



Cheriro & another v Kipketer & another (Environmental and Land Originating Summons E003 of 2023) [2024] KEELC 7507 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2023
LA OMOLLO, J
NOVEMBER 14, 2024**

BETWEEN

DAVID KIPLANGAT CHERIRO 1ST PLAINTIFF

JOEL KIPKURUI CHERIRO 2ND PLAINTIFF

AND

ELIZABETH JEROTICH KIPKETER 1ST DEFENDANT

MOSES KIBET CHERIRO 2ND DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Plaintiffs/Applicants Notice of Motion application dated 5th April, 2024. The said application is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules, Section 5(1) of the *Judicature Act*, Section 3A of the *Civil Procedure Act* and Order 52 of the Rules of the Supreme Court of England.
2. The application seeks the following orders;
 - a. That the 1st Respondent by herself, her agents, servants, employees or otherwise be committed to civil jail for contempt of Court for disobeying the express orders of this Honourable Court granted by Lady Justice M.C Oundo on the 27th day of February, 2023.
 - b. That the said Respondent be ordered or kept in prison for a term not exceeding 6 (six) months or for a term this Honourable Court may deem fit and just.
 - c. That the Respondent do pay costs of this application.
3. The application is based on the grounds on its face and the supporting affidavit of one David Kiplangat Cheriro sworn on 5th April, 2024.



Factual Background.

4. The Plaintiffs/Applicants commenced the present proceedings vide the Originating Summons dated 22nd February, 2023
where they seek the determination of the following questions;
 - a. That an order do issue finding the registration of the second (2nd) Defendant as the proprietor as irregular and that therefore Kipngeny A. Boiwo (deceased) be deemed, found and made the registered proprietor in the interlude as the Court further finds that the Plaintiffs together with their brother Moses Kibet Cheriro, the 2nd Defendant, have acquired and obtained ownership by way of adverse possession.
 - b. That this Honourable Court be pleased to declare that the Plaintiffs, together with the second Defendant are entitled to the whole portion of the land parcel LR No. Kericho/Kapsuser/1701 by way of adverse possession having been in uninterrupted occupation and/or possession of the whole portion of land for a period of over twenty-nine (29) years.
 - c. That an order do issue requiring and directing the Land Registrar Kericho to register the 1st, 2nd Plaintiffs together with the 2nd Defendant as the joint proprietors of the suit land in place of Kipngeny A. Boiwo (deceased) after the irregular registration of the 2nd Defendant has been replaced by the Kipngeny A. Boiwo (Deceased). (sic)
 - d. That this Honourable Court do issue a permanent injunction restraining the 1st Defendant from interfering with the 1st and 2nd Defendants (sic) occupation and enjoyment of the suit land.
 - e. That the costs of this suit be borne by the Defendants.
5. The 1st Defendant/Respondent entered appearance on 8th March, 2023 while the 2nd Defendant/Respondent has not entered appearance.
6. None of the Defendants have filed their Statements of Defence.
7. The application under consideration first came up for hearing on 9th April, 2024 when the Court directed that it be served upon the Defendants/Respondents.
8. On 6th May, 2024 the Court directed that the application would be canvassed by way of written submissions. The application was mentioned severally before it was reserved for ruling on 25th July, 2024.

The Plaintiffs/Applicants Contention.

9. The affidavit in support of the application is sworn by one David Kiplangat Cheriro the 1st Plaintiff/Applicant.
10. He contends that he together with the 2nd Plaintiff/Applicant commenced the present proceedings on 23rd February, 2023 seeking that the Court issues a declaration that they together with the 2nd Defendant/Respondent have acquired land parcel No. Kericho/Kapsuser/1701 by way of adverse possession.
11. He also contends that on 27th February, 2023 the Court issued an order that all the parties maintain the status quo obtaining as at 22nd February, 2023 when the case was filed pending the hearing and determination of the suit.



