report and/or to be determined by the court in an account held by the court before hearing of the petition to be able to purge the contempt and be granted audience to proceed with the petition.
  - f. In the alternative, where the 3<sup>rd</sup> Respondent may not have the amount as assessed in the valuation Report, this Honourable Court be pleased to order that this deposit becomes a first charge on any account held by and/or funds received by the 3<sup>rd</sup> Respondent until the case is conclusively heard and determined.
  - g. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents be personally responsible for enforcing the above orders and held liable for any failure to enforce Orders 5 and 6 above.
  - h. This Honourable Court be pleased to order the Respondents to compensate the Petitioners for the loss occasioned to them by having their properties demolished.
  - i. The cost of this application be provided for.
2. The application is predicated on grounds shown on the face of the application supported by the affidavit of Rose Nandako sworn on 25<sup>th</sup> May, 2024.
  3. The Petitioners case is that they filed a constitutional petition simultaneously with a Notice of Motion under certificate of urgency dated 9<sup>th</sup> February, 2024 and upon considering the said application, the duty court on 14/02/2024 issued temporary conservatory orders restraining the Respondents jointly and severally from trespassing, vandalizing, demolishing and generally interfering with the Petitioners ownership rights, use and occupation of the suit property. They stated that despite service of the said order, the Respondents failed/refused to comply with the said Orders despite being fully aware of its existence disobeyed the same by demolishing and destroying their properties thereon.
  4. The Petitioners further stated that following the said demolitions, they have lost their only source of income and have faced public humiliation and have suffered huge losses in terms of income from the developments on their land. They stated that the Respondents have demolished their properties and converted spaces as parking areas for county vehicles during the Madaraka day celebrations on the 1st June, 2024. It was averred that should the orders of contempt not be granted summoning the Respondents to appear in court and explain why they disobeyed the court orders despite being served, the Petitioners stand to suffer great loss and irreparable harm.



5. In opposition to the said application, the Respondents filed grounds of opposition dated 5/7/2024 and a replying affidavit sworn by Arch. Douglas Sasita Wekesa on even date. In his affidavit, the Respondent stated that the Petitioners Notice of Motion is incurably incompetent and jurisdictionally impotent as it purports to invoke jurisdiction of this Honourable through a non-existent provisions of the [Contempt of Court Act](#), 2016 which was declared unconstitutional and that a Court cannot exercise a non-existent jurisdiction as purportedly purveyed by the Petitioners in their Notice of Motion dated 25<sup>th</sup> May, 2024 and that this Court is obliged to strike out the same. He stated that whereas the Petitioners in an earlier application for contempt dated 23<sup>rd</sup> April, 2024 claimed that the suit property herein was demolished on 20<sup>th</sup> April, 2024 in disobedience of this Court's orders of 14<sup>th</sup> February 2024, the same Petitioners in the present application allege that the suit property herein was demolished on 5<sup>th</sup> May, 2024 in disobedience of the very same orders of 14<sup>th</sup> February, 2024 thus rendering the factual premise of the contempt application herein tenuous, lame duck and hollow and on a moving target which cannot be the basis for granting the orders sought herein.
6. To the contrary, the Respondent contend that the they have complied with the order of this Court and have not disobeyed the same as generally alleged without any specificity by the Petitioners or at all. They averred that in the absence of any evidentiary material, the Respondents' are unable to respond to the bare, hearsay allegations made against the them. They also stated that the Petitioners have not proved that the Respondents have disobeyed the orders of this Court to warrant the criminal liability for contempt on the bare assertion of demolishing their properties without prove thereof and the person who undertook the alleged demolition cannot be the basis of holding the Respondents in contempt of the orders of this Court.
7. It was further deposed that the Petitioner ought to appreciate in totality the activities, operations and preparations made towards the events of 1<sup>st</sup> June, 2024 which is 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 stated that there were multiple activities that the National Government undertaken which is outside the mandate and oversight of the County Government.
8. It was also the Respondents contention that in the absence of a order seeking this Court to first make a finding of disobedience of the specified Court Orders, it is an exercise in futility to issue summons against the Respondents to appear before this Court as the Petitioners' Notice of Motion is seeking. It was further deposed that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are legal phantoms and cannot sue or be sued and further that they are incapable of any acts of commission or omission and therefore cannot be held liable for contempt. It was also argued that the Applicants application is devoid of any evidentiary foundation and this Court cannot therefore exercise its jurisdiction to grant the orders sought.
9. When the said application came up for directions, the parties agreed to have the same canvassed by way of written submissions

