



Wangamati & another v CECM-Lands, Urban Physical Planning, Housing & Municipalities - Bungoma County & 5 others (Constitutional Petition E001 of 2024) [2024] KEELC 14144 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 14144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
CONSTITUTIONAL PETITION E001 OF 2024
EC CHERONO, J
OCTOBER 31, 2024**

BETWEEN

PATRICK WANGAMATI 1ST PETITIONER

WANGAMATI ESTATES LIMITED 2ND PETITIONER

AND

CECM-LANDS, URBAN PHYSICAL PLANNING, HOUSING & MUNICIPALITIES - BUNGOMA COUNTY 1ST RESPONDENT

GOVERNOR- BUNGOMA COUNTY 2ND RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA 3RD RESPONDENT

CABINET SECRETARY FOR YOUTH AFFAIRS, SPORTS & THE ARTS 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

THE COUNTY ATTORNEY - BUNGOMA COUNTY 6TH RESPONDENT

RULING

1. This ruling determines the Petitioners Notice of Motion dated 25th May, 2024 brought under the provisions of Sections 3, 4(1) (a), 5, 28 and 34 of the Contempt of Court Act No. 46 of 2016, sections IA and 3A of the Civil Procedure Act, Cap 21, Order 40 Rule 1,2, 3 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 5 of the Judicature Act and Article 159 (2)(e) of the Constitution of Kenya.
 - a. This application be certified urgent and service be dispensed with in the first instance.



- b. This Honourable court be pleased to issue summons against the respondents to appear before the Court and show cause why they should not be committed to civil jail for such term as the court may deem just.
 - c. This Honourable Court be pleased to find the Respondents be cited for contempt of court orders issued on February 5, 2024 and April 25, 2024 and further be committed to civil jail for a term of six (6) months until they purge the contempt and comply with the orders of this Honourable Court.
 - d. This Honourable Court be pleased to grant leave to the Petitioners to file the latest valuation of the demolished property and that the valuation report attached hereto be deemed as duly filed.
 - e. This Honourable Court be pleased to order the 3rd Respondent to deposit monies equivalent to value of the property as per the valuation report and/or to be determined by court in an account held by the court before hearing of the petition to be able to purge the contempt and be granted audience to proceed with the petition.
 - f. In the alternative where the 3rd Respondent may not have the amount as assessed in the valuation Report, this Honourable Court be pleased to order that this deposit becomes a first charge on any account held by and/or funds received by the 3rd Respondent until the case is conclusively heard and determined.
 - g. The 1st and 2nd Respondents be personally responsible for enforcing the above orders and held liable for any failure to enforce Orders 5 and 6 above.
 - h. This Honourable Court be pleased to order the Respondents to compensate the Petitioners for the loss occasioned to them by having the entire property demolished
 - i. The cost of this application be provided for.
2. The application predicated on grounds shown on the face of the application and is supported by the affidavit of a director shareholder of the applicant Patrick Wangamati sworn on May 25, 2024.
 3. The Petitioners case was that he filed a constitutional petition dated 2nd February, 2024 and were granted conservatory orders dated February 5, 2024 by this Honourable Court. That despite service the Respondents have refused to comply with the Order dated February 5, 2024 emanating from the Application dated 2nd February, 2024 in Constitutional Petition No: EOOI of 2024 which order stipulated that conservatory orders were issued restraining the Respondents jointly and severally from trespassing, vandalizing, demolishing and generally interfering with the Petitioner's ownership, rights, use and occupation of the property. That further vide a ruling delivered on the April 25, 2024 whereby all parties were well presented, the Honourable Judge ruled that the Application is meritorious and further granted conservatory orders in the nature of an injunction for six months with regards to the said property. That the Respondents were fully aware of the effective interim orders to the effect that they were not to interfere with or demolish or destroy the Petitioner's property until the application was determined and despite having knowledge of the existence of the interim orders, the Respondents on May 5, 2024 went further to demolish and destroy my property by disobeying the court orders that were put in place.
 4. That due to the said demolition, he has lost is only source of income and have faced public humiliation by being labelled a land grabber for a property that legitimately acquired. Further to this, damages have been caused to individuals as a result of the Respondents' negligence since due to the demolition, people were harmed during the process and some even died. That he has suffered a huge loss in terms



