



Watamu Men Fridays Limited & another v Attorney General & 6 others (Environment & Land Case 104 & 4 of 2019 (Consolidated)) [2024] KEELC 13969 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13969 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 104 & 4 OF 2019 (CONSOLIDATED)
FM NJOROGE, J
DECEMBER 18, 2024**

BETWEEN

WATAMU MEN FRIDAYS LIMITED PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

DIRECTOR OF SURVEYS 3RD DEFENDANT

REMO LENZI 4TH DEFENDANT

SEVEN ISLANDS WATAMU LIMITED 5TH DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 4 OF 2019**

BETWEEN

ALYVIDZA INVESTMENT LIMITED PLAINTIFF

AND

SEVEN ISLANDS WATAMU LIMITED 1ST DEFENDANT

LAND REGISTRAR KILIFI 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT



RULING

1. This ruling is in respect to the remainder prayers c, d, e, f and g of the Notice of Motion application dated 22/4/2024. The orders sought were framed as follows: -
 - a. Spent;
 - b. That prior to the hearing and determination of prayers (c), (d), (e) and (f) below, the 2nd, 3rd and 4th Defendants be compelled to supply the court under oath and names and service numbers of the officers who registered Parcel No. Kilifi/Jimba/1125 as entry no. 9 dated 13.2.2020 of Photo Index Diagram (PID) No. 12 of Kilifi/Jimba Registration Section and registered the subdivision of Parcel No. Kilifi/Jimba/1125 into three portions namely Parcel No. Kilifi/Jimba/1719, Kilifi/Jimba/1720 and Kilifi/Jimba/1721. (spent)
 - c. The honourable court be pleased to cite and punish for contempt the directors of the 1st Defendant namely Roberto Lenzi and other and the specific officers of the 2nd, 3rd and 4th Defendants disclosed in (b) above for:
 - i. Jointly and severally registering parcel no. Kilifi/Jimba/1125 as entry no. 9 dated 13.2.2020 of Photo Index Diagram (PID) No. 12 of Kilifi/Jimba Registration Section; and
 - ii. Jointly and severally subdividing and registering parcel no. Kilifi/Jimba/1125 into three portions namely; Parcel No. Kilifi/Jimba/1719, Kilifi/Jimba/1720 and Kilifi/Jimba/1721.
 - d. The honourable court be pleased to issue a mandatory order cancelling entry no. 9 dated 13.2.2020 of Photo Index Diagram (PID) No. 12 of Kilifi/Jimba Registration Section and revoke and cancel the registration of Parcel No. Kilifi/Jimba/1125 together with the resultant title deeds for Parcel No. Kilifi/Jimba/1719, Kilifi/Jimba/1720 and Kilifi/Jimba/1721;
 - e. The honourable court be pleased to issue mandatory orders directing the 2nd and 3rd Defendants to delete from the land registry records entry no. 9 dated 13.2.2020 of Photo Index Diagram (PID) No. 12 of Kilifi/Jimba Registration Section and the registration of Parcel No. Kilifi/Jimba/1125 together with the resultant title deeds for Parcel No. Kilifi/Jimba/1719, Kilifi/Jimba/1720 and Kilifi/Jimba/1721.
 - f. The court be pleased to re-open the plaintiff's case to file further witness statements and adduce more evidence.
 - g. The costs of the application be provided for.
2. The application is supported by the affidavit of the applicant's director, Philip Obandah Arungah sworn on 19/4/2024. According to the Applicant, while the suit was still pending, the 1st, 2nd and 3rd Defendants' agents registered Parcel No. Kilifi/Jimba/1125 as entry no. 9 dated 13.2.2020 of Photo Index Diagram (PID) No. 12 of Kilifi/Jimba Registration Section and registered the subdivision of Parcel No. Kilifi/Jimba/1125 into three portions namely Parcel No. Kilifi/Jimba/1719, Kilifi/Jimba/1720 and Kilifi/Jimba/1721, contrary to prohibitory orders issued by this court.
3. The deponent narrated that on 17/10/2019, a consent order to maintain status quo pending the hearing and determination of the suit was recorded in the presence of counsel for all parties; that as



at that time, the status quo as confirmed in a related judgment of the Court of Appeal, Civil Appeal No. 67 of 2016, was that the PID No. 12 of Kilifi/Jimba Registration Section had not been registered. This, he alleged, was also the status confirmed by a surveyor's report dated 13/12/2019. He added that sometime in December 2019, two other matters were filed in this court- ELC JR No. 7 of 2019 and HC Misc. Civil Application No. 14 of 2019.

