



**Mutisya alias Lazaro & another v District Land Registrar, Makueni County & 4 others
(Environment & Land Petition E003 of 2021) [2022] KEELC 3868 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3868 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION E003 OF 2021**

**TW MURIGI, J
JULY 27, 2022**

BETWEEN

STEPHEN KASOLO MUTISYA ALIAS LAZARO MUTISYA 1ST PETITIONER

FELISTER MBULA KIOME 2ND PETITIONER

AND

DISTRICT LAND REGISTRAR, MAKUENI COUNTY 1ST RESPONDENT

**DIRECTOR OF LAND ADJUDICATION & SETTLEMENT, MINISTRY OF
LANDS AND PHYSICAL PLANNING 2ND RESPONDENT**

SUB-COUNTY SURVEYOR, KIBWEZI SUB-COUNTY 3RD RESPONDENT

BRIAN MUTIE MUTINDA 4TH RESPONDENT

**COUNTY COMMANDER, NATIONAL POLICE SERVICE, MAKUENI
COUNTY 5TH RESPONDENT**

RULING

1. By a notice of motion dated November 12, 2021 brought pursuant to the provisions of section 5 of the *Judicature Act*, rule 39 of the *High Court Organization and Administration General Rules 2016*, order 40 rule 3 (1) and order 51 rule 1 of the *Civil Procedure Rules*, section 1A, 1B and 3A of the *Civil Procedure Act* and all enabling provisions of the law, the applicants are seeking for the following orders: -
 1. Spent.
 2. That Brian Mutie Mutinda, the 4th respondent herein, be cited for contempt of court and be committed to civil jail for a period of six (6) months for disobeying the orders of the honourable court issued on May 17, 2021.



3. That an order of injunction do issue restraining the 4th respondent either by himself, agents, servants, employees, workers, proxies or anyone acting on his behalf or under his command from further trespassing onto and/or cultivating or carrying out any activities on or in any other way interfering with possession, occupation, use and quiet enjoyment by the petitioners of plot No 444 Kiboko B settlement scheme pending the hearing and determination of this application.
 4. That an order of injunction do issue restraining the 4th respondent either by himself, agents, servants, employees, workers, proxies or anyone acting on his behalf or under his command from further trespassing onto and/or cultivating or carrying out any activities on or in any other manner interfering with possession, occupation, use and quiet enjoyment by the petitioners pending the hearing and determination of this petition.
 5. That the OCS Makindu police station do ensure compliance of these orders.
 6. That the costs of this application be borne by the 4th respondent.
2. The application is premised on the grounds on its face together with the supporting affidavit of the applicant sworn on the even date.
 3. A summary of the grounds and the averments is that pursuant to the application dated April 9, 2021, the court granted conservatory orders and the same were served upon the respondent's counsel on May 18, 2021. That in blatant disregard of the said orders, the 4th respondent in the company of goons ploughed the suit land using tractors. The applicants contends that the actions by the 4th respondent are expected to recur with the onset of the rainy season if the court does not punish the 4th respondent for disobeying the court order.
 4. Opposing the application, the 4th respondent vide his replying affidavit sworn on the January 17, 2022 averred that he is the registered owner of plot No 444 Kiboko B settlement scheme. He averred that after he purchased the property, he took possession of the same until there arose a need to verify the boundaries between plot No 444 and plot No 445. In that regard, the 1st to 3rd respondents upon carrying out the verification exercise realized that the applicants who had purchased portions of plot No 445 Kiboko B settlement scheme had trespassed on the suit land.
 5. He further averred that although he was not served, he was aware of the existence of the court orders. He further averred that he had not interfered with the applicants possession, occupation or quiet enjoyment of the portion of 2 acres comprised in plot No 444 Kiboko B settlement scheme. He argued that he had planted on his portion since the court did not restrain him from cultivating his land. The respondent denied that he hired goons to threaten the applicants.
 6. The application was canvassed by way of written submissions.

