



REPUBLIC OF KENYA



**Oltukai Mara Limited v Ole Tuya & 7 others (Commercial Case E371 of 2022)  
[2023] KEHC 1890 (KLR) (Commercial and Tax) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1890 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E371 OF 2022  
DO CHEPKWONY, J  
FEBRUARY 28, 2023**

**BETWEEN**

**OLTUKAI MARA LIMITED ..... PLAINTIFF**

**AND**

**SAMSON OLE TUYA ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL OLE MPOA ..... 2<sup>ND</sup> DEFENDANT**

**MAKOI OLE KYRIONGOT ..... 3<sup>RD</sup> DEFENDANT**

**STANLEY OLE LENJIR ..... 4<sup>TH</sup> DEFENDANT**

**ROBERT OLE TIPIS ..... 5<sup>TH</sup> DEFENDANT**

**NOAH OLE SAYAGIE ..... 6<sup>TH</sup> DEFENDANT**

**SAMSON OLE LETURA ..... 7<sup>TH</sup> DEFENDANT**

**PAUL OLE LAPORE ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. On November 24, 2022, this court delivered a ruling in this case and issued the following orders:
  - a. That pending the hearing and determination of the intended arbitral proceedings between the parties herein, or pending further orders of the arbitral tribunal, a conservatory order for the maintenance of status quo presently prevailing on the suit property known as LR No14898 (IR 48066) be and is hereby issued.



- b. For the expeditious conclusion of the dispute, the parties are hereby directed to agree on the arbitration within 21 days from the date hereof failure to which either party can write to the Chairman Chartered Institution of Arbitrators (Kenya Branch) for nomination of an arbitrator.
  - c. Each party shall bear its own costs for this application.
2. Upon the delivery of this ruling, the applicant, Oltukai Mara Limited filed the application dated December 6, 2022 which is the subject of this ruling. The application seeks the following orders:
- a. Spent;
  - b. The honorable court be pleased to hold the respondents and/or their legal representatives in contempt of court and be committed to jail and detained in prison for a period of six (6) months or such period as the court may deem fit for their willful and mutinous disobedience of the orders issued by the Hon Lady Justice Dorah Chepkwony on November 24, 2022;
  - c. The following state officers to enforce and ensure compliance with the court orders of this court:
    - i. The Inspector General of Police, Mr Japheth Koome;
    - ii. The Regional Commissioner, Rift Valley, Mr Maalim Mohammed;
    - iii. The County Commissioner, Narok County, Mr Isaac Masinde;
    - iv. The Narok County Police Commander;
    - v. Narok West Sub County Police Commander (OCPD) Mulot Police Station;
    - vi. Officer in Charge of Station (OCS), Mulot Police Station;
    - vii. Officer in Charge of Police Post, Nkoilale Police Post;
  - d. Costs of this application be borne by the respondents and/or their legal representatives.
3. The application is premised on the grounds set out on its face and further supported by the affidavit of Godfrey Mwirigi, the applicants Operations Manager sworn on December 6, 2022.
4. The application is opposed through the replying affidavit of Samson Ole Tuya, the 1<sup>st</sup> respondent herein sworn on January 19, 2023 pursuant to court's leave issued on January 25, 2023, and by the 1<sup>st</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents *vide* affidavit sworn on February 9, 2023.
5. The applicant filed a supplementary affidavit sworn on February 8, 2023 in rebuttal of the averments by the respondents.

### **Applicant's Case**

6. The applicant submitted that the respondents have willfully disobeyed the court orders issued on November 24, 2022 with respect to LR No 14898 (IR 48066) ("subject property"). It is the applicants' case that despite the issuance of the court orders on November 24, 2022, the respondents are still



disobeying the court orders and are still in invasion and occupation of the subject property thus hindering the applicant from resuming its operations. The applicant avers in the resultant. That it has suffered losses due to cancellation from its guests. It adds that the respondents' continuous occupation and possession of the premises is gross interference and deliberate disregard of the court orders. On that basis, the applicant seeks to have the respondents cited for contempt and their committal to civil jail.

### **The Respondent's Case**

7. On the other hand, the respondents submitted that the intention of the applicant is to malign the character of the respondents some of whom are deceased while others are of old age. They maintain that they are not in contempt of court orders issued on November 24, 2022 and in any event, the applicant has not demonstrated how they have willfully disobeyed the court orders. They crave for the application to be dismissed with costs.
8. The parties filed their submissions in respect to the application as per the court's directions. In its submissions, the applicant starts by defining 'contempt of court' as per the *Black Law Dictionary* as being "conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable by fine or imprisonment".
9. The applicant has cited various authorities and reiterates that the respondents should be punished for disobeying the court orders. It is argued that this being a second application for contempt of court, the respondents are aware of the court orders issued on November 24, 2022 but have chosen to willfully disobey them by failing to vacate the premises. The applicant has added that the subject property is still being manned by hostile Maasai Morans on the instructions of the respondent thereby causing applicant losses which is a mockery of the court orders.
10. The applicant also maintains that it requires court intervention to evict the respondents who are trespassers on the subject property and it requires the assistance of the office of the Inspector General of Police to effect the eviction. The applicant disputes the claim that some of the respondents are deceased since the respondents have not availed any evidence confirming such deaths.
11. In their submissions, the 1<sup>st</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents admit they are aware of the court orders of November 24, 2022 as they were in court during the delivery of the ruling. However, they hold that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> respondents are not aware of the court orders since they are deceased and the court orders ought to have been served upon their respective estates or their legal representatives. That it would be unfair for them to be held in contempt of court orders they were not aware of. In support of their arguments, they have cited various authorities which I have taken note of and urge the court to dismiss the application.

