



**U-Haul Vehicle Ltd v Kiambu Dandora Farmers Co. Ltd & 5 others (Environment and Land Case Civil Suit 39 of 2019) [2022] KEELC 3108 (KLR) (27 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3108 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 39 OF 2019  
SO OKONG'O, J  
JUNE 27, 2022**

**BETWEEN**

**U-HAUL VEHICLE LTD ..... PLAINTIFF**

**AND**

**KIAMBU DANDORA FARMERS CO. LTD ..... 1<sup>ST</sup> DEFENDANT**

**DANDORA HOUSING SCHEME LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**INSPECTOR GENERAL OF POLICE ..... 5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. This is one of the many rulings that I have made on the interlocutory applications filed in this suit. The suit was filed on February 12, 2019 against the 1<sup>st</sup> defendant which was the only defendant in the plaint dated February 12, 2019. Together with the plaint, the plaintiff filed an application by way of Notice of Motion of the same date seeking a temporary injunction restraining the then sole defendant from in any manner interfering with the plaintiff's quiet possession and enjoyment of all those parcels of land known as LR No 209/9466 and LR No 209/9467 pending the hearing and determination of the suit. On April 23, 2019, the plaintiff brought another application by way of Notice of Motion dated April 23, 2019 seeking an order that pending the hearing of the plaintiff's earlier application dated April 12, 2019, the court be pleased to issue orders restraining the defendant from in any manner interfering with the plaintiff's possession and enjoyment of all those parcels of land known as LR No 209/9465, LR No 209/9466, LR No 209/9467 and LR No 209/9468(hereinafter referred to only as 'the suit properties'). On April 29, 2019, the court issued an order restraining the then sole defendant



from carrying out further demolition of a perimeter wall that was constructed by the plaintiff around the suit properties.

2. On June 7, 2019, the plaintiff brought another application by way of Notice of Motion dated June 3, 2019 seeking a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from encroaching, alienating, dividing, transferring, selling, charging, developing or in whatever manner and whichever manner dealing with or interfering with the plaintiff's right of occupation, possession and/or use of the suit properties pending the hearing and determination of the suit. On June 13, 2019, the plaintiff amended the plaint to add the 2<sup>nd</sup> to 6<sup>th</sup> defendants to the suit. When the matter came up for the hearing of the plaintiff's application dated June 3, 2019 inter-partes on June 17, 2019, the court gave the defendants time to respond to the application and ordered that pending further orders by the court, there was to be no other or further developments or construction works on the suit properties. On September 23, 2019, the said order of June 17, 2019 was extended to March 18, 2020 when the matter was to come up for further directions.
3. On December 18, 2019, the plaintiff filed yet another application by way of Notice of Motion dated December 16, 2019 seeking the following orders;
  - a) That the Honourable court be pleased to find and hold that the directors of Kiambu Dandora Farmers Company Limited and the directors of Dandora Housing Scheme Limited were in contempt of the court orders issued on the June 17, 2019.
  - b) That this Honourable court be pleased to hold that as consequence of their acts of contempt, the contemnors shall be detained in prison for a period of 6 months or such period that the court may please.
  - c) That this Honourable court be pleased to compel the contemnors to obey the said court order.
  - d) That this court be pleased to issue a mandatory order directing that any and all structures erected after the issuance of the orders of this Honourable court of June 17, 2019 be demolished forthwith.
  - e) That this court be pleased to order the officers of the 5<sup>th</sup> Respondent to enforce the above orders of the Honourable court.
4. The application was supported by the affidavit of Francis Kibiru Njenga sworn on December 16, 2019 and a supplementary affidavit sworn on April 30, 2020. In the affidavit of December 16, 2019, the deponent averred that on June 17, 2019 in the presence of the advocates for all the parties, the court made an order that there shall be no further developments on the suit properties. The deponent averred further that on September 23, 2019 the said order was extended. The deponent averred that the 1<sup>st</sup> and the 2<sup>nd</sup> defendants by themselves and/or agents entered the suit properties and began to excavate and erect structures thereon. The deponent averred that the said activities were being carried out with the blessings of the 5<sup>th</sup> defendant. In his supplementary affidavit, Francis Kibiru Njenga averred that on December 20, 2019 the court issued an order directing the OCS Buruburu Police Station to arrest and bring to court any person contravening the order in question and that the said order was not enforced. He stated that a follow up letter to the OCS Buruburu Police Station on the enforcement of the order elicited no response. He stated that due to the failure, refusal and neglect to enforce the orders issued by this court, the construction was still being undertaking on the suit property in contravention of the orders issued by the court. He contended that the OCS Buruburu Police Station was in contempt of court. He stated that court orders are not issued in vain and the same must be obeyed and enforced by the relevant authorities to preserve the dignity of the court.



5. The court after hearing the application made the following orders on November 26, 2020:

- ' 1. All the structures and buildings constructed on or put up on LR No 209/9465, LR No 209/9466, LR No 209/9467 and LR No 209/9468 after June 17, 2019 shall be demolished by the owners thereof forthwith.
2. The plaintiff shall pin a copy of this order in a conspicuous place on each of the said structures and shall also publish the order once in the Daily Nation and the Standard newspapers on a week day.
3. In the event that the owners of the said structures fail to demolish the same within 21 days from the date of the publication of the order in the two (2) newspapers as aforesaid, the plaintiff shall be at liberty to carry out the demolition of the same at its own cost which costs shall be recoverable at the conclusion of the suit subject to proof from whichever party the court will find to have been responsible or contributed to the construction of the said structures.
4. In the event that the demolition of the said structures becomes necessary pursuant to order 3 above, the 5<sup>th</sup> respondent through the Officer Commanding Dandora Police Station shall provide the plaintiff with the necessary security to enable it carry out the demolition.
5. The costs of the application shall be in the cause.'

6. In the said ruling, the court made the following observations:

' It is not disputed that on June 17, 2019, the court made an order on the following terms:

'That pending further orders by the court, there shall be no other or further developments or construction works on the properties in dispute namely, LR No 209/9465, LR No 209/9466, LR No 209/9467 and LR No 209/9468.'

7. It is not disputed that the said order was made in the presence of the advocates for the plaintiff, the 1<sup>st</sup> defendant, the 3<sup>rd</sup> defendant and the 5<sup>th</sup> and 6<sup>th</sup> defendants. The 2<sup>nd</sup> defendant has never participated in these proceedings and it is not clear whether it was served with summons to enter appearance and the various applications for injunction that were filed herein by the plaintiff. It is also not disputed that the said order of June 17, 2019 was not obeyed and that the construction works continued on the suit properties despite the existence of the order. It is also not disputed that when it was brought to the attention of the court through an application dated December 20, 2019, that its order was not being obeyed, the court made a further order on the following terms:

' That the court hereby directs the Officer Commanding Buruburu Police Station to arrest and bring before the court as soon as practically possible any person found carrying out any construction or development on LR No 209/9465, LR No 209/9466, LR No 209/9467 and LR No 209/9468 for him or her to show cause why he/she should not be committed to civil jail for disobeying the orders issued by the court herein on June 17, 2019.'

8. It is not in dispute that even this order of December 20, 2019 was not obeyed. The construction works on the suit properties continued and no one was arrested as ordered by the court. On May 5, 2020, the counsel appearing for the Attorney General informed the court that the order of the court made on



December 20, 2019 was not attended to by the Officer Commanding Buruburu Police Station because the suit properties are situated in Dandora and not Buruburu. He requested that the order be amended and directed at the Officer Commanding Dandora Police Station. Following that request, the court amended the earlier order on May 5, 2020 to read:

' That the Officer Commanding Dandora Police Station to arrest and bring before the court as soon as practically possible any person found carrying out any construction or development on LR No 209/9465, LR No. 209/9466, LR No 209/9467 and LR No 209/9468 for him or her to show cause why he/she should not be committed to civil jail for disobeying the orders issued by the court herein on June 17, 2019.'

