



**Kirui v Towet (Environment and Land Case Civil Suit
26 of 2013) [2022] KEELC 2472 (KLR) (20 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT 26 OF 2013
FM NJOROGE, J
JULY 20, 2022**

BETWEEN

CAROLINE CHERONO KIRUI PLAINTIFF

AND

LINER CHERONO TOWET DEFENDANT

RULING

1. This is a ruling on the application dated 21/03/2022 filed by the plaintiff. The application seeks the following orders:
 - a. ...spent
 - b. ...spent
 - c. That upon grant of prayer 2 above, this Honorable court be pleased to find the OCS, Njoro Police Station, one Benard Ebuu (CI) guilty of contempt of court and commit him to prison for a period of six months or such longer period not exceeding two years or to a fine not exceeding twenty million shillings or to both.
 - d. That further and/or in the alternative, this honorable court be pleased to issue appropriate and/or further orders and/or directions to enable the orders issued on 1st March 2022 be fully implemented, enforced and/or executed.
 - e. That the OCS, Njoro Police Station, one Bernard Ebuu (CI) to personally pay to the applicant the costs of this application.
2. The application is supported by the applicant's sworn affidavit dated 21/03/2022. The grounds on the face of the application and the supporting affidavit are that the plaintiff filed the application dated October 14, 2021 which was allowed on February 25, 2022; that among the orders granted was an order that required the OCS Njoro Police Station to provide security during the survey work to ascertain



and excise 0.404 Hectares in the plaintiff's favor; that the said order was served upon the OCS Njoro Police station on March 1, 2022; that the OCS received the court order but declined to comply with it by stating that he lacked jurisdiction to enforce it; that the OCS wrote the letter dated March 11, 2022 to the court acknowledging receipt of the court order where he allegedly stated his intention not to comply with the said court order; that by the fact that the OCS had declined to comply with the order, the plaintiff is unable to also comply with orders (b) and (c) of the orders granted on February 25, 2022 and issued on 1/03/2022; that the letter of consent for subdivision from the Rongai Land Control Board that was issued to the plaintiff on October 12, 2021 was set to expire on April 12, 2022 and therefore the plaintiff had no alternative but to cite the OCS Njoro Police Station to comply with the said order before the Land Control Board Consent lapses; that the OCS Njoro Police Station does not have a plausible reason to ignore and disobey the court order issued on March 1, 2022; that it is in the interest of justice that the application be granted.

3. In response to the application dated March 21, 2022, Benard W. Ebuu the Officer Commanding Station (OCS) Njoro Police Station filed a replying affidavit on April 20, 2022. He deposed that he was served with a court order on 11/03/2022 by a process server known as Martin Liambila; that the court order was issued on 1/03/2022 which required him to provide security during the survey work on Njoro/Ngata Block 2/2807(Kirobon); that after reading the court order he requested one P.C. Jamleck Ngare, a police officer to accompany the process server to the suit property to ascertain its jurisdiction; that upon visiting the suit property, PC Ngare returned and confirmed that the land falls under the jurisdiction of Menengai police station; that he then wrote a letter to the issuing court indicating that the orders needed to be rectified to read the OCS Menengai Police Station; that it is not possible for his office to provide security as the suit property does not fall within their jurisdiction; that the application for contempt was filed ten (10) days after they received the court order which is unreasonable because the order had no specific date for conducting the survey; that there was no willful disobedience of the court order as alluded by the applicant and that it is in the interest of justice that the contempt application be dismissed with costs.
4. The application was canvassed by way of written submissions. The plaintiff filed her submissions dated 5/05/2022 on 06/05/2022. She submitted on whether the OCS Njoro Police station is in contempt of Court and whether she is entitled to the orders sought.
5. The plaintiff relied on Section 29 of the *Environment and Land Court Act* No. 19 of 2011, Section 5 of the *Judicature Act* and the case of *Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR. The plaintiff submitted that the aforementioned case laid down the procedure to be followed in making an application for contempt of court which procedure she had complied with. The plaintiff further submitted that the OCS Njoro Police Station is in breach of the orders of the court granted on February 25, 2022 and issued on March 1, 2022 which required him to provide security to the plaintiff's surveyor. She further relied on the case of *Samuel M.N Mweru & Others vs National Land Commission & 2 Others* [2020] eKLR which set out the ingredients needed to make out a case for contempt of court which she submitted that she has met.
6. The plaintiff submitted that the OCS Njoro Police Station's reason for disobeying the court order is unreasonable as no geographical and/or operational map or gazette notice delimiting the area of jurisdiction of Njoro Police Station was annexed to the replying affidavit and that he had failed to discharge the burden of proving or disproving the lack of territorial jurisdiction. The plaintiff further submitted that the OCS Njoro Police Station is in contempt of court and ought to be punished and she therefore sought that her application be allowed.
7. The Attorney General filed his submissions dated May 17, 2022 on the same date. It was submitted that contempt of court is the willful disobedience of a court order and that in addition to willful



