



**Mangala v Majani (Environment and Land Appeal 4 of 2019)  
[2023] KEELC 16944 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16944 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND APPEAL 4 OF 2019**

**FO NYAGAKA, J  
APRIL 27, 2023**

**BETWEEN**

**MICHAEL MANGALA ..... APPELLANT**

**AND**

**EVERLYNE NAMALWA MAJANI ..... RESPONDENT**

*(Being an Appeal arising out of the Ruling and Order of Hon C. M. Kesse (Principal Magistrate)  
in Kitale Chief Magistrate's Court ELC Case No. 16 of 2006 delivered on 3rd May 2019)*

**JUDGMENT**

**Background**

1. The genesis of the proceedings at the trial in Kitale CMC Land Case No 16 of 2006 was a decision of a sitting of the elders at the Central Division Land Dispute Tribunal (of the then Trans Nzoia District) in Claim No 023 of 2006. In its findings of January 11, 2006, the Tribunal declared that the Respondent was entitled to remain on a one (1) acre plot as shared by her late husband Patrick M Mello. The Tribunal found further that the Appellant was a dishonest Administrator whose actions leant toward favoring only one (1) side of his deceased brother's family.
2. Following the award forwarded before the trial court, parties were invited to appear on March 2, 2006 for the adoption of the award. Having confirmed that service of the date of adoption on February 22, 2006 was proper, since it had been effected by the court process server, one Archibald Wekesa, the Court adopted the award on that day. A resultant decree dated April 3, 2006 was drawn.
3. In compliance with the decree, one John M Maroa, District Surveyor Trans Nzoia District on June 5, 2006 confirmed that his office executed the court's orders on April 24, 2006.
4. In the meantime, the Appellant challenged the decision by filing judicial review proceedings in Kitale High Court Miscellaneous Civil Application No 28 of 2006. The parties appeared before Karanja J



- on April 28, 2006. The judge, after perusing the pleadings and hearing the Applicant, found, on April 28, 2006, that based on his admission before him at the hearing that the land was not his and he had no business on the suit land. The judge's finding was that the judicial review proceedings lacked merit and she accordingly dismissed the application.
5. Thereafter on May 2, 2007, the Respondent applied for execution by way of notice to show cause why the Appellant would not be evicted from the Respondent's land. On May 2, 2007 the Appellant was summoned to appear before the trial court on May 10, 2007 to explain why he should not be evicted from the Respondent's land.
  6. Upon hearing parties, the trial court issued an eviction order against the Appellant, his family, agents or servants or any other persons. It permitted the use of reasonable force with a view to the implementation of the eviction process. The order was dated May 14, 2007.
  7. Come January 15, 2008, the Respondent filed an Application on even date seeking to order the executive officer to execute the mutation, the land control board application and transfer forms on behalf of the Appellant, in compliance with the decree. After hearing both parties, the trial court on March 6, 2008 directed the executive officer to execute all the necessary documents to facilitate the transfer.
  8. It appears that the application, subdivision and transfer process was successful as the Respondent was ultimately issued with a title deed on all that parcel of land known as Waitaluk/Mabonde Block 13/1007 on June 7, 2012.
  9. For one reason or another, following the orders of March 6, 2008, there was a lull regarding the process. However, that came to an end on account of the Respondent's Application dated December 11, 2018 seeking to hold the Appellant in contempt of court and his committal to civil jail for a period of six (6) months, for disobedience of the court orders of April 3, 2006.
  10. The Application was supported by the grounds on its face and by the supporting Affidavit of the Respondent. She grounded it on the points that the Appellant was evicted on July 14, 2007 by the assistant chief from the suit land but returned to occupy a half-acre of the property.
  11. The Appellant filed a Replying Affidavit on December 18, 2018 and sworn on December 17, 2018. He opposed the Application on several grounds as follows. Firstly, that the Application improperly invoked the provisions of Order 40, Rule 3 (1) of the Civil Procedure Rules. Secondly, it was statute barred. Thirdly, it failed to disclose facts or give evidence entitling the court to issue the orders sought.
  12. Additionally, the Appellant denied placing Alex Kituyi, the deceased's son, on the half-acre plot. As such, he contended, he was not in occupation personally or through his assigns. He stated that he resided in Machungwa farm, some five (5) kilometers away from the suit land. Finally, the Appellant denied service of the eviction order. Citing that the court lacked jurisdiction to entertain the subject matter, the Appellant urged the trial court to dismiss the same with costs.
  13. The Application was argued on February 26, 2019 before the trial court. Learned Counsel for the Respondent Mr Wanyama gave a brief synopsis leading up to the Application. He relied on the contents of the Respondent's Application to submit that the Appellant's assignee, Alex Kituyi, was the son to the Respondent's deceased husband currently occupying the suit land. He accused Alex of occupying the suit land at the behest of the Appellant. He urged the trial court to punish the Appellant for disobeying lawful court orders.
  14. Learned Counsel for the Appellant Mr Nyamu wholly relied on the Appellant's Replying Affidavit. He maintained that the orders were neither served nor implemented as alleged. He observed that the