9. The new order was served upon the Officer Commanding Dandora Police Station. I am certain of this fact because from the record, on May 18, 2020, the Officer Commanding Dandora Police Station wrote to this court to confirm the authenticity of the said order. When the matter came up on June 8, 2020 for confirmation whether the Officer Commanding Dandora Police Station had acted on the order, the court was informed that despite service of the order upon the said officer, no action had been taken and that construction was still continuing on the suit properties. It was after all attempts to enforce the orders made herein on June 17, 2017 failed that the court gave directions for the hearing of the plaintiff's contempt of court application dated December 16, 2019.

' I am satisfied from the evidence placed before the court that even after the court stopped any other or further construction on the suit properties, the construction works continued. I am also convinced that those who were carrying out construction on the suit properties were aware of these proceedings and of the fact that the activities they were engaged in were stopped by the court. The activities on the suit properties were in the circumstances being carried out in contempt of court. It is regrettable that even the Police could not bring the contemptuous acts to an end by arresting those found on the suit properties after the court ordered such arrest to be carried out to unmask those behind the construction. I believe that the Police will still have an opportunity to come clean on the matter.

I am convinced that demolition of the structures put up on the suit properties after the orders made herein on June 17, 2019 will send a strong message to the contemnors and those who have been protecting them that you defy a court order at your own peril. I am satisfied that in the circumstances of this case, an order for the demolition of the structures put up on the suit properties in defiance of the orders made on June 17, 2019 is necessary to redeem in the words of the Attorney General 'the already ridiculed image of the court'.

10. It appears as if I spoke too early when I stated that 'the Police will still have an opportunity to come clean on the matter'. It was not to be. What is now before me is another contempt application now brought against the Officer Commanding Dandora Police Station (hereinafter referred to only as 'the OCS'). The application that has been brought by way of Notice of Motion dated January 26, 2021 is seeking the following orders;

1. That the court be pleased to find and hold the OCS Dandora Police Station (the OCS) in contempt of this court's order of November 26, 2020.
2. That this court be pleased to hold that as a consequence of their acts of contempt, the contemnors shall be detained in prison for a period of six (6) months or such period that the court may please.
3. That the court be pleased to compel the contemnors to obey the said court order.



