



Wamahu v County Government of Nyeri (Environment and Land Appeal 23 of 2020) [2024] KEELC 7504 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7504 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 23 OF 2020**

**JO OLOLA, J
NOVEMBER 14, 2024**

BETWEEN

CHARLES MATHANGANI WAMAHIU & 22 OTHERS APPELLANT

AND

COUNTY GOVERNMENT OF NYERI RESPONDENT

(Appeal arising from the Ruling and Order made by the Honourable R. Kefa SRM on 20th July 2020 in Nyeri MCLE No. 217 of 2018)

JUDGMENT

1. This is an Appeal arising from the Ruling and Order made by the Honourable R. Kefa SRM on 20th July 2020 in Nyeri MCLE No. 217 of 2018.
2. By a Plaint dated 20th May 2016, the 22 Appellants herein had sought Judgment against the Respondent County Government as follows:
 - a). An order restraining the Defendant from removing, destroying or in any way interfering with the Plaintiffs' operation of their stalls allotted to them within Gatitu Market;
 - b). A declaration that the Plaintiffs are the owners of the stalls allotted to them within Gatitu Market;
 - c). An order that the removed stalls be reinstated at the Defendant's cost;
 - d). Damages for loss due to the removal or closure of the stalls; and
 - e). Costs of the suit with interest.
3. Those prayers arose from the Appellants' contention that they are stall owners at Gatitu Market. It was the Appellant's case that following meetings held with the Respondent they had been allowed to



demolish their former stalls within the market and to install new ones in accordance with plans issued by the Respondent.

4. The Appellants pleaded that after complying with the Respondent's directives and installing new kiosks, the Respondent had maliciously embarked on a plan to remove the said stalls and thereby deny them their source of income without any reasonable course.
5. In its statement of Defence dated and filed on 16th January 2017, the County Government of Nyeri (the Respondent) denied that all the Appellants were stall owners and asserted that only the 1st, 5th, 6th, 7th, 17th and the 20th Appellants owned stalls within Gatitu Market.
6. The Respondent denied going back on its plans for the new stalls with the stall owners and asserts that the Appellants had been notified to halt any further developments with regard to the stalls. The Respondent further asserted that its decision to halt any further development of the stalls was prompted by an unruly mob that had protested the process of demarcating the stall boundaries which meant that any further development would not have been in accordance with the Respondent's approved plan.
7. Having heard the dispute and in a Judgment delivered on 18th December 2019, the Learned Trial Magistrate ordered as follows:
 1. The Defendant is hereby restrained from interfering with the Plaintiffs' operation of their stalls within Gatitu Market;
 2. It is hereby declared that the Plaintiffs are the legal owners of the stall allotted to them within Gatitu Market; and
 3. The removed stalls to be reinstated at the Defendant's costs.
8. After the delivery of the Judgment, the Appellants subsequently filed a Notice of Motion dated 16th March 2020 seeking the following orders:
 1. That the application be certified urgent and be heard on a priory basis.
 2. That the Plaintiffs/Appellants be granted leave by the court to forcefully remove the impugned stalls erected within Gatitu Market in compliance of the Judgment and decree made by this court on 18th December 2019;
 3. That the OCS Nyeri Police Station be directed to provide security for the exercise;
 4. That the Chief Officer, Lands Housing and Physical Planning and Urbanization Nyeri County one Ms. Hanna N. Maranga be cited for contempt of this Court's Decree for deliberately attempting to re-allocate the impugned stalls to members of the public; and
 5. That (the) costs of the application be provided for.
9. Having heard the application and in a Ruling rendered on 20th July 2020, the Learned Trial Magistrate disallowed the Appellants' application. Aggrieved by the said Ruling, the Appellants moved to this court vide their Memorandum of Appeal dated 24th July 2020 urging this court to set aside the said Ruling and grant the prayers sought in the Motion dated 6th March 2020 on the grounds that:
 1. The Learned Trial Magistrate erred in law and in fact in failing to find that the Defendants have deliberately failed and or refused to abide by the specific terms of the Judgment delivered on 18th December 2019, hence was in express contempt of the said Judgment;



