



**In re Estate of Kimoi Chirchir Chembulet (Deceased) (Probate & Administration 160 of 2023) [2024] KEHC 5889 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5889 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
PROBATE & ADMINISTRATION 160 OF 2023  
RN NYAKUNDI, J  
MAY 24, 2024**

**BETWEEN**

**LILIAN JEPKEMBOI KIPKOSGEI ..... 1<sup>ST</sup> PETITIONER  
FLORA JERONO KIMUTAI ..... 2<sup>ND</sup> PETITIONER  
RAEL JEMUTAI KIMAIYO ..... 3<sup>RD</sup> PETITIONER**

**AND**

**SELLY KIBET ..... 1<sup>ST</sup> RESPONDENT  
JAMES CHEMBULET ..... 2<sup>ND</sup> RESPONDENT  
ALBINA KOECH ..... 3<sup>RD</sup> RESPONDENT  
GRACE TABSIMEI CHELAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion filed on 3/4/2024, the Petitioners/Applicants seek orders that;
  - a. Spent.
  - b. This Honourable Court be pleased to cite the Respondents herein for contempt of the Court orders issued on 30/11/2022, 10/3/2023, 17/3/2023, 31/3/2023 and 21/3/2024.
  - c. The Honourable Court do commit the Respondents to Civil jail for contempt of Court orders.
  - d. The Honourable Court so order the Respondents to purge up the Contempt by allowing the Petitioners access to the 15 acres within land parcel SERGOIT/ SERGOIT BLOCK 1 (MOIBEN SERGOIT)/1 and pay the Petitioners



Kshs.225,000/= for use of the 15 acres in the years 2022, 2023 and 2024 and by also pay the Petitioner Kshs.379,288/= for the use of an extra 10 acres for the year 2022, 2023 and 2024.

- e. The Respondents be denied audience in this Court until they purge the contempt herein
  - f. Costs be provided by the Respondents.
2. The application is premised on the grounds therein and is further supported by the Affidavit sworn by Lilian Jepkemboi Kipkosgei on 3/4/2024. The Petitioners contend that the Respondents are perpetuating an illegality by trespassing, planting and leasing out of the portion of land contrary to the Court orders issued on 30/11/2022, 10/3/2023, 17/3/2023, 31/3/2023 and 21/3/2024, that the Respondents are in contempt of the orders of this Court issued on 30/11/2022, 10/3/2023, 17/3/2023, 31/3/2023 and 21/3/2024, barring them from trespassing, planting, leasing out and or intermeddling in the suit land, that the Respondents and their Advocate were served in person with the orders dated 30/11/2022, 10/3/2023, 17/3/2023, 31/3/2023 and 21/3/2024. According to the Petitioners, the Respondents' actions are acts of intermeddling which this Court ought to punish harshly. The Petitioners maintain that justice will not be met unless the Respondents are cited for contempt of Court and the instant orders issued as prayed.
3. The application is unopposed. There is a copy of an Affidavit of Service sworn by Ben Cheruiyot on 11/4/2024 indicating that this instant application was served upon the Respondents.

### **The Submissions**

4. The application was canvassed vide written submissions. The Petitioners filed their submissions dated 16/4/2024 but the Respondents did not file any.
5. With regard to whether the Court should cite the Respondents for contempt of the Court orders issued on 30/11/2022, 10/3/2023, 17/3/2023, 31/3/2023 and 21/3/2024. Counsel for the Petitioner submitted that the Court issued orders on 30/11/2022, 10/3/2023, 17/3/2023, 31/3/2023 and 21/3/2024 directing the preservation of the Estate herein and the Respondents to cease from intermeddling, trespassing, leasing out, or selling the suit land parcel belonging to the late KIMOCHI CHIRCHIT CHEMBULET and that the Respondents were directed to plough and plant where there have planting and the Petitioners to utilize 15 acres previously being utilized by the deceased pending the distribution of the estate herein. Counsel further submitted that the Respondents and their Advocate were served in person with the said orders but have since ignored and or refused to obey the said orders and are now perpetuating illegality by trespassing, planting, leasing out and intermeddling with the 15 acres with land parcel number SERGOIT/SERGOIT BLOCK 1 (MOIBEN SERGOIT)1 allocated by the Court to the Petitioners for their use and subsistence contrary to the Court orders. Counsel cited the case of [\*North Tetu Co. Ltd Vs. Joseph Nderitu Wanjohi \[2016\]\*](#) eKLR with regard to the ingredients of contempt of Court.
6. Counsel maintained that the terms of the said Court orders were clear and unambiguous and the Respondents never raised or filed any application to seek clarification from the Court if they deemed the orders unclear. Counsel further argued that the Respondents were represented by Counsel at the time of issuance of the said orders and as such, the Petitioners assume that their Counsel explained the said orders and their implication to them. Counsel argued that it is trite law that a Court order is binding on the party against who it is addressed and until the same is set aside it remains to be valid and is to be complied with. Counsel cited the case [\*Samuel M.N. Mweru & Others V National Land Commission & 2 Others \[2020\]\*](#) eKLR in that regard.



