



Republic v Land Registrar Machakos & another; Kilonzo (Interested Party); Makau & another (Exparte Applicants) (Environment and Land Civil Miscellaneous Application 221 of 2010) [2022] KEELC 14998 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14998 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
 ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION 221 OF 2010
 A NYUKURI, J
 NOVEMBER 24, 2022**

IN THE MATTER OF: AN APPLICATION BY FREDRICK NZYOKI MAKAU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND PROHIBITION

AND

IN THE MATTER PARCEL NO'S MACHAKOS/MUA HILLS/173,335 & 336

AND

IN THE MATTER OF ORDER LIII CIVIL PROCEDURE AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF LAW

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR MACHAKOS 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

RAPHAEL FK KILONZO INTERESTED PARTY

AND

FREDRICK NZYOKI MAKAU EXPARTE APPLICANT

PATRICK KIMEU MAKAU EXPARTE APPLICANT



RULING

Introduction

1. Before court is an *ex parte* notice of motion dated July 12, 2021, filed by the 2nd *ex parte* applicant seeking the following orders;
 - a. Spent
 - b. That this honourable court be pleased to find the 1st respondent in contempt of the orders issued by this honourable court on the February 19, 2021.
 - c. That this honourable court be pleased to commit the 1st respondent to civil jail for a period of six months for being in contempt of court.
 - d. That the honourable court be pleased to issue any further punitive orders in respect of the said contempt and disobedience by the 1st respondent as may be necessary geared towards meeting the ends of justice and towards protecting the dignity and authority of this honourable court.
 - e. That the costs of the application be borne by the 1st respondent.
2. The application is anchored on the supporting affidavit of Patrick Kimeu Makau the 2nd *ex parte* applicant herein. The applicant's case is that on February 19, 2021, this honourable court issued orders, *inter alia*, orders of mandamus directed to the 1st respondent to revoke any Title Deed issued to the interested party in respect of any parcel created by the sub-division of land parcel number Machakos/Mua Hills/173. He further stated that the said orders were registered at the office of the 1st respondent on February 24, 2021, for implementation.
3. He deponed that the 1st respondent herein has completely refused and/or neglected to implement the aforesaid orders, which conduct amounts to contempt and wanton disobedience of the said orders and appropriate punishment ought to be meted on the holder of the office for the sake of maintaining the rule of law and order and the authority and dignity of the court. He prayed that the application be allowed.
4. The application was unopposed.
5. The application was canvassed by way of written submissions. The applicant filed submissions dated November 15, 2021.

Applicant's Submissions

6. Counsel for the Applicant submitted that the dignity and authority of the court must be respected and protected. Counsel referred to section 5(1) of the *Judicature Act* which empowers superior courts to punish for contempt for purposes of upholding the authority and dignity of the court.
7. Counsel also cited section 29 of the *Environment and Land Court Act* which provides that any person who fails to obey orders of this court, 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.



8. Reliance was placed on the case of *Samuel MN Mweru & others v National Land Commission & 2 others* [2020] eKLR for the proposition that contempt power is inherent in courts and that court orders are binding against the persons upon whom they are addressed.
9. Counsel also referred to the cases of *A Jiwa Shamji v National Land Commission & 14 others* [2019] eKLR and *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] 1 KLR 828, to argue that courts punish for contempt to safeguard the rule of law and authority and dignity of the court. In conclusion, it was submitted for the applicant that orders sought herein are meant to ensure the applicant's right to ownership of property is respected and protected and to ensure the preservation and protection of the authority of the court as envisaged under article 159 (1) of the *Constitution*. He urged the court to allow the application dated July 12, 2021 as prayed.

Analysis and Determination

10. Having considered the application and submissions filed by the applicant, the only issue that arises for determination is whether the 1st respondent is in contempt of court.
11. Contempt is the act of defying and despising the authority of the court, which authority is derived from the people. The *Blacks Law Dictionary* 11th edition, defines "contempt" as;
 1. The act or state of despising.
 2. The quality, state or condition of being despised.
 3. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.
12. The power to punish for contempt is an inherent power of the court. Court orders and proceedings must be obeyed, even where the parties involved do not think that the order is irregular. The court exercises its power of contempt to uphold the authority and dignity of the court so as to maintain the rule of law which is the foundation of a democratic society. The importance of compliance with court orders was emphasised in the case of *Econet Wireless Kenya Ltd v Minister for information & Communication of Kenya & another* [2005] 1 KLR 828, where the court 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 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."
13. Contempt is a serious matter bearing a criminal element, as it involves deliberate defiance of the court. Therefore, the standard of proof of contempt is above proof on a balance of probabilities, but slightly lower than beyond reasonable doubt. This position was well stated in the case of *Gatharia K Mutikika v Baharini Farm Limited* [1985] eKLR, where the court held 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 of 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."

14. For an applicant to succeed in an application for contempt of court order, they must demonstrate that the order was in clear, unambiguous terms; that the alleged contemnor was aware of the terms of the order and that they acted deliberately in disobeying the terms of the order. In the case of *Katsuri Limited v Kapurch and Depor Shah* [2016] eKLR, the court cited with approval the decision in *Kristen Carla Burchell v Barry Grant Burchell* (Eastern Cape Division Case No 364 of 2005, where the court stated that for an applicant to succeed in civil contempt proceedings, they must prove the terms of the order, knowledge of the terms of the order by the respondent and deliberate failure to obey the terms of the order.
15. In the instant application, the applicant states that the order dated February 19, 2021, required the 1st respondent to revoke the interested party's title; that he registered the said order and that the 1st respondent has deliberately failed to comply with the terms of the order.
16. In have perused the said order and indeed the same states in order number 2 as follows;

"That an order of *mandamus* be and is hereby issued directed to the 1st respondent to revoke any title deed issued to the interested party in respect of any parcel created by the sub-division of land parcel number Machakos/ Mua Hills/173."
17. It is therefore clear that the terms of the order were unambiguous that the 1st respondent was to revoke any title deed issued to the interested party in respect of sub-division of parcel number Machakos/ Mua Hills/173. Those are clear terms, with no ambiguity. Besides, the applicant stated that the order was registered at the 1st respondent's registry. He annexed an application for registration as annexure "PKM2". This is a clear indication that the 1st respondent was made aware of the order. As the applicant's assertion that the 1st respondent has deliberately failed to comply with the mandatory terms of the said order, has not been denied or challenged by the 1st respondent, it is clear that indeed the 1st respondent has defied the said order.
18. In view of the above, the notice of motion dated July 12, 2021 is merited and this court makes the following orders;
 - a. The 1st respondent is found to be in contempt of court for disobeying this court's orders of February 19, 2021.
 - b. The 1st respondent be and is hereby ordered to purge the contempt within 30 days.
 - c. In default of compliance with order b) above, a notice to show cause shall issue against the 1st respondent to show cause why he should not be punished for disobedience of this court's orders of February 19, 2021.
 - d. The applicant shall have costs of this application.
19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF NOVEMBER 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A NYUKURI

JUDGE

In the presence of;



No appearance for the applicant.

No appearance for the respondent.

Josephine Misigo – court assistant.

