



**Gumba ((Suing as the legal administrator of the Estate of Aloyce Gumba Oloo - Deceased))
v Nenga alias Oduor Nenga; Oduor & another (Interested Parties) (Enviromental and Land
Originating Summons E029 of 2022) [2024] KEELC 7392 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E029 OF 2022
AY KOROSS, J
NOVEMBER 7, 2024**

BETWEEN

**JOHN ODHIAMBO GUMBA PLAINTIFF
(SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF ALOYCE
GUMBA OLOO - DECEASED)**

AND

JOHN ODUOR NENGA ALIAS ODUOR NENGA DEFENDANT

AND

VINCENT ONYANGO ODUOR INTERESTED PARTY

GEORGE ODUOR AGUNJA INTERESTED PARTY

RULING

1. By way of a notice of motion dated 9/07/2024 that was filed within the provisions of Sections 1A, 1B, 3, and 63 (e) of the *Civil Procedure Act* and Section 5 of the *Judicature Act*, the plaintiff moved this court seeking the following reliefs:
 - a. Spent.
 - b. Spent.
 - c. An order of committal to civil jail be made against the defendant for 6 months or such period as this honourable court deems fit.
 - d. That this honourable court be pleased to grant such other orders on implementation of the orders issued on 11/04/2024.



- e. Costs be provided for.
2. The motion was premised on the grounds enumerated on its face and the annexed affidavit of the plaintiff sworn on 9/07/2024.
 3. In the grounds and affidavit, it was the plaintiff's position that, on 17/04/2024 which was 6 days after this court had rendered a determination in his favour which was on 11/04/2024, the defendant in contempt of court, subdivided land parcel no. North Ugenya/Masat/1779 (suit property) into land parcels no. North Ugenya/Masat/2883 and 2884 (subdivisions) and had them transferred to the 1st and 2nd interested parties (IPs).
 4. According to him, these actions had impeded the implementation of the judgment and denied him the right to enjoy the fruits thereof. He therefore urged the court to grant the orders sought.
 5. Despite service, the defendant and IPs did not participate in the proceedings.
 6. As directed by the court, Mr. Odera, counsel for the plaintiff, made his oral submissions in which he rehashed the averments contained in the grounds in support of the motion and supporting affidavit.
 7. Having carefully considered the motion, grounds in support, affidavit, and annexures thereto, and Mr. Odera's oral submissions, the following 2 issues which arise for resolution shall be dealt with in a seriatim manner: -
 - a. Whether the defendant is in contempt of court.
 - b. What orders should this court issue on the subdivisions conducted post-judgment?
 8. On the 1st issue, the law governing contempt proceedings is found in Section 5(1) of the *Judicature Act*. The decision of Kenya Human Rights Commission v Attorney General & another [2018] eKLR declared the *Contempt of Court Act* unconstitutional and on nullification, our regime reverted to Section 5(1) of the *Judicature Act*. This provision states: -

“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.”
 9. The authority of this court to deal with contempt proceedings is derived from Section 29 of the *Environment and Land Court Act*.
 10. It must be noted Section 5 of the *Judicature Act* is bereft of the procedure for instituting such contempt proceedings and consequently, this court has to seek recourse in the procedure applicable in the High Court of Justice in England and Wales.
 11. The Civil Procedure Rules of England and Wales was considered in detail by the Court of Appeal in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR when in this decision, the court stated: -

“The procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court RSC), made under the Supreme Court of *Judicature Act*, 1873 (or simply the *Judicature Act*, 1873)...Following the implementation of the famous Lord Woolf's “Access to Justice Report, 1996”, The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. On 1st October, 2012 the



Civil Procedure (Amendment No. 2) Rules, 2012 came into force and PART 81 thereof effectively replaced Order 52 RSC in its entirety.”

12. PART 81 of these England and Wales Civil Procedure Rules elaborately states the ingredients of contempt applications, the definition of terms, and proceedings thereof, and this procedure was concisely summarized in Christine Wangari Gachege (Supra).

13. Rule 81.4 of this England and Wales Civil Procedure Rules deals with the ingredients of contempt applications and provides: -

“(1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.

(2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—

- (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
- (b) the date and terms of any order allegedly breached or disobeyed;
- (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
- (d) if the court dispensed with personal service, the terms and date of the court’s order dispensing with personal service;
- (e) whether a penal notice had been added to the front of any order allegedly breached or disobeyed included a penal notice;
- (f) the date and terms of any undertaking allegedly breached;
- (g) confirmation of the claimant’s belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
- (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
- (i) that the defendant has the right to be legally represented in the contempt proceedings;
- (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
- (k) that the defendant may be entitled to the services of an interpreter;
- (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
- (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;



- (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public".

