



Wamalwa & another v County Executive Committee Member for Lands, Urban/Physical Planning, Housing & Municipalities County Government of Bungoma & 2 others (Environment and Land Constitutional Petition E001 of 2024) [2024] KEELC 7559 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7559 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E001 OF 2024

EC CHERONO, J

OCTOBER 31, 2024

IN THE MATTER OF ARTICLES 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 VIOLATION OF THE RIGHTS PROTECTED UNDER THE CONSTITUTION

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE FREEDOMS) PRACTICE AND PROCEDURE RULES 13,19 AND 23 OF 2013

AND IN THE MATTER OF LAND REGISTRATION ACT NO.3 OF 2012

AND IN THE MATTER OF THE PHYSICAL AND LAND USE PLANNING ACT NO. 13 OF 2019

AND IN THE MATTER OF COUNTY GOVERNMENT ACT 2012

AND IN THE MATTER OF TITLE E.BUKUSU/N.KANDUYI/6573 AND 6574

BETWEEN

SIMON WAMALWA 1ST PETITIONER

MOSES WAKOLI WAMALWA 2ND PETITIONER

AND

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

THE GOVERNOR, COUNTY GOVERNMENT OF BUNGOMA 2ND RESPONDENT



RULING

1. This Court has been called upon to determine the Petitioners' Notice of Motion dated 22nd April, 2024 brought under the provisions of Section 1A 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;
 1. That the application herein be certified urgent and heard on priority basis.
 2. That the honorable court be pleased to find the ARCH. DOUGLAS SASITAWEKESA, 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.
 3. 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.
 4. 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.
 5. 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.
 6. That Costs of the application be borne by the Plaintiff/Respondent.
2. The application is predicated upon grounds shown on the face thereof supported by the affidavit of SIMON WAMALWA, the 1st Applicant herein sworn on 22nd April, 2024.
3. It was the applicants case that on 7/2/2024, this Honourable Court issued conservatory orders prohibiting and 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 the suit land parcel numbers NO. E.BUKUSU/N.KANDUYI/6573 and 6574 pending the hearing and determination of said application dated 6/2/2024. That the said order was extracted and served upon the Respondents on 8/2/2024 who acknowledged service by rubberstamping and signing on the return copy.
4. It was deposed that the Respondents were aware that the application dated 6/2/2024 was still pending and was 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, the Respondents, without any lawful justification or excuse, deliberately disobeyed the said court order by descending on the suit property situate on land parcels NO. LR E.BUKUSU/N.KANDUYI/6573 and 6574 and demolished the same occasioning massive losses to the Petitioner/Applicant. It was



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 while MR. KENNETH MAKELO LUSAKA who is the Governor in the County Government of Bungoma are personally liable for the actions.

5. The Applicants contend that the actions by the Respondents are calculated to ridicule this honourable court. That the Actions of the Respondents to deliberately disobey the orders of 7/2/2024 are not only detrimental to the Petitioner/Applicant but also a threat to the rule of law and brings the orders of this Honourable court into ridicule. That the conduct of the Respondents amounts to disobedience of lawful court orders and are setting a bad and an alarming precedent which militates against the administration of justice and the rule of law in general and also undermines the integrity and/or dignity of this court. It was argued that it is in the interest of orderly administration of justice and peaceful co-existence and that should the orders sought herein are granted, the same will not prejudice the Respondents or make them suffer any hardship.
6. In response to the said application, the Respondents filed grounds of opposition dated the same date and a replying affidavit sworn by Arch. DOUGLAS SASITA WEKESA on 7th day of May, 2024. In his replying affidavit, the Respondents refuted all the allegations levelled against them by the Petitioners and stated that the Petitioners have not discharged their legal and evidentiary burden to sustain the serious offence of contempt of Court to the required standard or at all. He stated that the totality of the activities, operations, preparations taking place at Masinde Muliro Stadium at Kanduyi, Bugnoma town to the run up of commemoration of Madaraka Day on 1st June, 2024 must be contextualized and appreciated so that the Petitioners' do not distort the reality to advance unfounded allegations against the Respondents. that it is not legally tenable for the Petitioners to purport to make the Respondents collectively and vicariously liable for the alleged acts of commission without any iota of evidence.
7. The Respondents stated that the Notice of Motion before this Honourable court is absolutely devoid of any evidentiary foundation upon which this Court can exercise its jurisdiction to grant the draconian orders sought by the Petitioners/Applicants

SUBMISSIONS.

8. When the said application came up for directions, the parties agreed to canvass the same by way of written submissions.
9. The Petitioner filed submissions dated 25th June, 2024 while the Respondents filed theirs dated 17th May, 2024.