The Applicants' Submissions

7. The applicants submissions were filed on 14th February 2022.
8. Counsel for the applicant submitted that the orders issued on May 17, 2021 and served upon the respondent counsel had not been set aside. Counsel went on to submit that the 4th respondent admitted that he was aware of the orders issued by the court which restrained him from interfering with the petitioners quiet enjoyment and occupation of plot No 444 Kiboko B settlement scheme in its entirety pending the hearing and determination of the petition.



9. Counsel argued that the order did not allude that the 4th respondent could occupy or use any portion of the suit land as alleged. Counsel maintains that the actions by the 4th respondent clearly interfered with the petitioners possession, occupation, use and quiet enjoyment of the suit land. To buttress his submissions counsel placed reliance on the following authorities: -
- 1) [Dunstan Mutuku Wambua v Glory Rent a Car Ltd](#) (2017) eKLR.
 - 2) [Teachers Service Commission v Kenya National Union of Teachers & 2 others](#) (2013) eKLR.
 - 3) Section 29 of the [Environment and Land Court Act](#).

The 4th Respondent's Submissions

10. The 4th respondents written submissions were filed on February 23, 2022.
11. Counsel submitted that the applicants had failed to disclose the person who had issued the threats and the particulars of the threats. Counsel further submitted that the respondent was occupying 6 acres in plot No 444 Kiboko B settlement scheme which borders plot No 445 Kiboko B settlement scheme. he stated that the applicant had trespassed on 2 acres comprised in the suit land.
12. In addition, counsel submitted that the suit land was ploughed by the 4th respondent's wife in his absence who did not perceive it as an act of contempt. Counsel maintains that the 4th respondent did not deliberately disobey the court orders.

Analysis And Determination

13. Having considered the application, the affidavits and the rival submissions, I find that the issue for determination is whether the 4th respondent is in contempt of the court orders issued on May 17, 2021.
14. The [Black's Law Dictionary](#) 9th Edition defines contempt of court as;
- “conduct that defies the authority or dignity of the court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
15. In [Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another](#) (2005) eKLR Ibrahim J (as he then was) stated as follows;
- “It is essential for the maintenance of the rule of law and order that the authority and 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 or in respect to whom an order is made by the 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.”
16. The applicant cited the provisions of section 5(1) of the [Judicature Act](#) which confers jurisdiction on the superior courts to punish for contempt and provides that;
- “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.”



17. The law guiding the present application is order 40 rule 3(1) of the *Civil Procedure Rules* which provides 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.

18. The High Court of South Africa in the case of *Carla Burchell v Barry Grant Burchell* Eastern Cape Division Case No 364 of 2005 held that in order to succeed in civil contempt proceedings, an applicant has to prove;

- i) The terms of the order,
- ii) Knowledge of these terms by the respondent,
- iii) Failure by the respondents to comply with the terms of the order.

19. Back home, in the case of *Samuel MNMweru & others v National Land Commission & 2 others* (2020) eKLR the court set out the elements to be proved in an application for contempt of court as follows;

“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.”

20. The first issue for determination is whether the terms of the order were clear. It is not in dispute that on May 17, 2021, the court pursuant to the application dated April 9, 2021, issued a conservatory order restraining the respondents from either by themselves or through their agents, servants, employees, workers, proxies or anyone acting on their behalf or under their command from verifying and marking the boundaries, repossessing, allocating, transferring, evicting, threatening to evict or in any other way interfering with the possession, occupation, use and quiet enjoyment by the petitioners of plot No 444 Kiboko B settlement scheme pending the hearing and determination of this petition.

21. The order was unambiguous as it restrained the respondents from interfering with or doing any act that would be prejudicial to the petitioner’s quiet possession of plot No 444 Kiboko B settlement scheme.