14. A reading of the provision of law demonstrates the requirements are mandatory except if the court directs otherwise or if a particular requirement is inapplicable.
15. A scrutiny of the motion reveals that the plaintiff has not sought citation of contempt proceedings against the defendant but instead, has sought an order for committal of the defendant to civil jail.
16. Be that as it may, the motion before me is bereft of a statement envisaged by Rule 81.4 of this England and Wales Civil Procedure Rules.
17. Additionally, in an application for citation for contempt for disobedience of a court order, this court will consider whether the judgment and decree were served and whether they were endorsed with a notice of penal consequences.
18. In the instance case, the plaintiff proved he served the defendant with the judgment on 12/04/2024. However, there is no evidence the defendant was served with the decree which usually contains the notice of penal consequences.
19. I further note the extracted decree has an erroneous date as it reads 4/04/2024 instead of 11/4/2024. I therefore find the relief for contempt proceedings has not met the threshold.
20. On the 2nd issue, by the provisions of Section 3A of the *Civil Procedure Act* and Section 3 of the *Environment and Land Court Act*, this court can exercise its inherent powers.
21. This is to ensure it renders a decision that is just, necessary, the ends of justice are met, and also to prevent an abuse of the process of the court. In recent decision of Migori County Government &



another v Migori County Transport Sacco (Civil Appeal 110 of 2017) [2021] KECA 7 (KLR) (23 September 2021) (Judgment), the Court of Appeal held thus: -

“The court was always possessed of residual inherent powers which allowed it to make any orders in the wider interest of justice. It was for the court to fashion out an appropriate remedy even in instances where *the Constitution* and the law were silent. A court could not just helplessly stare at a petitioner whose rights and fundamental freedoms were trampled upon or when it was ostensibly demonstrated that *the Constitution* was either contravened or so threatened. Unless a court rose to, and asserted its authority, chances were that it could fail the calling in article 3 of *the Constitution*. Even in instances where there were express provisions on specific reliefs, a court was not precluded from making any other orders under its inherent jurisdiction for the ends of justice to be met to the parties.”

22. The applicable provisions that govern the review of court orders are encapsulated by Section 80 of the *Civil Procedure ACT* and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 states that;

“Any person who considers himself aggrieved-(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

23. Having been served with the judgment and with the sole aim of defeating the cause of justice, the defendant callously subdivided the suit property on 17/04/2024.

24. North Ugenya/Masat/2883 was on the very day of the subdivision transferred to the 1st IP and North Ugenya/Masat/2884 to the 2nd IP.

25. The defendant’s actions amounted to a breach of the doctrine of lis pendens. His conduct was a mockery of the effective administration of justice and public policy. His acts amounted to abuse of the court process. See Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR that was cited with approval in Caroline Cherono Kirui v Liner Cherono Towett [2022] eKLR and Agripina Nekesa Wafula v Vincent Wesonga Osimata [2021] eKLR. I find that it is only fair and just that the registration of the subdivisions is cancelled.

26. The creation of the subdivisions amounted to the discovery of new and important matters and evidence which on the exercise of due diligence, was not within the knowledge or could not be produced by the plaintiff at the time this court rendered its judgment. I find the plaintiff has met the ingredients of Order 45 Rule 1 of the Civil Procedure Rules.

27. Considering the findings of this decision and the circumstances of this case, I entertain no doubt that an order of review is required to give effect to the judgment of this court that was rendered on 11/04/2024.

28. The appropriate order would be a cancellation of the subdivisions and for the suit property to be reverted to its previous registration of North Ugenya/Masat/1779.

29. To halt any delay in the execution of the judgment, the surveyor’s and land registrar’s costs shall be borne by the plaintiff.

30. Utmost, I find the motion merited and because costs follow the event, I award costs to the plaintiff. Consequently, I hereby make the following final disposal orders:



- a. The District Land Surveyor-Ugenya/Ugunja or any other designated officer is hereby ordered to amend the Registry Index Map (RIM) of where the subdivisions known as land parcels nos. North Ugenya/Masat/2883 and 2884 are located and the Land Registrar- Ugenya/Ugunja shall cancel the subdivisions known as land parcels nos. North Ugenya/Masat/2883 and 2884 and revert the land to the previous no. being land parcel no. North Ugenya/Masat/1779.
- b. Upon compliance with order no. (a) above, the sequence of events envisaged in orders no. (b) and (c) of the judgment rendered on 11/04/2024 shall be commenced to ensure full execution of the decree in the suit.
- c. For purposes of compliance with order no. (a) above, the plaintiff shall bear the District Land Surveyor's-Ugenya/Ugunja, Land Registrar's -Ugenya/Ugunja, or any other designated officer's costs.
- d. The costs of the motion are awarded to the plaintiff.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 7TH DAY OF NOVEMBER 2024.

HON. A. Y. KOROSS

JUDGE

7/11/2024

judgment delivered virtually through microsoft teams video conferencing platform in the presence of:

In the Presence of:

N/A for the plaintiff

N/A for the defendant

N/A for 1st interested party

N/A for 2nd interested party

Court assistant: Ishmael Orwa

