



**Njeru Nyaga & Co Advocates LLP v Registered Trustees of Ruiru Sports Club & another (Environment and Land Miscellaneous Application E083 of 2022) [2024] KEELC 6894 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6894 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E083 OF 2022**  
**JO MBOYA, J**  
**OCTOBER 22, 2024**

**BETWEEN**

**NJERU NYAGA & CO ADVOCATES LLP ..... ADVOCATE**

**AND**

**REGISTERED TRUSTEES OF RUIRU SPORTS CLUB ..... CLIENT**

**AND**

**NATIONAL LAND COMMISSION ..... RESPONDENT**

**RULING**

**Introduction and Background:**

1. The Applicant herein has approached the court vide notice of motion application dated the 6th June 2024 brought pursuant to the provisions of Section 5 of *Judicature Act*, Section 29 of the *Environment and Land Court Act* and Sections 1B, 3A and 63[a] of the *Civil Procedure Act* and wherein the Applicant seeks for the following reliefs;
  - i. That the application herein be certified urgent and an inter partes hearing date be set o priority basis.
  - ii. That this Honourable Court be pleased to site the National Land Commission through commissioners; Mr. Gershom Otachi EBS (Chairman), Getrude Nduku Nguku (Vice Chairperson Prof. James K. Tuitoek, Hon. Samwel Kazungu Kambi, Hubbie Hussein Alhaji, Alistar Muri Mutugi, Hon. Tiyah Galgalo MBS, Reginald Okumu and Hon. Esther Mathenge for contempt court and he be ordered to show cause why he should not be punished by being committed civil jail in accordance with Section 5 of the *Judicature Act* for failing to obey the court order issued on 13th October, 2023.



- iii. That the contemnor be condemned in the costs of this application.
2. The Application beforehand is anchored on various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit of Martin Njeru Nyaga [deponent] sworn on even date and to which the deponent has annexed two [2] documents including a copy of the order issued by the court of appeal on the 13th December 2023.
3. Upon being served with the Application beforehand, the garnishee herein filed replying affidavit sworn by Bryan Ikol sworn on 18th September 2024 and in respect of which the deponent has annexed two [2] documents.
4. On the other hand, the Respondent herein does not appear to have filed any response to the application. Nevertheless, the Respondent filed written submissions dated the 2nd October 2024.
5. The application beforehand came up for hearing on the 19th September 2024; when the advocates for the respective parties covenanted to file and exchange written submissions. In this regard, the court proceeded to and circumscribed the filing and exchange of the written submissions.
6. Suffice it to point out that the Applicant thereafter filed written submissions dated the 20th September 2024 whereas the garnishee/contemnor filed written submissions dated the 2nd October 2024. The Respondent on the other hand, filed written submissions dated the 2nd October 2024.
7. For coherence, the three [3] sets of written submissions [details in terms of the preceding paragraphs] form part of the record of the court.

**Parties' submissions:**

**a. Applicant's submissions:**

8. The Applicant filed written submissions dated the 20th September 2024; and in respect of which the Applicant has adopted the grounds contained at the foot of the application and reiterated the averments in the supporting affidavit. In addition, the Applicants has thereafter raised, highlighted and canvassed three [3] salient issues for consideration by the court.
9. Firstly, learned counsel for the Applicant has submitted that though the application beforehand adverts to the order issued on the 13th October 2023, the said date is however contended to be erroneous and a typographical error. In this regard, learned counsel for the Applicant has thereafter contended that the correct date of the order should be the 2nd November 2023 and not otherwise.
10. Arising from the foregoing, learned counsel for the Applicant has therefore implored the court to find and hold that the date of 13th October 2023 is erroneous and that the court should proceed and amend the said date. For good measure, learned counsel has posited that the amendment in question would thereafter allow the court to venture forward and deal with the application on merits.
11. Secondly, learned counsel for the Applicant has submitted that the garnishee/contemnor herein was and is duly knowledgeable of the terms of the court order and hence same [garnishee] cannot contend that the orders in question were never served. At any rate, learned counsel has posited that the replying affidavit filed on behalf of the garnishee confirms that the garnishee was indeed knowledgeable of and conversant with the terms of the court order.
12. Thirdly, learned counsel for the Applicant has submitted that even though the garnishee/contemnor is knowledgeable of the court order, same [garnishee] has failed and/or neglected to comply with the



terms of the court order. In particular, it has been contended that the garnishee herein has failed to process and pay the monies in accordance with the court order issued on the 13th October 2023.

