



**Said v Lepapa & another (Environment and Land Appeal
E011 of 2023) [2024] KEELC 7402 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7402 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E011 OF 2023
LC KOMINGOI, J
NOVEMBER 7, 2024**

BETWEEN

ABDIRHAMAN MUSA SAID APPLICANT

AND

PHYLIS MUSOI LEPAPA 1ST RESPONDENT

COUNTY GOVERNMENT OF KAJIADO 2ND RESPONDENT

RULING

1. This is the Notice of Motion dated 7th February 2024 brought under; (Pursuant to Section 5 of the Judicature Act, Cap 8 Laws of Kenya, Section 1A, 1B & 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules and all enabling provisions of the Law)
2. It seeks Orders;
 1. Spent.
 2. Spent.
 3. Spent.
 4. The Honourable Court be pleased to find and hold that Ms. Phylis Musoi Lepapa is in contempt of the orders dated 18th December, 2023 issued by the Honourable Lady L. Komingoi.
 5. The Honourable Court be pleased to hold that as a consequence of her acts of contempt, Ms. Phylis Musoi Lepapa shall be detained in prison for a period of six months or such period that the court may please.
 6. The Honourable Court may be pleased to grant such other orders and directions as may be appropriate in the circumstances.



3. The grounds are on the face of the Notice of Motion and are set out on paragraphs 1 to 11.
4. The Application is supported by the Affidavit of Abdirhaman Musa Said, the Appellant herein, sworn on the 7th February 2024 and a further affidavit sworn on the 2nd April 2024.
5. The Application is opposed. There is a Replying Affidavit sworn by Phyllis Musoi Lepapa, the 1st Respondent, sworn on the 27th February 2024.
6. On the 19th March 2023, the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.
7. The Appellant's submissions are dated 2nd April 2024. Counsel submitted that the 1st Respondent and his Advocates had personal knowledge of the said orders and that the breach of the said orders was intentional.

The 1st Respondent never showed any intention of complying even after the numerous correspondences to stop the construction.

8. It is also submitted that the standard of proof required in applications of this nature, is higher than on a balance of probabilities as held in *Mutitika Vs Baharini Farm Limited* (1985) KLR 227 where it was held;

“We agree with Mr. Khaminwa's submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi-criminal in nature....”

9. It is the Appellant's case that there is evidence of trenches that have been dug in readiness for construction and on some other parts there are construction materials and erected walls with labourers carrying on. This can be seen from the photographs attached.

He prays that the Application be allowed.

10. The 1st Respondent's submissions are dated 22nd July 2024.

Counsel submitted that the orders of 18th December 2023 have never been served on the 1st Respondent or her counsel.

Further that the 1st Respondent has not breached any term of the order as the orders did not require her to vacate the said plot or restrain her from continuing to utilize the land.

11. Counsel further submitted that the 1st Respondent is in possession of the suit plot. The Appellant has not demonstrated that he will suffer irreparable injury that cannot be compensated by an award of damages if these orders are not granted.

12. Counsel also submitted that the reliefs granted in the lower court were mainly declaratory. There were neither negative nor positive orders relating to the matters complained of by the Appellant and it is evident that the instant application for injunction intends to cure that which was missing in the previous orders.

He prays that the application be disallowed.



13. I have considered the Notice of Motion, the Affidavits in support and the response thereto. I have also considered the written submissions and the authorities cited. The issues for determination are;
- i. Whether a temporary injunction ought to be granted pending the hearing and determination of the Appeal.
 - ii. Whether the 1st Respondent is in contempt of the orders of 18th December 2023.
 - iii. Who should bear costs of this Application?
14. In the case of Patricia Njeri & 3 Others Vs. National Museum of Kenya (2004) eKLR the court gave the following principles as governing temporary injunction pending appeal;
- “a) An order for injunction pending appeal is a discretionary one which will be exercised against an applicant whose appeal is frivolous.
 - b) The discretion should be refused where it would inflict great hardship that it would avoid.
 - c) The applicant must show that to refuse the injunction would render the appeal nugatory.
 - d) The court should also be guided by the principles of Giella Vs. Cassman Brown (1973) EA 358.”
15. In the case of Mutitika Vs. Baharini Farm Limited (1985) KLR 227 the Court of Appeal stated as follows; “We agree with Mr. Khaminwa’s submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi-criminal in nature....”
16. The 1st Respondent disputes personal service of the orders of 18th December 2023. The position is that the 1st Respondent who was represented by Mr. Wachira participated in the hearing of the application which culminated in the orders of 18th December 2023. She cannot feign ignorance of the said orders.
17. I am guided by the case of Patricia Njeri & 3 Others (supra) in finding that the Appellant has failed to demonstrate that refusing to grant the injunction would render the appeal nugatory.
18. I am also guided by the Mutitika Case (supra) in finding that the Appellant has failed to demonstrate that the 1st Respondent has willfully and intentionally disobeyed the orders of 18th December 2023. She has not wasted the said land or acted in any way to devalue the same.
19. It is imperative to note that contempt proceedings, given their quasi – criminal nature, require a higher standard of proof than ordinary civil claims, as they carry the potential of curtailing an individual’s liberty through punitive measures such as imprisonment or fines. This was the holding of the Court of Appeal in the case of Shimmers Plaza Limited Vs. National Bank of Kenya Limited (2015) eKLR;
- “It is important however, that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.....”



20. It is not in dispute that the 1st Respondent has been in possession and continues to be in possession. It is however important that the substratum of the Appeal be preserved pending the hearing and determination of this Appeal.
21. The upshot of the matter is that the Notice of Motion fails on both limbs.
22. In conclusion I find no merit in the application and the same is dismissed. The costs do abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 7TH DAY OF NOVEMBER 2024

L.KOMINGOI

JUDGE

In the presence of:

N/A for the Appellant.

Mr. Wachira for the 1st Respondent.

N/A for the 2nd Respondent.

Court Assistant – Mutisya.

