



**Muthama v Government (County) Surveyor, Urru & 3 others (Environment & Land  
Petition E005 of 2023) [2024] KEELC 13774 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13774 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ENVIRONMENT & LAND PETITION E005 OF 2023**

**CK NZILI, J**

**DECEMBER 4, 2024**

**IN THE MATTER OF PROTECTION OF THE RIGHT TO PROPERTY  
UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ABUSE OF ADMINISTRATIVE ACTION  
CONTRARY TO ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF THE NATIONAL  
VALUES AND PRINCIPLES OF GOVERNANCE AS PROVIDED  
UNDER ARTICLE 10 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 22 AND 23 OF  
THE SURVEY ACT, CAP 299 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 15 OF THE LAND REGISTRATION ACT 2010**

**AND**

**IN THE MATTER OF SECTION 3 AND 4 OF THE  
FAIR ADMINISTRATIVE ACTION ACT 2015**

**BETWEEN**

**JOSEPH KITHINJI MUTHAMA ..... PETITIONER**

**AND**

**THE GOVERNMENT (COUNTY) SURVEYOR, URRU ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, URRU ..... 2<sup>ND</sup> RESPONDENT**



## RULING

1. The ruling relates to two applications dated 23.9.2024 and 14.11.2024. In the first application, the court is asked to commit the 1<sup>st</sup> and 2<sup>nd</sup> respondents to civil jail for 6 months for contempt of court.
2. The reasons contained on the face of the application and a supporting affidavit of Joseph Kithinji Muthamia are that though there was a consent order made on 20.5.2024, the citees have defiantly vowed not to comply with the said judgment, yet they were bound by it, and the defiance breed impunity.
3. The applicant averred that though he is the owner of LR No. Tigania/Antuamburi/7021, the respondents have failed to implement the decree of the court arguing that court orders from Tigania SPM ELC No. E029 of 2023 yet the order is that suit shows that the suit was marked withdrawn as per annexure marked JKM "1" with no other substantive orders made.
4. The applicant avers that despite demand letters written on 26.8.2024 seeking compliance attached as JKM "2," the 1<sup>st</sup> & 2<sup>nd</sup> respondents have declined to comply, giving no valid reasons, hence denying him the right to enjoy the suit land despite having a title deed to it.
5. The application was opposed through replying affidavits sworn by Delphine Nyaga, the 1<sup>st</sup> respondent and Jonah Mbaabu Mwambia, the 2<sup>nd</sup> respondent, sworn on 7.10.2024. The 1<sup>st</sup> respondent avers that LR No. Antuamburi/7021 is not represented on the registry index map since it was not originally mapped. On the contrary, the 1<sup>st</sup> respondent averred that it was plotted on sheet number 108/4/17/8 by replacing the existing parcel LR No's. 11821 and 3162, which amendment was executed through a government mutation with serial number 0000042100 and was approved on 18.4.2023.
6. The 1<sup>st</sup> respondent averred that the authority for this amendment was provided by the office of the Land Adjudication and Settlement Tigania East sub-county as documented in a letter Reference No. SCLASO/TE/Vol. VII/61 dated 14.10.2021. The government mutation and the letter authorizing the changes were not attached as annexes.
7. Further, the 1<sup>st</sup> respondent averred that the replacement of parcel NO. Antuamburi/3162 and 11821 with parcel LR No. Antuamburi/7021 was reversed after realizing that the documents used to cause the said amendment were not authentic since the registered proprietors of parcel LR No. 11821 and 3162 did not consent, nor was there a court order authorizing the said amendments.
8. The 1<sup>st</sup> respondent averred that as a result, the reversal of the amendment was implemented on the registry index map on 24.4.2024; hence, parcel LR Antuamburi/7021 no longer appears on the current registry index map. The 1<sup>st</sup> respondent averred that due to the reversal of the registry index map amendment and the absence of parcel No. Antuamburi/7021, on the current registry index map, the court order could not be implemented during the visit on 6.6.2024. The 1<sup>st</sup> respondent averred that the assertions by the applicant are inaccurate as she did not refuse to comply with the court order; otherwise, she visited the site on 6.6.2024 with the aim of re-establishing the boundaries of the suit land. Again, the 1<sup>st</sup> respondent averred that she recommended that the matter be referred back to court for further directions on whether the two parcels found in the registry index map should be removed and replaced with the applicant's land.



