



**Kirorei & another v Kitita (Environment & Land Case E001 of 2023)
[2023] KEELC 20709 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E001 OF 2023
CG MBOGO, J
OCTOBER 17, 2023**

BETWEEN

JOHN RAKITA KIROREI 1ST PLAINTIFF

SIMON NKOITOI OLE KIROREI 2ND PLAINTIFF

AND

POPOTIE OLE KITITA DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion Application dated 20th April, 2023 and expressed to be brought under Article 159 of *the Constitution*, Order 40 Rule 1,2 & 3 and Order 51 of the Civil Procedure Rules and Sections 1A and 1B of the *Civil Procedure Act* seeking the following orders: -
 1. Spent.
 2. That Popotie Ole Kitita the defendant herein do stand committed to civil jail for a period of time as this honourable court may determine for contempt of this honourable in knowingly and willfully committing, breaching, aiding, abetting and authorizing violation and/or disregard of the orders made by this honourable court in this suit and otherwise interfering with the administration of justice, the authority and dignity of a court of law.
 3. A declaration that the ploughing, cultivation and construction of a house and settlement structures on the suit property and other activities on the suit property by the defendant is in contempt of court and disrespect to the authority and dignity of this honourable court.
 4. That defendant is in blatant disobedience of the court's orders of 22nd February 2023 and has trashed with impunity the orders of this court.



5. That the actions of the respondent have caused the plaintiff/applicant to suffer irreparable loss and damage and psychological torture and anguish.
 6. That court's dignity has been greatly undermined by the actions of the defendant by openly disobeying court orders.
 7. That unless the defendant is punished for contempt, the continuation of the main suit would be an exercise in futility.
2. The application is premised on the grounds inter alia that on 22nd February, 2023, this court issued injunctive orders against the defendant/respondent restraining him from dealing with parcel of land known as CisMara/Ololulunga/931 pending the hearing and determination of this application interpartes which orders were extracted on 22nd February, 2023 and served upon the defendant/respondent on 6th March, 2023.
 3. The application is supported by the affidavit of the 1st plaintiff/applicant sworn on even date. In his affidavit, the 1st plaintiff/applicant with the authority of the 2nd plaintiff/applicant deposed that the orders of this court issued on 22nd February, 2023 were extracted on the same day, endorsed with a penal notice was duly served upon the defendant/respondent on 6th March, 2023. Further, that in utter disobedience of the court order, the defendant/respondent proceeded and caused to be ploughed, cultivated and he commenced construction on the suit property which action unequivocally and unmistakably implies that the court orders have been disobeyed with extra ordinary show of arrogance and impunity in total disregard to the rule of authority and dignity of this court.
 4. The 1st plaintiff/applicant further deposed that the defendant/respondent has continued to carry out agricultural activities and has no regret or intention to purge the contempt. Further, that he has been obstructed and the frustration mechanisms are developed to hamper him from accessing the suit land and effectively displacing them which measures are meant to ridicule and embarrass the honour and dignity of this court.
 5. The 1st plaintiff/applicant further deposed that the defendant/respondent has vowed that he will not allow him to access his land irrespective of whether there is a court order and that he will continue with the acts of disobedience and as such, the defendant/respondent should be cited for contempt of valid court orders.
 6. The application was opposed by the replying affidavit of the defendant/respondent sworn on 2nd July, 2023 and filed in court on 7th July, 2023. The defendant/respondent deposed that the plaintiff/applicant is exceedingly erroneous, misleading and misdirecting this court as regards the registration of the suit land and being a law-abiding citizen, and being aware of the court order, he has obeyed and adhered to the orders religiously without any alteration whatsoever. Further, that he has not ploughed, cultivated or constructed any structures on the suit land or supervised any activities. Also, that the alleged disobedience of the court order is unfounded and should be struck off the record.
 7. The defendant/respondent further deposed that it is in fact, the plaintiffs/applicants who have disobeyed the orders of this court for the reasons that on 6th March, 2023, the plaintiffs/applicants invaded and demolished houses which he alleged were constructed on the suit land in show of might and power of the alleged eviction orders. Further, that the orders that the plaintiffs/applicants used to uproot the beacons, destroy fences and demolish houses are the same orders that the plaintiffs/applicants allege to have been disobeyed and that due to the blatant disobedience and selective reading of the orders issued by the court on 22nd March, 2023, he reported the matter at Ololulunga Police Station and the matter is still under investigations.



