



**Impact Chemicals Limited v County Government of Kisumu & another;  
Kenya Commercial Bank Ltd (Interested Party) (Environment & Land  
Case E003 of 2021) [2022] KEELC 3087 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3087 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE E003 OF 2021**

**A OMBWAYO, J  
JULY 22, 2022**

**BETWEEN**

**IMPACT CHEMICALS LIMITED ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF KISUMU ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, KISUMU ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**KENYA COMMERCIAL BANK LTD ..... INTERESTED PARTY**

**RULING**

- 1 The plaintiff/applicant comes to this court vide application dated 23/2/2022 seeking orders that:
  1. The honorable court be pleased to cite and punish the County Secretary and/or City Manager of the defendant/respondents, for disobeying and/or disregarding the lawful court order issued and/or granted on the September 9, 2021.
  2. Consequently, the honourable court do issue warrants of arrest, to bring the county secretary and/or city manager of the defendant/respondents before this honourable court for committal to jail for disobedience.
  3. Consequent to prayer 2 hereinabove being granted, the honourable court be pleased to commit the county secretary and/or city manager of defendant/respondents to jail for a duration not exceeding six (6) months and/or such shorter period as the court may deems fit and expedient.
  4. In the alternative, the honourable court be pleased to grant an order of sequestration to attach the properties of the defendant/respondents, and same be sold to defray the damages



occasioned by the breach and/or disobedience of the lawful court order made on the September 9, 2021.

5. Costs of this application be borne by the defendant/respondents.
6. Such further and/or other orders be made as the court may deem fit and expedient.

2 The application is based on grounds that:

- a. On or about the 29<sup>th</sup> day of January, 2021, the applicant herein filed an application seeking an order of injunction restraining the respondents either by themselves, agents, employees and/or any other person acting under their instructions from trespassing into, alienating, encumbering, developing and/or dealing with the property known as Kisumu Municipality/block 13/107 and Kisumu Municipality/block 13/109 respectively, hereinafter the suit properties.
- b. The application was heard and allowed vide ruling dated 3<sup>rd</sup> September, 2021 wherein the honourable court issued temporary injunction against the respondents herein, pending hearing and determination of the main suit.
- c. Following the said ruling, the applicant's counsel extracted an order dated September 9, 2021, allowing the applicant's prayers for temporary injunction against the respondents as well as the interested parties herein and served the same upon the respondents and the interested party, all of them on September 10, 2021.
- d. On the other hand, the court order under reference was clear, explicit and unequivocal.
- e. However, despite the explicit court order, the respondents have since commenced and/or carried out activities meant to interfere with the suit properties.
- f. In the particular, the respondents have proceeded to fence off the suit properties, denying the applicant access to the suit properties and the respondents have also commenced works on the same using tractors and are now demolishing everything within the properties as they pave and/or plough the suit properties to the dismay of the applicant herein.
- g. In the premises, the respondents have disobeyed and/or disregarded lawful order of this honourable court.
- h. Unless the orders sought are granted, the actions of the respondents shall continue to deprive the applicant of his rights before the hearing and determination of the main suit herein thus interfering with the substratum of the suit.
- i. The actions and/or activities of the respondents are aimed at defeating the applicant's rights over and in respect of the suit properties.
- j. On the other hand, the activities are being carried out, on the face of vibrant and existing court orders.
- k. In the premises, the actions and/or omission complained of, constitute and/or amount to disobedience of lawful court orders.
- l. In the circumstances, the conduct of respondents are bound to set a dangerous precedent.
- m. The conduct of the respondents militates against the administration of justice and the rule of law in general,