9. The 2<sup>nd</sup> respondent's affidavit adopts almost word by word the contents of the affidavit of the 1<sup>st</sup> respondent in its entirety.
10. Following directions, the application for contempt of court was heard through viva voce evidence. The applicant opted to adopt the contents of the application. On their part, the citees appeared in open court on 18.11.2024 and adopted the two affidavits as their evidence in chief to oppose the application for contempt of court as PW1 and PW2, respectively.
11. The 2<sup>nd</sup> respondent testified as PW1. She told the court that she had not joined the office by the time the petition was filed or compromised and only became aware of the same in June 2024 when a court order was presented to her office for implementation. PW1 said that she eventually visited the locus in quo with the 1<sup>st</sup> respondent in the company of the OCS Mikinduri Police Station and compiled a report dated 19.9.2024, affirming their attendance, findings and recommendations.
12. In cross-examination by the petitioner's counsel, PW1 admitted that the issuance of the title deed fell under her docket. Further, the 2<sup>nd</sup> respondent admitted that the title deed and an official search in possession by the petitioner were issued from her office. Equally, the 2<sup>nd</sup> respondent admitted that a title deed must be issued pursuant to a specific registry index map. Similarly, the 2<sup>nd</sup> respondent acknowledged that her office was yet to recall, cancel, or invalidate the title deed held by the petitioner/applicant on account of the findings in her report dated 19.9.2024 since there was an ongoing case. The 2<sup>nd</sup> respondent told the court that the fixing of the beacons fell under her jurisdiction.
13. On his part, the 1<sup>st</sup> respondent as PW 2 admitted that he assumed office on 22.4.2024 and was only notified of the petition by Mr. Kimathi, learned state counsel after the consent was signed and made aware that it required to be implemented. After the visit in June 2024, the 1<sup>st</sup> respondent told the court that the report that was prepared was forwarded to the office of the attorney general.
14. Additionally, PW 2 stated that it was not possible to implement the order unless the three holders of the title deed consented or the court issued an order to that effect. The 1<sup>st</sup> respondent said that it was abnormal to have a title deed without a registry index map. Similarly, PW2 said that his registration maps did not reflect land parcel LR No. 7021 Antuamburi. According to the PW 2, missing registration maps was a common occurrence in Tigania. He told the court that when they visited the land, they found out that there were other occupants on the land, hence the need to reconcile the title deed held by the petitioner with the registry index map. Again PW 2 affirmed that the erasing of the petitioner's land parcel from the registry index map was lawfully done by his predecessor, Mr. John Mahagu, on 3.11.2022, through a mutation form dated 31.10.2022, which, according to him, going by a copy availed to court, was never registered.
15. After the close of oral testimonies, parties relied on written and oral submissions. The applicant relied on written submissions dated 15.11.2024 urging the court to find that the 1<sup>st</sup> & 2<sup>nd</sup> respondents are guilty of contempt of court of the court orders entered and adopted on 20.5.2024, since they are the ones in charge of the survey, placing beacons, registration of maps and issuance of titles on the register. It was submitted that despite having a title deed, the applicant continues being frustrated even though he has a title and an order from the court, which, instead of enforcing the 1<sup>st</sup> & 2<sup>nd</sup> respondents, are attempting to involve other parcels of land in order to mix up issues. The applicant submitted that his land is unique, distinct and separate from the other parcels of land, since he does share a number with them.
16. The applicant submitted that all this mess was created by the 1<sup>st</sup> & 2<sup>nd</sup> respondents, who can still clean it. The petitioner urged the court to find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have deliberately failed or



refused to comply with the court orders and, hence, are guilty of contempt of court. Reliance was placed on *Law Society of Kenya & others vs Inspector General of Police & others* (Petition E436 of 2024 (2024) KEHC 10634 (KLR)).