13. Arising from the foregoing, learned counsel for the Applicant has therefore implored the court to find and hold that the Application beforehand is meritorious and that the contemnor ought to be cited and punished for contempt of court. In short, learned counsel for the Applicant has invited the court to allow the application dated the 6th June 2024.

**b. Respondent's submissions:**

14. The Respondent filed written submissions dated the 2nd October 2024 and wherein same [Respondent] has highlighted and canvassed three [3] salient issues for consideration by the court.
15. First and foremost, learned counsel for the Respondent has submitted that the Applicant herein is privy to the consent order that was entered into and adopted by the court of appeal on the 13th December 2023. In particular, it has been contended that the said consent order directed that the sum of Kes.41, 289, 401.80/= only, which forms the basis of the current application, were to be deposited into an escrow account.
16. Nevertheless, it has been contended that even though the Applicant is privy to the terms of the said consent, the Applicant herein has now made an about turn and seeks to have the said monies paid directly unto him and not otherwise. In this regard, learned counsel for the Respondent has submitted that the demand by the Applicant herein is not in consonance with the consent order.
17. Secondly, learned counsel for the Respondent has submitted that the garnishee/contemnor has indicated that same [garnishee] has been willing to comply with the terms of the consent entered into and adopted by the court of appeal. Furthermore, counsel has posited that the Applicant herein is aware of the efforts by the garnishee to deposit the monies in question in an escrow account.
18. Thirdly, learned counsel for the Respondent has submitted that the Respondent herein has since moved the court of appeal vide an application seeking to extend time within which to deposit the monies in question in an escrow account. Besides, it has been stated that the Applicant is equally aware and privy to the application for extension of time.
19. Additionally, learned counsel for the Respondent has submitted that the Applicant has even proceeded to and filed a replying affidavit to the application before the court of appeal. In this regard, it has been contended that it is therefore apposite that the application beforehand be postponed pending the determination of the application before the court of appeal.
20. On the other hand, learned counsel for the Respondent has submitted that the garnishee herein [National Land Commission] should not be compelled to pay the monies in question directly to the Applicant because the Applicant herein may not be able to refund the monies should the appeal before the court of appeal succeeds. Consequently, learned counsel for the Respondent has invited the court to find and hold that the application before hand is devoid of merits.

**c. Submissions by the garnishee:**

21. The garnishee herein filed written submissions dated the 2nd October 2024 and wherein same [garnishee] has adopted and relied on the grounds of the replying affidavit sworn on the 18th September 2024. Thereafter, the garnishee has raised and canvassed four [4] salient issues for consideration by the court.



22. Firstly, learned counsel for the garnishee has submitted that the application by the applicant herein does not meet and/or satisfy the requisite threshold to warrant a finding of contempt against the alleged contemnors. In particular, it has been contended that the Applicant herein has neither established nor demonstrated that the contemnors are guilty of wilful and deliberate disobedience of lawful court orders.
23. To the extent that the Applicant has not demonstrated that the contemnors are guilty of wilful and deliberate disobedience, it has been contended that the application for contempt therefore ought to fail.
24. In support of the foregoing submissions, learned counsel for the garnishee has cited and referenced the decision in *Michael Sistu Mwaura Kamau v Director of Public Prosecution & 4 Others* [2018]eKLR and *Cecil Miller v Jackson Njeru* [2017]eKLR, respectively.
25. Secondly, learned counsel for the garnishee has submitted that the Applicant herein has neither established nor demonstrated that the terms of the court order were clear and devoid of ambiguity. In this regard, it has been contended that prior to and before a court of law can cite and punish a contemnor, it must be demonstrated that the orders of the court were devoid of ambiguity.
26. Nevertheless, learned counsel for the garnishee has also submitted that the orders being referenced by the Applicant herein have since lapsed. For good measure, it has been contended that the Respondent has even ventured forward and filed an application seeking for extension of the said orders.
27. Thirdly, learned counsel for the garnishee has submitted that the various officer of the garnishee, who are sought to be cited and punished were never served with the said orders. Besides, learned counsel for the garnishee has submitted that it behooved the Applicant herein to extract the court order and thereafter to ensure personal service on the various officer who are sought to be cited and punished.
28. In support of the submissions pertaining to lack of service of the orders upon the officers of the garnishee, learned counsel has cited and referenced inter-alia the case of *Wanjala Mining Company Ltd v National Land Commission & 3 Others* [2017]eKLR; *Stephene Mbugua Gituthi & 2 others v National Land Commission & Another* [2020]eKLR; *Shammers Plaza Ltd v National Bank of Kenya Ltd* [2015]eKLR and *Nyamogo v Kenya Post & Telecommunication Commission* [1990 – 1994] EA 464, respectively.
29. Finally, learned counsel for the garnishee has submitted that the garnishee herein has not acted in contravention of the orders that were issued on the 13th December 2023. To this end, it has been contended that in the absence of evidence of disobedience or contravention of the court orders, the application for contempt is misconceived and legally untenable.
30. Arising from the foregoing submissions, learned counsel for the garnishee has therefore implored the court to find and hold that the application dated the 6th June 2024 is devoid of merits and thus same [ Application] ought to be dismissed with costs.