4. On 5/12/2019 orders were issued against them ex-parte in ELC JR No. 7 of 2019. The orders directed the director of surveys to immediately amend the survey records Registry Index Map No 12 for Kilifi/Jimba registration section to include plot no Kilifi/Jimba/1125 These orders were later set aside on 28/5/2021. Prior to that setting aside the court first issued a status quo order in the matter on 5/2/2020 which was to last up to 12/3/2020 which order was later extended to the ruling date herein above, that is 28/5/2021. To the Applicant therefore, between 17/10/2019 (date of the consent order in ELC NO 4 OF 2019 to 28/5/2021 (date of setting aside the order allowing the amendment of the RIM), the Defendants were barred from registering the said PID since that is the root cause of action or foundation in this suit, or carry out any other activities thereon; that sometime in February 2024, upon conducting another survey, the Applicants learnt that the agents of the defendants had registered the PID and subdivided the suit property Kilifi/Jimba/1125 contrary and in deliberate disregard of this court's orders.
5. The deponent further states that sometime in February 2024 he learnt that the 1st defendant was still selling units relating to some developments on the suit property so he and others commissioned a surveyor to do a report. The resulting survey report is said to be dated 27/3/2024 by Kiguru, Surveyor. It revealed that the parcel no 1125 was registered and subdivided into three portions. The report shows that the changes were done after 17/10/2019 and 5/2/2020. It is stated that the order of 17/10/2019 was by consent of all parties and the order carried a penal notice and so the acts in contravention of that order were deliberate. The subsequent filings of Roberto Lenzi in this matter never disclosed the changes. Neither did the respondent's counsel notify court.
6. The application was opposed. On their part, the 4th and 5th Defendants filed grounds of opposition dated 29/5/2024 stating that the application is marred with massive misrepresentation of facts, devoid of merit and a gross abuse of the court process. To these Defendants, the application is only but an attempt to amend the plaint at a late stage; that the amendment of the Registry Index Map as alleged by the Applicant was done in compliance of mandamus orders issued in ELC JR No. 7 of 2019, and that the same was done before stay of execution orders were issued. Counsel added that the subdivision was equally made pursuant to a judgment of the Court of Appeal in Civil Appeal No. 81 of 2016 requiring the mapping of Plot No. 103 within the suit property Kilifi/Jimba/1125.
7. The 1st Defendant filed a replying affidavit sworn by Lee Dzoro, District Surveyor, on 29/5/2024, wherein he deposed that the office of the District Surveyor was served with a court order dated 5/12/2019 in JR No. 7 of 2019, compelling the Director of Surveys to amend the survey records of Registry Index Map No. 12 for Kilifi/Jimba Registration Section to include Title No. Kilifi/Jimba/1125. Subsequently, the process commenced immediately in accordance with the court order and the law.
8. Parties filed written submissions.

The Plaintiff/ Applicant's Submissions

8. In the submissions dated 23/10/2024 filed by the firm of Muniyithya, Mutugi, Umara & Company Advocates, counsel identified four issues for determination. Firstly, whether the Defendant's conduct is an act of contempt of court. Citing the case of Econet Wireless Kenya Ltd V Minister for Information



& Communication of Kenya & another [2005] eKLR, counsel submitted that contempt of court entails any act that is a willful disobedience of Court orders and any conduct that impairs the fair and efficient administration of justice. He added that the principles to be proved in a civil contempt of court case were expounded in the case of Samuel. M.N Mweru & Others V National Land Commission & 2 Others [2020] eKLR 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) that: -

- 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;
- d) The defendant’s conduct was deliberate.”

9. On whether the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant, counsel submitted that the orders issued on 17/10/2019 were issued by consent in the presence of all advocates and none raised any concern on the meaning and implication of the orders on the parties they represented. Therefore, the terms of the orders issued on 17/10/2019 were clear and unambiguous.

10. On whether the defendant had knowledge of or proper notice of the terms of the order, counsel was guided by the case of Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR where the Court of Appeal held: -

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client’s case.”

11. Counsel submitted that on 17/10/2019 when the orders were issued, the counsel on record for the Defendants in ELC No. 4 of 2019 were all present in court during issuance of the orders, thus the Defendants had knowledge of the terms of the orders in issue.

