



REPUBLIC OF KENYA



**Kimau & another v Registrar & 2 others (Environment and Land Constitutional
Petition 13 of 2020) [2023] KEELC 20798 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20798 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 13 OF 2020
CA OCHIENG, J
OCTOBER 18, 2023**

BETWEEN

BENEDICT MUKUMA KIMAU 1ST PETITIONER

MUMBUA KIMAU 2ND PETITIONER

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

NAIROBI COUNTY LAND REGISTRAR 2ND RESPONDENT

MACHAKOS COUNTY LAND REGISTRAR 3RD RESPONDENT

RULING

1. What is before Court for determination is the Petitioners' Notice of Motion Application dated the February 2, 2023 where they seek the following Orders:
 1. Spent
 2. That the Honourable Court do find the Respondents herein, the Chief Land Registrar, the Nairobi County Land Registrar and the Machakos County Land Registrar, to be in contempt of this Honourable Court orders as per the Judgment delivered on May 28, 2021.
 3. That pursuant to prayer 2 above, the Honourable Court be pleased to order that the Respondents/Contemnors herein, the Chief Land Registrar, the Nairobi County Land Registrar and the Machakos County Land Registrar be fined such amount as this Honourable Court may deem fit in punishment for contempt of this Court orders pursuant to the Judgment delivered on May 28, 2021.



4. That in addition to the above, the Honourable Court be pleased to order that the Respondents/Contemnors herein, the Chief Land Registrar, the Nairobi County Land Registrar and the Machakos County Land be jailed for six (6) months for the willful disobedience of the Court Order given on May 28, 2021 and or such further period as the Court may order until the Respondents purges the said contempt.
 5. That the costs of this Application be borne by the Respondents/ Contemnors.
2. The Application is premised on the grounds on the face and the Supporting Affidavit of the 1st Petitioner Benedict Mukuma Kimau where he deposes that on May 28, 2021, the Court delivered a Judgment in this matter directing the Respondents to issue the Petitioners with the Title Deed over UNS. Residential Plot No. 443 Athi River which belongs to them. He confirms that there has been no review or appeal preferred against the said Judgment. He explains that pursuant to the enforcement of the said Orders, his Advocates served the impugned Judgment and Order upon the 2nd and 3rd Respondents who refused to receive them but instead directed that the same be forwarded to the Chief Land Registrar who is the 1st Respondent herein. Further, that his Advocates vide their letter dated the August 9, 2021 forwarded the Judgment and Order to the Chief Land Registrar. He claims that their Advocates have made numerous efforts to follow up with the Respondents but it has been in vain. He insists that the Respondents are in breach of the Judgment of this Court and this is clearly an act of disobedience. He seeks for the Respondents to be cited for contempt and be fined as well as committed to civil Jail for six (6) months.
3. In response to the instant Application, the Respondents filed a Replying Affidavit sworn by David Nyandoro Nyambaso, the Senior Assistant Chief Land Registrar where he deposes that he had knowledge of the Court Order issued on June 4, 2021 which was received in their office on August 11, 2021. He explains that the Chief Land Registrar and County Land Registrar could not comply with the Order because an Un-surveyed Plot cannot be issued with a Title Deed since it does not have a survey Reference Number. Further, that Un-surveyed plot is only known by an allocating entity yet the 1st and 2nd Respondents are not responsible for carrying out survey work. He insists that it is the Director of Survey who is responsible for surveying land but the 1st and 3rd Respondents can only issue a title emanating from Leases issued through allotment from the Director of Land Administration. He contends that it was hence impossible for the 1st and 3rd Respondents to issue a title without a supporting Lease Instrument. Further, that the 1st and 3rd Respondents can only convey a good title after preparation of a Part Development Plan, issuance of a survey number and preparation of a Deed Plan, Registry Index Map and Lease, which processes are not undertaken by the office of the Chief Land Registrar. He outlines the process of registration of an individual lease and contends that the Petitioner did not exhibit a copy of the Letter forwarding the Registry Index Map and the one forwarding the Lease to the Lands Registry for registration. He reiterates that the plot had not crystallized to the registration stage where the District Land Registrar/Chief Land Registrar has a role to play. He states that he sent a letter to the Deputy Registrar of this Court explaining his difficulty in effecting the Order of the Court. He insists that failure to comply with this Court's Judgment was not deliberate but impracticable in view of the process he has highlighted.
4. The Petitioners filed a Supplementary Affidavit sworn by Benedict Mukuma Kimau where he reiterates his earlier averments and insists that the Respondents seem to be seeking to review, set aside, vary or appeal the Judgment without following the legal procedures as established by law. He contends that the Replying Affidavit is steeped with generalities about the process of procuring land. He insists that he adhered to all the legal processes to acquire the suit land. Further, that the suit land is actually surveyed



and the reference of UNS is only the definition or identification of the plot as rendered on the allotment letter. He made reference to the Customer Enquiry Form which indicated that the Lease was being processed.