**Issues for Determination:**

31. Having reviewed the application dated the 6th June 2024 and the responses thereto and upon consideration of the written submissions filed by the parties, the following issues crystalize [emerge] and are thus worthy of determination;
  - i. Whether the instant application and which adverts to court orders issued on [sic] the 13th October 2023 is competent or otherwise.



- ii. Whether this honourable court is seized of the requisite jurisdiction to cite and punish a contemnor on the basis of [sic] disobedience of the orders of the court of appeal or otherwise.
- iii. What orders if any ought to be granted.

## **Analysis and Determination**

### **Issue number 1**

#### **Whether the instant application and which adverts to court orders issued on [sic] the 13th October 2023 is competent or otherwise.**

32. The Application beforehand touches on and concerns [sic] an order of the court issued on the 13th October 2023. Furthermore, ground [a] of the application also adverts to and highlights [sic] the order of the court that was issued on the 13th October 2023.
33. Other than the foregoing, ground [a] of the application proceeds and highlights the terms of [sic] the order issued on the 13th October 2023 and provides that the said order directed the garnishee/contemnor to deposit the sum of kes.41, 289, 401.80/= only into and interest earning account in the names of the advocates for the Appellant and Respondent, respectively.
34. Taking the foregoing averments into account, what comes to mind is that the Applicant is seeking to have the garnishee and in particular, officers of the garnishee to be cited and punished for disobeying the orders of the court that were issued on the 13th October, 2023. In this regard, it is therefore apposite for the court to interrogate whether or not there exists any orders that were issued on the said 13th October 2023.
35. To start with, it is common ground that the only orders that were issued by this court were made/issued on the 2nd November 2023 and wherein the court granted an order absolute directed against the garnishee. For good measure, the order absolute enjoined the garnishee to pay to and in favour of the Applicant herein the sum of kes.41, 289. 401.80/= only.
36. To my mind, this court has never issued any order on the 13th October 2023. At any rate, it suffices to point out that no such order exists on the record of this court. Furthermore, the Applicant herein has also not exhibited a copy of such order.
37. Arising from the foregoing, it is therefore imperative to underscore that the Application beforehand which adverts to the orders of the court issued on the 13th October 2023 [which orders are non-existent] is not only premature and misconceived but same is also incompetent for referencing a non-existent order.
38. Other than the foregoing, it is also worthy to point out that the court of appeal also did not issue or make any order on the 13th October 2023. For good measure, the only order that was made by the court of appeal was the consent order issued on the 13th December 2023. In this regard, there is an apparent confusion being created by the Applicant and his legal counsel.
39. Be that as it may, it is common ground that neither this court [environment and land court] nor the court of appeal issued any order on the 13th October 2023, which was capable of being disobeyed.
40. At any rate, it is worthy to underscore that the Applicant herein discovered the serious discrepancy on the face of the application and in an endeavour to remedy the discrepancy, the Applicant has invited the court to amend the date of the order appearing on the face of the application. However, it is worthy to state that the invitation to amend the date of the order has been made in the final submissions and



not otherwise. In this regard, there is no gainsaying that such amendment cannot be granted at this point in time.

