



**Stephen v M'Itonga (Environment & Land Case 46 of 2018)  
[2022] KEELC 13437 (KLR) (12 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13437 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 46 OF 2018  
CK NZILI, J  
OCTOBER 12, 2022**

**BETWEEN**

**CEASER IKUNDA STEPHEN ..... PLAINTIFF**

**AND**

**MISCHECK MUTHAMA M'ITONGA ..... DEFENDANT**

**RULING**

1. Through an application dated October 8, 2020 the court is asked to cite the respondent for contempt of court, commit him to civil jail for (6) months and to order that he restores the access road to the applicant's property LR No Abogeta/Lower Kithangari/1691 to a passable state.
2. The reasons for the application are contained on the face of it and the affidavit in support sworn by Ceaser Ikunda Stephen on the even date. The applicant states that an order was granted on March 5, 2019 and issued on March 15, 2019 for a temporary injunction barring the respondent from interfering with the applicant's use of the access road which has been defied by the respondent such that he cannot access his home and is now landlocked.
3. The applicant has attached a copy of the order, photos showing the digging of holes on the access road making him to park his vehicle on the roadside which is far away from the home.
4. The application is opposed through a replying affidavit sworn on October 19, 2020 by Meshack Muthamia M'Itonga on the basis that he was not served with the order dated March 15, 2019, the orders lapsed on March 15, 2020; he has not blocked any alleged access road; that after the plaintiff/applicant was convicted of malicious damage to property in Nkubu Law courts No 423/17:some of his family members replanted the destroyed crops; the judgment in Nkubu has not been appealed against; he was not guilty of any contempt of court and the alleged contempt of court has not been proved to the required standards.



5. By an order dated January 25, 2021 the court directed that a scene visit report be filed as per the order made on October 9, 2019. The report was duly filed on January 25, 2021 dated January 22, 2021. The County Surveyor Meru confirmed that Parcel No 1691 is possessed by the applicant and has a permanent building with a cultivated shamba. Through another survey report dated July 6, 2019, it was stated that LR No Abeita/L-Kithangari/1232 was subdivided into two portions namely LR NoS 1691 and 1692 each measuring 0.202 ha and 3.31 ha respectively. Further the report indicated that mutation documents were approved and the registration map amended.
6. Additionally, it outlined that the subdivisions created a 6-meter access road abutting LR No's 1230, 1231, 1691 and 1692 which are within the same registration section.
7. The report stated that the 6m access road was created as a result of the inaccessibility of LR No 1691 from the already existing 24-meter road. Further the report stated that the survey records and the amendments thereto were approved by the proprietor of LR No 1232, the respondent herein.
8. The survey report was accompanied by a copy of a mutation form dated March 11, 2014 which is duly signed by the defendant, a letter of consent dated July 13, 2004, an application for land control form consent dated June 28, 2004, and a certificate of official search dated April 6, 2004.
9. In the said mutation form, it is quite clear that a 6m access road exists and forms part of the mutation form.
10. The applicant submits that he bought LR No 1691 from the defendant and the access road partially passes through the defendant's LR No 1692. Despite this the defendant/respondent has persistently denied him the use access road contrary to the existing court orders.
11. It is submitted that the respondent has admitted planting the banana trees on the access road contrary to the court orders. As regards the Nkubu case, the applicant submits that the said case was not related to the orders issued herein.
12. Concerning the service of the order, the applicant submits that the said orders were granted in the presence of the respondent and his advocate on record on March 5, 2019, hence his deviance is contemptuous and a deliberate act of impunity.
13. The respondent has submitted that the application herein lacks both factual and legal basis since the order was issued under order 40 rule 4 Civil Procedure Rules, the application is made 1 ½ years late, there is no proof service, the existence of the order and the connection of the defendant to the alleged offensive act was lacking.
14. Further the respondent submitted that the applicant was imaging things and the explanation given in the replying affidavit was more cogent hence the application lacks merits.
15. The court record herein indicates that on November 15, 2018 the court granted a temporary order of injunction in terms of prayer no 2 of the application dated November 22, 2018 and ordered the same to be served upon the defendant for interpartes hearing on February 20, 2019. When the parties appeared in court on January 30, 2019, they informed the court that they were engaged in an out of court negotiations hence requested for more time and a mention for March 5, 2019.
16. On March 5, 2019 both parties appeared in court together with their respective advocates on record and by consent agreed to prayer nos 2, 3, 4 of the aforementioned application, pending the hearing and determination of the suit. Prayer no 3 related to an inhibition against any transfer or making of any entries to the register while prayer no 4 related to a temporary injunction against the defendant, his agents, servants or employees or relatives from blocking, fencing, constructing, excavating, cultivating,