22. To this end I find that the order issued on the April 17, 2021 was clear and unambiguous.

23. The next issue for determination is whether the 4th respondent was served or had proper notice of the order. The applicant in her supporting affidavit averred that the 4th respondent counsel was served with the order on May 18, 2021. Counsel for the 4th respondent did not dispute the same. The 4th respondent in his replying affidavit admitted that although he was not served with the order, he was aware of the



- order. I am therefore satisfied that the 4th respondent was aware of the terms of the order. I also find that the terms of the order were clear in terms of the parcel number and the conservatory order.
24. On the issue whether the 4th respondent has deliberately breached the court order, the applicant herein has a duty to prove his case beyond the balance of probabilities. This is because contempt of court is in the nature of criminal proceedings and the liberty of the subject is usually at stake. The applicant must prove wilful and deliberate disobedience of the court order if he were to succeed as was held in the case of *Gatharia K Mutitika v Babarini farm Ltd* (1985) KLR where the court held that;
- “A contempt of court is an offence of a criminal nature. A man may be sent to prison. It must be proved satisfactorily.....It must be higher than prove 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 nature.”
25. Similarly, in the case of *Peter K Yego & others v Pauline Wekesa Kode* ACC No 194 of 2014 the court held that;
- “it must be proved that one had actually disobeyed the court order before being cited for contempt.”
26. In the present application, the conservatory orders issued by the court relates to plot No 444 Kiboko B settlement scheme. The applicant averred that the respondent in blatant disregard of the orders issued on May 17, 2021 ploughed the suit land with the assistance of hired goons. She averred that the goons were armed and when she tried to resist the trespass and ploughing of the suit land, the goons threatened her with dire consequences. The applicant in her supporting affidavit annexed photographs that depicted men at work, a tractor ploughing the land and the ploughed suit land.
27. The 4th respondent on the other hand stated that he is the lawful registered owner of the suit land. He stated that the applicant had trespassed on 2 acres of the suit land. He produced a letter dated May 4, 2021 from the sub county land adjudication and settlement officer Kibwezi sub county to demonstrate that he was registered owner of the suit land. He argued the court did not issue orders restraining him from cultivating his portion of land. The 4th respondent submitted that the suit land was ploughed by his wife in his absence who did not perceive it to be an act of contempt of court.
28. In the case of *Mutitika v Babarini Farm Ltd* (1985) eKLR the Court of Appeal held that;
- “In our view, the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities but almost not exactly beyond reasonable doubt..... the standard of proof beyond reasonable doubt ought to be left where it belongs, to criminal cases. It is not safe to extend it to an offence which can be said to be quasi criminal in nature.”
29. This court has examined all the photographs annexed to the applicant’s supporting affidavit. There is clear evidence of men and a tractor at work on the suit land. It is crystal clear that the suit land has been ploughed. The respondent equally admitted that the suit land was ploughed by his wife.
30. In the case of *Commercial Bank of Africa Ltd v Ndiragu* (1992) KLR the Court of Appeal held that;
- “It is imperative that orders of the court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the



courts. A flagrant disobedience of the court order if allowed to go unchecked, will result in the onset of an erosion of judicial authority.”

31. I find that the 4th respondent was aware of the order issued on May 17, 2021 as he acknowledged the same in his replying affidavit. His advocate was equally served with the said orders. The 4th respondent ploughed the suit land despite the fact that the orders issued on May 17, 2021 had not been set aside. I find that the 4th respondent wilfully and deliberately defied the orders of the court despite being aware of the same.
32. Court orders must be obeyed whether a party agrees with its contents or not. As long as the order subsist, it is not open for a person to choose whether or not to comply with or to ignore such orders.
33. I find that the 4th respondent is in contempt of the orders of the court for which he should be punished. The 4th respondent is directed to appear before this court on an agreed date for sentencing and or sanctions against him.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF JULY, 2022.

IN THE PRESENCE OF: --

Court assistant – Mr. Kwemboi

Wambua for the Petitioners/Applicants

Wasolo for the 4th Respondent