41. On the other hand, even assuming that the court was gracious enough to allow the amendment sought for, it is still evident that the amendment in question would not be helpful. To this end, it is worthy to take into account that the amendment adverted to in terms of prayer two [2] would thereafter create an inherent contradiction in the application, taking into account ground [a] at the foot of the application as well as paragraphs 2, 3 and 4 of the supporting affidavits.
42. In a nutshell, it is my finding and holding that the amendment that is being sought for by the Applicant in the current submissions is not only misconceived but same is also legally untenable. Instructively, a court of law cannot allow an amendment which thereafter proceeds to create confusion and contradiction.
43. Flowing from the foregoing, my answer to issue number one [1] is to the effect that the application beforehand, which adverts to and references a non-existent order is therefore premature and incompetent. Simply put, the application is stillborn.

## Issue Number 2

### **Whether this honourable court is seized of the requisite jurisdiction to cite and punish a contemnor on the basis of [sic] disobedience of the orders of the court of appeal or otherwise.**

44. The other issue that is discernible from the face of the application beforehand and the affidavit in support thereto, relates to the fact that the Applicant is inviting the court to cite and punish the garnishee/contemnor for disobeying the orders of the court of appeal.
45. To be able to understand the gist of the application beforehand, it suffices to reproduce ground [a] of the application. Same is reproduced as hereunder;
  - (a) an order of the court was issued on the 13th October 2023 wherein the contemnor was directed to deposit kes.41, 289, 401.80/= only into an interests earning account in the names of the advocates for the Appellant and the Respondent
46. Furthermore, the other aspect that would enable the court to appreciate the substratum of the dispute beforehand is paragraph 4 of the supporting affidavit. The said paragraph states as hereunder;
  4. That the garnishee has not deposited the funds within the 30 days from the 13th December 2023 as ordered by the court of appeal neither has the client filed and served the supplementary record of appeal within 21 days from the 13th December 2023.
47. To my mind, the Applicant herein has approached this court to cite and punish the contemnor and the named officers, whose names has been highlighted in the body of the application, for disobedience of the orders of the court of appeal. For good measure, my reading of the application, drives me to the conclusion that the Applicant herein is complaining about the failure of the garnishee to deposit the monies in question in an escrow account.
48. To the extent that the application beforehand adverts to non-compliance with [sic] the orders of the court of appeal, the question that does arise and which merits discussion is whether this court is seized of jurisdiction to cite and punish for contempt of the orders of the court of appeal.
49. It is important to outline that the court of appeal is by itself a superior court of record and thus by virtue of the provisions of Section 5 of *Judicature Act*, Chapter 8 Laws of Kenya, same [court of appeal] is seized of the jurisdiction to punish for disobedience of its orders. In this regard, where a complaint



touches on disobedience or contempt of the orders of the court of appeal, such issues must be mounted before the court of appeal and not otherwise.

50. For ease of appreciation, it is important to reproduce the provisions of Section 5 of the *Judicature Act*. Same are reproduced as hereunder;

5. Contempt of court

(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 such power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

51. My understanding of the provisions of Section 5 [supra] is that the court of appeal is possessed of the requisite powers to cite and punish for contempt. Consequently, where the contempt in question touches on the orders of the court of appeal, then the appropriate forum to canvass [sic] the contempt is the court of appeal.

52. Arising from the foregoing, it is therefore my finding and holding that this court is not seized of the requisite jurisdiction to cite and punish anyone, let alone the contemnors herein for alleged disobedience of the orders of the court of appeal. For good measure, such an endeavour would be tantamount to insubordination which must be frowned upon by a conscientious court of law.

53. Barring repetition, if the Applicant herein is convinced that the garnishee/contemnor is indeed guilty of wilful disobedience of the orders that were issued on the 13th December 2023, then the appropriate forum to approach is the court of appeal.

54. In view of the foregoing, it is my finding that this court is not seized of jurisdiction to engage with the application that seeks to cite and punish on account of disobedience of order of the court of appeal. Suffice to state that without jurisdiction, a court of law cannot render any order. In any event, if any order were to be rendered by such a court, then the order would be a nullity ab initio.

55. Before departing from these issues, it suffices to reference the decision in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service (Civil Appeal 244 of 2010)* [2019] KECA 767 (KLR) (Civ) (10 May 2019) (Judgment), where the court of appeal considered the implication of proceedings and orders made without jurisdiction.

