



**Kamei (As the Personal Representative of the Estate of Paulina Arepel  
Cheptalam) v Chepocheba & another (Environment & Land Case  
116 of 2016) [2022] KEELC 14940 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14940 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 116 OF 2016  
FO NYAGAKA, J  
NOVEMBER 23, 2022**

**BETWEEN**

**JOEL LOKANDAKO KAMEI (AS THE PERSONAL REPRESENTATIVE OF THE  
ESTATE OF PAULINA AREPEL CHEPTALAM) ..... PLAINTIFF**

**AND**

**ZIPORAH CHEPOCHEBA ..... 1<sup>ST</sup> DEFENDANT**

**SIMEON KALEKENO KANYONGO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By an Application dated May 05, 2022 the Applicant moved this Court for orders of giving effect to its decree that was dated on March 07, 2017. The Application was brought under Sections 3 and 3A of the *Civil Procedure Act* and Order 22 Rule 82 of the *Civil Procedure Rules, 2010*. Specifically, the Application sought:
  1. ...spent
  2. That this Honourable Court be pleased to put the Applicant in possession of the land comprised in West Pokot/Siyoi "A"/125.
  3. That the Defendants/respondents be detained in prison for a period of 30 days for having obstructed the applicant from taking possession of the land comprised in West Pokot/Siyoi "A"/125.
  4. That the OCS Kapenguria Police Station be directed to remove the respondents from parcel number West Pokot/Siyoi "A"/125 and put the Applicant in possession of the same land.
  5. That the respondents be condemned to pay the costs of this Applicant.



2. The Application was grounded on seven (7) points which are summarized as hereafter. The Applicant was the administrator of the estate of one Paulina Arepe Cheptalam who was the Plaintiff/decreed holder who died on June 15, 2019. She was substituted as the Plaintiff in place of the decreed holder. The decree had been passed on March 29, 2017 and by it the Plaintiff was declared the sole registered owner of the parcel of land in issue while the Defendants were ordered to vacate it failing which they would be forcefully evicted. The Respondents refused to move out of the land and an eviction order was issued and served on the Officer Commanding Station (OCS) Kapenguria Police Station. The OCS indeed evicted them from the land and indeed in 2019 demolished their structures which were thereon. Having been removed from the land, and before the Applicant could take possession, the Respondents forcefully came back onto the land and put up new homes and have to date remained thereon. The Respondents have obstructed the Applicant from taking possession of the parcel of land and he has lost user of the 7.6 Hectares. The Respondents have, by their actions, rendered the judgment of this Court of no effect and made it a mockery of justice.
3. The Application was supported by the Affidavit of Joel Lokandako Kamei which was sworn on May 05, 2022. Its contents were fairly similar in all respects as those of the grounds in support of the Application save that to the Affidavit were two annexures. These were a copy of the eviction order issued on September 22, 2017 which was annexed as JLK1 and photographs marked as JLK2 of the new houses erected on the parcel of land.
4. The Application was opposed by the Respondents through a Replying Affidavit sworn by Simeon Kalekeno Kanyongo on May 23, 2022. He deponed that it was not true that they had erected new houses on the suit land. He annexed to his affidavit photographs of the houses that were demolished, which he said they had not interfered with. He then stated that they had not obstructed the Applicant from taking possession of the land and asked that the Application be dismissed with costs.
5. Since the Application was a complaint about obstruction of being put into possession of immovable property, upon the Application being served, and using Order 22 Rule 82(2) of the Civil Procedure Rules 2010, the Court decided to investigate the matter. The provision reads, "The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same."
6. Thus, the Court summoned the Defendants to attend its sitting on the date of the inter partes hearing of the Application and explain the status on the ground vis-à-vis the depositions in the Affidavits and the content of the Application. The 2<sup>nd</sup> Defendant was the first one of the people summoned to take the witness box. He introduced himself and gave his national Identity Card number as 22897702. He stated that although he was sued as shown in the pleadings he rarely used the name. However, he acknowledged that he was the 2<sup>nd</sup> Defendant.
7. He stated on oath that the Plaintiff was the one still in occupation of the suit land since 1991. He stated further that the Plaintiff had put up on the suit land a house which had a living room and a kitchen. He denied obstructing him from taking possession thereof. On cross-examination he acknowledged that the decreed holder's mother died on June 15, 2019. By the time she died she was living on the parcel of land. She was not buried on the land. He admitted that he and the other judgment debtor were evicted from the suit land in 2019 by the OCS Kapenguria Police Station.
8. He stated that since the time they were evicted they have never gone back onto the parcel of land. When shown the photographs marked as JLK2 and asked to comment about them, he stated that the houses shown were demolished. But he was hard pressed to explain the presence of chicken seen outside the houses whose photographs it was alleged they (judgment debtors) had re-built although he said they did not live on the land. He also admitted knowledge of the decreed holder - the son of the deceased