17. In the second application the 1<sup>st</sup> – 3<sup>rd</sup> respondents have asked the court to set aside the consent order dated 20.5.2024. The reasons are set out on the face of the application and in a supporting affidavit sworn by Delphine Nyaga on 14.11.2024. The reasons are that when the 1<sup>st</sup> and 2<sup>nd</sup> respondents visited the locus quo on 6.6.2024 to implement the order, it was established that parcel LR No Antuamburi/7021 did not exist in the current registry; it had been erroneously plotted in Sheet No. 108/4/17/8 replacing the existing parcels LR No's 11821 and 3162; initially, the parcel had not been plotted in the registry index map; a reversal was made after realizing that the documents used to cause the said amendments were not authentic and the owners of the affected parcel of land had not consented to the changes and there was also no court order to that effect, the reversal of the amendment was effected on the register on 24.4.2024, effectively erasing the petitioner's parcel of land from the current registry index map.
18. Further, the applicants averred that due to the reversal and in the absence of the parcel of land in the current registry index map, the decree of the court could not be implemented; issues of fraud and unauthentic documents have been discovered; thus, the consent entered between the parties is void. Additionally, it was averred that the discovery of new material information voids the consent and, therefore, cannot be cited for contempt as they have not refused to comply with the court order; otherwise, to comply with it would amount to infringing on other land owners plots is what the contempt application is all about yet the contempt proceedings are based on quality to be an illegality, the petitioners want a positive order of the court based on illegality. In support of the application, the applicants attached a copy of the joint report compiled after visiting the locus in quo on 6.6.2024 marked AT "1" copy of the registry index map as AT "2", pictures of the buildings and dwellings in LR No. Antuamburi/3162 and 11821 and the title deeds as annexures marked AT "3" and AT "4" respectively. In sum, the respondents urged the court to recall the consent order and issue further directions on the hearing and determination of the actual ownership of the affected parcels of land.
19. The application is opposed by a replying affidavit of Joseph Kithinji Muthamia sworn on 18.11.2024 as a cheeky way of avoiding compliance with court orders on the basis that he used unauthentic or fraudulent documents to obtain the order, yet particulars of the fraud have not been given or a report to the police made complaining of the alleged fraud. The petitioner averred that as a layman, he was not involved in the alleged illegal or fraudulent process, which ideally falls under the statutory duties of the 1<sup>st</sup> & 2<sup>nd</sup> respondents who cannot escape their mandate under the guise of an unauthentic document, yet they emanated from their offices.
20. The respondent averred that his title remains valid since it had never been invalidated, yet he is unable to enjoy the land on the ground out of dereliction of duty by the 1<sup>st</sup> & 2<sup>nd</sup> respondents. Again, the respondent averred that the implementation of the consent order should resolve the entire issue and ensure that his land is placed on the ground. The respondent averred that the applicants had not met the threshold for setting aside consent orders.
21. When this application came up for hearing on 18.11.2024, the court directed that the party's advocates who signed the consent file affidavits explaining the circumstances under which they executed the consent in view of the new issues raised by their respective clients. None of the two lawyers who appended their signatures to the consent letter dated 14.5.2024, filed in court on 3.6.2024 and appeared before the court on the day they sought its admission and confirmation as an order of the court, took the liberty of filing the said affidavits as directed by the court.



22. Given that the determination of whether the consent judgment should stand would affect the outcome of the 2<sup>nd</sup> application on whether the 1<sup>st</sup> & 2<sup>nd</sup> respondents are guilty of contempt of court, the court, during the hearing, directed that the second application be heard first. Mr. Juma, learned counsel for the respondents, submitted that though a consent order is like a contract, it can be set aside like the instant case where there is evidence of misrepresentation of facts, fraud, or illegality, which, if discovered by one party, renders the consent void. The respondents submitted that the applicant misled the 2<sup>nd</sup> respondent to enter into a consent without being aware that the suit land had pending issues of ownership with third parties, primarily through cases pending at the lower court.
23. The respondents submitted that the petitioner had pleaded the case as if it was purely on a boundary fixing based on an amended map annexed to the petition, which turned out to have been fraudulently obtained or made since there was no consent from the other landowners to the amendments and for the petitioner's parcel of land to be effected on the map.
24. Learned counsel submitted that there was no court order to amend the map or effect the changes before the adoption of the consent on 20.5.2024. Learned counsel submitted that the consent was, therefore, based on an unauthentic map, contrary to the one annexed to the application, published and gazetted in January 2019, reflecting the actual status of the registered proprietors of the section.
25. Learned counsel submitted that at the place where the petitioner's land allegedly lies, other registered owners of LR No's. 3162 and 11821 have developed their parcels of land with permanent dwellings and business premises.
26. Moreso, counsel submitted that the applicant misrepresented all these facts and also came to the court waving a fake title deed claiming to own LR Tigania/Antuamburi/7021 based on a defective registry index map. All these facts taken together learned counsel submitted that they make the consent illegal.
27. Learned counsel submitted that the court's policy is to disallow and decline to uphold a consent that is illegal and whose implementation would impede on the proprietorship rights of other parties. Learned counsel urged the court to find that the consent is incapable of implementation. Reliance was placed on *Sarova Hotels Ltd India vs. Placid View Properties Ltd* (2022) eKLR, on the effect of a decree procured through fraud, misrepresentation, or mistake. Learned counsel further submitted that it was almost impossible for the respondents' counsel at the time to have known the facts on the ground; hence he was mistaken in entering into such a consent.
28. Mr. Kimanthi, learned counsel for the applicant, submitted that this client's title deed was yet to be impeached and was lawfully issued by the 1<sup>st</sup> & 2<sup>nd</sup> respondents, who were now washing their hands and leaving him in a dilemma contrary to his proprietary rights under Article 40 of the *Constitution*. Learned counsel submitted that there was no evidence placed before the court that the respondents had complained to the police about the documents held by his client as forgeries; otherwise, the application should be dismissed.
29. What is before me is a case where the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the main petition, who had been sued together with the Hon Attorney General as the 3<sup>rd</sup> respondent to the petition, have disowned issuing instructions to their lawyers to compromise a petition whose effect was to issue orders of mandamus compelling them to perform what they call an illegality and do what is professionally impossible on their part. The land registrar and the land surveyor are now before the court brought by the petitioner, whose lawyer was a signatory to the consent letter dated 14.5.2024, which had equally been signed by the 1<sup>st</sup> and the 2<sup>nd</sup> respondents' lawyer, and who on 20.5.2024 appeared before this court after uploading the consent letter on the Case Tracking System platform and asked this court to endorse it as a decree of the court.



