



**Oduor v Ogoya (Environment & Land Case 1 of 2023)
[2023] KEELC 19889 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 1 OF 2023
AY KOROSS, J
SEPTEMBER 21, 2023**

BETWEEN

VINCENT SAMSON ODUOR PLAINTIFF

AND

DISMAS OTIENO OGOYA DEFENDANT

RULING

1. The plaintiff's notice of motion dated March 24, 2022 that was moved pursuant to the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#) sought the following reliefs from this court: -
 - a. Spent.
 - b. That an order of eviction be issued to be executed within seven days by the OCS Segia.
 - c. That the defendant be held in contempt of court for failure to obey lawful orders of the court.
 - d. That the OCS Segia Police Station be held in contempt of court for failure to execute lawful orders of the court.
 - e. Costs of the motion be in the cause.
2. The motion was premised on the grounds enumerated on its face and on the affidavit in support which was sworn on March 24, 2022 by the plaintiff Vincent Samson Oduor.
3. It was the plaintiff's averment the defendant was represented by counsel and he was privy to the eviction order and the suit had been pending in court for over 10 years. The court should put stringent orders against the defendant. The OCS had failed to execute the orders in a timely manner and had abused



powers donated to him. He annexed an affidavit deposed by the defendant dated December 30, 2021 in which he (defendant) had averred the police notified him of the court order.

4. The defendant did not file any documents in opposition to the motion and there is no evidence the OCS was ever served with the motion.

Plaintiff's submissions

5. The plaintiff who was acting in person filed his written submissions dated March 27, 2023. He argued on the motion that is the subject of this ruling and on a pending application dated November 15, 2022. This court has noted the pending application is not a subject for determination and this limb of the submissions will be disregarded.
6. He reiterated the history of the suit and asserted by a decision of this court, orders of eviction had been issued against the defendant after it was found he had trespassed on North Ugenya/2066 ('suit property').
7. On January 30, 2021, an order of eviction was issued against the defendant and he was given 1 month to vacate the suit property.

Defendant's submissions

8. His counsel, Odhiambo BFO & Co Advocates filed undated written submissions that were filed on March 29, 2023. In it, counsel submitted the suit property was non-existent and orders of the court were incapable of being executed hence the reason the plaintiff had filed the application dated November 15, 2022.

Analysis and determination

9. Having read and considered the pleadings and written submissions, the issues that fall for determination are (i) whether prayer (b) is res judicata (ii) whether the prayers for contempt of court are merited.
10. Notwithstanding the application dated November 15, 2022 was not the subject for determination, I have glimpsed it and taken notice similar prayers were sought in the plaintiff's application dated February 23, 2022 and another one dated May 18, 2020.
11. In a ruling rendered on July 30, 2021 on the latter application, the prayers he is seeking in his application dated November 15, 2022 were disallowed. As of now, I restrain myself from making any findings on the application dated November 15, 2022.
12. I have also noted the defendant in his entire submissions adduced evidence. Parties must be reminded submissions are arguments and not evidence. If at all he wanted to oppose the motion, nothing could have been easier than for him to file documents in opposition. To this end, his submissions will be disregarded. Even if the motion is unopposed, it will be subjected to merit evaluation. I will now proceed to consecutively address the issues for determination.

- a. Whether prayer (b) is res judicata

13. The doctrine of res judicata is provided for under Section 7 of the *Civil Procedure Act* in the following terms: -

'No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under



whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.’

14. The essence of the doctrine is to bring litigation to finality and affords parties closure and respite from the spectre of being vexed with multiple suits that have already been determined by a competent court. The intent of the doctrine was aptly summarized by the Supreme Court of Kenya’s decision of *John Florence Maritime Services Limited & another vs. Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR* as follows: -

’ It is primarily founded on the following three maxims:

- (1) nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.
- (2) interest republicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and
- (3) res judicata pro veritate occipitur: a judicial decision must be accepted as correct.’

15. In an application dated May 18, 2020, the plaintiff sought orders of eviction against the defendant. In a ruling rendered on July 30, 2021, this order was granted. He filed another application dated August 18, 2021 in which he sought for the OCS Segal to provide security during eviction of the defendant. An order to this effect was issued on August 20, 2021.