12. Counsel added that the terms of the order were clear that status quo ought to be maintained. The defendants were to maintain the status quo by retaining the physical possession of Kilifi/Jimba/1125, and not to sub-divide, sell or transfer it pending the hearing and determination of the suit. Having done the latter, the Defendants have acted contrary to Court orders and are therefore in contempt of court. To buttress this point, counsel relied on the case of Samuel. M.N Mweru & Others v National Land Commission & 2 Others [2020] eKLR.

13. The second issue was whether the Court should issue mandatory orders compelling the 2nd and 3rd Defendants to delete the entries. On the principles that govern the grant of a mandatory injunction, counsel was guided by a decision of the Court of Appeal in Kenya Breweries Limited Washington



Okeyo (2002) EA 109 where the court referred to the principles stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 as follows: -

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

14. He argued that those special circumstances were expounded in the case of *Machiri Limited v Mayfair Insurance Company Ltd; Jinsing Limited (Interested Party) (Civil Case E502 of 2022) [2023] KEHC 20218 (KLR) (Commercial and Tax) (17 July 2023) (Ruling)* to mean: -

“...where the matter ought to be decided at once or where the injunction is directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff.”

15. It was his submission therefore that the registration of Photo Index Diagram (PID) No.12 of Kilifi Jimba Registration Section as Entry No.9 dated 13.2.2020, the registration of Parcel No. Kilifi Jimba/1125 and the subsequent sub-division of the same into three portions namely Parcel No Kilifi/Jimba/1719, Parcel No. Kilifi/Jimba/1720 and Parcel No. Kilifi/Jimba/1721, during the subsistence of the orders to maintain status quo, created special circumstances. To counsel, the Defendants’ actions were intended to steal the match from the Plaintiff, hence the mandatory orders ought to be granted.
16. Thirdly, counsel submitted on whether the Court should re-open the Plaintiff’s case. Counsel explained that the case which the plaintiff advanced up to the time it closed its case on 28/2/2024, was based on the plea that Parcel NO. Kilifi/Jimba/1125 and the RIM were not registered. Therefore, the status quo having been changed, it is proper that the Plaintiff be allowed to re-open its case so as to recall PW-2, Mr. Edward M.J.Kiguru to produce his report dated 27.3.2024. To support this prayer, counsel relied on the cases of *Samuel Kiti Lewa v Housing Finance Company Limited & another [2015] eKLR* and *Susan Wavinya Mutavi v Isaac Njoroge & another [2020] eKLR*.

The 4th and 5th Defendants’ Submissions

17. Counsel submitted that there was no amendment done on the Photo Index Diagram. He explained that the amendment that was done was on the Registry Index Map pursuant to a court order issued in JR No. 7 of 2019 on 5/12/2019; that in the same matter, the court declined to set aside its orders of 5/12/2019 and directed that status quo be maintained. He argued that the existing state of affairs at that time was that the amendment of the RIM was already in progress. To explain the meaning and essence of an order for status quo, counsel cited the cases of *Fatuma Abdi Jillo v Kuro Lengesen & another [2021] eKLR*, and *Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others [2015] eKLR*.
18. Submitting on whether the Defendants’ conduct is an act of contempt of court, counsel stated that the elements to be proved in such an application were espoused in *Republic v County Secretary County Government of Mombasa & another; EPCO Builders Limited (ex-parte applicant) (JR Application E049 of 2021) [2024] KEHC 394 (KLR)*, and restated in *Katsuri Limited v Kapurchand Depor Shah [2016] eKLR*.