- decree holder. He stated that he, the son, had never lived on the suit land. He said that the said Joel Kamei's home was about 5 kilometres from the suit land and that it was his brother known as Amerika who resided on the suit land. He denied making demolition of the house belonging to the mother the decree holder.
9. On re-examination he stated that he never lived on the parcel of land. He stated that instead he and his mother and moved and live in a local trading centre. He stated that the structures they had erected were demolished when they were evicted but their remains were left on the suit land. He testified that the houses on the parcel of land were those built by the Plaintiff's mother in 1991 and that was wherein Amerika lived.
  10. The Area sub-Chief, one Priscilla Arupe attended Court as the local administrator and neutral witness to testify on the status quo. She stated that she was the sub-chief of Kamatila Sub-location for 13 years. She stated that he knew the suit land well since it was within her sub-location. She stated that the owner of the land was the late Pauline Arupel Cheptalam. She then stated that as at the time she was testifying in Court or to that date, the person who were residing on the parcel of land then were Zipporah Chepocheba (the 1<sup>st</sup> Defendant) and Simoen K. Kanyongo (the 2<sup>nd</sup> Defendant).
  11. On cross-examination she stated that she had not been asked by one Kenyatta to lie to the Court. She stated that in 2019 the two defendants were evicted and their houses pulled down but they came back onto the land. They build other houses whose evidence she was ready to provide to the Court. She stated that the houses the Defendants claimed as of the late Pauline Cheptalam were not hers. They belonged to the son to the late decree holder who resided towards the bottom or lower end of the suit land. She testified that the two Defendants lived on the upper or higher side of the suit land. She testified further, that her office was two kilometres away from the suit land and she had visited the suit land the week before coming to Court to testify. At the conclusion of the proceedings, the parties sought for time to file written submissions.

### Submissions

12. As at the time of writing this Ruling, only the Applicants had filed submissions. They were dated July 21, 2022 and filed on July 25, 2022. In them they summarized the Applicant's case and that of the Defendant. They also summed up on how the 1<sup>st</sup> Defendant had testified on the status quo and how he had tried to mislead the Court that all along the decree holder was in possession of the parcel of land. He then stated how upon the contradictions by the Defendant's testimony, the Court opted to get the proper information by summoning the area sub-chief to Court. He summarized how the sub-chief clarified that they Defendants were evicted from the parcel of land in 2019 yet they returned onto it later and settled on the upper section of the land and erected houses thereof.
13. He then stated that the Defendants' actions were sheer contempt of the Court and an obstruction of the decree of the Court hence the need for them to be punished and the Plaintiff be put back into possession. He relied on the case of *Arthur Mathitu & another v Settlement Fund Trustees and 2 others; Fredrick Wang'ombe Nderitu & another (Proposed Interested Parties)* [2019] eKLR. In the case, the Court stated that it was upon the Applicant to prove satisfactorily to the Court that there was re-entry on the suit land by the proposed interested parties despite orders of eviction having been granted. The Applicant discharged that burden and the court found the Interested parties guilty of contempt of Court and fined each of them Kshs 100,000/=.



## Issues, Analysis And Determination

14. I have considered the Application before me and facts thereto. I have also considered both statutory law and case law, the response thereto, the oral testimony of the 1<sup>st</sup> Defendant and the sub-Chief, and the submissions on the record. I am of the view that the following are the issues for determination before me:
- a. Whether the Defendants re-entered the suit land;
  - b. Whether the Plaintiff should be put back into possession;
  - c. Whether the Defendants acted in contempt of this Court's orders;
  - d. What orders to issue, including, costs.
15. I have set out the issues herein for determination in a sequence because the finding on the preceding one lays the basis for the determination of and finding on the following one. Of worth noting at this point is that the Application was brought under Order 22 Rule 82 of the Civil Procedure Rules, 2010. The provision stipulates in sub-Rule 1 as follows: -
- “Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.”
16. Thus, it is the finding of this Court that the Applicant moved this Court under the proper provisions of law. And given that the Rule does not provide for the format of bringing the Application, Order 50 Rule 1 which provides that applications other than those whose format is specified be by way of Notice of Motion applies.
- (a) Whether the Defendants re-entered the suit land
17. I start with a summary of the undisputed facts. Both the Applicant and the Defendants do not dispute the fact that this matter proceeded to hearing on merits, the Court found in favour of the Plaintiff/decree holder about ownership of the suit land and that the judgment debtors were in occupation at the time of judgment, the decree holder was to be put into possession, the defendants were to either remove themselves from the suit land or being forcefully evicted, the initial applicant or decree holder having died subsequent to the decree of the Court, on June 15, 2019, and the defendants having been evicted in 2019.
18. However, that being the case, on the one hand, the Applicant contended that after the eviction the Defendants returned onto the suit land and erected houses thereon and had since been on it, using it and obstructed the decree holder from taking possession of the same. The Applicant argued further that the judgment debtors' actions of re-entry and obstruction of the Plaintiff rendered this Court's orders ineffectual. On the other hand, the Defendants denied re-entering the land or constructing houses thereon, or obstructing the decree holder from taking possession. The judgment debtor annexed as JLK 2 photographs of the houses re-built by the Defendants on the suit land.
19. Although the Defendants disputed that facts alleged, they only denied the allegation of re-entry. On their part they annexed photographs of the houses demolished during the eviction, to demonstrate to the Court that indeed they had been evicted and were not on the land. The Court analyzed the photographs filed by both sides. One set was alleged to be a depiction of actions done post-eviction while the other was alleged to be of the eviction. The latter could not assist the Court about allegations



of actions that took place after the eviction was done. In any event it was not indicated and proved to Court when the latter set of photographs were taken. The Defendants did not specifically deny that the houses appearing in the first set of photographs, marked as JLK 2 and the chicken seen at the outside of the houses, belonged to them. That made the Court to be convinced that the Defendants had indeed re-entered the suit land and rebuild thereon. But it was left of the Court to properly satisfy itself of the fact that its finding would be correct in the event that it was wrong in its analysis of the already laid out facts.

20. The issue of re-entry and obstruction being the ones in contention, and the Court having not had the benefit of visiting the ground to confirm which of the two clashing positions was right, the Court summoned a neutral person, the Area Sub-Chief to inform the Court on the status quo. The said area sub-Chief, one Priscilla Arupe of Kamatila Sub-location informed the Court that indeed the Defendants were evicted from the suit land in 2019 and their houses demolished but they re-entered it in 2019 and rebuild on the upper part of the parcel, where they reside on to date. That settled the issue of whether or not there was re-entry. Therefore, I find that indeed the Defendants, upon being evicted from the land, re-entered the same.

(b) Whether the Plaintiff should be put back into possession

21. Turning to the second issue, the Applicants contended that the actions of the Defendants of re-entry onto the land prevented him from taking possession of the suit land as ordered by the Court. In my view, the purpose of the eviction of the Defendants that was carried out in 2019 and the subsequent demolition of their structures on the suit land was to have Plaintiff to be put into possession. The Plaintiff argued that the eviction was completed but before he could get onto the land, the Defendants re-entered it. The Area Sub-chief confirmed on oath that indeed the Defendants were evicted but came back onto (re-entered) the suit land in 2019 and they occupied the upper part of the land and reside and work thereon to date.
22. In my view, whether they re-entered and occupied part or whole of the land, the Defendants' actions amounted to obstruction of the Plaintiff from taking possession of the land. The inquiry by the Court yielded fruit. For that reason, the Court process should be re-activated to put the Applicant into possession of the suit land, parcel number West Pokot/Siyoi "A"/125.