- occupying or in any other way whatsoever interfering with the plaintiff's use of the access road leading to LR NO 1691 or interfering with his occupation, possession and the use of the suitland, pending the hearing and determination of this suit.
17. So, on the question of the legality, validity and the service of the order raised by the defendant, it is quite clear from the court record that this was a consent order duly approved and signed by the parties' front of both the court and their advocates on record after intimating to the court that they were engaged in an alternative dispute resolution.
  18. The consent order not only bound the defendant in person but also his agents, servants and or relatives.
  19. The power to punish for contempt of court is derived from the Constitution, section 5 of the Judicature Act, section 29 of the Environment and Land Court Act 2011 (Revised Edition 2015) and section 63 of the Civil Procedure Act as read together with order 40 of the Civil Procedure Rules.
  20. This power is aimed at protecting the dignity and the authority of the court. Judicial authority is derived from the people of Kenya under article 159 of the Constitution and must be respected and protected by all, at all costs.
  21. This is the cornerstone and the hallmark of a democracy such as ours which is governed by the rule of law, respect for human rights and freedoms, social justice and equality as set out in the preamble and article 10 of the Constitution.
  22. The court therefore is clothed with the power to punish those who tend to undermine this authority, be they in or out of court, otherwise the majesty of the law and the administration of justice would be eroded.
  23. In establishing the contempt of court, a party so applying must satisfy the court about the order or decree alleged to have been violated, the specific conduct or acts of contempt, if the order or decree was within the knowledge of the party cited and the manner in which it has violated the dignity, repute or authority of the court.
  24. These essentials are critical since as stated above, contempt of court goes to the very core or foundation of the judicial authority in making its orders and decrees, which must not be seen to be made in vain, otherwise the court would be exposed to ridicule as a guarantor of legality and the defender of the rights of the people it serves.
  25. So, courts and the judiciary at large take the interference with its orders and decrees as a threat to the rule of law and hence the reason that before a court punishes for contempt, it must be satisfied that the key ingredients of contempt of court have been met. See Supreme Court of Kenya in Republic vs Ahmad Abolfathi Mohammed & another (2018) eKLR.
  26. In Shimmers Plaza vs National Bank of Kenya Limited (2013) eKLR, the court held that the test for contempt of court is whether the disobedience was deliberate, malafide, or mistaken, unreasonable, bonafide, intentional or willful. An applicant must prove that the terms of the order were clear, unambiguous, binding, the respondent who had knowledge of the terms failed to comply with the order and the conduct was deliberate, See Samwel MN Mweru & others vs National Land Commission and 2 others (2020) eKLR.
  27. Applying the above principles to this suit it is not in dispute that a consent order was made by this court on March 5, 2019 directing the defendant not to interfere with the access road. The order was made in the presence of the defendant and his counsel on record. The order was in clear and unambiguous terms. It was binding on the defendant and his agents, servants or employees until the hearing and determination of this suit.



28. Therefore, it cannot be true as averred by the defendant that it was to last for one year, was not served upon him and that his advocate on record had advised him otherwise. If the defendant/respondent did not understand the order and or was aggrieved by it, he did not come back to court for review and or setting aside. Similarly, the respondent did not appeal against the said order if at all he was opposed to it.
29. After the order was made, parties complied with pretrial directions and filed several documents and witness statements. The defendant filed, the sale agreement, mutation form dated March 14, 2014 and the sketch map all which indicates that there is an access road serving the plaintiff. The mutation form is duly signed by the respondent. These are the same documents appearing in the County Surveyor's report. After the scene visit, the County surveyor confirmed the existence of the 6-meter access road which the defendant is alleged to have blocked despite the existence of the consent order.
30. The defendant has stated that his relatives may have been the ones who replanted the bananas trees after the plaintiff was convicted in Nkubu PM Cr case No 425 of 2017 for malicious damage.
31. Even if the said judgment was delivered on May 12, 2020 during the pendency of this consent order, it did not in any way set aside or review or vacate the consent order. Therefore, the defendant cannot possibly justify the disobedience of a superior court order through a judgment by a lower court.
32. The court has gone through the said judgment. Nowhere did the lower court authorize the defendant, his agents, servants or employees to defy a valid court order of this court. I therefore find the defendants explanation lacking merits.
33. Since the defendant was aware that the consent order was binding not only on him but also his agents, relatives, servants or employees, he has not said what he did to stop the interference by his alleged relatives.
34. Furthermore, it is the defendant, who in the first instance willfully consented to and approved the access road through the signing the mutation form, his participation in the land control board meeting to facilitate the amendment of the index map so as to facilitate the changes and lastly by appearing before this court and approving the consent order.
35. In my considered view the defendant knew of the existence of not only the road of access but also the order which was made in his presence, in clear terms and which was binding on him until the suit was heard and determined.
36. In the circumstances, I find that the defendant has willfully, deliberately and unreasonably impeded the cause of justice hence bringing the dignity of the court to ridicule. I find him guilty of contempt of court and put him to mitigation before sentencing.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 12TH DAY OF OCTOBER, 2022

In presence of:

Kitheka for plaintiff

Muchiri for Momanyi for defendant

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE

