



REPUBLIC OF KENYA



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Wesonga & 10 others v CECM Lands, Urban Planning, Housing and Municipalities-Bungoma County & 5 others (Constitutional Petition E003 of 2024) [2024] KEELC 7562 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7562 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
CONSTITUTIONAL PETITION E003 OF 2024
EC CHERONO, J
OCTOBER 31, 2024
N 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

MARGARET NASIMIYU WESONGA 1ST PETITIONER
JOSEPH MASIBO 2ND PETITIONER
GODFREY JACOB 3RD PETITIONER
SIMON WAMALWA 4TH PETITIONER
SAFARIPLIES LIMITED 5TH PETITIONER
CLEOPHAS MISIKO 6TH PETITIONER
SALU WEKESA 7TH PETITIONER
JUMA WASWALA 8TH PETITIONER
BLASIO BARASA 9TH PETITIONER
ANDRIANO MAKOKHA 10TH PETITIONER
GABRIEL NALIANYA 11TH PETITIONER

AND

CECM LANDS, URBAN PLANNING, HOUSING AND MUNICIPALITIES-
BUNGOMA COUNTY 1ST RESPONDENT



THE GOVERNOR- BUNGOMA COUNTY	2 ND RESPONDENT
COUNTY GOVERNMENT OF BUNGOMA	3 RD RESPONDENT
CABINET SECRETARY FOR YOUTH AFFAIRS SPORTS AND ARTS	4 TH RESPONDENT
THE HONOURABLE COUNTY ATTORNEY	5 TH RESPONDENT
THE COUNTY ATTORNEY-BUNGOMA COUNTY	6 TH RESPONDENT

RULING

1. This ruling seeks to determine the Petitioners' Notice of Motion dated 25th 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 for the following orders;
 - a. This application be certified urgent and service be dispensed with in the first instance.
 - b. This Honourable court be pleased to issue summons against the respondents to appear before the Court and show cause why they should not be committed to civil jail for such term as the court may deem just.
 - c. This Honourable Court be pleased to find the Respondents be cited for contempt of court orders issued on 6th February, 2024 and 25th 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 3rd Respondent to deposit monies equivalent to value of the property as per the valuation report and/or to be determined by 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 3rd 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 3rd Respondent until the case is conclusively heard and determined.
 - g. The 1st and 2nd 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 Margaret Nasimiyu Wesonga, the 1st Appellant/Applicant on her behalf and that of the other 10 Applicants herein sworn on 25th May, 2024.
3. It was the Petitioners case that they filed a constitutional petition dated 6th February, 2024 contemporaneously with a Notice of Motion under certificate of Urgency. That upon being placed before the duty court, they were granted conservatory orders 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 their ownership rights, use and occupation of the properties pursuant to the public Notice dated 31st January, 2021 pending the hearing and determination of the said application inter-partes. They stated that despite the existence of those orders, the Respondents failed to comply with the same which orders clearly restrained the Respondents jointly and severally from trespassing, vandalizing, demolishing and generally interfering with the Petitioner's ownership, rights, use and occupation of the suit properties. They further stated that the said court order was effectively served upon the Respondents via their respective emails, WhatsApp and physically to their designated offices and in the premises, the Respondents were fully aware of the effective interim orders which required not to interfere with the Petitioner's property until the application was heard and determined.
4. That despite having the knowledge of the existence of the interim orders, the Respondents blatantly disobeyed the court orders and demolished part of the suit properties thereby causing substantial loss to the Petitioners. The Applicants stated that after inter-partes hearing of the said application, this court delivered a ruling on the 25th April, 2024 allowing the same on merit and confirmed the interim conservatory orders for a further six (6) months pending hearing and determination of this Petition. It was their contention that the Respondents' actions are unwarranted and uncalled for and they are facing untold suffering and prejudice and continues to suffer financial losses by the actions of the Respondents in demolishing their properties which are their only source of livelihood. They stated that their right to peaceful enjoyment of property has been curtailed by the Respondents which is a violation of a fundamental constitutional right.
5. By way of a response to the said application, the Respondents filed grounds of opposition dated 9/5/2024 and a replying affidavit sworn on even date by Arch. DOUGLAS SASITA WEKESA. In the said replying affidavit, the deponent stated that this Court's jurisdiction is only triggered by invoking the appropriate statutory and/or constitutional provision conferring the court the jurisdiction to handle the matter. He stated that the Petitioners' Notice of Motion dated 25th May, 2024 is not only defective but incompetent, having been brought under the Contempt of Court Act which is a non-existent statute after it was declared unconstitutional by the Court. On that ground, he stated that this Court is obliged to strike out this Notice of Motion for being incurably incompetent and an abuse of the process of Court. The Respondents further stated that this application is also incurably incompetent for having been supported by an Affidavit sworn by Simon Wamalwa who had purportedly given authority to Margaret Nasimiyu Wesonga who is the 1st Petitioner/Applicant herein in a earlier application which is still pending dated 22nd April, 2024.
6. It was argued that the present Notice of Motion which is supported by an affidavit sworn herein having been supported by Simon Wamalwa is sub-judice a similar application for contempt filed earlier dated 22nd April, 2024 between Simon Wamalwa & Moses Wamalwa v County Government of Bungoma & Other being BUNGOMA ELC Constitutional Petition No. E002 of 2024 which is still pending and on that basis, the present application ought to be struck out with costs as being an abuse of the process