Appellant's Replying Affidavit was not responded to and thus unchallenged. He added that Section 4 of the *Limitation of Actions Act* barred the Application for want of time. It was further not clear when the contempt was committed. He challenged the title as invalid since no official search had been conducted. In view of the above, he urged the trial court to dismiss the Application since the Respondent had failed to discharge her burden of proof.

15. In his rejoinder, learned counsel Mr Wanyama submitted that a party was not mandatorily required to demonstrate service of the orders in contempt. Instead, the fact that the party was aware of the subsistence of the orders was sufficient. He urged the trial court to presume that the Respondent was aware of the orders complained of. He denied that the present Application fell within the parameters of Section 4 of the *Limitation of Actions Act*. He observed that the decree remained limitless and could be executed any time.
16. Continuing, learned Counsel maintained that it was the Appellant who introduced Alex Kituyi in the proceedings. However, Mr Nyamu objected and relied on paragraph seven (7) of the proceedings where the Respondent stated that Alex Kituyi was in occupation. Mr. Wanyama maintained that Kituyi was brought in by the Appellant. He continued that by dint of Section 25 of the *Land Act*, the title deed annexed was prima facie evidence that the Respondent owned the suit land.
17. After considering the Application, the grounds in support of it, the Affidavits, the annexures thereto and submissions, the trial court allowed the Application with costs. The trial magistrate found the Appellant guilty of contempt of court following the eviction order granted on May 14, 2007.

### **The Appeal**

18. Aggrieved by the decision, the Appellant filed his Memorandum of Appeal dated May 30, 2019 on May 31, 2019. He faulted the trial court for allowing that Application dated December 11, 2018 which he argued, besides being statute barred, invoked wrong provisions of the law. He decried the decision as erroneous since crucial evidence was not submitted before the trial court. He found that the magistrate erred since the court lacked jurisdiction. He maintained that not only was he not served with the eviction orders hence were never enforced but also that he did not stay on the suit land. He denied ever assigning anyone thereto to occupy the suit land. As a result, he urged that the decision arrived at was misdirected.
19. The Appellant prayed, in view of the foregoing, that the Appeal be allowed by setting aside the ruling of May 3, 2019 and that the same be substituted with an order dismissing with costs the Application dated December 11, 2018. He further prayed for costs of the Appeal.

### **Hearing Of The Appeal**

20. The Appeal was canvassed by way of written submissions. According to the Appellant, in his submissions dated December 6, 2022 and filed on that day, the Application was statute barred by virtue of Section 7 of the *Limitation of Actions Act*. He submitted that no evidence was placed before the trial court to demonstrate that the eviction order was served, the eviction took place and that the Appellant returned on the suit land. He noted that the accusations concerning Alex Kituyi were baseless. He added that the Application was incompetent as it relied on the wrong provisions of the law. Finally, he submitted that the trial court's decision was erroneous for failing to give reasons supporting the outcome.
21. On the part of the Respondent, it appears that she was not interested in participating in the proceedings of the Appeal. This is because as at the time of writing this ruling, she had not filed submissions, in spite of proper service.



