



Nyamai (Suing as the Administrator of the Estate of Onesmus Nyamai Kyengo) v Mwanganda & 6 others (Environment & Land Case 183 of 2013) [2024] KEELC 6989 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6989 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 183 OF 2013
FM NJOROGE, J
OCTOBER 24, 2024

BETWEEN

DANIEL KATUMO NYAMAI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ONESMUS NYAMAI KYENGO) APPLICANT

AND

GILBERT KANUNGU MWAGANDA 1ST RESPONDENT
JOANNES CHARO KATANA 2ND RESPONDENT
JUMWA KARISA MRYANI 3RD RESPONDENT
ZAWADI KIBETU KIERIA 4TH RESPONDENT
PAUL KATANA MWANZA 5TH RESPONDENT
JOSEPHAT NGALA MUNYAKI 6TH RESPONDENT
JONATHAN KENGA KATANA ALIAS GONA 7TH RESPONDENT

RULING

1. Vide an application dated 27/7/2023, filed pursuant to the provisions of Section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Section 5 (1) of the *Judicature Act* and Part 81 of the English Civil Procedure Rules, 1998, the Applicant sought the following orders: -
 1.Spent.
 2.Spent.
 3. That Gilbert Kanungu Mwanganda, Joannes Charo Katana, Jumwa Karisa Mryani, Zawadi Kibetu Kieria, Paul Katana Mwanza, Josephat Ngala Munyaki, Jonathan Kenga Katana alias



Gona the cited contemnors herein do stand committed to civil jail for a period as this honourable court may determine and or pay punitive fine for contempt of court in that the said defendants willfully disobeyed the orders of the court issued on 20/9/2020.

4.Spent.
 5. That the honourable court do issue an order to compel the defendants in the contempt proceedings to purge their contempt of court by forthwith vacating the suit property known as CR 27920 Subdivision No. 176 (Original No. 163/1/) Section IV MN.
 6. That an order be issued directing the County Police Commandant Kilifi, Officer Commanding Police Division (Kilifi South-Mtwapa) and Officer Commanding Kijipwa Police Station to provide security and enforce the orders of the court compelling the defendants, their agents, servants or whomsoever claiming under them to vacate the suit property known as CR 27920 Subdivision No. 176 (Original No. 163/1/) Section IV MN.
 7. That the costs of this application be awarded to the Plaintiff/applicant.
2. The basis of the application as explained in the supporting affidavit sworn by the Applicant on 27/7/2023 is that the Respondents have acted in breach of and in disobedience of the orders issued by this court on 20/9/2020 in the presence of both parties herein; that the court issued a permanent and mandatory injunction against the Respondents to vacate the suit property known as CR 27920 Subdivision No. 176 (Original No. 163/1/) section IV MN within 90 days; that the Respondents have continued to occupy the suit property and the Applicant's efforts to evict them have been met with brute force.
 3. In response, the Respondents filed a replying affidavit they jointly swore on 26/10/2023 denying the allegations of contempt. They stated that they filed an application for stay of execution against the said decree of this court at the Court of Appeal and that the same was yet to be heard and determined. To the Respondents, the application for contempt was therefore not procedural and in turn defective. They urged the court to dismiss the application with costs.
 4. The application was canvassed by way of written submissions which I have carefully read, understood and considered.

Analysis and Determination

5. The main issue for determination in the present application is whether the Respondents are in contempt of this court's orders.
6. The application emanates from an order made by the court on 18/9/2020 and not 20/9/2020 as alleged by the Applicant. The said orders read as follows: -
 1. That the Defendants' originating summons dated 2nd September 2013 is hereby dismissed;
 2. That an order of permanent injunction is hereby issued forthwith restraining Defendants by themselves, their agents, servants or whomsoever claiming under them from trespassing, developing on, subdividing, selling, transferring or in any other way dealing with the suit property known as CR 27920 Subdivision No. 176 (Original No. 163/1/) Section IV MN;
 3. That the Defendants are hereby granted 90 days within which to voluntarily vacate the suit property in default of which an order of mandatory injunction shall issue forthwith compelling the defendants, their agents, servants or whomsoever claiming under them vacate the suit property known as CR 27920 Subdivision No. 176 (Original No. 163/1/) section IV MN; and



4. That the Plaintiff shall have costs of this suit and the originating summons.
7. It is settled that with the nullification of the *Contempt of Court Act*, Section 5 of the *Judicature Act* stands as the applicable law which courts derive their power to punish for contempt of court (See *Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited J.R. No. 390 of 2014*). That 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 subordinate courts.
8. In the case of *Econet Wireless Kenya Limited v 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.”
9. In the case of *MNN v JMM [2022]* eKLR my sister Judge Hon Maureen Odero relied on the dicta in an Indian case which I am of the view is also relevant here. In that case she stated as follows:
 - “13. Likewise, in the case of *T.N Gadavarman Thiru Mulpad v Ashok Khot and anor [2005] 5 SCC*, the Supreme Court of India in emphasizing the dangers of disobeying court orders held as follows: -