30. From the court record, the office of the Hon. AG was served with the petition on 31.8.2023. An affidavit of service to that effect was filed on 27.9.2023, 19.11.2024. A mention notice was again served on the Hon. AG on 18.10.2023, 13.2.2024, and 24.4.2024. The matter was mentioned before the Deputy Registrar on 9.11.2023 and 1.2.2024. On 14.3.2024, the lawyers appeared and told the Deputy Registrar of this court that they were engaged in negotiations to settle the petition out of court. The matter was placed before this court by the Deputy Registrar at the request of the advocates on 20.5.2024, following the culmination of the negotiations and the uploading of the consent letter in the CTS platform.
31. Learned state counsel Miss Dalive Mbaikyatta appeared for the respondents and urged the court to adopt the consent letter, which her office had duly signed alongside Mr. Edwin Kimathi, advocate for the petitioner. None of the two lawyers who appeared before the Deputy Registrar and this court, despite serious issues raised and the direction of the court, have explained how the consent came about and if the instructing clients gave their input. In *Julius Kigen Kibiego vs. Angeline Korir & another* (2012), eKLR a consent had been entered into by the office of the Attorney General on behalf of Moiben Primary School, giving out part of the school land without instructions from the defendant and which bound the school and gave away its land. The consent was termed as irregular, void and against the *Education Act*. The court cited *Hiram vs Kassam* (1952) 19 EACA 131 that prima facie that any order made in the presence and with the consent of counsel is binding on all parties and can only be varied if there is evidence of obtaining it through fraud, collusion or was based on an illegal agreement contrary to the policy of the court, or if it was given without sufficient material facts, or in misapprehension or ignorance of material facts or in general for a reason which could enable the court to set aside an agreement as set out in *Seton on Judgment and Orders* 7<sup>th</sup> edition Vo. 1 page 124.
32. In *Ndewa & others vs. Kenya Defence Forces & others* (2022) KEELC 4802 (KLR) (21<sup>st</sup> September 2022) (Ruling) the consent to compromise the petition had been executed by the lawyers for the parties. The court was asked to approve and adopt the consent. The court cited *Ransa Co. Ltd vs Manco Francesco & others* (2015) eKLR on the implication of consent entered into by lawyers without the involvement of all the parties. The court cited *Kasmir Wesonga Ongoma & another vs Wanga* (1987) eKLR and *Flora Wasike vs Desmond Wamboella* (1980) 1 KAR that a consent judgment has contractual effects. The court took the view that issues raised in the petition revolved around public law in relation to implications on the land conversion from one regime to the other and on the third parties. The court cited *Geoffrey M. Asango & others vs AG* (2020) eKLR on the freedom of parties to settle matters out of court. Further, the court cited Order 25 *Civil Procedure Rules*, Rules 29 & 30 of the *Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice & Procedures Rules*, (2013) (Mutunga Rules) on parties' freedom with leave to compromise suits and petitions. The court cited *Leo Investment Ltd vs Estuarine Estate Ltd* (2017) that consent must meet the requirement of Sections 3 (3) of the *Law of Contract Act*. The court declined to adopt the consent since the holder of the title in trust of the 2<sup>nd</sup> respondent was not a party to the petition or had not signed the consent. The court cited *Narok County Government vs Livingstone Kanani Ntutu & others* (2018) eKLR where the court set aside the consent for the matter to go for a full trial on account of public interest. On appeal, the order of this court was by consent vacated, and the initial consent was adopted as valid.
33. In the *Mbugua vs Mbugua & others* (2022) KEHC 11912 (KLR) (18<sup>th</sup> August 2022) Ruling, the court said that a court has to test the legality of the compromise. It further cited *Diamond Trust Bank (K) Ltd vs Ply & Panel Ltd & other* (2004) 1 EA 31, that where consent was written on the letterhead of the advocates, there cannot have been undue influence by one side over the other and more so, where the respondent came to know of the judgment almost immediately and yet did not come to court until some 5 months later after the grace period run out and that the burden is heavier on the