## Analysis And Determination

22. I have considered the Appeal, the Appellant's written submissions, the relevant law, the facts at the trial (as the law requires me to) and the impugned decision and now render my decision. As a first appellate court, I remind myself that this Court will not normally interfere with the exercise of discretion unless exercised injudiciously. This has been stated in *Kiriisa -vs- Attorney General & another [1990 - 1994] EA 244*.
23. The impugned orders arose out of an Application seeking to find the Appellant guilty of contempt of court. Before delving on the issue, I remind the parties as to the rationale and relevance of contempt proceedings. By its nature, contempt seeks to punish an alleged contemnor for disobeying court orders. In conventional practice, the punishment is of a criminal nature since the contemnor, if found guilty, is denied his or her right to liberty by being committed to civil jail or paying a fine.
24. I borrow from the wisdom and exposition of the Mativo J (as he then was) in *Samuel MN Mweru & Others vs National Land Commission & 2 Others [2020] eKLR* where he expounded on this discourse as follows:

' I now address the question whether the applicants have established any basis for the orders sought to be granted. If courts are to perform their duties and functions effectively and remain true to the spirit which they are sacredly entrusted with, the dignity and authority of the courts has to be respected and protected at all costs. Otherwise the very cornerstone of our constitutional scheme will give way and with it will disappear the Rule of Law and a civilized life in the society. It is for this purpose that courts are entrusted with the extraordinary power of punishing those who indulge in acts whether inside or outside courts which tend to undermine their authority and bring them in disrepute and disrespect by scandalizing them and obstructing them from discharging their duties. When the court exercises this power, it does so to uphold the majesty of the law and of the administration of justice. The foundation of judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working the edifice of the judicial system gets eroded.

It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is 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 a 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.

It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors. The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.

It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has in general terms



received a constitutional ‘stamp of approval,’ since the Rule of Law - a founding value of the Constitution - ‘requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.’

25. From the above, it goes without saying that contempt of court proceedings and the orders subsequent thereto are essential and lie at the heart of the administration of justice. They advance the rule of law which, in Kenya, is one of the national values and principles as provided for under Article 10(2) of the Constitution. They ground the dignity of the Court. When that dignity is upheld by obedience to its orders the rule of law is enhanced and emboldened. This is because obedience leads to stability, certainty and the growth of a nation and its institutions.
26. The rule of law is a cardinal value a court is dutifully called upon to implement in upholding the sovereignty of the people of Kenya as enshrined in Article 1 of the Constitution. Vide Article 1 (3), the court, under the aegis of the judiciary, is delegated with such sovereign power and mandated to perform its functions in accordance with the Constitution. The court will, thus, not hesitate to punish severely a person disobeying its orders. I have noticed lately, and I am almost taking judicial notice of the fact that many a people in Kenya are keen to disobey the orders of the Court. It is a worry that the society of Kenya should ponder over and, while trying to understand the source of and stem out this ‘cancer’, mete out severe punishment to the disobedient. In this instance, this court will uphold the (effect of) the orders if it were to find that indeed the orders of eviction issued on May 10, 2017 were disobeyed by the Appellant.
27. Since the duty to uphold orders of the court is imposed on all courts, I find that where a party is of the view that the circumstances demonstrate an act of disobedience of a court order, the aggrieved party is at liberty to file an application for contempt of court, at the instance/court where the orders were issued that have been subsequently disobeyed. In my view, thus, the Application was properly filed before the trial court. And it is important for the parties to understand that orders of the court do not end by lapse of time. They can only lapse of the Court so orders or they serve their purpose, are for a specific period of time and it ends, are varied by setting aside or review or successfully appealed from.
28. Section 10 (3) of the Magistrate’s Court Act provides as follows:
  - (1) Subject to the provisions of any other law, the court shall have power to punish for contempt.
  - (2)
  - (3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of court or willful breach of an undertaking given to a court constitutes contempt of court.
  - (4) ,’ etc.
29. In an Application for contempt, a party is required to meet certain parameters in order be granted the orders. The principles were enunciated by the court in Samuel MN Mweru & Others vs National Land Commission & 2 others (Supra) thus:
  - (i) It is an established principle of law 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, but the Respondent could rebut this inference



by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:

'There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:

- (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; and
- (d) The defendant's conduct was deliberate'.

30. It must be remembered in case of subsequent breach of an order of court, service thereof is not necessarily paramount. Knowledge of the order is the all-important aspect. In other words, the Applicant does not have to demonstrate that he served the orders. All that has to be show is that the contemnor was aware of the orders he subsequently disobeyed. This was the holding of the Court of Appeal in [\*Shimmers Plaza Limited vs National Bank of Kenya Limited \[2015\] eKLR\*](#) where the Learned Justices held:

' 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.'