- of income from the developments on the land. I have also incurred costs of hiring security to guard the property as threats of demolition were rampant as well as costs of assessing the value of the property and the loss of business occasioned by the Respondents since the property had a remainder of 45 years emanating from the lease of the property and by demolishing the same, the Petitioner is now left stranded as the buildings on his property do not exist anymore because of the acts of the Respondent.
5. The Applicants stated that the Respondents' action of demolishing their properties on the suit land despite the existence of court orders is contemptuous on the face of it and are therefore liable to compensate them in damages. Lastly, the Applicants contend that the actions of the Respondents' have stripped this Honourable Court of its dignity and it is imperative that contempt orders are imposed on the contemnor to restore this court's dignity and prevent any future attempts to disobey court orders.
 6. The Respondents in opposition filed grounds of opposition dated July 5, 2024 and a replying affidavit sworn on even date by Arch. Douglas Sasita Wekesa. The said Arg. Douglas Sasita Wekesa deposed that the Petitioners Notice of Motion is incurably incompetent and impotent as it purports to invoke the provisions the *Contempt of court Act*, 2016 which jurisdiction is non-existent after the said law was declared unconstitutional and stated that a Court cannot exercise a non-existent jurisdiction as purportedly purveyed by the Petitioners in the current Notice of Motion dated May 25, 2024 and the application should therefore be struck out with costs.
 7. The Respondents also stated that whereas the Petitioners in a similar application for contempt dated April 23, 2024 alleged that the suit property was demolished on April 20, 2024 in disobedience of this Court's orders of February 14, 2024 while the same Petitioners in the present application for contempt allege that the suit property herein was demolished on May 5, 2024 in disobedience of the Court orders of February 14, 2024. They stated that the two factual versions of the contempt application render the present application tenuous, lame duck and hollow and a fishing expedition which cannot be the basis of granting the orders sought herein.
 8. They stated that the Respondents herein have obeyed the order of this Court and have not breached the same as alleged generally without any specificity by the Petitioners or at all. They stated that that in the absence of evidentiary material, the Respondents' are unable to respond to the bare, hearsay allegations made against the them. They stated that the Petitioners have not demonstrated non-compliance of this Court's orders on their part to warrant the grant of the orders sought. They also stated that the bare assertion of demolition without identifying the person who allegedly undertook the demolition cannot be the basis of holding the Respondents in contempt of the orders of this Court.
 9. It was deposed that the Petitioner ought to appreciate in totality the activities, operations and preparations made towards the events of June 1, 2024 which was a national holiday marking the commemoration of Madaraka Day which took place at the Masinde Muliro Kanduyi-Stadium and the import of Article 6 of the *Constitution*, 2010 as it distinguishes the County Government from the National Government. The Defendant's/Respondents stated that the organization of such a national function is the mandate of the National Government as provided for under the *Public Holidays Act* Cap 110 Laws of Kenya and which is a function organized by the Ministry of Interior and Co-ordination of the National Government in collaboration with other National Government ministries and agencies. They contend that there have been multiple activities that the National Government has undertaken which is outside the oversight and mandate of the County Government of Bungoma.
 10. It was the Respondents' contention that in the absence of a prayer for first making a finding of disobedience of the specified Orders of the court, it is an exercise in futility to issue summons against the Respondents to appear before this Court as sought in the present application. It is further deposed that the 2nd, 3rd and 4th Defendant/Respondents are legal phantoms who cannot sue or be sued and



further that they are incapable of disobeying, breaching any orders of this Court and cannot therefore be held in contempt. It was argued that the Plaintiff/Petitioners have not established the threshold for the grant of the orders sought.

11. When this application came up for directions, the parties agreed to have the same canvassed by way of written submissions.