8. The defendant/respondent further deposed that the application is cunningly calculated to portray him as a party who does not respect and obey court orders.
9. On 25th July, 2023, this court directed that the application be canvassed by way of written submissions. By the time of writing this ruling, none of the parties had filed their written submissions. Be that as it may, I have considered the application and the replying affidavit and the issue for determination is whether the respondent is in contempt of the orders issued by this court on 22nd February, 2023.
10. The *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.”
11. The law guiding the present application is order 40 rule 3(1) of the *Civil Procedure Rules* which stipulates as follows: -

“In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.”
12. Also, section 29 of the *Environment and Land Court Act* is clear to the effect 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.”
13. In the case of *Samuel M. N. Mweru & Others versus National Land Commission & 2 others* [2020] eKLR the court held that

“A Court without contempt power is not a Court. [30] The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a Court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of Court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in Courts, and automatically exists by its very nature...”

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.



33. 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.^[32]

34. 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.^[33] 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.^[34]”

14. In the case of *Exparte Langely* 1879, 13 Ch D/10 (CA) Thesiger L.J stated at P. 119 as follows: -

“...the question in each case, and depending upon the particular circumstances of each case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made” And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.”

15. In this case, the plaintiffs/applicants obtained the orders of this court on the same date that they were issued which was on 22nd February, 2023. The plaintiffs/applicants contended that service of the orders was effected upon the defendant/respondent on 6th March, 2023 and that whereas the defendant/respondent is aware of the said orders, he is in blatant disobedience of the orders as he proceeded to commence construction of a structure, ploughed and cultivated the suit land.

16. The defendant/respondent in his affidavit has not denied lack of service of the orders nor knowledge of existence of the orders. In fact, he admitted to have been served with the orders on the 6th March, 2023 but denied disobeying the same. The defendant/respondent instead, accused the plaintiffs/applicants of disobedience of the orders which they used the said orders to uproot beacons, destroy the fences and demolish the houses.

17. From the above, it is clear that the defendant/respondent was aware of the orders of the court but has denied being in disobedience. I have looked at the affidavit of service sworn by Geoffrey Mongare Mogaka on 6th March, 2023. In his affidavit, the process server deposed that on 23rd February, 2023, he received relevant court documents from the plaintiffs'/applicants' advocates with instruction to serve the same upon the defendant/respondent. He deposed that on 3rd March, 2023, he was able to trace the defendant/respondent whom he served and acknowledged but declined to sign on his copies.

18. The affidavit of service seems to be in contrast with the averments of both the 1st plaintiff/applicant and the defendant/respondent on the date of service. More importantly, is the fact that the orders were issued *ex parte* and it behooves the plaintiffs/applicants to ensure that service of the said orders are within the period stipulated by law.



19. Order 40 rule 4 (3) of the *Civil Procedure Rules* provides: -

‘In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse’.

20. The orders were issued on 22nd February, 2023 and served upon the defendant/respondent either on 3rd March, 2023 or 6th March, 2023 were so served outside the timeframe provided under order 40 rule 4 (3) of the *Civil Procedure Rules*. In my view, failure to serve the order would mean that the order of temporary injunction automatically lapsed after 3 days and in this case on 1st March, 2023. An order that has lapsed cannot be the basis upon which any contempt proceedings can be founded.

21. Arising from the above, I find that the notice of motion application dated 20th April, 2023 lacks merit and the same is dismissed. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 17TH DAY OF OCTOBER, 2023.

HON. MBOGO C.G.

JUDGE

17/10/2023

In the presence of:-

CA:Meyoki

