



Okeyo v Nyarera (Sued as the Legal Representative of the Estate of Selina Aoko Mbeche - Deceased) (Environmental and Land Originating Summons E008 of 2023) [2024] KEELC 13656 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13656 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2023
GMA ONGONDO, J
DECEMBER 10, 2024

BETWEEN

MILICENT ANYANGO OKEYO APPLICANT

AND

CALEB OCHIENG NYARERA RESPONDENT

SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SELINA AOKO MBECHÉ - DECEASED

RULING

1. The applicants through C. Obiero & Associates Advocates, mounted an application by way of a Notice of Motion dated 13th March 2024 pursuant to, inter alia, articles 49, 50 and 159 of *the Constitution* of Kenya, 2010 and Sections 1 and 2 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya (The Application herein) seeking the orders infra;
 - a. Spent
 - b. Spent
 - c. That the respondent Mr. Caleb Ochieng Nyarera, be found to be in contempt of court orders dated 30th November 2023.
 - d. That upon finding the respondent to be in contempt of court, this court be pleased to commit the respondent, Mr. Caleb Ochieng Nyarera, to imprisonment for such term it deems fit and/or order him to pay such fine or both; and his properties be sequestrated and seized to pay such fines so ordered.
 - e. That this court do deny the respondent audience in this suit.



- f. That the application dated 30th November 2023 and the Originating Summons be deemed as withdrawn for being overtaken by events at the instance of the respondent with no orders as to costs.
- g. That cost of this application be provided for.
2. The application is anchored on the applicant's supporting affidavit, sworn and filed on even date, and the annexed documents including a copy of the court order dated 30th November 2023, a copy of an affidavit of service of pleadings and photographs (MA-1 to 4 respectively).
3. Briefly, the applicant deponed that on 3rd December 2023, she served the respondent with the court order dated 30th November 2023. That on 7th December 2023, the respondent, in total disregard of the court orders, demolished houses and evicted the applicant from the suit land, L.R. No. Kanyada/Kotieno/Katuma 'B'/686. That as a result, her occupation thereon has been interfered with and she no longer wishes to proceed with this suit since the same has been overtaken by events.
4. The respondent, represented by Oguttu Mboya, Ochwal & Partners Advocates, opposed the application by way of a Replying Affidavit sworn on 24th April 2024. He deponed inter alia, that he was not served with any court order on 30th November 2023 since he only became a party to the suit on 16th February 2024, after substituting the original respondent who is deceased. That eviction orders had been issued in Homa Bay CMCC ELC No. 35 of 2018. Aggrieved thereby, the appellant lodged an appeal which was dismissed. Subsequently, the appellant lodged a Notice of Appeal to the Court of Appeal and sought an order of stay but the application seeking stay orders was struck out. That therefore, he enforced the subordinate court's orders of eviction and duly evicted the appellant from the suit land on 24th November 2023.
5. On 14th May 2024, this court ordered and directed that the application be argued by way of written submissions pursuant to order 51 rule 16 of the *Civil Procedure Rules, 2010* and Practice Direction No. 33 of the *Environment and Land Court (ELC) Practice Directions, 2014*.
6. Accordingly, the applicant's counsel filed submissions dated 3rd June 2024 and identified the following questions for determination:
- Whether the applicant has met the prerequisites for stay of proceedings of all earlier applications and the substantive originating summons pending the hearing and determination of this Application.
 - Whether the respondent is in breach of court orders issued on 30th November, 2023.
 - Whether this court should deny the respondent audience in this suit.
 - Whether the application dated 30th November, 2023 and the originating summons be deemed as withdrawn for being overtaken by events
7. Briefly, Learned Counsel submitted that it is imperative to determine the legality of the respondent's actions before proceeding with the substantive suit herein. That the applicant posted copies of the court order all over the compound of the suit land hence, the respondent cannot purport not to have seen the same. That this court should deny the respondent audience herein. That ultimately, the application dated 30th November 2023 and the Originating Summons have been rendered void and are therefore, deemed withdrawn. To reinforce the submissions, counsel relied on various authorities including the case of *Fred Matiang'i, The Cabinet Secretary, Ministry of Interior and Co-ordination of National Government -vs- Miguna Miguna & 4 Others* [2018] eKLR, among others.