Petitioners Written Submissions

12. The Petitioners filed submissions dated June 25, 2024 where they submitted on two issues. In the first issue is whether the Respondents should be held liable for contempt of court orders. On that issue, it was submitted that the Respondents have always demonstrated disrespect to the Court and have been malicious and deliberate in disobeying the orders of the court. The Applicant submitted that despite the Respondents being aware of the orders of this Court issued on both the 14th February and April 25, 2024, the Respondents deliberately and maliciously disobeyed the same.
13. The Plaintiff/Petitioners in support of their argument submitted that their application is proper and referred to the definition of contempt of Court as defined in the *Black's Law Dictionary* 9th Edition and the Provisions of Order 40 Rule 3 of the *Civil Procedure Rules, 2010*. It was also submitted that the mere fact that the Defendant/Respondents have filed a notice of appeal against the orders of this Court does not justify their contemptuous actions. Reliance was placed in the case of; *Hadkinson v Hadkinson* 1952 2ALL ER 56, *Republic v County Chief Officer, Finance and Economic Planning, Nairobi City County Ex Parte Stanley Muturi, Republic v Ahmad Abolfathi Mohammed 7 Another* (2018)Eklr, *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* (2005) 1KLR 828 and *Mutitika v Baharini Farm Limited* (1985) KLR 229,234.
14. The Petitioner further submitted that they had met the standard of proof as required in contempt proceedings. It was also argued that Courts do not grant orders in vain and that such orders must be obeyed and that contempt proceedings are designed to safeguard the rule of law which is fundamental in the administration of justice in any democratic state.
15. On the issue of costs, it was submitted that the Respondents ought to bear the same for having blatantly disobeyed the orders of the Court which is the subject of this application.

Respondents Written Submissions.

16. The Respondents on the other hand filed submissions dated 5th July, 2024 and submitted that the present Notice of Motion herein is brought under the *Contempt of Court Act, 2016*. They submitted that the *Contempt of Court Act, 2016*, was declared unconstitutional by the High Court in *Kenya Human Rights Commission v Attorney General & another* [2018] Eklr. They submitted that the court in that case held as follows;
17. "a declaration is hereby issued that the entire *contempt of court Act* No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the the *Constitution* and encroaches on the independence of the Judiciary..."
18. It was argued that the *Contempt of Court Act, 2016* having been declared unconstitutional cannot anchor the contempt application as purported in the Notice of Motion herein. It was the Respondents submission that the Court is thus improperly moved and lacks jurisdiction to hear and determine the present application.
19. The Respondents further submitted that the provisions cited by the Petitioners were inapplicable and that the suit herein was instituted by way of a constitutional but failed to provide the specific provisions



of the the Constitution breached, violated and or threatened. The Respondents relied on the following cases; John Muthui & 19 others v County Government of Kitui & 7 others [2020] eKLR, Hamdia Yaroj Shek Nuri v Faith Tumaini Kombe & 2 others [2019] eKLR, Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR. It was argued that the jurisdiction of this Court flows from either the the Constitution or the legislation or both and that this Court can only exercise jurisdiction as donated by the the Constitution or any other written law.

20. It was further argued that the Notice of Motion under review is incurably defective, incompetent and for striking out with costs to the Respondents for being supported by an Affidavit sworn by a person without authority (Rose Nandako Namianya). Reliance was placed in the case of; Ephraim Mbae & 2 others v Gilbert Kabeere M'mbijiwe & 2 others (2013) eKLR, Savala & another v Ndanyi (Environment and Land Case Civil Suit 248 of 2021) [2022] KEELC 2536 (KLR) (5 July 2022) (Ruling), Ndungu Mugoya & 473 others v Stephen Wangombe & 9 others [2005] eKLR.
21. On whether the Petitioner had established that the Respondents failed to comply with the Court orders and should therefore be cited for contempt, the Respondents referred to Section 107(1) of the Evidence Act which requires that he who alleges must prove. It was the Respondents' submission that in Githaiga & 5 Others v Kiru Tea Factory Company LTD (2023) eKLR, the court held that contempt proceedings being quasi-criminal proceedings require a higher standard than that required in civil claims. It was also submitted that the statements in paragraph 6 and 7 of the supporting affidavit to the application do not meet the threshold for the grant of the orders sought. They further submitted that the Petitioners have plainly failed to prove that the Respondents disobeyed the orders of this court and that the allegations in the application are mere speculations. It was also submitted that the compensation sought which is special damages, though pleaded, has not been strictly proved. The Respondents referred the court to the following cases; Mbui & another v Mbui (Environment & Land Case 154 of 2017) [2022/ KEELC 2203 (KLR) (27 May 2022) (Ruling), Samuel M. N. Mweru & others v National Land Commission & 2 others [2020] eKLR and James Mumiu Mucheru v National Bank of Kenya Ltd [2019/ eKLR In conclusion, the Respondents urged the Court to dismiss the application with costs.