### **Applicants Written Submissions**

10. The Petitioner filed submissions dated 25<sup>th</sup> June, 2024 in which they submitted on two issues. The first issue is whether the Respondents should be held liable for contempt of court orders. On this issue, they submitted that the Respondents have all along demonstrated their disrespect for Court orders and



have been malicious and deliberate in disobeying the same. The Petitioners submitted that despite the Respondents being aware of the orders of the Court issued on 14<sup>th</sup> February, 2024 and 25<sup>th</sup> April, 2024, they deliberately and maliciously disobeyed the same.

11. The Plaintiff/Petitioners also argued that the application has properly defined the meaning of contempt of Court as spelt out in the Black's Law Dictionary 9<sup>th</sup> Edition and Order 40 Rule 3 of the Civil Procedure Rules, 2010. It was submitted that the mere fact that the Respondents have filed a notice of appeal against the orders of this Court does not justify their contemptuous actions. Reliance was placed in the following cases; Hadkinson vs. Hadkinson 1952 2ALL ER 56, Republic vs. County Chief Officer, Finance and Economic Planning, Nairobi City County Ex Parte Stanley Muturi, Republic vs. Ahmad Abolfathi Mohammed 7 Another (2018) eKLR, Econet Wireless Kenya Ltd vs, Minister for Information & Communication of Kenya & Another (2005) 1KLR 828 and Mutitika vs. Baharini Farm Limited (1985) KLR 229,234.
12. The Petitioners further submitted that they have met the standard of proof in contempt proceedings. It was argued that the Court does not make orders in vain and as such, they ought to be obeyed and that contempt proceedings are designed to safeguard the dignity of the court and the rule of law which is fundamental in the administration of justice.
13. On the issue of Costs, it was submitted that the Respondents ought to bear the same for having blatantly disobeyed the orders of this court and its authority which is the subject of this application.

### **Respondents Submissions**

14. The Respondents on their part filed submissions dated 5<sup>th</sup> July, 2024 and submitted that the Applicants have invoked the Contempt of Court Act, 2016 as the applicable law in the current application for contempt of Court proceedings. They submitted that the Contempt of Court Act, 2016, is a non-existent law having been declared unconstitutional by the High Court in the case of Kenya Human Rights Commission v Attorney General & another [2018] eKLR in which the court rendered itself thus  

“ a declaration is hereby issued that the entire contempt of court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and encroaches on the independence of the Judiciary.”
15. It was argued that the Contempt of Court Act, 2016 having been declared unconstitutional cannot anchor the contempt application as purported in the Notice of Motion application herein. It was the Respondents submission that the Court is thus improperly moved and lacks jurisdiction to hear and determine the present application.
16. It was further submitted that the other provisions cited are inapplicable and that this case is instituted as a constitutional petition without stating the provisions of the constitution the Respondents have allegedly violated, breached or threatened. They referred to the following cases of; John Muthui & 19 others v County Government of Kitui & 7 others [2020] eKLR, Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others [2019] eKLR, Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017/ eKLR.
17. It was argued that the jurisdiction of this Court flows from either the Constitution or legislation or both and this Court can only exercise jurisdiction as donated either by the Constitution or any other written law.