16. In prayer no. (b) the plaintiff sought similar prayers which have already been heard and determined by a competent court. No doubt, this prayer (b) falls on all four corners of the doctrine of res judicata as set out in Section 7 of the *Civil Procedure Act* and on that basis, I find prayer (b) incompetent and I hereby strike it out.

b. Whether the prayers for contempt of court are merited

17. Section 5 of the *Judicature Act* confers jurisdiction to punish contemnors for contempt of court. This provision of law also applies to courts of equal status to the high court and provides as follows: -

’ (1) 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 that power shall extend to upholding the authority and dignity of subordinate courts.’

18. The settled principles of contempt proceedings were well enunciated by the decision of *Samuel MN Mweru & Others v National Land Commission & 2 others [2020] eKLR* as follows: -

’ It is an established principle of law that^[45] 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.^[46] Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*^[47] 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.'

19. Courts punish contemnors for their failure to uphold the dignity and authority of the court and for disobedience of its orders. It enhances expeditious resolution of disputes by ensuring compliance with directions of the court, observance and respect of due process of law, preservation of an effective judicial system and maintains public confidence in the administration of justice by courts.
20. In the absence of repercussions for contempt, there would be anarchy which 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 him. See *Sheila Cassatt Isenberg & another v Antony Machatha Kinyanjui [2021] eKLR*.
21. Contempt proceedings are criminal in nature and proof of a case against a contemnor is higher than that of balance of probability. This is because the liberty of the contemnor is at stake and an applicant must prove the ingredients of contempt have been established.
22. In this case, the motion did not disclose which orders the defendant and OCS had disobeyed but it is evident from the record they were the eviction orders issued on March 13, 2019 and August 16, 2021 against the defendant and an order issued on August 20, 2021 against the OCS Segal Police Station to provide security. He has not sought an order for the contempt proceedings to be purged and has left the court to exercise its discretion on the nature of punishment to be merited against the contemnors.
23. In applying the principles of contempt proceedings to the circumstances of this case. The motion and affidavit are silent on when the orders were served on the parties.
24. In an affidavit dated December 30, 2021 in support of an application dated the instant date, the defendant admitted he became privy to the order issued on August 20, 2021.
25. There can be no doubt the defendant was at all times aware of the judgment and more particularly the decree issued on March 13, 2019 which ordered his vacation from the suit property and in default eviction order do issue. This manifest from the request for proceedings and judgment made on March 6, 2019, his notice of appeal dated March 6, 2019, an application for stay of execution dated May 15, 2019 and an application for review of the judgment and subsequent orders dated July 14, 2022.
26. As for the order prayed against the OCS Segal, eviction orders are usually executed by appointed court bailiffs and the court only issued an order for the police to provide security. Put differently, the OCS's role and that of his officers were restricted to maintaining law and order as the court bailiffs performed their duties.
26. The plaintiff has not tendered any evidence demonstrating court bailiffs had been secured to execute the orders issued on August 16, 2021 on a particular date to enable the OCS Segal comply with the order and provide security on that particular date.



26. In applying the principles highlighted above to the circumstances of this case, I am persuaded the plaintiff has demonstrated that the defendant was privy of orders issued against him to vacate the suit property and had willfully failed, refused and or neglected to obey the said orders. I find the defendant is in contempt of the court orders issued on March 13, 2019.
26. However, the same cannot be said of the OCS Sega. His execution of the order was incumbent upon the court bailiff's participation in the eviction process. On that basis, I find he is not in contempt of court.
26. In view of the above reasons and findings, the upshot is that I find the defendant Dismas Otieno Ogoya in contempt of court for disobedience of the court order issued on March 13, 2019. The plaintiff's costs shall be borne by the defendant. Accordingly, I hereby issue the following disposal orders: -
- a. The defendant is hereby directed to purge his contempt within the next 14 days by complying with the orders issued on March 13, 2019.
 - b. In default of compliance with order (a) above, the matter shall be mentioned on October 18, 2022 for purposes of mitigation, sentencing and further orders.
 - c. Save for mitigation and sentencing, the defendant will not be heard by this court or be allowed to participate in these proceedings until he has purged his act of contempt.
 - d. The plaintiff's costs shall be borne by the defendant.
31. Orders accordingly.

Delivered and Dated at Siaya this 21st day of September 2023.

HON. A. Y. KOROSS

JUDGE

21/9/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Plaintiff

Mr. Odhiambo B.F.O. for the defendant

Court assistant: Ishmael Orwa

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