party who alleged that there was, in fact, no consent or the consent was invalid, for advocates have ostensible authority to reach a compromise on behalf of their clients who have control over the conduct of the trial including to compromise the disputed claim, made bonafide, unless shown to the court that there was misrepresentation which influenced the representative into an agreement. The court said that the conduct of the parties since the compromise was recorded was a relevant consideration in an application to set aside the compromise and excessive delay may be construed as an affirmation of the compromise depending on the circumstances of each case. In *Kenneth K Boit & another vs Commissioner of land & others* (2015) eKLR, the court cited *KCB vs. Benjob Amalgamated Ltd* (1798) eKLR, that the authority of a solicitor if he acts bonafide and not contrary to express negative directions is lawful.

34. In this application, the litigation counsels who signed the consent and who appeared before the court on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to endorse it have not denied express or implied authority in signing the same to binding their clients. None has sworn on oath faulting or admitting that they did not act in the best interests of the respondents and or were mistaken or misled on the facts in existence at the time. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have not denied that they were aware of the petition, with effect from 2023. Equally, none of them has denied giving instructions to defend the petition on their behalf to the office of the Hon. AG to act on their behalf. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have not told the court that the brief that they had given to the Hon. AG before the consent letter was signed was ignored, overlooked, or materially different from what was signed and adopted by the court.
35. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have not stated that the Hon. AG and its legal representative acted contrary to express instructions given to it in writing or otherwise. The 2<sup>nd</sup> respondent has admitted that she spoke with the Hon. AG and equally visited the suitland. If at all a report was prepared on 6.6.2024, it is not clear why the application for setting aside was not made immediately after the discovery of new evidence or facts, only to wait for the title deeds by the third parties to be issued in September 2024 and for the respondents to now argue that there was misrepresentation, mistake or illegality on the part of the petitioner.
36. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have admitted that the petitioner holds a valid title to land that has not been recalled, invalidated and or complaints lodged for uttering false documents or forgery to the police. There is no evidence that the issuer of the said title deed and an official search certificate was reprimanded or called to explain why he issued an invalid title deed to the petitioner.
37. The mutation said to have been used to plot on the map the petitioner's title is admitted not to have been registered by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. So how could the petitioner have mistakenly been issued with a title deed on 18.1.2023 based On Registry Index Map Sheet No. 108/4/17/8 and for the same to be said to have replaced LR Tigania/Antuamburi/11821 and Meru North/Antuamburi/3162, before they came into existence. Additionally, the conclusion that the court order dated 22.5.2024 was impossible to implement in June 2024 for it would affect the title deeds of the two parcels of land, even before their title deeds were issued three months later on 27.9.2024, baffles this court.
38. The questions then that remain unanswered by the respondents are how the petitioner misled their counsel on record and this court and how this court should vacate the consent order based on mistake, illegality, misrepresentation, and or fraud. The official documentation of the suit land as of 20.5.2024 has not been availed to the court. Authentic and certified documents supporting the survey report dated 19.9.2024 have also not been availed. The preliminary findings made on 6.6.2024 before the issuance of the title deeds on 27.9.2024 are missing. If, at all, the 1<sup>st</sup> and 2<sup>nd</sup> respondents became aware of the mistake less than 20 days after the consent was entered, it remains a mystery why the respondents