12. He deposes that the said order was served upon the 1st Defendant/Respondent on 2nd March, 2023.
13. He further contends that the Plaintiffs/Applicants and the 2nd Defendant/Respondent have lived in, occupied, cultivated and possessed the suit property since the year 1994 adding that their father had purchased the suit property in 1974 and left it to them when he passed on.
14. It is his contention that the 1st Defendant/Respondent who is the wife of the deceased took out Letters of Administration and purported to subdivide the suit property despite knowing that they have always lived on the land together with their families.
15. It is also his contention that it was after the 1st Defendant/Respondent had taken out Letters of Administration that they moved this Court seeking to be declared to have acquired the suit property by way of adverse possession.
16. It is further his contention that he together with his two brothers are the rightful owners of the suit property and therefore the title deed should be amended to reflect the said position.
17. He contends that they were surprised when the 1st Defendant/Respondent went to the suit property with the Officer Commanding Police Station and the surveyor on 2nd April to survey and demarcate the suit property in complete violation and in contempt of the orders of the Court issued on 27th February, 2023.
18. He also contends that the 1st Defendant/Respondent misled the Chief Magistrate's Court in Succession Cause No. 105 of 1998 by failing to disclose that this Court issued status quo orders.
19. He further contends that the Hon. Principal Magistrate's Court proceeded to innocently give an order that the Officer Commanding Police Station and the surveyor do proceed, survey and subdivide the land.
20. It is his contention that the actions of the 1st Defendant/Respondent were done in bad faith, with an ulterior motive to pre-empt, curtail and frustrate the orders of this Honourable Court.
21. It is also his contention that the 1st Defendant/Respondent has disobeyed Court orders and should be committed to civil jail for contempt of Court.
22. He ends his deposition by stating that it is in the interest of justice that the 1st Defendant/Respondent by herself, her agents, employees, servants or otherwise be committed to civil jail for being in contempt of Court Orders.

The 1st Defendant/Respondent's Response.

23. The 1st Defendant/Respondent filed a Replying Affidavit on 23rd July, 2024 sworn on the same date.
24. She deposes that the Plaintiffs/Applicants claim of adverse possession over the suit property is still pending for hearing.
25. She also deposes that the Plaintiffs/Applicants have never lived on land parcel No. Kericho/Kapsuser/1701 for a period exceeding twelve years as alleged.
26. She further deposes that she was not present at home on 2nd March, 2023 to accept service as deposed by Vincent C. Lelgo at paragraph 8 of his affidavit of service.
27. It is her deposition that the order dated 27th February, 2023 was never served on her personally but was served on someone else who was described as her son with no further particulars disclosed.



28. It is also her deposition that the Plaintiffs/Applicants have not demonstrated to this Honourable Court that Vincent C. Lelgo who allegedly effected service on 2nd March, 2023 was a licensed Court process server.
29. It is further her deposition that on 2nd March, 2023 she was away in Eldama – Ravine Hospital for medical treatment and that she did not inform anyone to accept service on her behalf.
30. She deposes that she did not instruct the Surveyors and/or the Officer Commanding Police Station Kapsoit Police Station to visit the suit property as alleged.
31. She also deposes that this Court’s jurisdiction is distinct and separate from that of the Chief Magistrate’s Court that dealt with Kericho CM Succession Cause No. 105 of 1998 where the distribution of the estate property was done in compliance with the rectified Certificate of Confirmation of Grant that was issued on 9th November, 2021.
32. She further deposes that the Plaintiffs/Applicants have not adduced any documentary evidence to demonstrate to the Court that she is the one who instructed the surveyors to visit the suit property.
33. It is her deposition that the mere fact that she is an Administrator of the Estate of Kipngeny Arap Boiwo does not necessarily imply that she is the one who participated in the fencing of the suit property as alleged.
34. It is also her deposition that she was never served with the application dated 5th April, 2024.
35. She ends her deposition by stating that her Advocates on record were only served with the application under consideration on 17th April, 2024.

Issues for determination.

36. The Plaintiffs/Applicants filed their submissions dated 5th June, 2024. The Defendants/Respondents did not file any submissions.
37. The Plaintiffs/Applicants submit that on 27th February, 2023 the Court issued orders of status quo which were served upon the 1st Defendant/Respondent on 2nd March, 2023 and an affidavit of service filed in Court.
38. The Plaintiffs/Applicants also submit that the affidavit of service is sworn by Vincent Lelgo.
39. The Plaintiffs/Applicants reiterate their averments in the affidavit in support of the application and submit that they have annexed photographs that show the unlawful entry and fencing that had been done by the 1st Defendant/Respondent.
40. The Plaintiffs/Applicants rely on Section 5 of the Judicature Act and seek that the 1st Defendant/Respondent be committed to civil jail for a period of six months.

Analysis and Determination.

41. I have considered the application, the response thereto and the Plaintiff’s submissions.
42. In my view the following issues arise for determination;
 - a. Whether the 1st Defendant/Respondent is in contempt of this Honourable Court.
 - b. Whether the 1st Defendant/Respondent should be committed to civil jail or whether she should be issued with a notice to show cause why she should not be committed to civil jail.



- c. Who should bear costs of this application.

A. Whether the 1st Defendant/Respondent is in contempt of this Honourable Court.

43. Section 5(1) of the *Judicature Act* provides as follows:

“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.”

