



**Mberia & another v County Government of Meru (Environment & Land
Petition 01 of 2020) [2022] KEELC 13822 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13822 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION 01 OF 2020
CK YANO, J
OCTOBER 26, 2022
IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF
THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF PUBLIC PARTICIPATION & PROTECTION TO
PROPERTY
UNDER
ARTICLES 10 & 40 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

JOSEPH BUNDI MBERIA 1ST PETITIONER

JULIUS MUTI M'THIRIBI 2ND PETITIONER

AND

COUNTY GOVERNMENT OF MERU RESPONDENT

RULING

The Application

1. This ruling is in respect of the notice of motion dated February 15, 2022 and filed on February 22, 2022 by the petitioners/applicants. The application is brought under section 15 of the *Judicature Act* and section 63 of the *Civil Procedure Act* and all enabling provisions of the law and seeks for orders;
 - i. That leave be granted to the applicants to institute contempt proceedings against the county secretary Meru County for contempt of court orders.



- ii. That this honourable court be pleased to punish and order the arrest and detention of (sic) for disobeying the court order made on the December 1, 2021.
 - iii. That costs of this application be provided for.
2. The application is supported by the affidavit of Joseph Bundi sworn on February 15, 2022 and is premised on the grounds;
 - a. That the respondent and their agents have forcefully evicted the applicants from the suit land and destroyed property despite of the court order made and consequences explained by the court.
 - b. That the applicants land has been wrongfully alienated by the respondent.
 - c. That such disobedience and breach if unpunished would paint a bad picture and undermine the dignity and authority of this honourable court.
 - d. That the applicant stands to suffer irreparable loss and damage.
3. The deponent has annexed the ruling delivered on December 1, 2021 and averred that the respondent and their agents have disobeyed the court order requiring maintenance of status quo on the suit property. It contended that the respondents and their agents have forcefully evicted the applicants from the suit land and destroyed property despite of the court order made and consequence explained by the court. The applicants have annexed photographs marked “JBM2” of the alleged destruction. The applicants averred that their land has been wrongfully alienated by the respondent.
4. In opposing the application the respondent filed a replying affidavit sworn by Dr Rufus Miriti, the County Secretary of the respondent. The deponent averred that he is not a party to the petition and is not aware of the ruling of this court made on December 1, 2021, adding that he saw the said ruling for the first time as an attachment to the application herein. He stated that he was not served with the said ruling or any extracted order. He further stated that the respondent has never, did not and has no plans to evict the applicants. The deponent has noted that the photographs annexed to the application shows the Kenya Police Officers supervising the process, adding that if it were the respondent doing the eviction it could have used the county enforcement officers. He denied that the respondent evicted any person on the alleged date or at all, and that it neither sanctioned nor authorized any eviction. The deponent averred that the respondent is a firm believer in the rule of law and the unquestioned obedience of court orders and as such did not breach and disobey the ruling of December 1, 2021.
5. It is the respondent’s contention that the application is premised on the wrong provisions of the law and that prayer 2 is vague and incapable of being acceded to by the court.

The Submissions

6. The application was canvassed by way of written submissions pursuant to the directions of the court, and with the consent of the advocates for the parties.
7. In their submissions filed on August 1, 2022, the advocates for the applicants cited the provisions of order 40 rule 3 (1) of the *Civil Procedure Rules* and reiterated the averments in the application and the supporting affidavit. Learned counsel for the applicants relied on the case of *Africa Management Communication International Limited v Joseph Mathenge Mugo & another* Nairobi Milimani Law Courts Commercial and Admiralty Division civil case No 242 of 2013 where Mabeya J held that a party must comply with an order whatever he thinks of such an order. That what is important is that



such a party has knowledge of the terms of the order. The applicants' counsel urged the court to allow the application.

8. The respondent filed their submissions on August 31, 2022 through the firm of Mwirigi Kaburu & Co Advocates. Relying on the case of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* (2014) eKLR, the respondent's advocate contended that prayer 1 of the application is not necessary because leave is not required where contempt proceedings relate to court orders.
9. Counsel for the respondent submitted that prayer 2 is vague and incapable of being acceded to by the court because the applicants did not indicate who the court should hold in contempt, and urged the court to disallow it for lack of focus and clarity. Counsel submitted that parties are bound by their pleadings as was elicited in the case of *Joseph Mbuta Nziu v Kenya Orient Insurance Company Ltd* (2015) eKLR. It was further submitted that in this matter, the applicants have sued the County Government and the County Secretary is not a party in the petition. Further, that he was not served by the applicants with the ruling or the extracted order.
10. Counsel for the respondent submitted that the threshold to invoke contempt proceedings in this case has not been met, and relied on the case of *Mengich t/a Mengich & Co Advocates and another v Joseph Mabwai & 10 others* [2018]eKLR where the court held that:

“Contempt proceedings are quasi –criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. The facts and the evidence adduced must demonstrate clear willful flagrant or reckless disobedience of the court order”
11. It was further submitted that the respondent did not evict any person on the material day or at all and that if it were the respondent doing the eviction, it could have used the county enforcement officers and not police officers as shown in the photographs exhibited. Counsel for the respondent submitted that the elements of civil contempt as started in the case of *Cecil Miller v Jackson Njeru & another* [2017] eKLR have not been proved. The respondent's counsel urged the court to dismiss the application with costs to the respondent.

Analysis and Determination

12. I have considered the application, the response as well as the submissions herein. The issue for determination is whether the respondent was in contempt of the order made on December 1, 2021.
13. The applicants contend that the order of the court issued on December 1, 2021 was disobeyed by the respondent and their agents by forcefully evicting the applicants from the suit land, alienated it and destroying the applicants' property. The court will examine the said order to ascertain whether the same was disobeyed as stated by the applicants.
14. I have perused the court record. The ruling dated December 1, 2021 was for a preliminary objection dated June 21, 2021 by the respondent on the ground that the court had no jurisdiction to hear the matter since the motion dated November 16, 2020 failed to comply with section 10 (2) of the *Physical Planning Act* cap 286 Laws of Kenya. In the ruling C.K Nzili J. found that the preliminary objection was not merited and therefore dismissed it.
15. Regarding the application dated November 16, 2020, the court stated that;- “having looked at the annexures to the supporting affidavit and there being no opposition by the respondent to the motion, I order status quo to be maintained for 120 days” from December 1, 2021.



16. I have perused the notice of motion dated November 16, 2020. The main prayer sought in the motion was prayer 2 which states that;
 - “2. That pending the hearing of this application inter-partes, this honourable court status quo be maintained on market stall Kianjai Market plot No A 17 issued *vide* minute No TP & M 16/05 A (a) 17 and plot No (B) 49 *vide* minute No 20/92(c) (B) 49”
17. There were no photographs annexed to the affidavit in support of the said motion dated November 16, 2020 to show the status that prevailed at that time and which status was to be maintained. Further, it is not stated by the applicants the date when the photographs annexed to the current application were taken.
18. The applicants also averred that the respondent and their agents forcefully evicted the applicants from the suit land, destroyed property and wrongfully alienated the land. However, the applicants have not stated the date when the alleged actions took place. The applicants have also not informed the court how the suit land has been alienated, as no mention of any new owner (s) has been given. In the absence of such details, in my view, it is quite difficult for this court to conclude that the order of December 1, 2021 was disobeyed.
19. It is trite law that for a party to succeed in contempt proceedings, the applicant has the burden to prove the terms of the order were unambiguous and binding onto the respondent, that there was proper service on the respondent of the order or that the respondent had knowledge of the order, and that the actions of the respondent are in clear violation of the terms of the order.
20. In my opinion, the applicants have not proved the clarity of the order of court issued on December 1, 2021. I also note that the ruling was delivered on December 1, 2021 in the absence of both parties. Therefore, this court cannot safely find that the respondent had knowledge of the order issued on December 1, 2021, considering that there was no order that was extracted and served.
21. Given that contempt of court orders seek the imprisonment of a party and denial of the liberty of a person, the applicants cannot wish away the duty to prove beyond a shadow of doubt the requirements expected of them. The criminality of punishing a party for disobeying a court order places a greater burden onto the applicants to prove to court that despite the respondent being fully aware of the order, they chose to disobey and for that reason should be punished. As rightly submitted by the respondent, the standard of proof in contempt proceedings is higher than in civil cases. The facts and the evidence adduced must demonstrate clear, willful, flagrant or reckless disobedience of the court order, but not casual.
22. The evidence adduced by the applicants does not lead this court to make a finding that the County Secretary of the respondent is in contempt of the order issued on December 1, 2021.
23. In light of the above observations, I find no merit in the applicants notice of motion dated February 15, 2022 and the same is dismissed.
24. Each party to bear their own costs.
25. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF OCTOBER, 2022.

In the presence of

C.A Mwenda



Nyenyire for petitioners

Karanja for respondent

C.K YANO

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C.K YANO

