



**Otieno & another v County Government of Homa-Bay & 2 others;
Ogutu & another (Interested Parties) (Environment & Land Petition
4 of 2021) [2022] KEELC 14639 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14639 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND PETITION 4 OF 2021
GMA ONGONDO, J
NOVEMBER 9, 2022**

BETWEEN

MICHAEL KOJO OTIENO 1ST APPLICANT

EVANCE OTIENO OLOO GOR 2ND APPLICANT

AND

COUNTY GOVERNMENT OF HOMA-BAY 1ST RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR LANDS, HOUSING,
PHYSICAL PLANNING & URBAN DEVELOPMENT 2ND RESPONDENT**

**COUNTY INDUSTRIAL DEVELOPMENT OFFICER HOMA-
BAY 3RD RESPONDENT**

AND

FELIX WAWILI OGUTU INTERESTED PARTY

JOHN OLOO OGUTU INTERESTED PARTY

RULING

1. On July 28, 2021, the applicants acting in person mounted an application by way of a Notice of Motion dated July 27, 2021 pursuant to, inter alia, Articles 3, 22, 48, 50(1), 159 and 165(3) of the Constitution of Kenya, 2010 (The Application herein). They are seeking the orders infra;
 - a. Spent
 - b. That the court be pleased to issue summons to the following persons to show cause why they should not be punished for contempt: Cyprian Otieno Awiti and Roseline Odhiambo.



- c. Pending inter-partes hearing this honourable court do deny the 1st, 2nd and 3rd respondents audience until it purges contempt.
 - d. The honourable court be pleased to cite the following persons Cyprian Otieno Awiti and Roseline Odhiambo for contempt for the court orders issued by this honourable court on February 19, 2021 (sic) and consequently commit them to civil jail for such period not exceeding six months or fine of Kshs 200,000 (two hundred thousand Kenya shillings) or for a period of time that the court may deem fit and just sufficient to punish the contemnors and be forced (sic) by Regional Police Commandant Nyanza.
 - e. That the court be pleased to award costs of this Application to the applicants.
 - f. This honourable court do make such further orders and/or directions as it may deem necessary in the circumstances.
2. The application is anchored on the 2nd applicant's supporting affidavit, sworn and filed on even date, and the annexed documents including a copy of printed email delivery sheets of service of the court orders and a copy of the affidavit of service filed herein.
 3. Briefly, the applicants deponed that the respondents have failed to comply with the orders of this court rendered on February 19, 2021; specifically an order of certiorari requiring the respondents to bring the list of persons compensated during compulsory acquisition of the parcel of land, LR No Kanyamwa/Kayambo/Kwamo 136 (the subject land herein) and a prohibition order prohibiting the respondents, whether by themselves or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect to the compulsory acquisition in any way whatsoever, until the matter is concluded. They therefore, urged the honourable court to make a finding that the respondents are in contempt of court.
 4. The respondents, represented by Otieno, Yogo, Ojuro & Company Advocates, failed to respond to the Application despite being served with the application as per the Affidavits of Service sworn on October 19, 2021, November 26, 2021, February 22, 2022 by Michael Kojo Otieno.
 5. On February 23, 2022, this court ordered and directed that the application be argued by way of written submissions pursuant to Order 51 Rule 16 of the *Civil Procedure Rules, 2010* and Practice Direction No 33 of the Environment and Land Court (ELC) Practice Directions, 2014.
 6. Accordingly, the applicants filed submissions dated March 4, 2022 on even date giving the background of the matter. The applicants identified twin issue for determination thus: whether the petitioners/ applicants have met the fundamental and well established threshold of being granted contempt of court orders and whether the 1st and 2nd respondents are in contempt of the orders issued by this court on February 19, 2021. The applicants submitted that the respondents are in contempt of court as envisaged under Section 29 of the *Environment and Land Court Act, 2015* (2011).
 7. Learned counsel for the respondents did not file any submissions in regard to the application herein.
 8. It is noteworthy that the orders as listed in paragraph 3 hereinabove were delivered by this court on February 17, 2021 and not on February 19, 2021 as stated by the applicants in the application.
 9. In the foregone, the issue that falls for determination is whether the 1st and 2nd respondents are in contempt of the orders issued by this court on February 17, 2021. Precisely, have the applicants established any basis for the orders sought to be granted?



10. On February 17, 2021, this honourable court made various orders with respect to the petitioners/ applicants Notice of Motion Application dated September 29, 2020, including:
 - a. That the order of certiorari is hereby issued for the respondents to bring the list of persons compensated during compulsory acquisition of the subject land.
 - b. That a prohibition be and is hereby issued prohibiting the respondents, whether by themselves, or any of their employees or agents or any person claiming to act under their authority from proceeding to give effect to the compulsory acquisition, in any way whatsoever until the matter is concluded.
11. The applicants contend that the respondents have failed to comply with the orders as listed in Paragraph 10 hereinabove. They therefore, urged the honourable court to cite Cyprian Otieno Awiti and Roseline Odhiambo for contempt of the court orders issued by this honourable court on February 17, 2021 and consequently commit them to civil jail for such period not exceeding six months or condemn them to pay a fine of Kshs 200,000 (two hundred thousand Kenya shillings). That the same be enforced by the Regional Police Commandant Nyanza.
12. It must be appreciated that contempt of court is that conduct or action that defies or disrespects authority of court. *Black's Law Dictionary 10th Edition at page 385*, defines the term 'contempt' as:

‘The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature.’
13. Section 5 of the *Judicature Act* Chapter 8 of the Laws of Kenya confers jurisdiction on the superior courts to punish for contempt.
14. The Court of Appeal in the case of *Fred Matiang'i, The Cabinet Secretary, Ministry of Interior and Co-ordination of National Government –vs- Miguna Miguna & 4 Others [2018] eKLR*, stated the following with regard to orders of the court: -

‘ When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities’
15. Indeed, the reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at that party.



16. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Ibrahim, J (now, Supreme Court of Kenya Judge), underscored the importance of obeying court orders, thus:

' 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.'

17. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if that party were to succeed. This was aptly stated in *Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227, that:

' 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 part 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.'

18. In *Samuel MN Mweru & Others v National Land Commission & 2 others* [2020] eKLR, Mativo J stated as follows:

In the case of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No 364 of 2005, the High Court of South Africa established principle of law that in order to succeed in civil contempt proceedings, the applicant 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 Perhaps the most comprehensive of the elements of



civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-

' 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.

19. It is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. In this regard, I am not satisfied that wilful disregard of the court order has been established by the applicants herein.
20. Applying the principles discussed herein above to the facts of this case, I am not persuaded that the applicants have demonstrated that the respondents willfully failed, refused and or neglected to obey the court order. Besides, a new governor was recently sworn into the office of the 1st respondent and there is a different officer holding the position of the 2nd respondent hence, it would be unjustified to hold the former officers responsible for the actions of the 1st and 2nd respondents. Put differently, the applicants have failed to demonstrate the tests for contempt which are a pre-requisite to granting the orders sought. The same has been overtaken by events and more fundamentally devoid of merit.
21. Wherefore, the applicants' Notice of Motion dated July 27, 2021 and duly filed herein on July 28, 2021 does not satisfy the prerequisites for the court to grant the orders sought therein. I proceed to dismiss the same.
22. Costs of the application be in the cause.
23. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 9TH DAY OF NOVEMBER, 2022.

G M A ONGONDO

JUDGE

Present

1. 1st and 2nd applicants- in person
2. Okello, Court Assistant