8. Learned counsel for the respondent filed submissions dated 11th October 2024 in regard to the application herein and identified two issues for determination thus: Whether the respondent is in contempt of valid court orders and whether the suit herein ought to be stayed and/or withdrawn.
9. Counsel submitted that the respondent was not served in person. That the applicant did not annex a copy of the affidavit of service as proof that he served the original respondent with the court order dated 30th November 2023. That the respondent only substituted the original respondent herein on 16th February 2024 and was served with amended pleadings in respect to the suit. That in fact, the initial respondent having died on 16th August 2017, no service of orders of 30th November 2023, could have been affected upon her. That the suit herein can be withdrawn with costs to the respondent. To buttress the submissions, reliance was placed on the case of *Woburn Estate Limited vs Margaret Bashforth* [2016] eKLR and *Kenya Power and Lighting Company Limited vs Esther Wanjiru Wokabi* [2014] eKLR.
10. In the foregone, the issue that falls for determination is whether the respondent is in contempt of the orders issued by this court on 30th November, 2023. Precisely, has the applicant established any basis for the orders sought to be granted?
11. On 30th November 2023, this honourable court made various orders with respect to the applicant's Notice of Motion Application of even date, including:

“...There shall be temporary stay of eviction of the applicant from the suit land pending the hearing and determination of this application as per prayer 2 therein...”
12. The applicant contends that on 7th December 2023, the respondent, in total disregard of the court orders, demolished houses and evicted the applicant from the suit land. That as a result, her occupation thereon has been interfered with and she no longer wishes to proceed with this suit since the same has been overtaken by events.
13. It must be appreciated that contempt of court is that conduct or action that defies or disrespects authority of court. Black's Law Dictionary 10th Edition at page 385, defines the term “contempt” as:

‘The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature...’
14. Notably, Section 5 of the *Judicature Act* Chapter 8 of the Laws of Kenya confers jurisdiction on the superior courts to punish for contempt.
15. In the case of *Fred Matiang'i* (supra), the Court of Appeal stated the following with regard to orders of the court: -

“...When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities...”



16. Indeed, the reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts.

17. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Ibrahim, J. (now, Supreme Court of Kenya Judge), underscored the importance of obeying court orders, thus:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.”

18. It is borne in mind that contempt of court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if that party were to succeed as was aptly stated in *Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227.

19. In *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR, Mativo J. (now JA) stated as follows:

In the case of Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005, the High Court of South Africa established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove

- (i) the terms of the order,
- (ii) Knowledge of these terms by the Respondent,
- (iii). Failure by the Respondent to comply with the terms of the order... Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated: -

“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; and
- (d) the defendant's conduct was deliberate. (Emphasis added).

20. It is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. In this regard, it is crystal clear that service of the court order dated 30th November 2023 was not effected on the respondent in person. No proof of service has been availed by the applicant thereof. Therefore, I am not satisfied that wilful disregard of the court order has been established by the applicant herein.
21. Regarding the applicant's intention to withdraw the matter, I note that the same is unopposed by the respondent. Therefore, I allow that prayer as sought in paragraph 6 of the Notice of Motion application dated 13th March 2024.
22. Wherefore, the applicant's Notice of Motion dated 13th March 2024 does not satisfy the prerequisites for the court to grant the orders sought therein, save for prayer number 6. I proceed to dismiss the same. For clarity, the application dated 30th November 2023 and the Originating Summons stand withdrawn as set out in paragraph 1(f) hereinabove.
23. Costs of the application to be borne by the applicant.
24. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 10TH DAY OF DECEMBER 2024

G M A ONGONDO

JUDGE

Present

1. M. Abuya holding brief for C. Obiero, Learned Counsel for the applicant
2. B. Mulisa, Learned Counsel for the respondent
3. Adongo, Court Assistant

