



Nyongesa v County Government of Trans-Nzoia (Environment & Land Case E021 of 2023) [2024] KEELC 6658 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6658 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E021 OF 2023
FO NYAGAKA, J
OCTOBER 3, 2024**

BETWEEN

ELIZABETH NASIMIYU NYONGESA PLAINTIFF

AND

COUNTY GOVERNMENT OF TRANS-NZOIA DEFENDANT

RULING

On Sentencing, arising from a Conviction on Contempt of Court

1. One of the single most important duties of the court is to inform or remind parties who appear not to appreciate its authority that it is the duty of everyone to whom court orders are directed to obey them fully. A party cannot be heard to do with any court orders as he pleases: he has the singular obligation is to obey them as soon as it comes to his knowledge howsoever that the orders exist in so far as, and to the extent that, they have not been varied. Otherwise, his only option is to approach the court at the earliest instance to request it to vary or set them aside.
2. The Court of Appeal, in *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR held as follows:

“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”.

3. One of the preliminary ways of enforcing disobedience of court orders is to deny audience a party who is in contempt until he/she purges it. A myriad of authorities take that position: that the best remedy for a breach, violation or disobedience of a court order is not for the suspected contemnor purport to move in any other manner the same court he is demeaning since he does not have regard to it anyway. He has to respect the authority and therefore obey the orders of the court first for him to be heard. While the judge or judicial officer may have discretion in regard to many decisions, he/she has none when it comes to obedience of a court order since such order once given is final at that instance. The judge cannot sit on appeal on his/his own decision. Thus, the requirement on a party to submit to the authority of the Court is not, should not and can never be negotiable. In essence disobedience soils the hands of the contemnor to the utmost.

4. In *Hadkinson v. Hadkinson*[1952] 2 ALL ER 562, the English Court of Appeal returned these categorical holdings;

“Held (per Somervell and Romer, L.JJ.), that it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged; that the mother in the present case had not brought herself within any of the exceptions to the general rule which debarred a person in contempt from being heard by the courts whose order he had disobeyed; and that she being in continuing contempt by retaining the infant out of the jurisdiction her appeal could not be heard until she had taken the first and essential step towards purging her contempt by returning the child within the jurisdiction.

Held Per Denning L.J.,: The fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice.”

5. This court rendered its determination on 23/01/2024. By it the Court found Truphosa Amere, the County Secretary of the County Government of Trans Nzoia in contempt of Court its orders given on 19/04/2023 and served on the Defendant on 20/04/2023. This Court summarized well the history and background of determination in the Ruling, including the fact that the Plaintiff had sought orders that two other officers of the Defendant, namely, the Governor and the County Executive Committee Member, one Janerose Nasimiyu Mutama, to also be found in contempt of court over the said orders. Also, that through a Preliminary Objection dated 14/06/2024, the Plaintiff had sought to strike out the Replying Affidavit sworn by the County Secretary to be struck out. The Court dismissed the two prayers summarized above, leaving the determination on the one for contempt of court by the contemnor to stand. Thus, it needs not rehash it. What is left is for it to sentence the contemnor.

6. Contempt of Court is no undoubtedly one of the clearest acts of aggression towards judicial authority and the rule of law. It not only demeans the dignity of the court but signals the rest of the citizenry to resolve to disobedience of similar orders and the law in general, lose faith in courts and take the law into their hands. One thing is clear: of the three arms of government the Court is the most impartial. It is the one central to the proper functioning of the state because, whereas the Executive is the one that has the purse and often muscles power through both the purse and execution, and Parliament exercises



its oversight on the Executive besides making laws, both arms operate and have been seen world over throughout generations to always lean towards certain political interests. How I wish this was not the case!

