



**Ethics and Anti Corruption Commission & another v Njuguna (Suing as Guardian ad Litem of Njuguna Macharia) & 4 others; Ngugi & another (Interested Parties) (Environment & Land Case 310 of 2014 & Civil Suit 270 of 2008 (Consolidated)) [2023] KEELC 17696 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17696 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 310 OF 2014  
& CIVIL SUIT 270 OF 2008 (CONSOLIDATED)**

**EK WABWOTO, J**

**MAY 25, 2023**

**BETWEEN**

**ETHICS AND ANTI CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**MARGARET NJOKI NJUGUNA (SUING AS GUARDIAN AD LITEM OF NJUGUNA MACHARIA) ..... DEFENDANT**

**AS CONSOLIDATED WITH**

**CIVIL SUIT 270 OF 2008**

**BETWEEN**

**MARGARET NJOKI NJUGUNA (SUING AS GUARDIAN AD LITEM OF NJUGUNA MACHARIA) ..... PLAINTIFF**

**AND**

**SUSAN WANGUI KIMANI ..... 1<sup>ST</sup> DEFENDANT**

**NJAMBI NG'ANG'A ..... 2<sup>ND</sup> DEFENDANT**

**D. NDEGWA ..... 3<sup>RD</sup> DEFENDANT**

**ELIZABETH WANGUI ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**PAUL NGUGI ..... INTERESTED PARTY**

**DANIEL MWAURA ..... INTERESTED PARTY**



## RULING

1. On 29<sup>th</sup> January 2015 this court different constituted issued inter alia the following orders;

“The Defendant be restrained whether by himself, his servants charge or assigns from selling, advertising for sale, transferring, advertising for sale, transferring, further charging, leasing, subdividing, wasting or in any manner howsoever disposing of L.R No. 209/14712 situated along Waiyaki Way, Nairobi, pending the hearing and determination of this suit or until further orders”.
2. Subsequently thereafter vide an application dated 8<sup>th</sup> February 2023, the Applicant moved this court seeking to cite the following persons for contempt; Margaret Njoki Njuguna, Macharia Njuguna, Daniel Mwaura and Paul Ngugi for the reasons that the said persons being aware and or having been served with the Order issued on 29<sup>th</sup> January 2015 had disobeyed the same by constructing a perimeter wall and had further pulled down the government building and excavating the on the suit property.
3. The application was opposed by Margaret Njoki Njuguna, Macharia Njuguna, Daniel Mwaura and Paul Ngugi.
4. It is the Applicant’s contention that the respondents have refused, neglected and failed to comply with the said order.
5. The Applicant further contends that the deliberate conduct of the Respondents is contemptuous to this court and a real threat to its dignity thus the urgent need for the orders sought.
6. The applicant also submitted that the continued disobedience of the court’s orders is likely to embarrass and delay the just and fair hearing of the suit hence the need for the orders sought in the instant application to be allowed.
7. In response to the application, Margaret Njoki Njuguna the 1<sup>st</sup> Respondent herein submitted that the application is misconceived and an abuse of the court process. That the orders sought were against Njuguna Macharia and that this was a case of poor draftsmanship since an order is granted on the prayers sitting in the said application and it should always be specific and precise.
8. It was further submitted that the applicant never sought any orders barring Margaret Njoki from renovating the premises which had been rendered defective by the construction of the road and that no business was being carried out since the structure was unfit.
9. The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties also opposed the application on the grounds that they were merely contractors who upon taking possession of the site to undertake some works their employer had made representation that all the relevant approvals had been granted and there was no order stopping them from commencing the renovation works. They also submitted that immediately they were served by the Applicant of the said order, they downed their tools and ceased all works. It was also their contention that there cannot be deliberate and willful disobedience of a court order unless the contemnor had knowledge of its existence. They urged the court to dismiss the application.
10. In my view, having considered the application and submissions made by counsel for the parties; the twin issues for consideration are:
  - i. Whether the Margaret Njoki Njuguna, Njuguna Macharia, Paul Ngugi and Daniel Mwaura are in contempt of the order of this Honourable court.



- ii. Who shall bear the costs of the application?
11. I have taken in to consideration the provisions of the Constitution of Kenya 2010, relevant statutes, judicial decisions, the response by the 1<sup>st</sup> Respondent and the Interested Parties and the submission filed by the applicant.
12. The law relating to contempt of this court is found in section 5 of the judicature Act, section 29 of the Land Act and The Practice Directions on Proceedings in the Environment and Land Court.
13. Section 5 of the Judicature Act provides as follows;
- 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 such power shall extend to upholding the authority and dignity of subordinate courts.
14. Section 29 of the Environment and Land Court Act provides as follows
- Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.
15. Practice direction 43 on Proceedings Relating to the Environment and the Use and Occupation of, and title to Land and Proceedings in Other Courts (Gazette Notice No. 5178) provides that non-compliance with the relevant provisions of the CPR, orders, and/or directions issued by a judge shall attract sanctions including but not limited to the imposition of costs, fines, striking out of pleadings, the dismissal of a suit and/or meting out punishment prescribed in the ELC Act or any other Statute as the court may deem fit bearing in mind the overriding interest of justice
16. This application is seeking prayers that the 1<sup>st</sup> Respondent and the Interested Parties be found to be in contempt. What constitutes contempt of court?
17. In the case of Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR, the Learned Judges of Appeal went to great lengths in tracing the foundations of law on contempt as practiced in Kenya. They state;
- “Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others, (*supra*) when dealing with the same issue concerning the applicability of English Law of contempt in our Courts had this to say:
- “Following the implementation of the famous Lord Woolf’s Access to Justice Report, 1996’, the Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. Recently on 1 st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court of England in its entirety.”
- Consequently, a careful consideration must be had to the provisions of the Contempt of Court Act of 1981 Act and Part 81 of Civil Procedure (Amendment No. 2) Rules, 2012 with regard to contempt proceedings in Kenya.
18. Part 81 provides for four different natures or forms of violations under contempt of court. They are
- i. Committal for “breach of a judgment, order or undertaking to do or abstain from doing an act” provided for under Rule 81.4.