- did not move with speed before the end of June 2024, to vacate the consent judgment. It is unclear why a report for a site visit on 6.6.2024 would also be prepared and be submitted in October.
39. Evidence of misrepresentation, concealment of material facts, fraud, illegality, and irregularity must be on a higher balance than in ordinary suits, as held in *Aritbi Highway Developers vs West End Butchery Ltd & others* (2015) eKLR. What the 1<sup>st</sup> and 2<sup>nd</sup> respondents have brought before the court are documents such as survey maps, mutation forms, and photos that are not certified, verified, published and authenticated. There are no reports by the authors or makers of the title deed demarcation, registry index maps, adjudication record, authorization of amendment letter, or reason referred to in the report dated 19.9.2024 predating 20.5.2024 pointing at a mistake, illegality, irregularity and or fraud on the part of the petition or the officers in charge of the adjudication or registration section in line with the land laws and the *Evidence Act*.
40. In *Paul Mwiti M'Reimberia vs Officer Commanding Meru Police Station & others* (2014) eKLR, Mr. Kieti, a litigation counsel, had signed a consent, which became a decree of the court. The decree was attacked for no material disclosure by the respondent misapprehension of the existing state of affairs; as well as lack of sufficient material facts at the time of entering into consent. The learned state counsel who had signed the consent on behalf of the respondent had not deponed that he gave the consent without the consent and knowledge of the respondent or knowledge of material facts. The respondent had not bothered to secure his affidavit in support of the application. The trial court held that the allegations in support for the application on material non-disclosure and misapprehension of the existing state of affairs should have been deponed by Mr. Kieti, learned state counsel; otherwise, the respondent had failed to set out conditions to justify setting aside of the consent. The respondents are not saying that they want the court to set aside the consent judgment with a view to defending the petition based on an arguable response with arguable grounds. My finding is that the consent was entered into voluntarily by both counsels. I find no basis to vacate it. The 2<sup>nd</sup> application is dismissed with costs.
41. Coming to the question of whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents are guilty of contempt of court; contempt constitutes an affront to judicial authority, safeguards its processes and sustains the rule of law and the administration of justice. See *Republic vs Mohamed & another* (Petition 39 of 2018 (2019) KSC 47 (KLB) (15<sup>th</sup> March 2019) (Ruling). Abiding by court orders is not an option. It protects the dignity and authority of the rule of law. A court will always deal firmly and zealously with anyone who deliberately disobeys court orders or attempts to scuttle the court's process. Section 5 of the *Judicature Act* as read together with Section 29 of the *Environment and Land Court Act* and Order 40 3(1) of the *Civil Procedure Rules* are guiding laws on punishing for contempt of court. The power was discussed in *BOG Moi High School Kabarak vs Malcolm Bell & another* Supreme Court of Kenya Petition No. 6 & 7 of 2013. The court said that it is a power without which the protection of citizens' rights and freedoms would be virtually impossible and may reduce courts of law to futile institutions spewing forth orders in vain. The power is not to vindicate the dignity of the court or the person of the judge, but to prevent undue interference with the administration of justice.
42. In *Sammy Nyamweya & others vs Kenya Premier League Ltd & others* (2015) eKLR, the court observed that the power is not to placate the applicant but is aimed at assuring a party who walks through the justice door with a court order in his hand, that the order will be obeyed by those whom it is directed and that to require for its compliance is not a mere suggestion or opinion or a point of view, but a command that is issued after much thought and with circumspection. Compliance with court orders, therefore, is mandatory, and it is in the interest of every person that it remains the case; otherwise, to see it any other way is to open the door of chaos and anarchy. Deviance from a court order is not an option; otherwise, whoever is dissatisfied with a court order has avenues to challenge it.