56. For coherence, the court stated and held as hereunder;

1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which



is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

### **ISSUE NUMBER 3**

#### **What orders if any ought to be granted.**

57. It is common ground that the Applicant herein filed garnishee proceedings and wherein same [Applicant] sought to procure and obtain an order absolute directed against National Land Commission [the garnishee], to attach and to pay unto the Applicant the sum of Kes.41, 289, 401.80/= only. Instructively, the application under reference was allowed on the 2nd November 2023.
58. My understanding of the orders made on the 2nd November 2023 is to the effect that the garnishee herein was enjoined to pay out and/or release the said monies to the Applicant. Suffice it to posit that the meaning and tenor of an order absolute is well known.
59. Be that as it may, it is not lost on this court that Respondent herein felt aggrieved by the order absolute and thereafter proceeded to and filed an appeal before the court of appeal. Furthermore, the Respondent herein also filed an application pursuant to Rule 5[2] [b] of the Court of Appeal Rules 2022.
60. Subsequently, the Applicant and the Respondent entered into a consent on the 13th December 2023 and wherein the Applicant and the Respondent agreed that the monies payable by National Land Commission at the foot of the orders issued by the environment and land court be deposited in an escrow account. For good measure, the said monies were to be deposited within 30 days.
61. However, it appears that the terms of the orders issued on the 13th December 2023 were not complied with. In this regard, there is no gainsaying that the orders under reference lapsed and stand extinguished unless duly extended by the court of appeal.
62. To the extent that the consent orders recorded by the court of appeal lapsed, the position reverted back to the orders of this court issued on the 2nd November 2023. In this respect, it is crystal clear that National Land Commission was under obligation to release and pay out the monies in question to the Applicant.
63. To my mind, there is no court order which is in existence and which requires the garnishee to deposit the sum of kes.41, 289, 401.80/= only in an escrow account. Instructively, the orders of the court of appeal lapsed upon the effluxion of time.
64. Arising from the foregoing, I beg to state that had the Applicant properly framed the application beforehand, this court would have been enjoined to interrogate the conduct of the garnishee [National Land Commission] and thereafter take appropriate action. Suffice it to point out, that the garnishee was under obligation to comply with and/or abide by the orders made on the 2nd November 2023. [ See the decision of the Court of Appeal in the Case of Shimmers Plaza Limited versus National Bank of Kenya Limited [2015]eklr]
65. However, having found and held that the application beforehand is riddled with several contradictions inter-alia referencing non-existent court orders and seeking to invite this court to usurp the mandate of the court of appeal, I beg to point out that this court cannot proceed and make any positive findings on the question of contempt.
66. In a nutshell, I come to the conclusion that the Applicant herein has neither established nor demonstrated the requisite ingredients that underpin the grant of the orders sought. For good measure,



a court of law cannot venture forward to cite and punish anyone, the garnishee not excepted unless the parameters espoused in the case of *Mutitika v Babarini Farm Ltd (Civil Application 24 of 1985)* [1985] KECA 60 (KLR) (Civ) (10 July 1985) (Judgment), are met.

**Final Disposition:**

67. Flowing from the foregoing analysis, it must have become crystal clear that the application beforehand is not only premature and misconceived, but same is legally untenable. Notably, the Applicant did not properly appreciate and internalize the provisions of Section 5 of the *Judicature Act*, Chapter 8 Laws of Kenya.
68. Consequently and in the premises, the final orders that commend themselves to the court are as hereunder;
  - i. The Application dated the 6th June 2024, is incompetent.
  - ii. The Environment and Land Court is not seized of the requisite jurisdiction to punish for contempt of orders of [sic] issued by the court of appeal.
  - iii. The Application dated the 6th June 2024, be and is hereby struck out.
  - iv. No orders as to costs taking into account the totality of the circumstances and the evident lack of compliance with court orders by both the Respondent and the Garnishee.
69. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER 2024.**

**OGUTTU MBOYA**

**JUDGE.**

In the Presence of:

Benson - Court Assistant.

Mr. Njeru Nyaga for the Applicant.

Mr. Preston Wawire for the Respondent.

Ms. Njuguna Jacqueline for the Garnishee/Contemnor.