“Disobedience of this Court’s order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court’s orders are to be followed and complied with.
10. As per the holding in *Gatharia K. Mutikika v Baharini Farm Ltd [1985] KLR 227*, the standard of proof required to establish a charge of contempt is higher than the standard of “balance of probabilities” required in an ordinary civil case but lower than the standard of “beyond reasonable doubt” required in criminal cases. Also, for orders finding a respondent to be in contempt to issue, an applicant must demonstrate that there was wilful and deliberate disobedience of the order in question. Finding a person in contempt has severe consequences. The liberty of the person and his freedom to



administer over his property may be at stake. In *Gatharia K. Mutikika v Baharini Farm* (supra) the Court held that:-

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily..... it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be heard to process contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the 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.”

11. Further, *Mativo J in Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR stated as follows:

“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.”

12. The ultimate consideration in a contempt application therefore is whether there was wilful and deliberate disobedience of court orders. The Respondents do not deny that they have not complied with the court orders. Their argument however is that the disobedience was unintentional under the circumstances and events that have occurred since filing of the application for stay of execution at the Court of Appeal. It must be remembered that filing of an appeal on itself is not equivalent to an order of stay of execution. Order 42 Rule 1 of the Civil Procedure Rules expressly provides as such. The Respondent argued that upon filing the application for stay and submissions thereto, the Court of Appeal failed to deliver its ruling on the same since the year 2021. They added that when the application came up for directions before the Court of Appeal, that court advised the Respondents to abandon the application and proceed with the main appeal. As a result, the Respondents allege, they withdrew the application.
13. Perusing the documents relied upon by the Respondents, it is evident there is an application apparently filed on 30/11/2020 in the Court of Appeal, but no copy of the appellate court’s proceedings to back the above allegation to the effect that the court advised counsel to withdraw their application for stay. It is not even stated when the appellate court directed as such. Further, there is attached to the respondents’ submissions dated 5/7/2024 a notice of withdrawal of the application COACAPPL No E017 of 2020, a notice of motion in COACAPPL No 005 of 2024 dated (and filed on) 23/2/2024 and



an electronic mail printout from the alleged contemnors' counsel to the present applicants' counsel notifying him of the filing of the withdrawal notice and the filing of COACAPPL No 005 of 2024.

14. However, even assuming that it was indeed the position that the alleged contemnors withdrew their application upon advice from the Court of Appeal, it is questionable that the Respondents decided to file another application for stay of execution and the notice of withdrawal on 23/2/2024, long after the present application for contempt had been filed. This Court's summation of available facts elicits the conclusion that the Respondents' actions were only an afterthought attempt to defeat the present contempt proceedings.
15. On the other hand, the applicant filed a further affidavit sworn by Henry Kariuki their advocate stating that he was served by the alleged contemnors with an application dated 4/10/23 in Mombasa ELC No 94 of 2022, David Chome & Others Vs Estate of Onesmus Nyamae Kyengo and Others, to which was annexed a supporting affidavit that showed that latest by 15th August 2023, the alleged contemnors herein were well aware of the application for committal now being adjudicated. It is apparent that the alleged contemnors herein attempted to join themselves to that Mombasa case vide that application.
16. In the light of the foregoing, I am persuaded that the Applicant has demonstrated that the Respondents willfully failed, refused and or neglected to obey the court order given on 18/9/2020 and they must be held to account. The result is that the application dated 27/7/2023 is hereby allowed in the following terms: -
 - a. All the Respondents Gilbert Kanungu Mwanganda, Joannes Charo Katana, Jumwa Karisa Mryani, Zawadi Kibetu Kieria, Paul Katana Mwanza, Josephat Ngala Munyaki and Jonathan Kenga Katana alias Gona are hereby found guilty of contempts by way of disobedience of the court order dated 18/9/2020;
 - b. All the respondents Gilbert Kanungu Mwanganda, Joannes Charo Katana, Jumwa Karisa Mryani, Zawadi Kibetu Kieria, Paul Katana Mwanza, Josephat Ngala Munyaki And Jonathan Kenga Katana alias Gona are hereby directed to appear in court in person on 19/11/2024 for purposes of sentencing;
 - c. However, the Respondents are also hereby ordered to purge their contempt of court by forthwith vacating the suit property known as CR 27920 Subdivision No. 176 (Original No. 163/1/) Section IV MN and the OCS Mtwapa and Kijipwa shall provide security to facilitate the enforcement of the orders herein;
 - d. The Applicant shall have the costs of this application.

RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 24TH DAY OF OCTOBER 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI

