



Odhiambo v Mfangano Division Assistant County Commissioner & another; Otindo (Interested Party) (Judicial Review 1 of 2022) [2023] KEELC 19088 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19088 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
JUDICIAL REVIEW 1 OF 2022
GMA ONGONDO, J
JULY 25, 2023**

BETWEEN

PATRICK OCHIENG ODHIAMBO APPLICANT

AND

**MFANGANO DIVISION ASSISTANT COUNTY COMMISSIONER 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

AND

SAMWEL OKEYO OTINDO INTERESTED PARTY

RULING

1. By a Notice of Motion Application dated April 29, 2019 and filed on April 30, 2019 (the application herein), the applicant through Moriasi Osoro and Company Advocates are seeking the following orders;
 - a. Spent
 - b. That the honourable court be pleased to order for the detention In prison of Samwel Okeyo Otind, the interested party herein for disobedience of court order for stay granted by this honourable court on the September 27, 2018.
 - c. That the honourable court be pleased to order for the attachment of properties of Samwel Okeyo Otindo for compensation of damages caused to the applicant's property and for breach of stay order of this honourable court.
 - d. 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 September 27, 2018.

- e. That the honourable court be pleased to award costs to the applicant.
2. The application is founded upon grounds 1 to 4 stated on the face of the same. It is further anchored on the applicant's supporting affidavit of nine paragraphs sworn on even date together with the annexures thereto.
3. Briefly, the applicant contends that he filed Judicial Review application dated September 25, 2018 seeking, amongst other orders, that the court do quash the decision of the Assistant County Commissioner who awarded the interested party the suit land. That the court issued a temporary order of stay, which order was properly served on both the respondents and the interested party herein. That in total disregard of the court order, the interested party together with his family members cut down trees on the suit land and burnt charcoal thereon.
4. In opposition to the application, the interested party through E Kisia and Associates Advocates, filed a replying affidavit dated July 31, 2019 on August 14, 2019. Although he admitted that together with his relatives they had cut down trees and prepared charcoal, he averred that the land occupied by the trees they cut down was not the suit land.
5. The respondents did not file any response to the application herein.
6. The application was heard by way of written submissions further to this court's directions of January 18, 2023; see Order 51 Rule 16 of the *Civil Procedure Rules*, 2010 and Practice Direction number 33 of the Environment and Land Court (ELC) Practice Directions, 2014.
7. Accordingly, learned counsel for the applicant filed submissions dated March 27, 2023 on even date. Counsel submitted that the applicant has proved that the interested party caused wanton destruction to the trees on the suit land. That the interested party ought to be condemned to pay special damages amounting to Kshs 271,000/- as well as general damages.
8. The interested party did not file any submissions in respect to the application herein.
9. Initially, this application was filed in Migori Environment and Land Court. On February 15, 2022, the same was transferred to this court, upon its establishment, for hearing and determination.
10. I have duly considered the application, the interested party's replying affidavit and the applicants' submissions in their entirety. The principal issue that falls for determination is whether the interested party is in contempt of the orders issued by this court on September 25, 2018. Precisely, has the applicant established any basis for the orders sought to be granted?
11. On September 25, 2018, this honourable court made various orders with respect to the applicant's Notice of Motion Application of even date, including:

' ...That leave granted herein in the nature of the order of certiorari as above do operate as stay of the proceedings and ruling of the Mfangano Division Assistant County Commissioner's Land Commission pending the hearing of this application and the subsequent judicial review...'
12. The applicant contends that the interested party has failed to comply with the orders as listed in Paragraph 11 hereinabove. Therefore, he urged the honourable court to cite Samwel Okeyo Otindo for contempt of the court orders issued by this honourable court on September 25, 2018 and consequently



- commit him to civil jail and condemn him to pay special damages amounting to Kshs 271,000/- as well as general damages for the destruction of the ecosystem and environmental degradation.
13. It must be appreciated that contempt of court is that conduct or action that defies or disrespects authority of court. Black's Law Dictionary 10th Edition at page 385, defines the term 'contempt' as:
'The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature...'
 14. Section 5 of the [Contempt of Court Act](#) No 46 of 2016 confers jurisdiction on the superior courts to punish for contempt.
 15. The Court of Appeal in the case of [Fred Matiang'i, The Cabinet Secretary, Ministry of Interior and Co-ordination of National Government -vs- Miguna Miguna & 4 Others \[2018\] eKLR](#), stated the following with regard to orders of the court: -

' ...When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities...'
 16. Indeed, the reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at that party.
 17. In [Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another \[2005\] KLR 828](#), Ibrahim, J (now, Supreme Court of Kenya Judge), underscored the importance of obeying court orders, thus:

' 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 whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void.'
 18. Contempt of court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if that



party were to succeed. This was aptly stated in *Gatharia K Mutikika v Baharini Farm Limited [1985] KLR 227*, that:

' A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.'

19. In *Samuel MN Mweru & Others v National Land Commission & 2 others [2020] eKLR*, Mativo J stated as follows:

In the case of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No 364 of 2005, the High Court of South Africa 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... 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. (Emphasis added).

20. It is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. In this regard, I am not satisfied that wilful disregard of the court order has been established by the applicants herein.
21. Applying the principles discussed herein above to the facts of this case, I am persuaded that the instant application is merited. The interested party was served in person with the court order as per the affidavit of service dated October 16, 2018 and sworn by Tom M. Obinga, a licensed court process server.



22. I direct that a Notice to Show Cause do issue to the interested party to show cause why he should not be committed to civil jail and pay the special damages amounting to Kshs 271,000/= as indicated in the assessment of tree and environmental destruction report by Kenya Forest Service dated March 25, 2019 and annexed to the instant application (POO- 2(a)).
23. Costs of this application to be in the cause.
24. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 25TH DAY OF JULY 2023.

G.M.A ONGONDO

JUDGE

Present

Okello, Court Assistant