Analysis and Determination.

22. I Have considered the application, the supporting affidavit, the Replying Affidavits and the annexures thereto, the submissions and applicable law and in my view, the following issues arise for this court's determination:
 - a. Whether the application is proper before this court?
 - b. Whether the Respondents are in contempt of the orders of the court dated February 5, 2024 and April 25, 2024 respectively?
 - c. Who bears the costs?

Whether the application is proper before this court.

23. The Respondent contend that the Contempt of Court Act, 2016 was declared unconstitutional and therefore being a non-existent law, it cannot anchor the present Notice of Motion application for contempt of court application and that the same is out for striking for invoking non-existent provisions of the law.



24. Indeed, the *Contempt of Court Act*, 2016 was declared unconstitutional and as such, the applicable law reverted to Section 5 of the *Judicature Act* as the law under which contempt proceedings can be initiated. The said section provides as follows:

“(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 the subordinate courts.”

25. The procedure for an application of this nature under the *English Civil Procedure Rules* is for a party to file an Application Notice (Rule 23.1) where the Petitioner intimate his/her intention to seek for a court order. In our jurisdiction and in my considered view, an Application Notice and what we refer to in our jurisdiction as a Notice of Motion serves the same purpose. Having expressed myself as such and considering the two options, this court has to decide whether to consider the English Rule which leads to procedural technicality, or walk down the path of substantive justice through the lenses of Article 159 of our *Constitution* which have been invoked by the Applicants in the present application. It is trite Law that courts exist to do justice therefore I am inclined to take the option of substantive justice as opposed to procedural technicality since there is no demonstrable prejudice the Respondents would suffer.

Whether the Respondents are in contempt of the orders of this court dated 5th February, 2024 and 25th April, 2024.

26. The Petitioners/Applicants have sought an order that this court finds the Respondents in contempt of the injunctive orders issued by this court on February 5, 2024 and 25th April, 2024. This Honourable Court in its final orders issued on April 25, 2024 confirmed its Ex-parte injunction order restraining the Respondents jointly & severally, their agents, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, vandalising, demolishing and generally interfering with the Petitioner’s ownership, rights, use and occupation of the property known as Bungoma/Kanduyi/1 referred to as Wangamati Estates Limited pursuant to the Public Notice dated 31st January, 2024 pending hearing and determination of the Petition.

27. Order 40 Rule 3 of the *Civil Procedure Rules* prescribes the consequences of breach of injunctive orders as follows:

“Consequence of breach [Order 40, rule 3.]

In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”

28. In the case of *Econet Wireless Kenya Limited v Minister for Information and Communication of Kenya Authority* [2005] eKLR Hon Justice Ibrahim (as he then was) stated as follows: -

“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. (emphasis)

