



REPUBLIC OF KENYA



KENYA LAW
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**Odhiambo v Mfangano Division Acc & 2 others (Judicial Review
1 of 2022) [2025] KEELC 2951 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2951 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
JUDICIAL REVIEW 1 OF 2022
FO NYAGAKA, J
MARCH 25, 2025**

BETWEEN

PATRICK OCHIENG ODHIAMBO APPLICANT

AND

MFANGANO DIVISION ACC 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

SAMWEL OKEYO OTINDO 3RD RESPONDENT

RULING

1. The parties herein moved this Court for the second time over the application dated 29th April 2019. The application had been brought by the Ex Parte Applicant on 30th April 2019. It was brought under Order 53 Rule 1(4) as read with Order 40 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A and 3A of the *Civil Procedure Act*, the Plaintiff moved this Court for the following orders:-
 1. ...Spent
 2. That the Honourable Court be pleased to order for the detention in prison of Samuel Okeyo Otindo, the interested party herein for disobedience of Court Order for stay granted by this Hon. Court on the 27th day of September, 2018.
 3. That the Honourable Court be pleased to order for the attachment of properties of Samuel Okay Otindo for compensation of damage caused to the applicant's property and for breach of stay order this Honourable Court.
 4. That upon determination of this application, the Honourable Court be pleased to issue an order of arrest directed to the officer in charge of Mfangano Police Station to arrest and bring before Court Samuel Okeyo Otindo to be committed to jail for contempt of Court order dated 27th September 2018.



5. That the Honorable Court be pleased to award costs to the applicant.
2. The application was supported by the grounds set out in its body. Simply they were that on 27th September 2018. The Court issued an order of stay in respect of the Assistant Commissioners Land Commissioner Award. It therefore barred the Interested Parties from carrying out activities on the disputed land, but the alleged contemnor went ahead to cut down indigenous trees and burn charcoal for commercial purposes and unlawfully tilled in the disputed land during the pendency of the order. The order was duly served upon the Interested Party on 15th October 2018, but he decided to disobey the same. It was in the interest of justice that orders of the court be obeyed. The application was brought without undue delay, malice or prejudice.
3. The application was supported by the Affidavit of the Plaintiff Ochieng Odhiambo sworn on 29th April 2019. He reiterated the contents of the grounds. He added that on the 25th of September 2018, he filed for Judicial Review application by praying for the quashing of the decision of the Assistant Commissioner who awarded the Interested Party the Applicant's father's land. The order was properly served on all the respondents, including the alleged contemnor. He referred to an Affidavit of Service sworn on 16th October 2018 which was marked as annexure POO1.
4. Further, the Interested Party disobeyed the court order and destroyed the ecosystem. He did so in the company of his family members whom he named in the Affidavit. He attached and marked POO2a, b, c, d and e being copies of a letter dated 18th March 2018 issued by the Assistant Chief, the report by the Suba South Forest Officer and photographs of the site. Further, The County agricultural officer and the sub-county forest officer of Suba South visited the land and confirmed the destruction of the indigenous forests and the burning of the charcoal. He annexed as P.O.O 3a, b, c, d, e, and f the Agricultural Officer's Report. He prayed for the application to be allowed.
5. The Interested Party filed a Replying Affidavit, sworn on 31st July 2019, on 14th August 2019. He stated that he had not disobeyed their court order and that the Notice of Motion citing him for contempt had been overtaken by events since some of his family members, namely, Masanga Okwach, Masanga Otindo, Moi Okwach, Mzee Oganyo, Janes Odhiambo, and Devis Masanga destroyed a farm by cutting down trees, burning charcoal and clearing the forests on Mfangano South Location. He stated that he had attached copies of the crop damage and compensation report but he did not. He added that the land destroyed was not the land in dispute, that there was no survey report to authenticate the allegations of contempt that had been levelled against him. The allegations and the affidavit relating to the application herein were false and misleading.