19. Counsel submitted that the Applicant does not deny the existence of a judgment of the Court of Appeal in Civil Appeal No. 81 of 2016 Sarah Siele v Seven Islands Limited wherein certain obligations were placed upon the 5th Respondent to map Plot No. 103 within the suit property; that the mapping could only be done through amendment of the RIM and thereafter subdividing it so as to accommodate the said Plot.
20. He added that in order to succeed in civil contempt proceedings, the applicant has to prove the terms of the order, knowledge of the said terms by the respondent and failure by the respondent to comply with the terms of the order and in addition to these, the presence of willfulness and bad faith on the part of the Respondent. To support this argument, counsel relied on the case of Kristen Carla Burchell v Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005. He added that contempt of court will only occur when a party willfully fails, refuses and neglects to obey the court order as was stated in the case of Samuel M.N Mweru & others v National Land Commission & 2 others [2020] eKLR; and Indian Airports Employees Union v Ranjan Catterjee & another [AIR 1999 SC 880; 1999 (2) SCC;537]. To counsel therefore, compliance with a superior court's order does not constitute contemptuous conduct.
21. On whether the court should issue the mandatory orders compelling the 2nd and 3rd defendants to delete the entries, counsel submitted that the mandatory injunction sought has the potential of interfering with the judgment of the Court of Appeal and that in so doing, the Applicant's cause of action herein will be ousted prematurely.
22. Further relying on the case of Susan Wavinya Mutavi v Isaac Njoroge & another [2020] eKLR, counsel argued that that the prayer to re-open the Applicant's case was a belated attempt to adduce evidence whole sole purpose is to fill in the gaps in his case, hence should be disallowed. He added that the decision to grant such an order is discretionary and must be exercised judiciously; that in so doing, the court is duty bound to ensure that the proposed re-opening does not embarrass or prejudice the opposite party and whether the proposed re-opening is intended to fill the gaps in the evidence of an applicant. This proposition, he argued was stated in the case of Samuel Kiti Lewa v Housing Finance Company Limited & another [2015] eKLR.

Determination

23. On 15/10/2024, this Court declined to grant prayer b of the present application, therefore what is left for determination is: -
 - i. Whether the directors of the 1st Defendant should be punished for contempt of Court.
 - ii. Whether a mandatory injunction should be granted cancelling entry no. 9 dated 13/2/2020 of PID No. 12 of Kilifi/Jimba Registration Section and revoke the registration of Parcel No. Kilifi/Jimba/1125 together with the resultant title Nos. Kilifi/Jimba/1719, 1720 and 1721.
 - iii. Whether the Plaintiff's case should be re-opened and the Plaintiff allowed to file further witness statements and adduce more evidence.
24. The law that governs contempt of court proceedings is the English law applicable in England at the time the alleged act of contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in Christine Wangari Gachege -v- Elizabeth Wanjiru Evans & 11 Others [2014] eKLR. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is Section 5 of the *Judicature Act* which reads: -



- (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 that 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.
25. It is also trite that the standard of proof required in cases of contempt is higher than that required in an ordinary civil case. Before a finding of contempt can be made, there must be a demonstration of willful and deliberate disobedience of a court order. It is also settled that in light of the gravity of the personal consequences that would ordinarily flow from a finding of contempt, the law requires proof that the order in question was brought to the attention of the alleged contemnor as proof that he/she had personal knowledge of said order. In *Oilfield Movers Ltd – v – Zahara Oil & Gas Limited* [2020] eKLR the court stated -
- “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 motive 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...”
26. There can be no doubt that the 1st Respondent was at all times aware of the orders made on 17/10/2019. The said order directed parties to maintain status quo pending the hearing and determination of the suit in the following terms: -
1. The status quo prevailing be maintained and that is to say:
 - i. That the 1st Defendant shall remain in physical possession of the suit property;
 - ii. That the 1st Defendant is currently not sub-dividing, selling or transferring the suit property;
 2. The status quo be maintained pending the hearing and determination of the suit.
27. It is also undisputed that the status quo as at that time was that the PID No. 12 of Kilifi/Jimba Registration Section and Parcel No. Kilifi/Jimba/1125 had not been registered. It is also evident that on 13/2/2020, PID No. 12 of Kilifi/Jimba registration section and parcel No. Kilifi/Jimba/1125 were registered as entry no. 9 and the latter subdivided into three portions. These changes were clearly made after the aforesaid order to maintain status quo was issued. The 4th and 5th Defendants contested that the amendment of the Registry Index Map as alleged by the Applicant was done in compliance of mandamus orders issued in ELC JR No. 7 of 2019, and that the same was done before stay of execution orders were issued. Counsel added that the subdivision was equally made pursuant to a judgment of the Court of Appeal in Civil Appeal No. 81 of 2016 requiring the mapping of Plot No. 103 within the suit property Kilifi/Jimba/1125.
28. As already established, the standard of proof required in cases of contempt is higher than that required in an ordinary civil case. A perusal of the order dated 5/12/2019 in JR No. 7 of 2019, it is evident that the court issued a mandamus compelling the Director of Surveys, 3rd Defendant herein, to amend the survey records of RIM No. 12 for Kilifi/Jimba registration section and include Kilifi/Jimba/1125 therein. On 5/2/2020 the same court in that case issued an order to maintain status quo which was extended to 28/5/2021 when the court set aside its earlier orders issued on 5/12/2019. While it must not be lost that the present application is in relation to the orders granted in this court and not in JR