29. It is pertinent to also point out that the burden of proof with respect to contempt of court is higher than on a balance of probabilities. In the case of *Refrigerator & Kitchen Utensils Ltd v Gulabchand Popatial Shah & Others* Civil Appln. No. 39 Of 1990, the Court of Appeal, while approving the standard of proof in contempt cases as set out in the case of *Gatharia Mitika & Others v Babrain Farm Ltd*, Civ. Appln.No.24 of 1995, held that in cases of alleged contempt, the breach for which the contemnor is cited must not only be precisely defined but proven to a standard which is higher than proof on a balance of probabilities but not as high as proof beyond a reasonable doubt. This is because, as already stated, the charge of contempt of Court is an offence of criminal character and a party may lose his liberty if found guilty.
30. In *Gatharia K. Mutikika v Babarini Farm Ltd* [1985] KLR 227 it was held as follows:-
- “...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 part 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 or 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.” (own emphasis)
31. In the light of the gravity of the personal consequences that would ordinarily flow from a finding of contempt, the key elements to prove in a matter of contempt is knowledge of the orders of the court and establishment of the alleged contravention of the orders of the court by the contemnor. 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.....”
32. The Appellate Court has also thrown its weight and held that it is sufficient to prove that the advocate of the alleged contemnor was present in court when such orders were made. This was the decision in; *Shimmers Plaza Limited v National Bank of Kenya* (2015) eKLR where the court 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.”
33. It is clear from the foregoing that before citing a party for contempt, I must satisfy myself beyond any shadow of doubt that the Respondents and/or their employees or agents willfully disobeyed the order



of February 5, 2024 and April 25, 2024. In this case, there can be no doubt that the 1st, 2nd, 3rd and 6th Respondents were well aware of the Orders of the Court issued on February 5, 2024 and April 25, 2024. Counsel on record representing the 1st, 2nd, 3rd and 6th Respondents i.e Mr. Wesonga appearing with Mr. Wekesa and Mr. Wangila Masinde were all present the said orders were issued. As for the 4th and 5th Respondents, they were not represented during the said ruling and there is no proof that they were served with the said orders and as such, they cannot be found to be in contempt. The issue that now remains for determination is whether the Petitioners have established that the Respondents actually contravened the orders of this court and if the answer is in the affirmative, whether the same was done willfully and intentionally. In *Mahinderjit Singh Bitta v Union Of India & Others* 1a No 100 Of 2010 the Supreme Court of India stated as follows: -

“In exercise of its contempt jurisdiction the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution (own emphasis)

34. In this application, the Petitioners have annexed photographs to its Supporting Affidavit showing the alleged acts of contempt by the Respondent’s agents. These photographs, however, do not indicate the time and date taken but are said to have been taken in the wee hours of May 5, 2024. The images further do not show whether the demolished structures are on the disputed land or another property all together. Again, the machinery used to carry out the said demolition/destruction have not been properly identified or linked to the Respondents by way of motor vehicle registration search or any other recognized mode of identification. The Petitioners have not also disclosed the identity of the individuals alleged to have conducted the demolition/destruction complained of and their relation to the Respondents herein. Moreover, with regard to the 3rd Respondent, it is not clear who the Petitioners seeks to commit to civil jail for contempt as the said Respondent is the County Government of Bungoma which is a body corporate and therefore, cannot be cited for contempt.
35. Further, this Court is of the considered view that in support of their application, the Petitioners should have procured the services of a surveyor to prepare a report on the change of the status of the suit property after the alleged demolition of the structures. It is only through such a report that this court could be persuaded that the demolitions of the structures were in respect of the suit property and not another property all together. The Petitioners seem to have diverted their minds into carrying out a valuation of the suit property in a bid to establish the damage occasioned which in my view is immaterial at this stage and indeed seek to introduce fresh evidence through an application.
36. In the present circumstances, I find that the Petitioners/Applicants have failed to discharge their burden of proof as required in law. For the above given reasons, the application must therefore fail.
37. The upshot of my finding is that the Notice of Motion application dated 25th day of May, 2024 is devoid of merit and the same is hereby dismissed each party to bear their own costs.
38. It is so ordered.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF OCTOBER, 2024.

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HON.E.C CHERONO

ELC JUDGE



In the presence of;

1. Mr. Wangila for the Applicants/Petitioners
2. Mr. Wesonga for the 1st, 2nd, 3rd & 6th Respondents.
3. Bett C/A