Analysis And Determination

6. The record shows that the application was canvassed before my brother Judge Ongondo GMA who delivered a ruling on 25th July 2023. In the ruling he found that the application was merited. He issued a notice to show cause for the Interested Party to attend Court and to be punished for contempt of court by committal to jail and also for him to compensate the Applicant the sum of Kenya shillings 271,000/= as found in the assessment report by the Kenya Forest Service, which report was dated 25th March 2019. He also awarded the costs of the application.
7. Thus, as things stand, the application herein is fully determined. I have nothing else useful to add or subtract. To be clear and plain, as to the merits of the application the issue is res judicata. If the parties thought that this Court could vary the orders or arrive at a different decision, they are mistaken. The Court could have arrived at the same finding: a conviction of the Interested party for the contemptuous acts complained of by the Applicant.



8. I note something strange, from the record. Following the delivery of the Ruling by my brother judge, a Notice to Show Cause was issued 9th February 2024. It was fixed for 5th March 2024. Another one was issued and fixed for 5th May 2024, another one fixed for 10th June 2024. On all those occasions the Court indulged the contemnor and extended the Notice despite service. After that the Interested party changed advocates. Rather than filing a Notice of Change of Advocates as contemplated under Order 9 Rule 5 of the Civil Procedure Rules, the new counsel filed a Notice of Appointment of Advocates, yet the party had an advocate before. I find the appointment irregular and unprocedural. Whereas the party has the right to be represented by counsel of choice, he and the counsel ought to follow the law, otherwise they would be leading the nation into the jungle where no law applies. Rules of procedure ought to be followed. A Notice of Change of Advocates should be filed and served on all parties in order for the new counsel to be properly on record for the party.
9. Further, from the record, I note that after the Appointment of the new advocates the Interested Party purported to file, through the said new Advocates, two documents. One was an application dated 3rd October 2024 in which he alleged that the orders granted by the Court on 25th July 2023 were obtained ex parte and should be set aside. Even before I find that the application is improperly filed, I first note that it is wholly misleading. Even then, the party realized his mistake and withdrew the application on 08th October 2024. Then he sought leave of the court on the same date to file a Further Affidavit as had been sought in the Notice of Motion which was being withdrawn. The Court granted his wish to file the Affidavit in 14 days and serve. The ex parte applicant was granted leave to file a rejoinder within seven days of service of the Interested Party's Affidavit. The Court went on to add that the orders of 25th September 2018 be observed and the Notice to Show Cause be fixed for a hearing on 12th November 2024. Come the 12th of November 2024 the Interested Party moved the Court to the effect that there was no rejoinder, or any document served on them by the Ex Parte Applicant. He asked the court to allow the Ex Parte Applicant to serve him.
10. I wonder who was to serve who with a rejoinder. My understanding of the record was that earlier the Interested Party was the one who, on 8th October 2024 prayed for leave to file a Further Affidavit and the court allowed him to do so. This latter time he wished to be served! The Court fixed the matter for mention on 12/02/2025 and later fixed the Notice to Show Cause the same date.
11. But before the mention of 12th November 2024, the Interested Party also filed submissions dated 24th October 2024 in respect of the application dated 29th April 2019. The document having been filed through counsel who is not properly on record it is hereby struck out of the record.
12. That said, I am of the view that either the Interested Party is groping in darkness or has found a way of extending the abuse of the process of the court to the fullest. Thus, I am of the humble view that the notice to show cause issued by this court having not been complied with for the last four and half years, it is blatant demonstration that the contemnor is a person hell bent to continuously disobey not only the order complained of but the subsequent orders of the court. This cannot continue as long as the said contemnor is alive and with us and while the rule of law and the dignity of the Court subsist. The two opposite correlatives do not co-exist.
13. On 12th February 2025 the Interested Party insisted on proceeding with the application dated 29th April 2019. He wanted to file a Further Affidavit thereto, but the Court was of a different view and gave the ruling date of today hence this Ruling.
14. As is clear from the record, the Ruling of 25th July 2023 has never been set aside. Its orders should be given effect forthwith. The Order fi contemnor is therefore directed to present himself in person voluntarily before this court in person on 2nd April 2025 at 8:45 AM for mitigation and sentencing



over his conviction for contempt of court, and also to confirm that he shall have compensated the Applicant the sum of Kenya Shillings 271,000/= together with the interest at court rates (12%) per annum from the date the learned judge found him liable to pay the compensation to date, in default he be committed also to civil jail forthwith.

15. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 25TH DAY OF MARCH 2025

HON. DR. IUR NYAGAKA

JUDGE.

In the presence of

Osoro for the Applicant