2. The Learned Trial Magistrate erred in law and in fact in giving cognizance and credence to the substandard stalls in terms of size and quality, on the basis that the defendants had spent Kshs. 4,292,500/= on the said stalls, despite the said finding directly and expressly contradicting the same court's Judgment dated 18th December 2019 and despite the impugned stalls, having been constructed in the pendency of the suit. A miscarriage of justice was done; and
 3. The Learned Trial Magistrate, in acknowledging the irregularly erected stalls by the defendants has technically reviewed her own Judgment, rendering the Plaintiffs' cause of action completely nugatory, making the Judgment of 18th December 2019 inexecutable hence of no legal consequence. A miscarriage of justice (sic).
10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence placed before the trial court and to make its own conclusion thereon.
 11. By the Motion dated 6th March 2020, the Appellants had sought the leave of the court to be allowed to forcefully remove certain stalls said to have been erected by the Respondent in alleged compliance with the Judgment and decree dated 18th December 2019. The Appellants further sought an order that the Respondent's Chief Officer, Lands, Housing and Physical Planning and Urbanization one Hanna N. Maranga be cited for contempt of the court's orders for deliberately attempting to re-allocate the said stalls to members of the public.
 12. That application was supported by a brief affidavit sworn by one Charles Mathangani who deposed as follows in the relevant Paragraphs 2 to 5 thereof:
 2. That in total contravention of this court's decree made on 18th December 2019, the Defendants have now gone ahead and are purporting to distribute their impugned, unusable stalls erected during the pendency of the suit, to the Plaintiffs and to the members of the public, instead of removing them (Annexure "CM1" is a copy of the Notice from the County Government of Nyeri dated 03/03/2020);
 3. That the Defendants have not yet reinstated the stalls they removed from the site as directed by the court, 3 months ago;
 4. That all this is being propagated by the Chief Officer Lands, Housing, Physical Planning and Urbanization Nyeri County one Ms. Hanna N. Maranga hence the reason we seek that she be cited for contempt of this court's decree; and
 5. That we, the Plaintiffs stand to suffer greatly as the whole court process will be rendered nugatory."
 13. The Respondent denied those accusations. In a Replying Affidavit sworn on its behalf by one Ibrahim Adan Edin, the Chief Officer in its Department of Trade, Culture, Tourism and Co-Operative Department, the Respondent denied having failed to comply with the Judgment. The Respondent asserted that as at the time of delivery of the Judgment it had constructed 50 standardized stalls at Gatitu Market at a cost of Kshs. 4,292,500/= as per its modern plan.
 14. The Respondent further asserted that in a bid to comply with the Judgment, it had put in a notice inviting members of the public to apply for the stalls and that the Appellants herein had been requested to avail themselves at their trade offices with their identification cards so that they could be given priority in the allocation of the new trading stalls.



15. Having considered the issues raised in the application, the Learned Trial Magistrate in her Ruling delivered on 20th March 2020 aforesaid found and determined as follows:

“The Applicants contend that the Respondent proceeded to install new stalls disregarding the court orders of reinstating the Applicants’ stall(s). In response, the Respondent stated that they had constructed new stalls at a cost of Kshs. 4, 292,500/- and in case the stalls are not reinstated (sic) it would lead to loss of tax payers’ money. It is not in dispute that the Applicants were granted priority by the Respondent in the allocation of the new stalls. Seven out of twenty three Plaintiffs responded and were allocated stalls. However, the remaining thirteen declined to avail themselves for the allocation of the stalls.

In as much as the court ordered the reinstatement of the Plaintiffs’ stalls, I find it would be prejudicial to the duties of the department of trade Nyeri County for the court to interrupt allocation of the new stalls given that the County spent Kshs. 4,292,500/= for the stalls. Further the issue of size and specification of the stalls did not arise during the initial proceedings and the court cannot dictate what size of stalls should be constructed at the said Market. According to the pleadings the issue was not the size of the stalls but the removal of the Plaintiffs’ stalls. Since the County Government of Nyeri has proceeded to construct new stalls and the Applicants given priority, I find that the Respondent has not in essence breached the court’s orders. The Applicants cannot hold the rest of the traders hostage yet they were given priority to choose stalls from those erected.”