31. Similarly so, Lenaola J (as he then was) in [\*Basil Criticos vs Attorney General and 8 Others \[2012\] eKLR\*](#) pronounced himself as follows:'

' The law has changed and as it stands today knowledge supersedes personal service. Where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary.'

32. Turning to the ruling of the trial court, I observe with great disquietude that it simply stated that it had examined the pleadings and analyzed the parties' oral arguments. Having said that, the court then allowed the Application. With all due respect to the trial magistrate, I am at pains and agonized by the fact that no analysis and reasoning was given of the issues before the trail magistrate for the benefit of the parties concerned. This practice of decision making leaves a lot to be desired. One wonders: how did the trial magistrate arrive at the said decision without expressing its ratio decidendi?

33. Order 21, Rule 4 of the [\*Civil Procedure Rules\*](#) provides that judgments in defended suit shall contain a concise statement of the case, the points for determination, the decision thereto and the reasons for such decision. So, should be rulings made by courts. This position was rehashed by the Court of Appeal



in *Francis Barasa Lurare & another vs Denis Nyongesa Maloba [2020] eKLR* citing with approval the case of *Wamitu vs Kiarie (1982) KLR 481* which had held earlier as follows:

' In defended suits, the Judgment shall contain a concise statement of the case, points of determination, the decision thereon and the reason for such a decision as required by Order XX, rule 4 of the CPR (as it was then cited) and now Order 21 rule 4'.

34. In the Francis Barasa case (supra), their Lordships then went on to analyze the judgment of the superior court and held as that 'Our findings thereon is that since the succession proceedings filed by the appellants were defended by the respondent, the learned trial Judge was enjoined to ensure that in the concise statement of the case both the rival pleadings and the evidence in support thereto were addressed'
35. In the instant case, the trial court failed to furnish the points for determination (which needn't be in prose form but could be deciphered from the style of writing) and the reasons for such decision. Regrettably, I come to the conclusion that based on the mandatory nature of that provision, the decision arrived at by the trial court was made per incuriam, for three reasons. First, the provisions cited by the Applicant was not relevant yet the Court, in the quietude of lack of analysis of the issued before it found the application merited. Second, the ruling was on ignorance of Order 21 Rule 4 of the Civil Procedure Rules. The application before the Court was opposed, and in like manner as a suit the provisions applied to it. Third, the decision was made in ignorance of the above decision of the Court of Appeal. It is sad that justice, if at all, is dispensed in such a manner. For these reasons, and bestowed with discretion to re-evaluate the evidence and re-consider the issues before me as a first Appellant court, I now turn to the merits or demerits of the Application dated December 18, 2018.
36. The trial court needed to do more! Anyway, in determining the merits of the appeal, I now begin by firstly analyzing the Appellant's objection that the Application was statutorily barred. Section 4 of the *Limitation of Actions Act* provides as follows:

' An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent Order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due'.
37. Mathematically deducing, and looking at the Application objectively, I find that judgment was entered on March 2, 2006. Thereafter, the Respondent applied for execution by way of a notice to show cause on May 2, 2007. She obtained orders implementing the eviction process against the Appellant and/or his assigns on May 10, 2007. The present Application was then filed on December 11, 2018. Since time started running from May 2, 2007, I find that the Application was brought within eleven (11) years and did not thus breach the provisions of Section 4 of the Act. It was properly filed and was not statute barred. In any event, I have stated above that the lapse of time does not make orders of the Court stale. The law should be interpreted holistically. It is inconceivable and absurd that it should be expected of anyone in their right mind to remain in obedience to an order of the court for only twelve years, and that after that they are freed from such obedience. It would be foolhardy to do so: it would mean that all should return to barbarism. Obedience to the orders of the court should be for life in as much as the order is binding, just as obedience to the law of God is eternal. There is nothing like being saved by grace hence being freed from obedience of the Law (of God) as others believe and argue. So, it should be of a subsisting order in a functioning social order.