- n. The integrity and/or dignity of this honourable court has been brought to disrepute.
  - o. It is in the interest of justice that the county secretary and/or city manager of defendants/ respondents be cited and punished.
  - p. At any rate, the applicant is bound to suffer irreparable loss.
  - q. In the premises, this is a fit and proper case to grant the orders sought.
  - r. It is in the interest of justice that the application herein be granted Ex-Debito Justitiae.
  - s. Unless the orders sought herein are granted, the efficacy of the orders made on the 3<sup>rd</sup> day of September 2021, shall be destroyed and/or rendered otiose.
- 3 The applicants have annexed two photos showing works being undertaken on the suit land. The photos are dated 8/2/2022 and 25/2/2022. In reply to the application the surveyor for the 1<sup>st</sup> respondent states that he was not served personally. Moreover, that the 1<sup>st</sup> respondent has not interfered with the suit property. That what is being constructed on the suit property is allegedly the County Assembly of Kisumu. He states that it is the County Assembly that is being constructed on the suit property. That the County Assembly and its membership is established under article 177 and 178 of the Constitution of the Kenya 2010. That part III of the County Assembly Services Act No. 17 of 2012 further gives finer details about the composition and functions of the various organs of the County Assembly.
- 4 That section 12 County Assembly Services Act provides for the powers of the County Assembly Service Board which includes to acquire, hold, charge and dispose of movable and immovable property. That part V of the County Assembly Services Act clearly provides on the financial provisions of the County Assembly and as such the respondent not involved in any way in the operations of the County Assembly.
- 5 That the developments of the County Assembly are not within control of the respondent and are in fact in full control of the speaker, clerk and the County Assembly Service Board and it is confirmed that it is the County Assembly that is being constructed on the suit land then the entity to pursue is the County Assembly. That the County assembly is not a party to this suit.
- 6 The respondent states that on February 22, 2022, the Counsel for the applicant submitted that there was a need for a surveyor to visit the site and identify the exact location of the suit property, it follows that the applicant is not even certain of the location of the suit land. The court should thus be slow to punish any person for the contempt in circumstances where the applicant is not sure of the contempt complained. The respondent insists that she has not carried on any activities on the suit land.
- 7 That the respondent did not on February 8, 2021 fence off the suit land and never installed security at the gate. That there is nothing to provide proof that the tractors captured belong to the respondent.
- 8 The applicant has never sought audience with the respondent at any level and if at all the applicant had approached the respondents they would have explained to him that they have nothing to do with activities on the suit land.
- 9 That there is no good faith on the part of the applicant noting that the applicant is already aware of the person who is carrying out activities on the allied suit land.
- 10 In the supplementary affidavit, Adams Omondi Kisoka states that the County Secretary did not respond to the application. The replying affidavit by Valentine Oiro is misplaced and should be struck out. The County secretary ought to have sworn the affidavit. According to the applicant, the order was served upon the counsel for the respondent hence he discharged his duty of service.



- 11 I have considered the application and affidavits on record and rival submissions and do find that this court issued an order granting the prayers for temporary injunction as prayed for by the plaintiff. However, the plaintiff did not extract the prayers as prayed in the application. I do find that what was extracted as the order of the court was ambiguous and that this court cannot punish a party or a person where the extracted orders are ambiguous.

Legally speaking, contempt of court is that behaviour, action or non-action that defies or disrespects authority of court.

Black's Law Dictionary 9<sup>th</sup> Edition, defines contempt as:

The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

- 12 Otherwise said, contempt is conduct that impairs the fair and efficient administration of justice. Section 5 of the Judicature Act confers jurisdiction on the superior courts to punish for contempt.
- 13 Order 40 rule (3) of the Civil Procedure Rules (2010) provides that in cases of disobedience, or of breach of any terms of a temporary injunction, the court granting that 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. This application has therefore invoked this court's powers in terms of Order 40 rule (3). The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there 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.
- 14 On the issue of contempt inonet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] KLR 828, Ibrahim, J (as he then was), underscored the importance of obeying court orders, stating:

It is essential for the maintenance of the rule of law and order that the authority and the 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 whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void. (emphasis)

- 15 In T. N. Gadavarman Thiru Mulpad v Ashok Khot and anor [2006] 5 SCC, the Supreme Court of India also emphasized on the dangers of disobeying court orders, thus:

Disobedience of this court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and



authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that court's orders are to be followed and complied with.

- 16 Contempt of court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed. This was aptly stated in *Gatharia K. Mutikika v Babarini Farm Limited* [1985] KLR 227, that:

A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof 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 in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.

- 17 Due to the seriousness of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order.
- 18 In this case there was proper service despite the fact that the extracted order was ambiguous. The extracted order does not come out clearly on the exact order given by the court. One has to go back to the proceedings to discern the order given. I am reluctant to punish the County Secretary and City Manager for the above reasons. The application is not allowed. Costs to the 1<sup>st</sup> respondent.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 22<sup>nd</sup> DAY OF JULY, 2022**

**ANTONY OMBWAYO**

**JUDGE**

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.