PETITIONERS WRITTEN SUBMISSIONS

10. The Petitioner submitted on four grounds. The first ground is whether the terms of the order were clear and unambiguous and were binding on the Respondents and the Petitioners submitted that the orders issued on 07.02.2024, were indeed clear and unambiguous terms and prohibited and 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 petitioner's/Applicant's use and occupation of the building erected on land parcel number E.Bukusu/N. Kanduyi/4632 pending the hearing and determination of the said application inter-parties. It was submitted that no contention has been 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.



11. On Whether the Respondents deliberately acted in breach of the terms of the said orders, the Petitioner/Applicants contend 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 same. They argued that the actions by the Respondents were in blatant breach of the orders made on 07.02.2024 which prohibited/restrained them 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 their (petitioner's/applicant's) use and occupation of the building erected on the suit property pending the hearing and determination of the said application. The Petitioner/Applicant attached photographs showing the remains of the suit property after the alleged demolition. It was their contention that the Respondents' actions in demolishing the building erected on the suit land parcel number E.BUKUSU/N. KANDUYI/4632 was a deliberate breach of the orders of this court made on 07.02.2024 for which the Respondents must be punished.

SUBMISSIONS BY THE RESPONDENTS.

12. The Respondents on their part filed submissions dated 22nd May, 2024 where they submitted on one issue i.e. whether the Petitioner had established the grounds for contempt to the required standard and demonstrated that they have disobeyed the orders of this Court and must therefore be held in contempt. By way of a background, they cited Section 107(1) of the *Evidence Act* which requires that he who alleges must prove. They referred to the case of; Githaiga & 5 Others vs. Kiru Tea Factory Company LTD (2023) eKLR, where the court held that contempt proceedings, being quasi-criminal proceedings, require a higher standard of proof. They submitted that the averments contained in paragraph 6 and 7 of the affidavit in support of the application alone do not meet the threshold to warrant the grant of the orders sought. They further submitted that the Petitioners have failed to prove that the Defendant/Respondents disobeyed the orders of this Honourable court and that the allegations in the application are merely speculative. It was also submitted that the order for compensation which are special damages, though pleaded, has not been strictly proved. They also 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 Mumiu Mucheru v National Bank of Kenya Ltd [2019/ eKLR In conclusion, they urged the Court to dismiss the application with costs.

ANALYSIS AND DETERMINATION.

13. Having carefully considered the application, the Replying Affidavit, the submissions by the parties and the annexures thereto, the following issues in my view arise for this court's determination:
- a. Whether the Defendants are in contempt of the orders of this court dated 7/2/2024?
 - b. Who should bear the costs of this application?

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

14. The Applicants in the present application are seeking an order that this court finds the Respondents in contempt of the injunctive orders of this court issued on 7/2/2024. In the impugned orders, this court issued conservatory orders 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 Petitioners'/Applicants' use and occupation of the building erected on the suit Land parcel number E.BUKUSU/N.KANDUYI/6573



and Land parcel number E.BUKUSU/N.KANDUYI/6574 pending the hearing and determination of the said application inter-parte.

15. Order 40 Rule 3 of the Civil Procedure Rules outlines 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.”

16. 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)

17. 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 if cited for contempt.

18. 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)

19. 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.....”

20. The Appellate Court has also 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 Plaza 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.”

21. From the above cited decisions, it is clear that before allowing the application for contempt, this court must satisfy itself beyond any shadow of a doubt that the Respondents and/or their employees or agents willfully disobeyed the order of 7/2/2024. In this case, there can be no doubt that the Respondents were well aware of the Orders of this Court made on 7/2/2024 as it is on the basis of service of the said order and the Petition as well as the said application that was pending at the time that they entered Appearance and filed their replying affidavit in opposition to the Petition and the notice of motion dated 6/2/2024. The issue that arise for determination therefore is whether the Petitioners have established that indeed there was 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)

22. The Petitioners have annexed photographs to their Supporting Affidavit allegedly showing the purported acts of contempt by the Respondents and or their agents. These photographs however do not indicate the time and date they were taken, though, 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 on the suit land or any other property all together. Again, the machinery used to carry out the said demolition/ 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 not also disclosed the identity of the individuals said to have conducted the demolition/ destruction complained of and their relation to the Respondents. Moreover, with regard to the 3rd Respondent, it is not clear who the Petitioners seek to be committed to civil jail for contempt as the said Respondent is the County



Government of Bungoma which is a body corporate and therefore, cannot in law commit acts of commission and/or omission.

23. Further, this Court finds that the Petitioners did not engage professional services of a surveyor to prepare a report indicating whether there was change of status of the suit property after the alleged demolition/destruction of structures. It is only through such a report this court can be satisfied that there were demolitions of structures 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.
24. In the present circumstances, the burden of proof remains undischarged by the Petitioners. The application must therefore fail.
25. The upshot of my finding is that the Notice of Motion dated 22nd April, 2024 is devoid of merit and the same is hereby dismissed with each party to bear their own costs.
26. It is so ordered.

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

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

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