38. To succeed in an Application for contempt, an Applicant must prove the following:
- (i) The terms of the order were clear, unambiguous and were binding on the Respondent;
  - (ii) Knowledge of these terms by the Respondent;
  - (iii) The Respondent failed to comply with the terms of the order; and
  - (iv) The Respondent's conduct was deliberate.
39. On whether the terms of the order were unequivocal, unambiguous and binding on the Appellant, I find in the affirmative. On May 10, 2007, the trial court issued an eviction order against the Appellant, his family, agents or servants or any other persons bound by the order. Reasonable force was permitted with a view to implementation of the eviction process.
40. On whether the Appellant was aware of the orders in question, I take note that he was present when the orders were issued the trial court listened to rival parties' presentations before making its orders. As stated earlier, service of that order remained gratuitous. In any event eviction was carried out. And of the eviction, it was not carried out for the purpose of the judgment debtor to be away from the suit land for a season but forever. It is a self-defeating argument and non-sensical that a person evicted can claim to be unaware of the existence of such an order. I thus concluded that the Appellant was very much aware of the orders sought.
41. Whereas the court faults the trial Court for not giving a reasoned ruling, that should not bring rejoicing to the appellant that the appeal is merited: this Court must evaluate merits of the facts of the matter before the lower court and the law. Thus, did the Appellant deliberately or otherwise fail to comply with the said orders? It was stated by the Respondent before the trial court that the area assistant chief evicted the Appellant and/or his assigns on July 14, 2007 but he returned to occupy half-acre of her property.
42. Should this court take the Respondent's word as the gospel truth irrespective of the Appellant's vehement opposition? I think not. The Appellant denied that any eviction of either himself and/or his assigns took place. It was his position that he lived some five (5) kilometres away from the suit land. He further denied that he invited Alex Kituyi on the suit land. In his Replying Affidavit he stated that the said Alex Kituyi was a son to the deceased husband of the Respondent. This crucial fact was not controverted.
43. The Appellant failed to furnish or advance documentary or other cogent evidence tallying with the requirements set out in Section 107, 108 and 109 of the *Evidence Act*. The evidentiary proof of the Respondent lay with her to establish the following pertinent questions:
- a. Did the Appellant resist the eviction?
  - b. In the alternative, was the eviction process successful?
  - c. If the answer to (b) is affirmative, when did the Appellant return to the land?
  - d. If he returned onto the suit land, whether by himself or representatives, what evidence is there that he indeed returned?
  - e. What were the reports of independent persons on the alleged breach?
  - f. Although, the Application was filed within time, what is the explanation for bringing the action eleven (11) years after the orders were issued or so many years after the (unknown) period of ingress?



44. Indeed, as rightly pointed out by the Appellant, the Respondent failed to exercise her right of response to his Replying Affidavit to controvert the facts therein. A rejoinder by way of Affidavit evidence would have resolved all these questions.
45. The standard of proof in such cases is higher than that of a balance of probability and below that of beyond reasonable doubt. I find that the Respondent failed to discharge this burden. She, as stated by the Appellant, even cited wrong provisions of the law further 'annihilating' her contention. While the oxygen principle may be placed in a statute with a view to relieving parties from such errors, the same should not serve as a panacea to improper citation of provisions of statute. Otherwise the existence of Parliament and its mandate will serve as an academic exercise.
46. Noting that the principles necessary towards granting contempt orders are conjunctive in their nature, and all but one have failed, consequently, I find that the Appeal is merited but only on that one ground. Success in only one limb while others fail leads this court to find that costs cannot be awarded to the appellant.
47. But caution is given to the Appellant, as he needs to note from the analysis hereinabove that the only reason the appeal succeeded was the failure on the part of the Respondent to avail evidence that he indeed disobeyed the orders of the Court. If indeed he did, having escaped by that manner, he should go and disobey orders of the Court no more. Should the Respondent 'amass' evidence of disobedience and avail it to the trial court, which she is not prevented from doing, punishment, and indeed a severe one, shall not fail to be meted.
48. Finally, the appeal hereby allowed in the following terms:
  - a. The ruling of the trial court of May 3, 2019 be and is hereby set aside.
  - b. The said ruling be and is hereby substituted with an order dismissing the Application dated December 11, 2018 with costs to the Respondent therein (now Appellant).
  - c. Each party shall bear their own costs of the Appeal.
49. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS  
27<sup>TH</sup> DAY OF APRIL 2023.**

**HON. DR. *IUR* FRED NYAGAKA**

**JUDGE, ELC KITALE**