4. That the costs of the application be paid by the respondent.
11. The application that was supported by the affidavit and supplementary affidavit of Kevin Wakwaya sworn on January 26, 2021 and March 15, 2022 respectively was brought on several grounds. In summary, the plaintiff's contention is that in defiance of the court order made on November 26, 2020, the OCS refused to give it assistance in the form of police protection to enable it demolish the structures on the suit property put up in contempt of court despite several requests. The plaintiff contended that it was after it brought these proceedings that the OCS pretended to be taking action on the court order. It is on account of that that the plaintiff has sought the punishment of the said OCS.
12. The application is opposed by the OCS through a replying affidavit sworn by Peterson Kunga on October 6, 2021. Peterson Kunga is the current OCS Dandora Police Station. In his affidavit he stated that he was posted to head Dandora Police Station in February 2021 and that from the correspondence that he found at the station concerning the dispute before the court; the court order of November 26, 2020 was received at the station; verified with the court and found genuine; the ground assessed and the number of police officers required confirmed. He stated that since the operation was to involve private use the Police, the plaintiff was advised to make payment for police services which he never did resulting in the Police not taking any action in the matter. He stated that there was no intention of disobeying the court order and that he was prepared to accord the plaintiff the needed assistance as soon as he made the requisite payment.
13. The application was heard on March 16, 2022 when Mr Wakwaya appeared for the plaintiff, Mr Kamau for the OCS, Mr Murunga for the 1<sup>st</sup> defendant and Mr Were for the interested parties. Mr Wakwaya submitted that the OCS was aware of the court order of November 26, 2020 but failed to comply with the same even after several letters were written to him to act on the matter. Mr Wakwaya dismissed the OCS's claim that he did not comply with the order because of the plaintiff's failure to pay for the police services as baseless. He submitted that the plaintiff was not seeking private use of the Police but execution of a court order. Mr Wakwaya submitted that the OCS was required to act under Chapter 28 of the National Police Service Standing Orders(SSO) and not under Chapter 57 of SSO referred to by the OCS. He submitted that Chapter 57 of SSO refers to private use of the Police while Chapter 28 of SSO deals with execution of court orders. He submitted that execution of court orders by the Police does not require any payment or facilitation. He submitted that even if payment was required, the plaintiff was never informed of the amount payable. He urged the court to allow the application.
14. In his submission in reply, Mr Kamau took issue with the competence of the affidavits filed in support of the application. He submitted that the affidavits were sworn by the plaintiff's advocate and not by the plaintiff's authorised officer. He submitted that an advocate of a party cannot depone to contentious matters in a suit. Mr Kamau cited two authorities in support of this submission and urged the court to disregard the said affidavits. On the merit of the application, Mr Kamau submitted that the order made on November 26, 2020 permitted the plaintiff to demolish structures that had been put up on the suit property. He submitted that the role that was to be played by the Police was to provide security. He submitted that at no time did the plaintiff indicate to the OCS that it was ready to carry out the demolition and that it required security.
15. Mr Kamau submitted further that the plaintiff was also required to pay for the Police services pursuant to Chapter 57 of the SSO. He submitted that the plaintiff did not make the payment and that the letters by the plaintiff's advocates inquiring about the charges payable were written while the present application was pending and furthermore the same were addressed to the Attorney General and not to the OCS. Mr Kamau reiterated that the exercise that the OCS was required to undertake was a private



affair and as such the plaintiff had to pay the Police for their services of providing security. He urged the court to dismiss the application.

16. Mr Murunga for the 1<sup>st</sup> defendant and Mr Were for the interested parties adopted the submissions by Mr Kamau. Mr Were added that his clients were denied an opportunity to respond to the application.
17. In response to Mr Kamau's submissions, Mr Wakwaya submitted that the facts that he deponed to were within his knowledge and that the same were not contentious. He submitted that the OCS did not contest any fact in his affidavits and that all the correspondence that he annexed to his affidavits originated from his office. He cited several authorities in support of his contention that nothing stops an advocate acting for a party from swearing an affidavit in a suit in respect of matters within his knowledge and which are not contentious. Mr Wakwaya submitted that the plaintiff had placed evidence before the court showing that the plaintiff had requested for security and that the same was not provided by the OCS. He submitted that the OCS had placed no material before the court showing that he was ready to comply with the order of the court. He submitted that failure to comply with the order was not explained.

### **Determination.**

18. I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the OCS in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the authorities cited in support thereof. In *Hadkison v Hadkinson*[1952] All ER 567, it was held that:

' It was plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment'.

19. In *Mwangi HC Wangonde v Nairobi City Commission, Civil Appeal No 95 of 1998*, it was held that:

' As a general rule an order of court requiring a person to do or abstain from doing any act may not be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.'

20. In *Mutitika v Baharini Farm Ltd [1985] KLR 227* it was held among others that:

- i. The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.
- ii. The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.

21. The courts have since moved away from the position that the order alleged to have been breached must be personally served on a person sought to be punished together with the penal notice before contempt can be proved. Knowledge of a court order has been held to be sufficient thereby dispensing with personal service for the purposes of contempt proceedings. See, *Shimmers Plaza Limited v National Bank of Kenya Limited*[2015]eKLR and *Basil Criticos v Attorney General & 4 others*[2012]eKLR.