(c) Whether the Defendants acted in contempt of this Court's Orders

23. The Applicant argued that the Defendants' actions amounted to contempt of Court and they should be punished for them. The Applicant's complaint was all to do with the assailing of the dignity of the Court by the Defendants. If courts are not to be held with dignity and their orders not obeyed, to whom shall the citizen turn when violations of the law occur? In *Johnson -versus- Grant, 1923 SC 789*, their Lordships held thus:

“...The law does not exist to protect the personal dignity of the Judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.”

24. When a party offends by showing contempt to the Court, that individual, institution or office essentially challenges its very existence and tends towards self-destruction because in the first place the person or entity is in a system of law that sets it up or protects it from harm and therefore guarantees its existence. If it is a natural being that does so, he trudges that part, forgetting that he is subject to the Divine authority which permits all systems of governance to be and exist under the sun. If it is an artificial creature, it ignores the truth that it is not in existence in a vacuum or sui generis but as a result of the vary law it seems to defy. Therefore, when we obey the orders of the Court, we remind ourselves



that “For we must all appear before the judgment seat...to give account of our actions” (2 Cor. 5:10, Bible, NIV).

25. The law on contempt of court in Kenya is now pretty clear and settled, in so far as there is no separate substantive statute on it. The term “contempt” in relation to Court is defined by Brian A Garner, in *Black’s Law Dictionary* (Eleventh Edition) Thompson Reuters, 2019, p. 397 as follows: -

“Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”

26. When all is said and done, it must be borne in the mind of everyone that the Court retains residual power upon which it can act on to ensure the ends of justice are met and its process is not abused. As was stated Ouko, J (as he then was) in *The Matter of The Estate of George M’mboroki* Meru HCSC No. 357 of 2004:

“It is therefore accepted that the court retains...a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”

27. It should be clear to the parties herein and all and sundry that orders of the Court are sacrosanct. They are issued for and on behalf of the people of Kenya through the power vest in the Courts by virtue of Article 159(1) of the 2010 *Constitution*, which cannot in any wise be gainsaid as being a transformative document. That has been recognized in several authorities, among which is the *Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others* Advisory Opinion Reference No. 2 of 2013 [2013] EKLK where the Supreme Court stated as follows: -

“Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional “liberal” Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on - “RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.” And the principle is fleshed out in Article 10 of the *Constitution*, which specifies the “national values and principles of governance”, and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government. The transformative concept, in operational terms, reconfigures the interplays between the States majoritarian and non-majoritarian institutions, to the intent that the desirable goals of governance, consistent with dominant perceptions of legitimacy, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racist governance system. Karl Klare, in his article, “Legal Culture and Transformative Constitutionalism,” *South African Journal of Human Rights*, Vol. 14 (1998), 146 thus wrote [at p.147]: “At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent.” The scholar states the object of this South African choice: “By transformative constitutionalism I mean a long-



term project of constitutional enactment, interpretation, and enforcement committed... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law." The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the Constitution of 2010".

28. It is thereby expected that the society of Kenya be transformed in many ways including by way of obedience of Court orders, a thing that was uncommon before the Constitution 2010. Gone in Kenya are the days when people, some of whom thought and felt that by virtue of being in authority of whatever kind, they could act with impunity and thereby disregard and disobey court orders. Things had to change and they did. That is why we promulgated the 2010 Constitution: a new dispensation of good national values amongst which is the rule of law. And the rule of law entails obedience of Court orders. As was succinctly stated by Odunga J. (as he then was) in Miguna Miguna vs. Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 Others [2018] eKLR:

"...obedience of Court orders is one of the tenets of the rule of law and contempt of Court would not be countenanced in a constitutional democracy such as ours where the rule of law is expressly stated in Article 10 to be one of the values and principles of governance that supremely bind all State organs, State officers, public officers and all persons..."