18. It was further argued that the Notice of Motion before court is incurably incompetent and out for striking with costs to the Respondents for having been supported by an Affidavit sworn by Rose Nandako Namianya who did not have the authority from the other Petitioners to swear on their behalf. Reliance was placed in the case of; Ephraim Mbae & 2 others v Gilbert Kabeere M'mbijiwe & 2 others (2013) eKLR, Savala & another v Ndanyi (Environment and Land Case Civil Suit 248 of 2021) [2022] KEELC 2536 (KLR) (5 July 2022) (Ruling), Ndungu Mugoya & 473 others v Stephen Wangombe & 9 others [2005/ eKLR
19. On whether the Petitioners have proved their claim to the required standard, the Respondents answered in the negative and submitted that the petitioners have failed to show that the Respondents disobeyed the orders of this Court and should therefore be held liable for 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 held that contempt proceedings being quasi-criminal proceedings require a higher standard of proof. It was submitted that the statements in paragraph 6 and 7 of the supporting affidavits to the application alone do not meet the threshold to warrant the grant of the orders sought. They further submitted that the Petitioners have plainly failed to prove that the Respondents disobeyed the orders of this court and that the allegations in the application are merely speculative. It was also submitted that the compensation sought being special damages, though pleaded has not been strictly proved. The court was referred to the cases of; 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 The Respondents therefore urged the Court to dismiss the application with costs.

#### **Analysis and Determination.**

20. I have considered the application, the Replying Affidavits, the submissions and the applicable law and in my view, the following issues distil for this court's determination:
- a. Whether the application is proper before this court.
  - b. Respondents are in contempt of the orders of the court dated 14<sup>th</sup> February, 2024 and 25<sup>th</sup> April, 2024
  - c. Who bears the costs?

#### **Whether the application is properly before this court.**

21. The Respondent contend that the *Contempt of Court Act*, 2016 having been declared unconstitutional cannot anchor the contempt of court application as invoked in the Notice of Motion herein thus the same is for striking out for failure to invoke the jurisdiction of the court properly. It is no doubt that the *Contempt of Court Act* was declared unconstitutional and as such, the applicable law reverted to Section 5 of the *Judicature Act* under which a party seeking to cite for contempt would apply. The said section provides as follows:

“(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 the subordinate courts.”



22. The procedure for an application of this nature under the English Civil Procedure Rules is by filing of an Application Notice (Rule 23.1) where the Petitioners intimate their intention to seek for a court order. In our jurisdiction and in my considered view, an Application Notice and what we refer to in this jurisdiction as a Notice of Motion serves the same purpose. Having expressed myself as such, this court in the circumstances of this case is called upon to determine whether to consider a procedural technicality, or walk down the path of substantive justice by interpreting the said English Rules of procedure through the lenses of Article 159 of our Constitution which have been invoked by the Petitioner in his application. It is trite that courts exist to do justice therefore, I am inclined to take the route of substantive justice as opposed to procedural technicality since there is no demonstrable prejudice to be suffered by the Respondents.
23. Further, in the instant case, the Applicant has sets out the grounds under which the application is premised and has further stated the date when the actions giving rise to the contempt allegations were committed. The motion is supported by an affidavit which contains the purported evidence concerning the acts of contempt of court complained of. Consequently, I see no offence to the law and no deficiency in the content or any prejudice occasioned to the Respondents by the use of “notice of motion” as opposed to application notice. It has not been demonstrated that the use of notice of motion as opposed to application notice as the form of bringing the application affects the substance of the application.
24. The Respondents equally argued that the current Application is incompetent since Rose Nandako Namianya who swore the supporting affidavit did not have the authority of the 2<sup>nd</sup> petitioner to swear the same. In my view, any person with information relevant to an action and who is a party to the suit can swear an affidavit in the action. I say so because the information contained in a supporting affidavit is more of evidence and the 1<sup>st</sup> Petitioner cannot be said to be a stranger to these proceedings. The deponent deposed information that is within her knowledge and which she disclosed to have been informed by counsel on record. Further, the enactment of the 2010 Constitution and the Civil Procedure Act 2010 mandates this court to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. It would equally be draconian to dismiss the application based on the errors alluded to and for the reasons advanced by the Respondents. It is therefore my considered view that the current application is proper and in order.