disobedience, there must be knowledge of the court order. The Attorney General identified two issues for determination which are whether the alleged contemnor willfully disobeyed the said court order issued on 1/3/2022 and whether the alleged contemnors ought to be punished for contempt of court.

8. On the first issue it was submitted that the OCS Njoro police station did not disobey the said court order deliberately and that he acted in good faith. It was also submitted that the plaintiff has not demonstrated that the respondent deliberately disobeyed the court order. That the OCS Njoro upon receipt of the court order requested PC Jamleck Ngare who is a police officer to accompany the process server to the suit property to ascertain its jurisdiction and he confirmed that the property fell within the jurisdiction of Menengai Police Station. That the respondent wrote the letter dated 11/03/2022 to the Environment and Land Court and stated that the orders needed to be rectified to read “the OCS Menengai Police Station.”
9. The Attorney General relied on the case of *Samuel M.N Mweru & Others vs National land Commission & 2 Others* (supra) which set out the elements that must be proved to make out a case for civil contempt. The court therein quoted the book *Contempt in modern New Zealand* where it was stated that:
 - “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.”
10. The Attorney General went on to submit that the first element was not met as the terms of the order were unclear as they did not state the period within which the said order was to be effected by the respondent. That the applicant acted prematurely and did not give the respondent sufficient time to act upon the order if the property fell within his jurisdiction. It was submitted that on the second element, the applicant failed to disclose how the respondent failed to act on the order and on the fourth element, it was submitted that the respondent did not disobey the court order and that he has always acted in good faith. The Attorney General concluded its submissions by submitting that the application is premature and bad in law and sought that it be dismissed with costs to the respondent.

Analysis and Determination

11. After perusal of the said application, the affidavit in support, replying affidavit and the submissions, the only issue that arises for determination is whether the OCS Njoro Police Station should be held to be in contempt of court.
12. Section 5 of the *Judicature Act* provides as follows:

“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 such power shall extend to upholding the authority and dignity of subordinate courts.”



13. Section 29 of the *Environment and Land Court Act* provides as follows:

“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.”

14. The plaintiff in this matter is seeking to have the OCS Njoro Police Station be cited in contempt of the court order issued on 01/03/2022.

15. The court in the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828 stated as follows with regard to obedience of court orders:

“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.”

16. Further, the court in the case of *Gatharia K. Mutikika v Babarini Farm Limited* [1985] KLR 227 held that contempt of court is in the nature of criminal proceedings and therefore the standard of proof is higher than that of a balance of probability. The court stated as follows:

“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 on 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. As indicated before, the plaintiff had stated that the court had directed the OCS Njoro Police Station to provide security to the plaintiff's surveyor in its order issued on 1/3/2022. I must reject the Attorney General's argument that the order did not meet the requirement of clarity or lack of ambiguity. All that it required was security. Police presence on the land as survey work was done. Ridiculous as it may seem, were it not for the issue of jurisdiction the applicant's agent took with him a policeman to the



land, but it was only for the purpose, it appears, of establishing whether the property fell within the jurisdiction of the Njoro Police station and he returned an answer in the negative.

