



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okwach & 4 others v Opolo (Environment & Land Case  
428 of 2017) [2023] KEELC 16729 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16729 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 428 OF 2017**

**MN KULLOW, J  
MARCH 28, 2023**

**BETWEEN**

**DAVID ONYANGO OKWACH ..... 1<sup>ST</sup> PLAINTIFF  
EVAN OKWACH ..... 2<sup>ND</sup> PLAINTIFF  
MAURICE OKWACH ..... 3<sup>RD</sup> PLAINTIFF  
FRANCIS FREDRICK OKWACH ..... 4<sup>TH</sup> PLAINTIFF  
JANE OKWACH ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**ANDERICUS OTUOMA OPOLO ..... DEFENDANT**

**RULING**

1. By notice of motion dated December 15, 2020, the plaintiffs/applicants sought for the following orders: -
  - a. An order of committal to civil jail be made against the defendant/ respondent one Andericus Otuoma Opolo to prison for such period as this Honorable Court may deem fit and just in that he, the said Andericus Otuoma Opolo disobeyed the Judgment and Decree made herein by this Honorable Court on the July 3, 2019.
  - b. The cost of this Application be provided for.
2. The application is based on the 8 grounds on its face and on the 1<sup>st</sup> Applicant's Supporting Affidavit sworn on December 15, 2020. He avers that that he is the registered and lawful owner of all that parcel of land No. Suba/ West Kubia/ 4671. That the instant suit was heard and finally determined by the court vide its Judgment delivered on the July 3, 2019. That the said judgment was duly served upon the Respondent in the company of the Area Chief.



3. It is his claim that despite service of the said Judgment and decree upon the Defendant and numerous visits and subsequent demands from the Area Chief; he has refused, neglected and/or ignored to comply with the said orders of the court. He annexed a copy of the title deed of the suit land, a copy of the judgment and decree, an Affidavit of Service sworn by Peter Simba and a copy of letter dated September 16, 2020.
4. That the said action by the Defendant of willful disobedience of the court orders is aimed at undermining the dignity and authority of the courts. He thus urged the court to allow the Application in the interest of justice.
5. The application was not opposed. The Respondent despite being served with instant Application failed to respond to the allegations leveled against him and/or give an explanation thereto.
6. The Application was disposed by way of written submissions. However, I do note that only the Applicants filed their submissions, which I have read and taken into account in arriving at my decision as hereunder;

### **Analysis and Determination**

7. The sole issue arising for determination herein is whether the Application dated December 15, 2020 is merited on account of contempt of the court orders issued on the July 3, 2019.
8. Contempt is defined in the Black's Law Dictionary as;  

“Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”
9. In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another*, Ibrahim J (as he then was) in addressing the issue on contempt made the following sentiments: -  

“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 or in respect of whom, an order is made by 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 void.”
10. The Applicants contend that even though the Respondent was not present in court during the delivery of the judgement in the matter, a copy of the said judgment and decree was duly served upon him with the assistance of the Area Chief and an Affidavit of Service filed to that effect. It is further his claim that the Respondent has been fully aware of the existence and the terms and/or contents of the judgment and decree thereof, the same having been served upon him but has willfully and blatantly disregarded and disobeyed the said orders of the court.
11. The Respondent despite being served with the instant Application, failed to respond and/or give a sufficient explanation for his continued non-compliance/ disobedience of the valid court orders. The evidence adduced by the applicant thus remains uncontroverted.



12. The elements to be proved in contempt proceedings were discussed in the South African case of *Kristen Carla Burchell vs Barry Grant Burchell* where it was held 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.
- Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred...
13. I have looked at the copy of the Affidavit of Service sworn by Peter Simba and marked “DOO – 2” on the November 19, 2020 and I note that the process server duly outlined how he effected service of the Judgment and Decree dated July 3, 2019, which service has not been challenged. This court therefore find that the Respondent was fully aware of the existence and terms of the orders issued by the court as contained on the Decree and his non-compliance with the same amounts to willful and intentional disobedience.
14. The Applicants have further demonstrated the effect of the Respondent’s disobedience of the judgment and decree issued on the July 3, 2019 and the irreparable loss occasioned to him as both the decree holder and the registered proprietor of the suit land by the respondent’s interference and continued trespass.
15. From the foregoing, it is clear that that the Respondent has not complied with the judgment and decree of the court issued on July 3, 2019. However, at the center of the instant Application is whether the said non-compliance warrants the committal of the Respondent to civil jail. Committal to civil jail involves the limitation of a person’s liberty and even though the law allows for a person’s liberty to be curtailed in specified situations, due process must be followed. Any such orders of arrest and detention must bear in mind the fundamental right to liberty and freedom under articles 28 and 29 of *the Constitution*. The court has to be very cautious before denying someone’s liberty.
16. This court appreciates the higher burden of proof required in civil contempt to warrant the committal to civil jail as sought by the Applicant herein. The question that therefore follows is whether the Applicants have discharged the said burden to warrant the grant of the orders sought. The Supreme Court of *Indian Airports Employees Union v Ranjan Catterjee & Another* [AIR 1999 SC 880: 1999(2) SCC:537 in addressing the issue of civil contempt held that: -
- “.....in order to amount to “civil contempt” disobedience must be willful. If disobedience is based on the interpretation of court’s order, notification and other relevant documents, it does not amount to willful disobedience.”
17. In view of the above, I find that the applicant has failed to satisfactorily prove that there was indeed contempt of court orders to the required standard to warrant the committal of the respondent to civil jail.



## **Conclusion**

18. In the premises, I accordingly find that the application dated May 26, 2022 is not merited and the same is hereby dismissed with no orders as to costs. The respondent is however directed to strictly comply with the orders of the court issued on the July 3, 2019 forthwith. It is so ordered!

**DATED, SIGNED and DELIVERED** Electronically via Email on **28<sup>TH</sup> day of MARCH, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

**Ruling delivered in the presence of: -**

Court Assistant - Tom Maurice/ Victor