**Whether the Respondents are in contempt of the orders of the court dated 14<sup>th</sup> February, 2024 and 25<sup>th</sup> April, 2024.**

25. The Petitioners have sought to have this court make a finding that the Respondents are in contempt of the injunction orders issued on 14<sup>th</sup> February, 2024 and 25<sup>th</sup> April, 2024. This Honourable Court in the said injunction orders had restraining the Respondents jointly and severally, their agents, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on vandalizing, demolishing and generally interfering with the Petitioners ownership, rights, use and occupation of the properties known as KANDUYI/20, PLOT NO.12A pursuant to public notice dated 31<sup>st</sup> January, 2024 pending the hearing and determination of the said application and the petition herein.
26. Order 40 Rule 3 of the Civil Procedure Rules prescribes 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.”

27. 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)

28. It is pertinent to also point out that the burden of proof with respect to contempt is higher than on a balance of probabilities. 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 a reasonable doubt. This is because, as already stated, the charge of contempt of Court is an offence of criminal character and a party may lose his liberty

29. In Gatharia K. Mutikika – vs Baharini Farm Ltd [1985] KLR 227 the court 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 on 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)

30. In the light of the gravity of the personal consequences that would ordinarily flow from a finding of contempt, 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.....”



31. The Court of Appeal has held for the umpteenth time 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 Plwaza Limited vs National Bank of Kenya (2015) eKLR* where the court stated 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.”

32. It is imperative that before allowing the present application, the court must satisfy itself beyond any shadow of a doubt that the Respondents and/or their employees or agents willfully disobeyed the orders of this court of 14<sup>th</sup> February, 2024 and 25<sup>th</sup> April, 2024 respectively. In this case, there can be no doubt that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents were well aware of the Orders of this Court issued on 14<sup>th</sup> February, 2024 and 25<sup>th</sup> April, 2024. Mr. Wesonga appearing together with Mr. Wekeas and Mr. Wangila Masinde appearing for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents were present on the date when the orders in issue were issued. As for the 4<sup>th</sup> and 5<sup>th</sup> Respondents, they were not represented during the said ruling and there is no proof that they were served with the said orders and as such, they cannot be said to have been aware of the same. The issue that now arise for determination is whether the Petitioners have established that indeed there was a contravention of the orders of this court and whether the same 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)

33. The Petitioners in the present application have annexed photographs to the Supporting Affidavit purporting to show the alleged acts of contempt by the Respondents and/or agents. These photographs however do not indicate the time and date they were taken. From the supporting affidavit, it has been alleged that they were taken in the wee hours of 5<sup>th</sup> May, 2024. Those images do not also show whether the demolished structures are on the disputed land or another property all together. Again, the machinery used to carry out the said destruction 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 further not disclosed the identity of the individuals said to have conducted the destruction/demolition complained of and their relation to the Respondents. Moreover, with regard to the 3<sup>rd</sup> Respondent, it is not clear who the Petitioners seeks to be committed to civil jail for contempt as the entity is the County Government of Bungoma which is a body corporate and therefore, cannot be cited for contempt.

34. Further, this Court is of the view that the Petitioners should have procured the 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 in support of their application. It is only such a report that would demonstrate that the demolitions of the structures were in respect of the suit property and not any other 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.

35. In light of the above analysis, it is my finding that the Applicants have not discharged their burden of proof to the required standard. The application must therefore fail.
36. The upshot of my finding is that the Notice of motion application dated 25/05/2024 is devoid of merit and the same is hereby dismissed with each party to bear their own costs.
37. It is so ordered.

**DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Wangila for the Applicants.
2. Mr Wesonga for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents.
3. Bett C/A.