16. From the material on record, I was unable to see how the trial court could be faulted for failing to grant leave to the Applicants to forcefully remove the stalls that had been erected by the Respondents at the said Gatitu Market. That prayer did not appear to me to flow from the dispute that was before the court.
17. In their Complaint dated 20th March 2016, the Appellants had sought an order restraining the Respondent from removing, destroying or interfering with the Appellants’ operations of their stalls at the market. They had also sought a declaration that they are the owners of the stalls that had been allocated to them at the market as well as an order that the removed stalls be reinstated.
18. Having heard the dispute and in the Judgment delivered on 18th December 2019 aforesaid, the Learned Trial Magistrate did decree as follows:
1. The Defendant is hereby restrained from interfering with the Plaintiffs’ operations of their stalls within Gatitu Market;
 2. The Plaintiffs are the legal owners of the stalls allotted to them within Gatitu Market; and
 3. The removed stalls to be reinstated at the Defendant’s cost.
19. Arising from the foregoing, it was evident that in issuing the said orders, the court did not restrain the Respondent from allocating the already constructed stalls to other members of the public and the question of removing them forcefully or otherwise did not flow from the Judgment.
20. In regard to the issue of whether or not the Respondent had complied with the Judgment delivered by the court on 18th December 2019, it was difficult to agree with the trial court that there had been any compliance therewith. I was unable to see how the allocation of new stalls by the Respondent on their own terms could be said to be commensurate with an order of the court that the stalls belonging to the Appellants which stalls had been removed be reinstated at the Respondent’s cost.



21. There was no evidence that the respondent had treated the Appellants as the owners of the stalls previously allotted to them within the market as they were still being asked to apply for the new ones and the Learned Trial Magistrate certainly fell in error in asserting that it would be pre-judicial to the duties of the Department of Trade for the court to interrupt the allocation of the new stalls.
22. Be that as it may, this court did note that in respect of the Respondent's contempt, Prayer No. 4 of the Motion dated 6th March 2020 was worded in very specific terms as follows:
 4. That the Chief Officer, Lands, Housing and Physical Planning and Urbanization Nyeri County one Ms. Hanna N. Maranga be cited for contempt of this court's decree for deliberately attempting to re-allocate the impugned stalls to members of the public."
23. From the material placed before the court, it was not clear what the said Hanna N. Maranga had done to warrant her being punished for contempt on behalf of the Respondent. In the Supporting Affidavit of Charles Mathangani, the only mention made of her is at Paragraph 4 thereof where he deposes on behalf of the other Appellants thus:
 4. That all this is being propagated by the Chief Officer Lands, Housing, Physical Planning and Urbanization Nyeri County one Ms. Hanna N. Maranga hence the reason we seek that she be cited for contempt of this court's decree."
25. As courts have repeatedly stated, contempt of court proceedings are akin to criminal proceedings and since they may culminate in a person losing his right to liberty, the court must be satisfied that the person sought to be cited was aware of the court's orders and had sought to willfully disobey the same.
26. Considering a similar matter in *Woburn Estate Limited –vs- Margaret Bashforth* [2016] eKLR, the Court of Appeal stated as follows:

“We reiterate that contempt proceedings being of quasi-criminal nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the oft-cited passage attributed to Lord Denning In *Re Bramblevale Ltd* [1970] 1 Ch.128 at Page 137 that:

“A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”
26. In this respect, one of the critical steps which the court must be satisfied has been taken before a person is cited for contempt, is service upon the alleged contemnor of the court order alleged to have been breached or disobeyed. In the matter before me, there was no evidence placed before the court to demonstrate that the said Hanna N. Maranga had been personally or otherwise served with the decree of the court issued on 18th December 2019, and/or that she had had any notice of the same.
27. It was also evident that while the said Hanna was being accused of “propagating” certain things and thereby warranting her being cited for contempt herein, the alleged offending Notice from the County Government dated 3rd March 2020 attached to the Appellants' Affidavit aforesaid emanates from the Respondent's Department of Trade, Tourism and Co-operative Department and not that of Lands, Housing and Physical Planning.



28. Arising from the foregoing, it was evident to me that the Appellants' application before the Lower Court had not met the threshold for the grant of the orders sought and I therefore have no basis to disturb the orders made in the Ruling issued by the court on 20th July 2020.

29. The result is that this Appeal fails and is hereby dismissed.

30. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 14TH DAY OF NOVEMBER, 2024.

In the presence of:

Mr. Ombongi for the Appellants.

Mr. Macharia for the Respondents.

Court Assistant: Kendi.

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J. O. OLOLA

JUDGE