- ii. Committal for “interference with the due administration of justice” (applicable only in criminal proceedings) provided for under Rule 81.11.
  - iii. Committal for contempt “in the face of the court”, provided for under Rule 81.16.
  - iv. Committal for “making false statement of truth or disclosure statement.” provided for under Rule 81.17.
19. For what it is worth, I have demonstrated that the willful disobedience of any judgment, decree, direction, order, or other constitutes contempt of court.
20. In *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR the Learned Judge cited with approval excerpts from the book “Contempt in Modern New Zealand”. He states as follows;

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.
21. In effect, an applicant seeking to cite another for contempt is held to very high standards of proof, higher than in civil cases. He must prove the following:
- a. That there is in existence of an order/ judgement that is clear unambiguous and binding.
  - b. That the Defendant/Respondent has knowledge of the said order/ Judgement
  - c. That the Defendant/Respondent has acted in breach of the said orders
  - d. That the Defendant/Respondent’s conduct is deliberate.
22. Looking at the circumstances in the present application, this Honourable Court issued its orders on the 29<sup>th</sup> January 2015. The order restrained the Defendant whether by himself, his servants charge or assigns from selling, advertising for sale, transferring, advertising for sale, transferring, further charging, leasing, subdividing, wasting or in any manner howsoever disposing of L.R No. 209/14712 situated along Waiyaki Way, Nairobi, pending the hearing and determination of this suit or until further orders. According to the Respondent, the said order did not restrain her from undertaking any construction and revocation works and hence therefore the Application was to be blamed for poor draftsmanship



since the order was issued as per what was prayed for. I have keenly perused the said order and indeed no reference was made restraining the defendant from undertaking any construction works.

23. On the second element, I wish to refer to the definition of ‘notice’ as contained in Black’s Law dictionary 12<sup>th</sup> Edition at page 1277;

“A person has notice of a fact or condition if that person Has actual knowledge of it; Has received information about it; Has reason to know about it; Knows about a related fact; Is considered as having been able to ascertain it by checking an official filing or recording.”

24. I take two approaches in answering the question of fact of notice/knowledge of the order. The first is that Respondent was represented by counsel who was aware of the said order. However, the interested parties were not initially parties to the suit and were only made aware of the orders on 30<sup>th</sup> January 2023 upon which they immediately ceased all works.

25. In the case of Shimmers Plaza Limited (Supra) the learned Judges 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 behooves him/her to report back to the client all that transpired in court that has a bearing on the client’s case.”

This is the position in other jurisdictions within and outside the commonwealth. In addressing the issue whether service of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at p. 226, LJ Sopinka, held that:- “In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed....”

26. In *Basil Criticos v Attorney General and 8 Others* [2012] eKLR the learned Judge 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”.

27. I have no doubt whatsoever that the Respondents had notice of the order and even though it did not specifically bar her from undertaking any construction. However, for the interested party they had no knowledge of the same.

28. On the third element, the Respondents were not in breach of the said order since there was no specific reference to construction.

29. Taking into consideration my finding on the above three elements, the logical deduction is that the Respondents together with the Interested Parties herein conduct was not willful and deliberate.

30. While it is essential for the maintenance of the law and order that the authority and dignity of courts must be upheld at all times and the court cannot condone deliberate disobedience of its orders.



31. In the shimmers plaza case (Supra), The learned judges quoted several decisions to reiterate the importance of obedience of court orders as a corollary to upholding the rule of law, good order and administration of justice in democratic societies. These decisions are:

Hadkinson v Hadkinson, [1952] ALL ER 567, “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 even void.

Lord Cottenham, L.C., said in *Chuck v Cremer (1)* (1 Coop. temp. Cott 342): “A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

32. In the Shimmers case (supra) the learned Judges of appeal reaffirmed the position of the court in *Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another*, -Civil Application No.39 of 1990 thus;

“... It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times.”

33. I am further fortified in my decision by the provisions of the [Constitution](#) of Kenya 2010, Article 159 (1) of which provides that the judicial authority is derived from the people and is vested upon the courts and Article 10 (1) provides the rule of law is one of the national values and principles binding on all state organs, public and state officers while implementing public policies and decisions.

34. In view of the foregoing, I am not satisfied that the Applicant had met the threshold for grant of the orders sought and in the circumstances the application is hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF MAY 2023.**

**E.K. WABWOTO**

**JUDGE.**

**In the presence of: -**

**Ms. Ng’ethe for the Applicant.**

**Mr. Steve Ogolla for the Respondents.**

**Mr. Waudu for the Interested Parties**

**Court Assistant; Ms. Caroline Nafuna.**

**NAIROBI ELC CASE NO. 310 OF 2014**