The Application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, annexures and rivaling submissions, the only issue for determination is whether the Chief Land Registrar, the Nairobi County Land Registrar and the Machakos County Land can be cited for contempt of the Judgment delivered on the May 28, 2021 plus Order issued on June 4, 2021 and jailed for six (6) months.
6. The Petitioners in their submissions insist the Orders issued on June 4, 2021 emanating from the Judgment delivered on May 28, 2021 are capable of being enforced. They argued that since the Respondents have not issued them with a title, they are in contempt of court for failure to act on the aforementioned orders.
7. The Respondents in their submission reiterated their averments as per the Replying Affidavit and insist that the process of issuing a Certificate of Title is the last stage in the process of allocation of public land. They deny willfully disobeying the Order of Court and insist that the Petitioners ought to prove that they complied with conditions set in the Letter of Allotment. Further, that non-compliance on their part was due to lack of relevant documents furnished by the Petitioners. They were ready to comply with the Order of the Court once the due process is complied with and completed. To support their averments, they relied on the following decisions: *Republic v Land Registrar, Trans Nzoia County & Attorney General Ex parte Turbo Munyaka Cooperative Society Ltd* (2017) eKLR; *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhamed Dagane, Suing on behalf of the estate of Mohamed Haji Dagane) V Hakar Abshir & 3 others* (2021) eKLR; *Peter Paul Ndururi (Suing on behalf of Donor Samuel Wamutu Waiganjo) V Kimani Njuguna & 6 others* (2021) eKLR; *Indian Airports Employees Union V Ranjan Catterjee & Another* (AIR 1999 SC 880: 1999(2) SCC: 537; *Republic V Jomo Kenyatta University of Agriculture and Technology Ex parte Elijah Kamau Mwangi* (2021) eKLR and *Mwangi HC Wangonde V Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998*.
8. *Black's Law Dictionary* (Ninth Edition) defines contempt of court as:-

Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
9. On contempt of Court, Section 29 of the *Environment and Land Court Act* stipulates that:

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.”
10. While Section 4(1) (a) of the *Contempt of Court Act* defines civil contempt as:

willful disobedience of any judgement, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court.”



11. In the case of *North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjobi* (2016) eKLR Justice Mativo (as he then was) stated that:

writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated as follows:

‘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 - (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.’

12. While in the case of *Samuel M. N. Mweru & Others V National Land Commission & 2 Others* (2020) eKLR, Justice Mativo (as he then was) while dealing with issues of contempt of Court observed that:

The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’^[40] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.^[41] Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith). These requirements - that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt-accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces.^[43] Honest belief that non-compliance is justified or proper is incompatible with that intent. 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.” Emphasis Mine

13. In this instance, I note the impugned Judgment was delivered on May 28, 2021 and an Order was issued on June 4, 2021. The Petitioners claim the Respondents have declined to enforce the order of the court and are hence in contempt. The Respondents on the other hand contend that they did not willfully disobey the order of the court as there are procedures which the Petitioners had not adhered to, to enable them register their title. From the impugned Judgment, the Court had directed as follows:
- a. A declaration is hereby issued that the Respondents have violated the Petitioners’ fundamental rights and freedoms as protected under Articles 27, 28, 35, 40 and 47 of *the Constitution*.
 - b. A Judicial Review order of mandamus is hereby issued to remove into this Honourable Court and compel the Respondents to register and issue the Petitioners with a Title Deed in respect of UNS. Residential Plot No. 443 Athi River.
 - c. Cost of the Petition to be paid by the 1st Respondent.



14. From the orders that have been cited above, I note the Respondents were supposed to register the Petitioners title. It is trite that registration of a parcel of land in a person's name is a process which also entails documents. The Petitioners have not informed Court on when they surrendered all the required documents to the Respondents for purposes of registration. The Respondents have explained that they did not willfully neglect to register the Petitioners title since the land was unsurveyed and some of the processes entailed engaging with the Director of Survey as well as the Director, Land Administration. It is trite that Contempt proceedings are criminal in nature and hence the burden of proof should be on the Applicants to prove that the same is ongoing. I note the Respondents have explained the reason they have been unable to register the Petitioners title as they had not been furnished with requisite documents. They confirm they will be ready to register the title once the aforementioned documents are furnished to them. From a perusal of the instant Notice of Motion Application including the Supporting Affidavit as well as the annexures thereon, I note there is no indication if a Penal Notice was attached to the Court Order served upon the Contemnors.
15. Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the quoted decisions, I find that the Applicants have failed to prove that they furnished the Respondents with all the requisite documents so as to register their title, but the 1st Respondent declined. Further, since the registration of a title is a process, I am convinced that the Respondents did not have capacity to comply with the court order in the absence of the aforementioned documents. From the averments in the respective Affidavits, I opine that there is no indication that there was willful disobedience or bad faith on the part of the Respondents. Further, there is no demonstration of the Contemnors deliberate and intentional violation of the court's dignity or authority. I am on the view that the Petitioners'/Applicants' allegations herein have not met the threshold required in contempt proceedings as envisaged by the law as the standard of proof in the said proceedings is higher than the balance of probabilities and almost beyond reasonable doubt, which position is well articulated in the case of *Africa Management Communication International Limited Vs Joseph Mathenge Mugo & Anor* (2013) eKLR.
16. At this juncture, I am unable to cite the Respondents for contempt. However I direct that the Petitioners to furnish the Respondents with all the requisite documents for registration of their title within thirty (30) days from the date hereof. Once the Respondents receive the required documents, I direct that the 1st Respondent do register the Petitioners' title within sixty (60) days from the said date, failure of which the Respondents will be cited for contempt.
17. In the circumstance, I will disallow the Notice of Motion Application dated the February 2, 2023 and make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 18TH DAY OF OCTOBER, 2023

CHRISTINE OCHIENG

JUDGE