43. An application for contempt of court is a serious matter and is to be taken with much urgency. In *Shimmers Plaza Ltd vs NBK* (2015) eKLR, the court held that knowledge of a court order suffices to prove service and dispense with personal service for contempt proceedings. See also *Basil Criticos vs AG & others* (2012) eKLR. In *Justus Kariuki Mate & Another vs Martin Nyaga Wambora & another* C.A No. 24 of 2014, the court satisfied the court that the contemnor willfully and deliberately committed the acts complained on. The ingredients to satisfy are:
- i. The terms of the order were clear, unambiguous, and binding on the citees.
  - ii. The citees had knowledge of or proper notice of the terms of the order.
  - iii. The citees acted in breach of the terms of the order.
  - iv. The conduct was willful and deliberate.
44. The procedure to punish for contempt was discussed in *Gitbinga & others vs Kiru Tea Factory Co. Ltd* Petition No. 13 of 2019 (2023) KESC 4 11 (KLR) (16<sup>th</sup> June 2023) (Judgment). The Supreme Court of Kenya observed that due to its quasi-criminal nature and the gravity of the consequences flowing from its proceedings, courts should adhere to the principles of natural justice, procedural fairness, and the right to fair hearing by giving an alleged contemnor the right to defend himself. In *Republic vs Abamad* (2018) eKLR, the court cited *Mutitika vs Baharini Farm Ltd* (1985) KLR 229 that the standard of proof must be higher than proof on a balance of probabilities since if cited for contempt, one may lose liberty or face civil jail.
45. The applicant must, therefore, prove the four ingredients of knowledge of the order; that there was a commission of the acts complained of; the conduct was willful and deliberate; that the terms of the order were clear, unambiguous, and binding on the citees. See *Kenya Tea Growers Association vs Francis Atwoli & others* (2012) eKLR. There is no evidence that the 1<sup>st</sup> & 2<sup>nd</sup> respondents were personally served with the decree of the court after it was extracted. There is no evidence that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were personally privy to and were explained the contents of the decree dated 3.6.2024. The decree, as extracted, has no penal notice. See *Nyamogo & another vs Kenya Posts & Telecommunications Corporation* (1994) KLR 141. An affidavit of service of the decree upon the 1<sup>st</sup> and 2<sup>nd</sup> respondents has not been filed. A demand letter dated attached as JKM "2" does not amount to a decree of the court. The affidavit sworn on 29.8.2024 by Paul Irungu Mwangi does not mention that the service of the decree done upon the 1<sup>st</sup> and 2<sup>nd</sup> respondents has not been filed.
46. He who alleges must prove under section 107 – 112 of the *Evidence Act*. Service or knowledge of the decree is critical. In *Inspector General & another vs Ochanda* (Civil Appeal 265 of 2017 (2024) KECA 272 (KLR) (8<sup>th</sup> March 2024 (Judgment), there had been evidence of receipt of the order and service upon the Hon. AG. A letter had also been addressed to the applicant's law firm, attaching the extracted order to enable them to act appropriately. The court, therefore, found the grounds of opposition by the respondent and his counsel dishonest, mischievous, and obstructive of justice and aimed to circumvent the rule of law. The court also found the conduct of the respondent a betrayal of the rule of law impugning on the dignity of the court despite reservice with the order.
47. In this application, the applicant had a duty to demonstrate that the citees were privy to, knew, and deliberately defied the decree. In *Shimmers Plaza Ltd vs NBK* (supra), the court observed that dispensation of service is only allowed where the person is said to have been aware of or known about the order if his person or agent was either present in court when the order was granted or was notified of the order its terms or contents by telephone, email or otherwise.



48. The consent, as indicated above, has not been impeached. Its ambiguity has not been indicated. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents who issued the title deed and an official search certificate to the petitioner, which supersedes the two title deeds subsequently issued for LR No's. 11821 and 3162, allegedly said would be replaced by the petitioner's title deed, if the court decree is implemented. Two wrongs do not make a right. It is up to the respondents to put their houses in order. The court cannot sanction the illegal conduct of the 1<sup>st</sup> and 2<sup>nd</sup> respondents who, out of their dereliction of duty and sheer negligence, are purporting to issue a title deed and other documents to the petitioner but without any remorsefulness, tell this court that their hands are tied and cannot implement a lawful decree of this court which they voluntarily consented to. It is not the business of this court to negotiate compliance with a court decree. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are, as a result of this, granted three days to reconcile their records, summon the parties to be affected under Sections 14-19 of the *Land Registration Act*, and file a report showing compliance, failure of which the court shall mete out the appropriate sentence.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 4<sup>TH</sup> DECEMBER, 2024**

In presence of

C.A Kananu

Miss Muna for Kimathi for petitioner

Ondieki for the interested party

Juma for the 1<sup>st</sup> – 3<sup>rd</sup> respondents

**HON. C K NZILI**

**JUDGE**