22. There is no dispute that the court made an order herein on November 26, 2020 requiring the OCS to provide security to the plaintiff in the event that it became necessary for it to carry out demolition of the structures that were put up on the suit property in breach of a court order. It is not disputed that the OCS was aware of the order and its terms and had even verified that it was genuine. What is disputed is whether the OCS disobeyed the order. The plaintiff thinks so while the OCS thinks to the contrary. The OCS has contended that the order of November 26, 2020 was not complied with by the OCS because of the failure on the part of the plaintiff to make payment for the use of the police officers who were to be deployed to assist in maintaining security. The OCS has contended that this was a private use of police officers and as such had to be paid for as provided in the SSO. The OCS contended that since no payment was made no further action could be taken in the matter. As mentioned earlier, the plaintiff contended that no payment was required and that in any event, it was not informed of the amount payable.
23. Having considered the evidence before the court, I am in agreement with the plaintiff that no reasonable explanation has been given by the OCS why it failed to comply with the order of May 26, 2020. Chapter 57 that the OCS has relied on as excusing his failure to comply with the said court order provides as follows:

' Chapter 57— Private Use Of Police

1.

- (1) Subject to section 104 of the *National Police Service Act*, 2011, the Inspector- General may, on application by any person, station an officer for duty on such place and for such period as the Inspector General may approve.
- (2) Subject to sub-paragraph (3), the Inspector General may delegate the powers to—
  - (a) A county commander; or
  - (b) The county formation or unit commanders, where private use of a police officer is sought for a period not exceeding three months.
- (3) Notwithstanding sub- paragraph (2), where a person who intends to engage the services of a police officer for a definite period exceeding three months, he or she shall make an application to the respective Service Headquarters: Provided that where the person desires to discontinue the services of a police officer deployed for private purposes, he shall give the respective Deputy Inspector General a one month's notice.
- (4) Any deployment for private purposes shall be for the protection of the public good or interest.
- (5) A police officer shall not be deployed for any private purposes other than in accordance with the provisions of this Standing Order and the relevant laws.
- (6) The Inspector-General shall have the discretion to determine the number of police officers to be deployed, the purpose and



the period for such deployment and may accept or decline to authorize such deployment where he considers it appropriate. Authority to deploy police officer for private purposes.

2. A person making an application for private police use of a police officer shall—
  - (a) Apply in the form and manner prescribed by the Inspector-General; and
  - (b) Pay the prescribed charges.
5.
  - (1) The agreement for private use of police officers shall be made and the charges paid by the applicant before the deployed officer is released to the private premises or in a public place where entry is temporarily regulated by the charging of a fee, such as race meetings and football matches.
  - (2) A charge shall not be made for police officers employed outside such places, where the police officers are responsible for the prevention and detection of crime or the regulation of traffic on public roads.
  - (3) Where any doubt arises as to whether charges should be levied, such issue should be referred to respective Service Headquarters for determination.'

24. I am in agreement with the plaintiff that this Chapter does not apply to the plaintiff's situation. The plaintiff did not make an application for private use of the Police. The plaintiff had a court order that directed the Police to provide it with security for a particular purpose. The order directed the Police to provide security only and nothing else. The Police was required to provide security so as to maintain law and order during the demolition that the plaintiff was to carry out at its own expense. The National Police Service maintains law and order as part of its public duty. It is not expected to demand any payment for such service unless it is expected to carry out an undertaking that is beyond its normal public duty. Enforcement of a court order by the Police cannot be deemed private use of the Police by any imagination. I am in agreement with the plaintiff that the provisions of the SSO that applies to execution of court orders is Chapter 28 and not Chapter 57. Chapter 28 of the SSO provides as follows:

' Chapter 28— Criminal And Civil Procedure

1.
  - (1) A police officer shall—
    - (a) Obey and execute all lawful orders in respect of the execution of the duties of his office which he or she may from time to time receive from his or her superiors while in the Service; and
    - (b) Obey and execute all orders and warrants lawfully issued by a court.
  - (2) Court orders shall at all times be verified by an officer of or above the rank of Inspector of Police or the registrar or executive officer of the issuing court. Procedure.
- 2.