44. Section 29 of the *Environment and Land Court Act* further provides that:

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

45. In the judicial decision of *North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi* [2016] eKLR the Court cited with approval excerpts from the book “Contempt in Modern New Zealand”. It sets out elements of civil contempt as follows;

“There are essentially four elements that must be proved to make the case for civil contempt. The Applicant must prove to the required standard (in civil contempt cases which is higher than Civil cases)

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;
- (b) the Defendant had knowledge of or proper notice of the terms of the order;
- (c) the Defendant has acted in breach of the terms of the order; and
- (d) the Defendant's conduct was deliberate.”

46. The Plaintiffs/Applicants contend that the 1st Defendant/Respondent is in contempt of the Court orders issued on 27th February, 2023.

47. The orders issued on 27th February, 2023 were with respect to the Plaintiffs/Applicants application dated 22nd February, 2023. Among the orders issued by the Court was an order that the parties were to maintain the status quo pertaining as at 22nd February, 2023.

48. The Plaintiffs/Applicants application is on the grounds that despite the Court's orders of status quo, the 1st Defendant/Respondent misdirected the Court in CM Succession Cause No. 105 of 1998 thereby occasioning it to issue orders directing the surveyor and the OCS to survey and subdivide the land.

49. Annexed to the Plaintiffs/Applicants application is a copy of an affidavit of service sworn by Vincent L. Lelgo on 8th March, 2023. He deposes that he received an order together with the pleadings filed in this matter and proceeded to the 1st Defendant/Respondent's home to effect service. He also deposes that upon arrival at her home, he failed to find her but found her son. He further deposes that the said son called the 1st Defendant/Respondent who authorized him to accept service on her behalf.

50. The Plaintiffs/Applicants have also annexed black and white photographs of what appears to be tea bushes and trees.



51. The Plaintiffs/Applicants have further annexed an order issued in Kericho CMCC Succession Case No. 105 of 1995 on 21st March, 2024. The said order is not entirely legible but orders 2 and 3 are as follows;
- “ 2. That the Kericho District Surveyor be allowed to access the land visit (sic) parcel of land for purposes of subdividing the land in conformity with the Certificate of Grant dated 9th November, 2021.
 3. That the OCS Kapsoit Police Station be served with this order and to provide security during the exercise”
52. In response, the 1st Defendant/Respondent denies that she was served with the order issued on 27th February, 2023 as she was away on the day it is alleged to have been served upon her.
53. The 1st Defendant/Respondent also denies authorizing anyone to accept service on her behalf and states that even though she is the Administratrix of the Estate of the deceased, she cannot be presumed to be the one who sought the said orders of subdivision.
54. In *Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227, it was held as follows;
- “ 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 had to process of 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.” [Emphasis mine]
55. On the issue of service, there is an affidavit of service on record which is not explicit on the date of the Order that was served and as pointed out by the 1st Defendant/Respondent, the particulars of the said son who was authorized to receive service on her behalf have not been given. Importantly, it is apparent that the order was not served upon the 1st Defendant/Respondent.
56. As mentioned in the preceding paragraphs, the Plaintiffs/Applicants depose that after this Court issued orders of status quo, the 1st Defendant/Respondent misrepresented facts before the Chief Magistrate’s Court and obtained orders for the subdivision of the suit property.
57. The Plaintiffs/Applicants annexed a copy of the said order issued on 21st March, 2024. As afore stated, portions of the said order are not legible. The name of the deceased is not clear and neither does the Court order contain the particulars of the representatives of the said estate.



58. The 1st Defendant/Respondent admits to being the Administratrix of the Estate of the deceased but denies that she sought the said orders.
59. It is my view that from the face of the said order issued on 21st March, 2024, the particulars of the 1st Defendant/Respondent are not contained thereon and in any case it is not clear, at whose behest the said orders were issued.
60. Taking the foregoing into consideration, my view is that the Plaintiffs/Applicants have failed to demonstrate that the 1st Defendant/Respondent had knowledge of or proper notice of the terms of the order of this court issued on 27th February, 2023 that she acted in breach of the terms of the order and that her conduct was deliberate.

B. Whether the 1st Defendant/Respondent should be committed to civil jail or whether she should be issued with a notice to show cause why she should not be committed to civil jail.

61. Given my finding on issue (a) above, the question of committal to civil jail and/or issuance of a notice to show cause is not ripe for determination.

Disposition.

62. Consequently, the Plaintiffs/Applicants' application dated 5th April, 2024 lacks merit and is hereby dismissed with costs.
63. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 14TH DAY OF NOVEMBER, 2024.

L. A. OMOLLO

JUDGE.

In the presence of: -

Miss Too for the Plaintiff/Applicant.

Miss Koech for the 1st Defendants/Respondents.

2nd Defendant (in person)- Absent.

Court Assistant; Mr. Joseph Makori.