of the Court. They contend that the present application contravenes section 6 of the Civil Procedure Act, 2010 and this Court is without jurisdiction to hear and determine the same.

7. The Respondents further deposed that the totality of the materials thrown at this Honourable Court through the Supporting Affidavit of Simon Wamalwa alleging that the Respondents have refused to comply with the Orders of this Court issued on 6th February, 2024 fall short of the threshold required to sustain a conviction in contempt proceedings. They stated that this Court did not issue interim conservatory order on 6th February, 2024 as alleged or at all and that the directions given by the Court on 6th February, 2024 did not forbid or direct the doing of anything by the Respondents to be the subject of the alleged disobedience. The Respondents stated that the 1st, 2nd, 3rd and 6th Respondents herein have obeyed the order of this Court and have not disobeyed the same as alleged generally without any specificity by the Petitioners/Applicants or at all.
8. The Respondents further stated that in the absence of evidentiary material, the Respondents' are unable to respond to the bare, hearsay allegations made against them. They stated that the Petitioners have failed to demonstrate who, when where and how the Respondents demolished the suit properties in disobedience of the orders of this court to warrant the present application for contempt proceedings against them.
9. It was further deposed that the Petitioners ought to appreciate in totality the activities, operations and preparations made towards the events of 1st 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 the National Government in collaboration with other National Government ministries and agencies. They stated that there have been multiple activities that the National Government has undertaken which is outside the mandate and oversight of the County Government of Bungoma.

Petitioners Submissions.

10. The Petitioner filed submissions dated 25th June, 2024 where they submitted on two issues. The first is whether the Respondents should be held liable for contempt of the orders of this court and they answered in the affirmative and submitted that the Respondents have all along demonstrated their disrespect to the Court and have been malicious and deliberate in disobeying the Court orders. The Applicant also submitted that despite the Respondents being aware of the orders of this Court issued on 14th February 2024 and 25th April 2024, they deliberately and maliciously disobeyed the same.
11. The Plaintiff/Applicants argued that the application herein is proper referred to the Black's Law Dictionary 9th Edition for the meaning of contempt of Court and the Provisions of Order 40 Rule 3 of the Civil Procedure Rules, 2010. They also submitted that the mere fact that the Defendant/ Respondents have filed a notice of appeal against the orders of this Court does not justify their contemptuous actions. Reliance was placed in the case of; *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 Petitioner submitted that the standard of proof in contempt proceedings has been met and that Court orders are not made in vain and ought to be obeyed and that contempt proceedings are designed



to safeguard the rule of law and the dignity of the court 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 disrespected the authority of the Court which is the subject of this application.

Respondents Submissions

14. On their part, the Respondents filed their submissions dated 5th July, 2024 in which they argued that the present Notice of Motion which is a contempt application has invoked the jurisdiction of this court under the Contempt of Court Act, 2016 as the applicable law. law invoking contempt of Court jurisdiction. They submitted that the Contempt of Court Act, 2016, is a non-existent statute after it was declared unconstitutional by the High Court in Kenya Human Rights Commission v Attorney General & another [2018] eKLR where it was held 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 after it was declared unconstitutional, the Contempt of Court Act, 2016 cannot anchor the contempt application as invoked by the Applicants in the Notice of Motion herein. It was further submitted that this Court has been 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 the suit herein was instituted by a constitutional petition on impleaded constitutional provisions. Reliance was placed on the following cases; 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. It was also submitted that jurisdiction of a Court flows from either a statute or the Constitution or or both and this Court can only exercise jurisdiction as conferred by the Constitution or any other written law.
17. It was further submitted that the Notice of Motion before court is incurably defective and incompetent and for striking out with costs to the Respondents for having been supported by an Affidavit sworn by Simon Wamalwa who did not have the authority from the other Petitioners to swear on their behalf in this petition or application. Reliance was placed in the case of; Ephraim Mbae & 2 others v Gilbert Kabere 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
18. The Respondents also argued that Simon Wamalwa having sworn the supporting affidavit in this suit without authority can only cover him in terms of his claim making the current application sub-judice to an application filed by the said Simon Wamalwa in ELC Constitutional Petition No. E002 of 2024 between Simon Wamalwa & Moses Wamalwa & County Government of Bungoma & Others. It was therefore submitted that this application is sub-judice pursuant to Section 6 of the Civil Procedure Act.
19. On the issue as to whether the Petitioner had proved the charge of contempt of court to the required standard that the Defendant/Respondents had failed to comply with the orders of this court and should therefore be held in contempt, they answered in the negative and referred to Section 107(1) of the Evidence Act which requires that he who alleges must prove. It was submitted that in Githaiga & 5 Others vs. Kiru Tea Factory Company LTD (2023) eKLR, contempt proceedings being quasi-criminal proceedings require a higher standard. They submitted that the statements in paragraph 6