- No. 7 of 2019, it is apparent that the Defendants' defence in this matter is that the amendments were done to comply with the orders in JR No. 7 of 2019. This assertion is however not relevant for the present purpose and cannot exonerate the Defendants since an order of status quo had already been issued in JR No. 7 of 2019 when the entry no. 9 was registered on 13/2/2020; it is the case that the 5th Defendant, despite being aware of the orders in this suit, opted to deliberately manipulate the judicial process by filing that judicial review suit as opposed to directly seeking redress and intervention of this court for what he considered his problem. However, the Defendants were at all times under the obligation to obey and comply with the orders of this court.
29. Given the quasi-criminal nature of contempt proceedings, this court can only find the natural person named director of the 5th Defendant in ELC 104 Of 2019 (also named as the 1st Defendant in ELC 4 of 2019) i.e. Roberto Lenzi, and the body corporate named as 5th defendant i.e. Seven Islands Watamu Limited in contempt of court orders. It is so found.
30. As already established, and bearing in mind the outcome of prayer (b) herein, the unknown and undisclosed officers of the 1st, 2nd and 3rd Defendants cannot be held in contempt in the circumstances. The Plaintiffs further asserted that 1st Defendant's directors were still carrying on sale of units relating to some developments being done on the suit property. As there was no evidence to substantiate this allegation, I am therefore hesitant to find that the directors of the 1st Defendant were in contempt of court regarding this particular issue of construction and sale.
31. Mandatory injunctions are often a means of undoing what has already been done so far as that is possible. It is also certain that interlocutory mandatory injunctions should be granted with reluctance and in very special circumstances. Mandatory injunctions have the effect of resolving all the matters in dispute and that is why they are not easily granted at interlocutory stage. (See *Agip (K) Ltd – v - Mahesh Chandra Himatlal Vora & 2 Others*, Civil Appeal No 213 of 1999). Also, they are most likely to be granted in cases where one party has attempted to steal a march on his adversary while the suit was still pending. (see the case of: *Locabail International Finance Limited - Versus - Agro Export and others* (1986) All ER 906).
32. In the present case, the subject of the suit is the legality of the existence of Title No. Kilifi/Jimba/1125, which in its plaint, the Plaintiff alleges that the same encompasses and stretches an area of 6.2 Ha which on the ground subsumes or totally extinguishes the Plaintiff's property identified as Plot No. 696 Watamu. Counsel for the 4th and 5th Defendants alleged that amendments done on the survey records of RIM No. 12 for Kilifi/Jimba registration section to include Kilifi/Jimba/1125 were done in compliance with orders issued in Civil Appeal No. 81 of 2016. The said orders of the Court of Appeal were not exhibited, it is therefore quite difficult to ascertain the same. In the given circumstances I find that there was an attempt to steal a march on the applicant and I thus find that prayers (d) and (e) are merited and should be allowed.
33. The final issue is whether the Plaintiff's case should be re-opened and the Plaintiff allowed to file further witness statements and adduce more evidence. The Plaintiff wants this court to exercise discretion and re-open its case for reasons that when the Plaintiff closed its case on 28/2/2024, its pleadings and case generally revolved around the fact that the suit property Kilifi/Jimba/1125 and the RIM had not been registered. Therefore, following the Defendants' actions complained of in this application, it is just that the Plaintiff be allowed to re-open its case and re-call PW2 to produce his report dated 27/3/2024. According to the affidavit in support of this application, the report is a surveyor's report pronouncing the status of the suit property concerning its registration and amendments complained of in the present application. Having granted the mandatory orders (d) and (e) to revert the suit land registration to the status quo ante, I see no special circumstances for this court to exercise discretion in the Plaintiff's



favour. Prayer (f) is thus denied. The contemnors are hereby orders to appear before this court on 30/1/2025 for mitigation and sentencing.

34. The Plaintiff shall have the costs of the application.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 18TH DAY OF DECEMBER 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