18. As to whether the respondent had knowledge of or proper notice of the terms of the order issued on March 1, 2022, he admitted that the said order was served upon him on March 11, 2022; an affidavit of service is annexed to the plaintiff's application under consideration. It is clear that he was aware of the terms of the order.
19. Regarding whether the respondent was in breach of the order, it is apparent that he wrote the letter dated March 11, 2022, the same day he was served with the court order, informing the court that land parcel No. Njoro/Ngata Block 2/2807 (Kirobon) falls within the jurisdiction of Menengai Police Station and sought that the orders be rectified. It is clear from the applicant's affidavit and from the letter the respondent wrote that the respondent never complied with the court order in question, yet it is the unqualified duty of a person who is aware of a court order to comply therewith in so far as it requires his compliance.
20. In the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR Mwita J cited with approval which this court also agrees with, the case of *Mabinderjit Singh Bitta v Union of India & Others* 1 A NO. 10 of 2010 (13th October, 2011) where the Supreme Court of India stated that:

“In exercise of ... contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution.”
21. It is the applicant's burden to establish that the OCS Njoro Police Station was aware of the court order and deliberately or willfully disobeyed it. The court in the case of *Silverse Lisamula Anami v Justus Kizito Mugali & 2 others* [2017] eKLR cited with approval the case of *Peter K. Yego & Others v Pauline Wekesa Kode*, ACC No. 194 of 2014 where the court stated as follows:

“It must be proved that one had actually disobeyed the court order before being cited to contempt.”
22. As pointed out earlier, the OCS Njoro Police Station acknowledged receipt of the court order and wrote to the court indicating that the suit property was not within his jurisdiction and requested that the orders be rectified to reflect Menengai Police Station under whose jurisdiction the suit property falls.
23. The applicant's argument raised to counter that statement is that the OCS Njoro Police Station's reason for disobeying the court order is unreasonable as no geographical or operational map or gazette notice delimiting the area of jurisdiction of Njoro Police Station was annexed to the replying affidavit and that he failed to discharge the burden of proving or disproving the lack of territorial jurisdiction.
24. This court takes judicial notice that various administrative branches of the executive arm of government charged with mandates over the entire country deploy officers to specific areas and that usually those officers are not expected to exceed the boundaries of the areas they command. This court is aware that this principle applies to the National Police Service. When the applicant argues that the OCS Njoro Police Station's reason for disobeying the court order is unreasonable as no geographical or operational map or gazette notice delimiting the area of jurisdiction of Njoro Police Station was annexed to the replying affidavit, she is in effect admitting the fact that different police stations could



be in charge of specific territories. It is only that she did not conduct a proper inquiry to establish which police station was responsible so that she may seek an order addressed to its commanding officer. Considerable confusion arises when citizens and institutions, unaware of the boundaries of the respective jurisdictions served by some offices, seek remedies from one office regarding a matter outside its territorial jurisdiction and the applicant's ignorance may be therefore excused.

25. This court notes that the Officer targeted by the order did not pretend not to have been served. He is to be commended for having received the order and actively investigating the issue of jurisdiction and for guiding the applicant's agent toward the police station said to have jurisdiction. Rather than remain silent after that, he also wrote to this court communicating his want of jurisdiction. That, to this court, hardly fits the description of contumelious conduct. The conduct of a person willfully disobeying a court order would have lacked any initiative to verify the jurisdiction within which the suit land fell, or courtesy to write to the court to reveal that the respondent was unable to comply.
26. It is my view therefore that in the circumstances of this case, the applicant has failed to prove contempt on the part of the Benard Ebuu (CI) OCS, Njoro Police station and her application dated 21/3/2022 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 20TH DAY OF JULY, 2022.

MWANGI NJOROGE

JUDGE, ENVIRONMENT AND LAND COURT, NAKURU