and 7 of the affidavits 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/Applicants have failed to prove that the Defendant/Respondents disobeyed the orders of this court and that the allegations in the application were merely speculative. It was also submitted that the compensation sought which is special damage, though pleaded was not strictly proved. Reliance was made to the case 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.

Legal Analysis And Determination

20. Having considered the application, the Replying Affidavits, the submissions and evidence filed, the following issues arise for this court's determination:
 - a. Whether the application is proper before this court.
 - b. Whether the Respondents are in contempt of the orders of the court dated 6th February, 2024 and 25th April, 2024.
 - c. Who bears the costs?

Whether the application is proper before this court.

21. The Respondents argued that the Application was incompetent since Simon Wamalwa who swore the supporting affidavit did not have the authority of the other petitioners/Applicants 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 deponent cannot be said to be a stranger to these proceedings. In the said affidavit, the deponent deposed information that was within her knowledge and those he had been informed by their 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 the 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 6th February, 2024 and 25th April, 2024.

22. The Petitioners/Applicants have sought an order that this court finds the Respondents in contempt of the injunctive orders of this court issued on 6th February, 2024 and 25th April, 2024. The court in the final orders issued on 25TH April, 2024 confirmed the interim/temporary orders issued on 2th February, 2024 after inter-parte hearing. The said injunction orders issued by this court restrained the Respondents jointly & 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 Petitioner's ownership, rights, use and occupation of the property known as Kanduyi/4,E.Bukusu/N/Kanduyi6573, E.Bukusu/N/Kanduyi/4644,E.Bukusu/N/Kanduyi/1716,E.Bukusu/N/Kanduyi/4635,Kanduyi/6,E.Bukusu/N/Kanduyi/4634,E.Bukusu/N/Kanduyi/4648,Kanduyi/3 pursuant to the Public Notice dated 31st January, 2024 pending hearing and determination of the application and/or this appeal.



23. 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.”

24. 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)

25. It is imperative to note 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 of 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 found guilty.

26. 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)

27. 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.....”

28. 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 held in *Shimmers Plaza Limited vs National Bank of Kenya* (2015) eKLR 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.”

29. It is clear from the above precedents that before allowing the orders in this application, the court must be satisfied beyond any shadow of a doubt that the Respondents and/or their employees or agents willfully disobeyed the order of 6th February, 2024 and 25th April, 2024. In this case, there can be no doubt that the 1st, 2nd, 3rd and 6th Respondents were well aware of the Orders of the Court made on 6th February, 2024 and 25th April, 2024. Counsel on record representing the Respondents were present on the date the said orders were issued on 6th February and 25th April, 2024. The issue that remains for determination is whether the Petitioners have established that indeed there was a contravention of the courts orders and if 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)

30. The Petitioners have annexed photographs to its Supporting Affidavit showing the alleged acts of demolition and destruction by the Respondent's agents. These photographs however do not indicate the time and date it is alleged to have been done. In the supporting affidavit, it is said to have been done in the wee hours of 5th May, 2024. The images further do not show whether the demolished structures are on the disputed land or another property all together. Again, the machinery used to carry out the said demolitions/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 regards the 3rd Respondent it is not clear who the Petitioners seeks to be committed to civil jail for contempt as the 3rd Respondent is County Government of Bungoma which is a body corporate and therefore, cannot be liable for contempt.



31. Further, this Court is of the opinion that in support of their application, 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. It is only such a report that would have persuaded this court that the demolitions of the structures were in respect of the suit property and not another property all together.
32. In the present circumstances, it is my view that the Petitioner/Applicants have not discharged their burden of proof to the required standard. The application must therefore fail.
33. The upshot of my finding is that I am Notice of Motion application dated 25th May, 2024 is devoid of merit and the same is hereby dismissed with each party to bears their own costs.
34. 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. Wangila for the Petitioners/Applicants.
2. Mr. Wesonga for the 1st, 2nd, 3rd, and 6th Respondents.
3. Bett C/A.