7. Nevertheless, courts do not have and are never expected to have any inclinations or interests to serve than upholding the rule of law and justice for all persons, natural or juristic, irrespective of which political leanings or other inclinations they have. Ours as the judiciary is to be as faithful to the law and our calling as Caesar's wife. Actually more. It is a divine call to serve justly and faithfully as the just Judge of the universe expects of us, unlike the elected (political) representatives of the people who must serve certain interests. The latter is more imperative and obligatory than measurements pegged on human standards of behavior: it is debatable but I believe that even Caesar's wife may have had natural temptations and faltered in some way.
8. Having said that, this Court found that the Defendant no doubt conducted itself in a most despicable manner yet it was the one upon whom the residents, including the Applicant, of this County put trust in by electing it into office. The Defendant was not elected to destroy but protect both the property of its residents and the rule of law. They have clearly shown that they have no respect for the rule of law.
9. In the case of *Miguna Miguna v Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others* [2018] eKLR, G. V. Odunga J. (as he then was) stated:-

“In deciding what sanction to mete this Court must reflect on the need to maintain the rule of law and to ensure that the authority and the dignity of our Courts are upheld at all times and to stamp the Court's authority and uphold the values and principles of governance enshrined in Article 10 of *the Constitution*. In this case the 1st to 3rd Respondents have not adhered to the oath of office which they took to inter alia protect *the Constitution* of this country including the national values and principles of governance. To the contrary the manner in they have conducted themselves in these proceedings does not inspire confidence at all. This is contrary to Article 74 of *the Constitution* which provides that a State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that inter alia avoids demeaning the office the officer holds. The provision proceeds to state that such an officer may, in accordance with the disciplinary procedure be dismissed or otherwise removed from office and where the officer is so removed, he or she is thereby disqualified from holding any public office.”

“This Court, like any other Court of law, ought not to make orders in vain. It must make sure that its orders “bite” as Kimaru, J said. It must not only make effective orders but orders whose execution can be carried out swiftly and efficiently and orders which it can supervise. It must not issue orders which from the circumstances of the case, there is high likelihood that they will not be implemented whether rightly or not.”

10. On its part, the Defendant argued that the contemnor was remorseful. It urged the court to take note of the fact that the service of the Court order was made when its workers were already on site undertaking the demolition. Immediately upon service they stopped the process. The contemnor thus obeyed the order from then. She respects the rule of law. Furthermore, the service was on the Governor and not the County Attorney.
11. Learned counsel argued that it was willing to fast-track the suit. He prayed for leniency. Further, he prayed that although there had been challenges in procuring the supporting documents, it gave an unequivocal undertaking to file the relevant documents regarding ownership.



12. In regard to the valuation of the property, the Defendant argued that it would not attach to it only since the Plaintiff also participated in the demolition of the same. It urged the court to issue directions on the determination of the value of the same and it was willing to follow every one of the directions. While urging that the suit property sat on Stadium land which is public property, he prayed for forgiveness of the contemnor. He also prayed that the court does permit the on-going developments to continue.
13. On her part, in her oral submissions made on 08/04/2024, the Plaintiff submitted that the Defendant was not truth when it argued that service on the County was improper. She pointed to the Court that at paragraph 77 of the Ruling on contempt it found that the annexure bore the stamp of the County Government hence service was proper. Her learned counsel went at length to explain how service was effected. Further, that the building on the property in issue were destroyed the following day.
14. Learned counsel argued further that the property destroyed was worth millions of Kenya Shillings, there was no reason at all for the destruction. Further, that the argument that it was within the Stadium was untrue since the Plaintiff had provided a title deed to prove that indeed it was private property. The Plaintiff had provided a valuation of the same. He urged the Court to rely on Section 29 of the *Environment and Land Act* to mete out a sentence of imprisonment of up to two years and also a fine of Kshs. 20,000,000/= simultaneously. He urged that this court send a signal to the County Government. He urged the Court to also order that the Defendant restores the property to its original state since the Plaintiff used to derive income from the property but it was now lost. Moreover, the property had been charged to many institutions and the Defendant ought to have known that their actions were totally wrong.
15. One of the reasons this prayer was made was that the Plaintiff had lost its property in the circumstances of the actions of the contemnor. Indeed, it is not in dispute that following the perceived threats of the Defendants over the said property the Applicant moved this Court under certificate to urgency for orders which, if issued, were to preserve the property in issue pending the hearing and determination of this suit. The Court issued orders whose details were given on 19/04/2023. By the said date the suit property was intact but by 20/04/2024 it was destroyed in part. That the same was destroyed in part during the pendency of the orders is not in dispute: that argument is settled. What is not settled and is for later determination, if raised by any parties, is whether the Plaintiff also participated in demolition of the property after the Defendant had demolished part of it, and allegedly stopped upon service of the interim orders. What that means was that that which the Plaintiff called his source of income was lost: as to whose full or extent of the cause, it is a matter of evidence. It is now the issue of ownership which is the subject of determination by this court later on, and the value of the destroyed property and to whom it is attributable given that the Plaintiff has filed an Amended Plaint dated 04/04/2024 on 08/04/2024.
16. Granted that the property belonged to the Plaintiff, she would have lost income for all the time this suit remains undetermined and afterwards, and the value of putting up one of a similar size and quality. If the property is ultimately found to belong to the Defendant or to say is public property the Plaintiff would have lost nothing but the cost of the structure that was destroyed. However, even that loss might not necessarily be borne by the Defendant as it may be attributable to her hence her own making since she was not supposed to have put it on the parcel of land in the first place, if the property is found to have been irregularly acquired by her. She would be a trespasser on public property: one who is actually supposed to compensate the public for the use and occupation of the property for all the years he put up the structure on it and used it. Also, by the end of the case, if the Defendant succeeds, she might be called upon to remove the structure and any attendant material from the suit property at his own cost and either restore, still at her cost, the land to where it was originally or compensate the government



for cost of both removal of the unwanted structure and materials and restoration of the land. These are some of the additional considerations this court has made, in arriving at the appropriate sentence.

17. Weighing the issues above, I have considered the mitigation of the contemnor. I am of the view that an order of restoration of the property would not be appropriate in the circumstances because, as I have stated above, should it be found in the end that the same was built on the Defendant's land it would have to be destroyed again. And should it be found to have been for the Plaintiff, since she has estimated the value of the destroyed property and even prayed for the loss of income thereof and the character thereof has changed, by the amendment of her pleadings to seek a relief for compensation and damages or loss of use, it would be contradiction of the prayers sought in the Amended Plaintiff. It would lead to another amendment being sought by the Plaintiff or double compensation ultimately if at all the Plaintiff's case succeeds in the end. The Plaintiff cannot be heard to seek restoration of the property at this stage while she has prayed in the Amended Plaintiff for compensation of the value of the apartment building and loss of monthly rental income for fifty-seven years and nine months. To grant the prayer would be inconsistent with the pleadings, and an indirect affirmation of ownership of title to the land.
18. This does not mean in any way that in future if the Defendant disobeys the court order by destroying anyone's property this is the way to go. The Defendant has only escaped an order directing it to deposit the entire sum of the value of the destroyed property in a joint fixed account or court pending the trial because it was not prayed for in the submissions.
19. For this reason, the court fines the contemnor a sum of Kshs. 100,000/=, in default the contemnor be arrested by the OCS Kitale Police Station and incarcerated for a period of one (1) month from the date of arrest. The fine shall be paid within seven (7) days. Meanwhile the contemnor is given a personal bond of Kshs. 200, 000/= to be executed immediately in order for her to be free to facilitate the processing of the of the fine.
20. Mention on October 15, 2024 at 08:30 AM to confirm compliance of payment of the fine or arrest and imprisonment in default.
21. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE IN THE OPEN COURT THIS 3RD DAY OF OCTOBER, 2024.

**HON. DR. IUR F. NYAGAKA,
JUDGE, ELC KITALE**

In the presence of:

Masika Advocate.....for the Plaintiff

Waswa Advocate.....for the Defendant