### **Analysis and Determination**

12. I have considered the application, the response, submissions and authorities cited. The only issue for consideration is whether the application for contempt is merited. However, I wish to state that in my ruling delivered on November 24, 2022 I gave a detailed analysis of the contempt of court proceedings and standard of proof required in an application as the one at hand which I shall not rehash. In my previous ruling I made a conclusion that the applicant in the application dated October 13, 2022 had not demonstrated that the respondents had willfully disobeyed the court orders issued on September 26, 2022 since the respondents did not have knowledge of the said court orders.
13. In this particular instance, the 1<sup>st</sup>, 5<sup>th</sup>, and 7<sup>th</sup> respondents agree that the orders in question were issued in the presence of their counsel. The 1<sup>st</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents however alleged that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> respondents are all deceased and therefore service of the court orders ought to have been effected



upon their estates. It would serve repetition to deliberate on the issue since in my ruling of November 24, 2022 I held as follows,

“Lastly, the respondents describe the suit as fatally defective as against the 2nd, 3rd, 4th, 6th and 8th respondents since they are deceased. However, no death certificates were annexed in support of those allegations and the court cannot delve further on that issue. However, the court agrees and reiterates that a suit brought against a deceased defendant in the name in which the defendant carries on business is a nullity from its inception and no valid orders can be made against a deceased defendant unless it is made against his estate through the legal representatives.”

14. I reiterate this position that there is no evidence adduced that some of the respondents are deceased, there is no death certificate provided, proof of legal representatives of any of the respondents, proof of substitution of any of the respondents and therefore as stated in the earlier ruling the court cannot delve on the issue any further until such proof is availed. It is upon the estate of the alleged deceased, respondents to step on their foot and in any event, parties are at liberty to put the record straight while proceeding before the arbitrator.

15. It is however undisputed that this court issued orders on November 24, 2022 which were not issued in vain but they must be obeyed. The Court of Appeal in *Sbimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR held the following on contempt proceedings;

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.....

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the *Constitution*. The dignity, and authority of the court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

16. In this case, the court orders are yet being trashed on although it is unclear whether the respondents have disobeyed the orders personally or through their agents. The applicant has stated that the subject property are being manned by the respondents’ Maasai Morans which the respondents have not disputed. The 1<sup>st</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents however seem to cast the disobedience to agents and estate of the allegedly deceased respondents adding that those representatives were not served. This court has however not lost sight to argument by the applicant that it has been unable to personally trace the respondents. However, the orders cannot be disobeyed by proxies who allege no notice of the orders. The court orders of November 24, 2022 were clear that conservatory orders were issued for the maintenance of status quo presently prevailing on the suit property known as LR No 14898 (IR 48066) pending the hearing and determination of the intended arbitral proceedings. Those orders remain in force in the absence of an appeal against them or application for review to alter the court orders.

17. Since all the parties actively participating in this suit have knowledge of the orders delivered on November 24, 2022 any party in disobedience thereof should be deemed to be in contempt. However, the applicant has not stated that the respondents are personally forcefully occupying the premises but states that they are doing so through their Morans. It would therefore be impractical without clear



connection between the Morans and the respondents, to commit the respondents in civil jail. But at all material times it must be remembered that court orders ought to be obeyed.

18. In view of my discussion, I find that the application with merit having established there is non-compliance with the court orders issued on November 24, 2022. Therefore, the application dated December 6, 2022 is hereby allowed in part, in the following terms:
- a. That the applicant affixes the orders issued on November 24, 2022 in conspicuous points in the subject premises for any person claiming through the respondents to see
  - b. The following state officers to enforce and ensure compliance with the court orders of this court issued on November 24, 2022;
    - i. The Inspector General of Police, Mr Japheth Koome;
    - ii. The Regional Commissioner, Rift Valley, Mr Maalim Mohammed;
    - iii. The County Commissioner, Narok County, Mr Isaac Masinde;
    - iv. The Narok County Police Commander;
    - v. Narok West Sub County Police Commander (OCPD) Mulot Police Station;
    - vi. Officer in Charge of Station (OCS), Mulot Police Station;
    - vii. Officer in Charge of Police Post, Nkoilale Police Post;
  - c. Costs of this application be borne by the respondents.

19 It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY , 2023.**

**D. O. CHEPKWONY**

**JUDGE**