- (1) The orders shall bear the court seal, date and signature of the issuing officer.
- (2) Before execution by police officers, a senior officer not below the rank of Inspector of Police must endorse the order by counter signing and stamping with the official stamp.
- (3) All police officers executing a court order shall be aware of—
  - (a) the contents of the order;
  - (b) the recipient of the order;
  - (c) the person to whom the order is to be executed;
  - (d) the time limit or consideration; and
  - (e) the penal notice.
- (4) On receipt of the court order and upon assessing the situation on the ground and if it appears to the police officer concerned that the order may not be executed owing to unavoidable circumstances, citing such reasons, the officer shall seek guidance from the originating court and from his or her superiors.'

25. It is clear from the foregoing Chapter of the SSO that the plaintiff did not need to make any payment to the Police before they could provide him with security as ordered by the court. In the event that the OCS could not execute the court order without external assistance, Chapter 28(4) of the SSO allowed him to seek guidance from the court that issued the order that he never did. From the history of the dispute that I have narrated in the excerpts of my earlier ruling reproduced above, I am of the view that the alleged non-payment of facilitation fees by the plaintiff is just an excuse being used by the OCS for his failure obey a lawful court order. No evidence has been placed before the court showing that the plaintiff was advised of the charges or fees that it was required to pay for the alleged private use of the Police. The plaintiff has placed before the court evidence showing that even after filing the present application, it made attempts to obtain information from the counsel acting for the OCS as to the amount it was required to pay and no response was received to its inquiries.

26. Due to the foregoing, it is my finding that the plaintiff has discharged the burden of proof of contempt against the OCS. The plaintiff has demonstrated that the OCS wilfully disobeyed the order of this court the terms of which he was aware of. A case has therefore been made out for the punishment of the OCS. In *Mutitika v Baharini Farm Ltd.*(supra), the court held among others as follows:

' The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.'

27. I have noted from the record that disobedience of this court's orders by the OCS Dandora Started in 2019. I have noted that the current OCS of Dandora Police Station was transferred to that station on January 22, 2021 after the order of November 26, 2020 had been issued and served upon the OCS who was in charge of that station. Although that was not an excuse for him not to comply with the said court order that he became aware of upon coming to the station, the court after going through his affidavit wishes to give him the benefit of doubt that he means well for the rule of law and administration of justice. I will therefore give him an opportunity to comply with the order of November 26, 2020.



28. In conclusion, I hereby make the following orders;

1. The Officer Commanding Dandora Police Station, Police Inspector Peterson Kunga is found to be in contempt of court for disobeying the order made herein on November 26, 2020.
2. The said officer is given thirty (30) days from the date when the plaintiff shall notify him in writing of its readiness to demolish the structures constructed on LR No 209/9465, LR No 209/9466, LR No 209/9467 and LR No 209/9468 in terms of the orders made on November 26, 2020 to purge his contempt by providing the plaintiff with security to enable it carry out the said demolition.
3. The said officer and the plaintiff shall agree on the date and time of carrying out the demolition exercise within the said period of 30 days.
4. The matter shall be mentioned on September 21, 2022 to confirm if the contemnor has purged his contempt and for further orders.
5. The costs of the application shall be in the cause.

**Dated and Delivered at Nairobi this 27th Day of June 2022**

**S. OKONG'O**

**JUDGE**

**Ruling read virtually through Microsoft Teams Video Conferencing platform in the presence of;**

**Mr. Wakwaya for the Plaintiff**

**Mr. Murunga for the 1<sup>st</sup> Defendant**

**N/A for the 2<sup>nd</sup> Defendant**

**N/A for the 3<sup>rd</sup> Defendant**

**Mr.Kamau for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants**

**Mr. Were for the Interested Parties**

**Ms. C. Nyokabi - Court Assistant**

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