7. With regard to whether the Court should commit the Respondents to Civil Jail for contempt of Court orders. Counsel cited the case of [Samuel M.N. Mweru & Others V National Land Commission & 2 Others](#) [2020] eKLR (supra) and submitted the pronouncement in aforementioned case by the High and Section 38 of the [Civil Procedure Act](#) gives this Court the power to punish the Respondents herein for contempt of Court orders by committing them to civil jail.
8. With regard to whether this Court should order the Respondents to purge the contempt by allowing the Petitioners access to the 15 acres of land within land parcel SERGOIT/SERGOIT BLOCK 1 (MOIBEN SERGOIT)/1 and pay the Petitioners Kshs.225,000/= for use of the 15 acres in the years 2022, 2023 and 2024 and by also pay the Petitioner Kshs.379,288/= for the use of an extra 10 acres for the year 2022, 2023 and 2024. Counsel submitted that the Petitioners have proved that the Respondents committed contempt of Court orders and that the Respondents should purge the contempt by allowing the Petitioners access to the 15 acres of land within land parcel SERGOIT/SERGOIT BLOCK 1 (MOIBEN SERGOIT)/1 and pay the Petitioners Kshs.225,000/= for use of the 15 acres in the years 2022, 2023 and 2024 and by also pay the Petitioner Kshs.379,288/= for the use of an extra 10 acres for the year 2022, 2023 and 2024.
9. On whether this Court should deny the Respondents audience until they purge the contempt herein. Counsel submitted that the Court herein should deny the Respondents audience until they purge the contempt of Court orders. In that regard, Counsel the Court to be guided by the case of [Fred Matiangi the Cabinet Secretary Ministry of Interior and Co-ordination of National Government V Miguna and 4 Others](#) [2018] eKLR.
10. With regard to the issue of costs. Counsel cited Section 27 of the *Civil Procedure Rules, 2010*, and stated that costs follow the event and that the successful party should be awarded costs.

### **Analysis and Determination**

11. It is worth mentioning that on 9/11/2018, Mwita J, in [Kenya Human Rights Commission vs. Attorney General & Another](#) [2018] eKLR, declared that the entire [Contempt of Court Act](#) No. 46 of 2016 as invalid for lack of public participation as required by Articles 10 and 118(b) of [the Constitution](#) and found that the said Act as enacted encroached upon the independence of the Judiciary.
12. Be as it may however, before the enactment of the since deleted Contempt of Act, Section 5 of the [Judicature Act](#) Cap 8 Laws of Kenya, was the only statutory basis with respect to the procedure for institution contempt of Court proceedings. That Section provides:
  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.



13. A party seeking recourse for contempt of Court proceeding would then have to rely on the provisions of Section 3 of the [Judicature Act](#) that provides that;

“The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with—

- a) [The Constitution](#)
  - b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule
  - c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12<sup>th</sup> August, 1897, and the procedure and practice observed in courts of justice in England at that date Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”
14. Therefore, in Kenya the law that governs contempt of Court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the [Judicature Act](#) imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought.
15. 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. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order. This was aptly stated in *Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227, that:

A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and on an application to commit, to take the lenient course of granting an



injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.

16. For a person to be punished for contempt certain ingredients must be present as was held in the case of *Cecil Miller v. Jackson Njeru & Another [2017]* eKLR where the Court held as follows;
- “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 conduct was deliberate.”
17. In the instant case, the Petitioner want this Court to cite the Respondents herein for Contempt of the Court orders issued on 30/11/2022, 10/3/2023, 17/3/2023, 31/3/2023 and 21/3/2024, barring them from trespassing, planting, leasing out and or intermeddling in the suit land. The Petitioners also seek that the Respondents be committed to civil jail for being in contempt of the said orders and that the Court orders the Respondents to purge the contempt orders by allowing them to acres 15 acres within parcel of land known as SERGOIT/SERGOIT BLOCK 1 (MOIBEN SERGOIT)/1 and pay the Petitioners Kshs.225,000/= for use of the 15 acres in the years 2022, 2023 and 2024 and by also pay the Petitioner Kshs.379,288/= for the use of an extra 10 acres for the year 2022, 2023 and 2024.
18. While appreciating that Court orders are never issued in vacuum and they ought to be obeyed. It is trite law that he who alleges must prove, the Petitioners herein allege that the Respondents are perpetuating an illegality by trespassing, planting, leasing out and intermeddling with 15 acres within parcel of land known as SERGOIT/SERGOIT BLOCK 1 (MOIBEN SERGOIT)/1 allocated to them for their use and subsistence contrary to the Court orders that were issued on 30/11/2022, 10/3/2023, 17/3/2023, 31/3/2023 and 21/3/2024 respectively. The Petitioners however have not tabled any evidence before this Honourable court to prove that the Respondents are indeed perpetuating an illegality by trespassing, planting, leasing out and intermeddling with 15 acres within parcel of land known as SERGOIT/SERGOIT BLOCK 1 (MOIBEN SERGOIT)/1 allocated to them for their use and subsistence contrary to the Court orders that were issued on 30/11/2022, 10/3/2023, 17/3/2023, 31/3/2023 and 21/3/2024 respectively. Without proof to sustain the said allegations, this Court cannot issue contempt of Court orders in vain, in fact a party has to sufficiently demonstrate to Court that one is in contempt of Court orders due to the gravity of consequences that ordinarily flow from contempt proceedings.
19. In view of my above analysis and findings, the conclusion becomes irresistible that the Petitioners’ application dated 3/4/2024 does not satisfy the prerequisites for the Court to grant the orders sought. Accordingly, I dismiss the Petitioners’ application dated 3/4/2024 with no orders as to costs.

\*\*DATED, SIGNED AND DELIVERED AT ELDORET THIS 24<sup>TH</sup> DAY OF MAY 2024

**R. NYAKUNDI**

**JUDGE**

