



**Muchelesi & 2 others v Zakali (Environment and Land Appeal  
22 of 2018) [2023] KEELC 887 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 887 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL 22 OF 2018**

**BN OLAO, J**

**FEBRUARY 14, 2023**

**BETWEEN**

**RASOA MUCHELESI ..... 1<sup>ST</sup> APPLICANT**

**JOHN JUMA MUCHELESI ..... 2<sup>ND</sup> APPLICANT**

**WANYONYI MUCHELESI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**PHILIP SIMIYU ZAKALI ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the Notice of Motion filed by Rasoa Nakhanu Muchelesi, John Juma Muchelesi and Wanyonyi Muchelesi (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants) premised upon the provisions of sections 3A and 63 of the *Civil Procedure Act* and dated July 18, 2022. The applicants seek the following orders against Philip Simiyu Zakali (the respondent):
  1. The respondent be cited and punished for contempt of court.
  2. The respondent do purge the contempt.
  3. Without prejudice to 1 and 2 above, the court secure the suit properties pending hearing and determination of the appeal by issuing a conservatory order.
  4. Costs be provided for.
2. The application is premised on the grounds set at therein and is also supported by the affidavit of John Juma Muchelesi the 2<sup>nd</sup> applicant herein.
3. It is the applicant's case that this court barred the parties in this appeal not to sell or alienate the land parcel no East Bukusu/South Nalondo 1915 pending the hearing and determination of this appeal. However, the respondent has sub-divided the said land to create land parcels no East Bukusu/



South Nalondo/9012 and 9013. He has then sold the parcel o East Bukusu/South Nalondo/9013 to one Wycliffe Wanjala Wamalwa who has charged it to Equity Bank (Kenya) Ltd to secure a loan of kshs.5,600,000 (five million six hundred thousand).

4. Annexed to the application are the following documents:
  1. Copy of the ruling by Muchelule J (as he then was) dated September 18, 2012.
  2. Copy of Green Card for the land parcel no East Bukusu/South Nalondo/1915.
  3. Copy of the certificate of official search for the land parcel no East Bukusu/South Nalondo/9012 registered in the name of the respondent on May 31, 2021.
  4. Copy of the certificate of official search for the land parcel no East Bukusu/South Nalondo/9013 registered in the name of Wycliffe Wanjala Wamalwa on August 23, 2021. The same was charged to Equity Bank (k) Ltd on September 17, 2021 to secure kshs 5,600,000 (five million six hundred thousand).
5. The application is opposed and the respondent filed a replying affidavit dated August 3, 2022 in which he deposed, *inter alia*, that the land parcel No East Bukusu/South Nalondo/1915 belonged to him. That after the applicants obtained a ruling herein, they took no action for 10 years in prosecuting their appeal filed on June 15, 2009. That he has sold his own land not the applicants' land. That the applicants sat on their rights for 14 years. That no order was extracted and served upon him with a specific penal notice while he was away on National duties in Somali. He therefore sought the dismissal of the application with costs.
6. He has annexed the following documents to his replying affidavit:
  1. Certificate of official search for the land parcel no East Bukusu/south Nalondo/2966 in the name of Ragoza Nakhanu Wafula.
  2. Certificate of official search for land parcel no East Bukusu/south Nalondo/3675 in the name of John Juma Muchesi.
  3. Proceedings of the Land Dispute Tribunal hearing dated June 8, 2006 involving land parcels No East Bukusu/South Nalondo/1915 and 3675.
  4. Submissions dated August 3, 2022 and authorities.
7. When the application was placed before me, I directed that it be canvassed by way of written submissions. Those were duly filed both by Mr Waswa instructed by the firm of Wabwile & Company Advocates for the applicants and by Mr Kundu instructed by the firm of Situma & Company Advocates for the Respondent.
8. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
9. It is common ground that the applicants had approached this court vide their application seeking a stay of execution of the decree in the subordinate court which had ordered for their eviction from the land parcel o East Bukus/South Nalondo/1915 as decreed in Bungoma Cmcc no 592 of 2007 pending the hearing and determination of this appeal. The applicants also sought orders restraining the respondent and those acting under him from excising and/or attending any part of the land parcels no East Bukusu/South Kanduyi/3675 and East Bukusu/South Nalondo/2966 belonging to the applicants.



10. Having heard the parties, Muchelule J (as he then was) delivered a ruling on September 18, 2012 in which he made the following orders:
  - a. “Any further act in execution is stayed, and
  - b. all the parties are hereby restrained from any further sub-division or alienation of their respective parcels until the appeal is heard and determined. Costs shall abide the appeal.”
11. There is no doubt therefore that Muchelule J (as he then was) made a clear and unambiguous order restraining all the parties herein from sub-dividing or alienating their respective parcels of land until the appeal is heard and determined or until any further orders. The Respondent’s parcels of land is parcel no East Bukusu/South Nalondo/1915 and the appeal herein was determined by a judgment delivered on February 14, 2023.
12. The hand written proceedings of Muchelule J (as he then was) clearly show that when he delivered his ruling on September 18, 2012, Mr Situma counsel for the respondent was present. The respondent has deposed in paragraph 12 of his replying affidavit as follows:

“That no order was extracted and served upon me with specific penal notice while I was away on national duties.”

Since Mr Situma was in court on December 18, 2012 when the ruling was delivered, it is presumed that the respondent was made aware about the restraining orders to the effect that the land parcel no East Bukusu/South Nalondo/1915 should not be sub-divided or alienated until this appeal is heard and determined or until any further orders. In the case of *Shimmers Plaza Limited -v- National Bank Of Kenya* 2015 eKLR, the Court of Appeal held as follows:

“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.”

13. Similarly, in *Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another* C a Civil Appeal No 24 of 2014 (NYERI), the Court of Appeal held that:

“On the other hand, however, this court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved.”

On the basis of those binding precedents among others, it is not open to the respondent to claim that no order was served on him following the delivery of the ruling dated December 18, 2012.

14. The respondent also shot himself in the foot when he deposed in paragraphs 9 and 10 of his replying affidavit as follows:
  9. “That while my advocate on record informed me of further eviction, the disposed (sic) off the suit land was not brought to my attention as I was away on National duties in Somali and South Sudan.”



10. “That it’s not that I did not obey the order as alleged but the Appellants sat on their rights all this time 14 years since appeal was filed.”

The respondent is therefore suggesting that while he may have been aware about the order not to evict the applicants, the land parcel No East Bukusu/South Nalondo/1915 was sold without his knowledge. That cannot possibly be true. If this land was sold without his knowledge, surely he would have taken action against the fraudsters. Then he accuses the applicants of taking 14 years to prosecute their appeal. In my judgment on the appeal, I did express my displeasure on the fact that whereas the appeal was filed on June 15, 2009, it was not until April 6, 2022 that the record of appeal was filed. However the delay in prosecuting the appeal was due to the fact that the subordinate court did not avail the record when required and it took my intervention to have the record availed. The applicants cannot be held responsible for the lapses on the part of the subordinate court. But that notwithstanding, the respondent was also at liberty to move the court for any appropriate orders with regard to the prosecution of the appeal. However, for as long as the appeal remained un-determined and no other orders having been made by the Court lifting or varying the orders of Muchelule J issued on December 18, 2012, the respondent could not alienate or sub-divide the land parcel no East Bukusu/south Nalondo/1915. To do so would be in contempt of an order of the court.

- 15 It is not in dispute that the respondent sub-divided the land parcel no East Bukusu/south Nalondo/1915 to create parcels no East Bukusu/south Nalondo/9012 and 9013 on May 7, 2021 while this appeal was still pending. Then he transferred the land parcel no East Bukusu/south Nalondo/9013 to one Wycliffe Wanjala Namalwa on August 23, 2021 who then changed it to Equity Bank (k) Ltd for a sum of kshs 5,600,000. That was clearly in disobedience of an order of this court for which the respondent must be found to be in contempt.
16. Obedience of an order of the court is not optional. It is mandatory. The respondent cannot therefore be heard to complain that the applicants took 14 years to prosecute their appeal. In *Hadkinson v Hadkinson* 1952 All E r 567, it was held that:

“It is the plain and unqualified obligation of any person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that 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 an order believes it to be irregular or even void.”

And in the case of *Refrigeration And Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another* C a Civil Application No 39 of 1990, the Court of Appeal said:

“... It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors ...”

Counsel for the respondent, citing the decision of the High Court in the case of *Samuel M N Weru & Others v The National Land Commission* Mis Civil Application No 443 of 2017, has submitted that no leave was sought before these contempt proceedings were instituted. The applicants moved this court on the basis of sections 3A and 63 of the *Civil Procedure Act*. Section 3A provides for the inherent powers of the court while section 63(c) provides for the court’s power to punish for disobedience of its order of injunction which is essentially what Muchelule J (as he then was) issued on December 18, 2012. In the case of *Christine Wangari Chege v Elizabeth Wanjiru Evans & Others*



Ca Civil Application No 233 of 2007 [2014 eKLR] it was stated that leave is not necessary where the committal proceedings for contempt relate to a breach of a judgment, order or undertaking. In the circumstances of this case, there is a clear breach of the order issued on December 18, 2012. This court is satisfied that the respondent is in contempt of that order.

17. Ultimately therefore and having considered the Notice of motion by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants dated July 18, 2022, this court makes the following orders:
1. Philip Simiyu Zakali is found to be in contempt of the orders issued on December 18, 2012.
  2. Summons to issue for Philip Simiyu Zakali to appear before Cherono J at the Bungoma Elc on February 27, 2023 at 9am for further orders.
  3. The respondent shall meet the costs of this application.

**BOAZ N. OLAO**

**JUDGE**

**14<sup>TH</sup> FEBRUARY 2023**

Ruling dated, signed and delivered at BUSIA ELC on this 14<sup>th</sup> day of February 2023 by way of electronic mail as had been advised to the parties and with notices to them.

**BOAZ N OLAO**

**JUDGE**

**14<sup>TH</sup> FEBRUARY 2023**