29. We need to live in a society guided and ordered by the rule of law as one of our great values. We cannot, as a Country, afford to discard the rule of law. And Courts should not make orders that are of no effect. In B vs. Attorney General [2004] 1 KLR 431 it was stated that:

"The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."

30. Of the importance of the observance of the rule of law, in Republic vs. Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478, the Court held that:

"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong...or which infringes a man's liberty...must be able to justify its action as authorised by law - and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."

31. The respect of Courts' orders is a fundament of an established system of the rule of law. Contempt of Court then is the last of the things to obtain or happen in such circumstances. Orders of the Court



must then be adhered to by all means. In *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, the Court of Appeal held as follows, about Contempt proceedings: -

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.....

“The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by *the Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

32. In the practice of establishment of systems of governance where there exist three arms of government, namely, the Executive, the Legislature and the Judiciary, in place, it is only judges and judicial officers who stand in the gap between the citizens and both the makers and executors of the law. They are the only ones who bear and ought to bear true fidelity to the law impartially because they are expected not to have any political, social, economic or other leaning other than a single mind towards the functioning of the law. They therefore ought to be vigilant and firm when the rule of law is at risk. They should ensure that they speak without fear or favour, impartiality or impropriety against any intent and action that tends to injure the rule of law, while they exercise the power of delegation. Contempt of Court is one of such negative behavior.

33. It was succinctly put forth by the Supreme Court of India in *T N. Gadavarman Thiru Mulpad v Ashok Khot And Anor* [2006] 5 SCC, 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.”

34. In my view, that is why Lord Atkin, in *Liverside vs. Anderson* [1942] AC 206 at 244, Lord Atkin would hold that:

“In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law.”

35. The power exercised by Courts is delegated to them by the people of Kenya by virtue of the fact that that power rests in the people of Kenya as a collective. Article 1(1) of the *Constitution* 2010. It is exercised by Courts as one of the state organs of delegation of the power through Article 1(3)(c) of the *Constitution* 2010.



36. Having been vested with the power, and since Courts ‘speak’ through the pen of interpretation of the law and application of facts thereon, then the orders issued by judges and judicial officers in their judicial capacity and authority ought to be obeyed as they are the ones who speak breathe life into the law. The law is cold and dead without life being breathed into it. Therefore, obedience to court orders is key, and failure to do so must attract sanctions.
37. About obedience of Court orders, the case of *Hadkinson -v- Hadkinson* (1952) 2 All ER. 567, held that:
- “It is plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that 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 an order believes it to be irregular or even void.” (Also see the case of *Katsuri Limited Vs Paurchand Depar Shah* (2016) eKLR).
38. Obedience of Court orders is not at the whims of the person to whom it is directed. Neither is it optional to anybody nor a whimsical observance unction. Thus, in *Robert Kisiara Dikir & 3 Others vs The Officer Commanding Keiyan General Service Unit (GSU) Post & 3 Others Kisii HCCP No. 119 of 2009*, Justice Musunga (as he then was) opined that if there is shown disrespect to the supreme law of the land and there be casual observance or breach thereof with impunity by the Government and then courts as temples of justice fail to punish or penalize the violation thereof, the courts will be encouraging such violation.
39. This Court is not prepared to be the first one to encourage the violation of court orders. It is therefore vital that every court order be obeyed by he/she to whom it is directed. Obedience is non-negotiable, regardless of the regularity or otherwise. If the recipient or addressee has an issue with the order, he is to obey it and then challenge its validity: there are remedies available for orders issued irregularly.
40. The power of this Court to punish for contempt of Court is given under Section 29 of the *Environment and Land Court Act*, Act No 19 of 2011. It stipulates:
- “... 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.”
41. On obedience of orders of the Court, in the case of *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR the court emphasized as follows:
- “Article 159 of the *constitution* recognizes the judicial authority of courts and tribunals established under the *constitution*. Courts and tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with the *constitution* and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.



In *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another* CCT 19/11(75/2015), Nkabinde, j observed that: -

“The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld.

This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

In the case of *Canadian Metal Co Ltd v Canadian Broadcasting Corp*(N0 2) [1975] 48 DLR (30), the court stated that;

“To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrong can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.”

Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society. That is why the court stated in *Carey v Laiken* [2015] SCC17 that;

“Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect”

It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. (*Louis Ezekiel Hart v Chief George 1 Ezekiel Hart* (-SC 52/2983 2nd February 1990). And in *Hon. Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another* [2014] eKLR, the Court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice.

It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim.”



42. It is now beyond peradventure, from the above, that this Court has the power to punish for contempt of its orders, that power is delegated, it is to protect the supremacy of the law and to ensure there is good order in our society, and indirectly transform the society to the better. Thus, this being a civil matter where contempt of Court is alleged to have been committed, the only questions that remain for this Court to answer are those that relate to the proof of the four basic elements of such. They were given the Law Commission of New Zealand in the article, Contempt in Modern New Zealand (see, <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP36.pdf>) as follows:-

“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.

43. These elements were recognized and summarized by the High Court of South Africa In *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005, where the Court held that one has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.

44. In brief it has to be proved that there existed an order which would be as precise and understandable as possible, the alleged contemnor was aware of the order and he failed to obey it, and the obedience was willful or within his control or abilities to avoid disobedience but he did not. About clarity of the order is not a question of conjecture or discussion any more. But regarding whether the Respondent had notice of it, Courts have held that the order ought not to be specifically served: even constructive knowledge of the order, including his learned counsel being aware of the same is sufficient. In *Oilfield Movers Limited v Zahara Oil and Gas Limited* [2020] eKLR it was held that:

“Kenyan Courts have held that personal service of an order is unnecessary where a party had knowledge of it. The local mantra in knowledge is higher than service.”

45. Similarly, in *Basil Criticos v Attorney General & 8 others & 4 Others* [2012] eKLR it was stated: -

“20. The issue of knowledge of orders as being sufficient was until recently, alien in our jurisprudence. In *Kariuki and Others v Minister for Gender, Sports, Culture and Social Services and Others*, (2004) I KLR 588, it was held:

”...but in our law, service is higher than knowledge and since the service here was frustrated...I shall hold in accord with the existing law that there was no service”. This was made following the decision in *Wangondu*.”

46. Also, in *Kenya Tea Growers Association vs Francis Atwoli & 5 Others*, Petition No.64 of 2010 the High Court stated as follows:

“In the case before me, I am more than satisfied that even at the higher level of beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court



order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the Court Order had stopped it. He went further to interpret it as made without jurisdiction and that only the “Workers Court”, (the Industrial Court) had jurisdiction to determine the matter.”

47. Going by the wisdom of my brother and sister judges as summarized above, I now proceed to answer the four questions I stated that I had to before I conclude this matter. First, was the order complained about clear? The answer to that emanates from the findings of the Court at judgment. The Court made an order that the Defendants remove themselves from the suit land or they be forcefully evicted, and the judgment debtor be put in possession. The order could not be clearer than that. Second, is whether the judgment debtors had knowledge of the order. They were served with the eviction order, and were actually evicted in 2019. Therefore, if they were not served with the order, their eviction itself was constructive knowledge of the order. Third, did they breach the order? The answer is simple yes. They did by returning to the suit land after the eviction, and worse, by their actions, re-built thereon. Lastly, is the question as to whether it was willful. None of the judgment debtors claim that they were compelled to be on the suit land or that they are of unsound mind. Thus, their actions are deliberate. And, for the above reasons, I find that the judgment debtors acted in contempt of the Court.

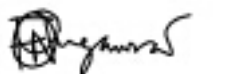
(d) What orders to issue, including, costs

48. The application dated May 5, 2022 succeeds in its entirety. The Judgment Debtors are hereby found guilty of contempt of Court and are each convicted accordingly.

49. The Judgment Debtors (now Contemnors), that is to say, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, shall attend court personally on December 5, 2022 at 9.30 am for mitigation and sentencing. The Applicant shall have costs of the application.

50. Orders accordingly.

**Ruling dated, signed and delivered at Kitale via Electronic Mail on this 23<sup>rd</sup> day of November, 2022.**



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**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE**

<b>RULING KITALE ELC NO. 116 OF 2016 - D.O.D. - 23/11/2022</b>	<b>0</b>
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