



**Republic v District Land Adjudication and Settlement Officer Igambang’ombe
Sub-County & 3 others; Gitonga & another (Exparte); Riungu & 3 others
(Interested Parties) (Environment and Land Judicial Review Miscellaneous
Application E009 of 2022) [2023] KEELC 448 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 448 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E009 OF 2022**

CK YANO, J

FEBRUARY 1, 2023

BETWEEN

REPUBLIC APPLICANT

AND

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER
IGAMBANG’OMBE SUB-COUNTY 1ST RESPONDENT
DEPUTY COUNTY COMMISSIONER 2ND RESPONDENT
LAND REGISTRAR MERU SOUTH/MAARA DISTRICTS .. 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

AND

**FREDRICK GITONGA EXPARTE
M’NGERENI MATHAIYA EXPARTE**

AND

**M’NYIRI RIUNGU INTERESTED PARTY
ESTHER NKINDU MAKAMBA INTERESTED PARTY
SALESIO MICHENI INTERESTED PARTY
CHARLES KIMATHI MAKAMBA INTERESTED PARTY**



RULING

1. This ruling is in respect of the Notice of Motion application dated 5th June, 2022 brought by the *Ex-parte* Applicants pursuant to Order 40 rule 1, 2, 3 and 4 of the *Civil Procedure Rules*, section 1A, 1B, 3A and 63(c) of the *Civil Procedure Act* and Article 21, 22, 25(c), 40 and 50(1) of the *Constitution* of Kenya and all provisions of the law. The applicants seek the following orders:
 1. That the Interested parties herein M’Nyiri Riungu, Esther Nkindu Makamba, Salesio Micheni and Charles Kimathi Makamba be and is hereby cited for contempt, convicted and committed to civil jail for periods of six (6) months, or such other sentence as may be found just and fair in circumstances for deliberately and persistently disobeying the Honourable court’s orders which was issued on 24th March, 2022.
 2. That the Honourable court be pleased to cite the 1st, 2nd, 3rd and 4th Interested parties named hereinabove, their agents, and/or servants for contempt for breaching the court orders issued on 24th March, 2022.
 3. That this Honourable court be pleased to grant any other or further orders geared towards protecting the dignity and authority of the court.
 4. The orders issued herein by this Honourable court be served upon the OCS Kathwana Police Station for compliance.
 5. That the Interested parties be condemned to bear the costs of this application.
2. The application is premised on the grounds in the body of the motion and supported by the affidavit of Fredrick Gitonga sworn on 5th June, 2022. The applicants, in a nutshell aver that the subject matter herein is land parcel No. Kamwimbi/Adjudication section No. 805 which they have been in possession since time immemorial. That on 31st March, 2022, an authorized court process server received orders issued by the court on 24th March, 2022 for service upon the interested parties and duly effected service upon them.
3. The applicants aver that the interested parties have deliberately disobeyed the said court orders by entering into parcel No. LR. Kamwimbi/Adjudication Section No. 805 and cut down trees as well as destroying beehives which actions have caused the applicants to suffer massive loss and damage as well as mental anguish. The applicants state that the acts of the interested parties have been reported to the police on several occasions to help them enforce the court orders, but have chosen to ignore and/or disregard the said orders.
4. In the affidavit in support of the application, the applicants have attached a copy of the affidavit of service dated 4th April, 2022, a copy of the said court order issued on 24th March, 2022, photographs of the trees cut down and the beehives destroyed as well as a copy of a letter dated 20th April, 2022. The applicants therefore want the interested parties cited for contempt of the said court order and punished accordingly, adding that this court orders were not issued in vain.
5. The Interested parties have opposed the application by way of grounds of opposition dated 7th July, 2022. It is the Interested parties’ contention that the application is fatally defective and bad in law for the reasons that it is non-justiciable and moot on account of the fact that the ex-parte applicants have misconstrued the nature, extent and import, of the order of stay of execution given on the 24th March, 2022 and that order 40(3)(1) of the *Civil Procedure Rules* relating to the consequences of



disobedience or breach of a court order is inapplicable in judicial review proceedings. Therefore, the interested parties pray that the application be dismissed with costs.

6. The court, with the consent of the parties, directed that the application be canvassed through written submissions. The *ex parte* applicants filed their submissions dated the 13th October 2022 through the firm of Ojwang Sombe & Company Advocates while the interested parties filed theirs on 10th November 2022 through the firm of Basilio Gitonga, Muriithi & Associates Advocates.
7. The *ex parte* applicants submitted that the law guiding the present Application is Order 40 Rule 3(1) of the [Civil Procedure Rules](#) which stipulates as follows:

“In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.”

8. The *ex parte* applicants further submitted that non-compliance with court orders or judgments and the appropriate sanctions to be applied in cases of such disobedience is a question that has been litigated upon in our courts and that as far as such circumstances are concerned, whenever the question of contempt of court has arisen, the first port of call has been Section 5 of the [Judicature Act](#), Cap. 8 which provides nothing more than to remind the courts that the law to be applied is that applied in England. The said section reads as follows:

Contempt of court

1. The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts. (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
9. The *ex parte* applicants aver that for one to succeed in a contempt of court application, they must prove that an order exists, the contents and nature of the order is well within the knowledge of the Respondent and that the Respondent has failed to comply with the terms stipulated in the orders and to buttress that they relied on the case of High Court of South Africa in the case of *Kristen Carla Burchell v Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005] which held that 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
 10. The *ex parte* applicants submitted that to prove the first principle, they submitted that an order was given by the court on 24th March 2022 which stated among other orders that;

“Leave is hereby granted to commence JR proceedings. The same to act as stay of implementation of the decision for period of one year.”



11. The *ex parte* applicants submitted that they followed the orders and commenced Judicial Review proceedings by filing Chuka JR. ELC Case No. E006 OF 2022.
12. The *ex parte* applicants stated that the second principle is the knowledge of the terms by the parties and submitted that the Interested Parties were served with among other documents the same orders issued by the court by a licensed court process server on 4th April 2022 and an affidavit of service filed. It is submitted that the substance of the common law is still applicable under Section 3 of the *Judicature Act* and the applicants state that they are guided by the applicable English Law which is Part 81 of the English *Civil Procedure Rules* of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings as found in Rule 81.8 of the English *Civil Procedure Rules*.
13. The *ex parte* applicants submit that they echoed the sentiment expressed by Hon Justice Lenaola in the case of *Basil Criticos v Attorney General & 8 Others* (2012) eKLR that: -

“The law has changed and it as it stands today, knowledge supersedes personal service – where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”
14. The *ex parte* applicants submitted that it is clear from the affidavit of service that the interested parties were properly served and were served in person hence they were aware of the court order for stay of execution of the decision of the minister.
15. The *ex parte* applicants submitted on the third principle which is failure by the interested parties to comply with the terms of the order and stated that despite the Interested Parties being aware of the court orders staying the execution of the minister’s decision, the Interested parties have gone ahead to cut down trees, remove beehives and burning charcoal in the suit parcel of land.
16. The *ex parte* applicants relied on the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR in which the Court held that:

“A Court without contempt power is not a Court. [30] The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a Court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of Court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in Courts, and automatically exists by its very nature.....”

A Court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. Article 159(1) of the *Constitution* provides that judicial authority is derived from the people and vests in, and shall be exercised by, the Courts and tribunals established by or under the *Constitution*. Under Article 10(1) of the *Constitution* the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the *Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2) (a) of the same Article the national values and principles of governance include the Rule of Law.

It is a crime unlawfully and intentionally to disobey a Court order.

This type of contempt of Court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the Court. [36] The



offence has in general terms received a constitutional ‘stamp of approval, ‘since the Rule of Law – a founding value of the *Constitution* – ‘requires that the dignity and authority of the Courts, as well as their capacity to carry out their functions, should always be maintained.’”

17. The *ex parte* applicants submitted that they have proved that there was a court order issued by this Honorable Court and the Interested parties were well aware of the terms of the court orders and they failed to obey the said court orders. The *ex parte* applicants further submitted that the interested parties should be cited for contempt of court orders and be punished for disobeying court orders.
18. The *ex parte* applicants prayed that the court grants orders for the interested parties to be cited for contempt of court orders and be punished for disobeying the said court orders.
19. The interested parties submitted that the order alleged to have been breached specifically stayed the execution of the decision of the Minister delivered on 13th February 2022 in Appeal Case No. 125 of 2018 and granted the *ex parte* applicants leave to institute judicial review proceedings.
20. The interested party stated that the *ex parte* applicants’ complaint is that the interested party is in contempt of those orders for allegedly entering the suit properties and cutting down trees and argue that the stay of execution order was directed at the Minister’s decision.
21. The interested party submitted that the order of stay of execution as granted was meant to ensure that the decision of the Minister is not implemented by the Ministry of Lands officials and that it has no relation with the use and occupation of land, which they argue is beyond the purview of judicial review proceedings.
22. Further, the interested parties submitted that Order 40 Rule 3 of the [Civil Procedure Rules](#) is aimed at punishing parties for the disobedience of an order of temporary injunction, arguing that in the instant case, no orders of temporary injunction are in force to enable the *ex parte* applicants move the court as such.
23. The interested parties submitted that judicial review proceedings being sui generis in nature, the provisions of the [Civil Procedure rules](#), 2010 are inapplicable, the fact that the procedure to institute the same is domiciled therein notwithstanding.
24. The interested parties relied on the decision made in [Republic v Sub County Commissioner Baringo North & 2 others ex parte Francis Kimosop & Another](#) [2021] eKLR.
25. The interested parties submitted that the application before the court for consideration is incompetent, lacks merit and the same should be dismissed with costs.
26. I have considered the application and the submissions herein. The Applicants herein contend that the orders of the court that were issued on 24th March, 2022 were disobeyed by the interested parties. The issues that call for determination are whether the interested parties are in contempt of the said court orders and whether the *ex parte* applicants are entitled to the orders sought herein.
27. There is no dispute that the court issued orders on 24th March, 2022 and the same were as follows:
 - “ 1. The application be and is hereby certified urgent
 2. The application is certified urgent
 3. Leave is hereby granted to commence JR proceedings as prayed leave granted to act as stay orders of the implementation of the decision delivered on 13th January 2022.



4. In line of Order 53 rule 1 (3) *CPR*. The *ex parte* applicants to file an undertaking to costs and damages within 7 days for Kshs 1,000,000/= within 7 days from the date hereof in default the stay to lapse.
 5. The Notice of motion to be filed and served within 21 days from the date hereof.
 6. Mention on 17.5.2022.”
28. Order 53 Rule 1 (4) of the *Civil Procedure Rules* provides that:
- The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.
29. A stay suspends or stops the proceedings that are challenged by the application for judicial review, its purpose being to preserve the status quo pending determination of the judicial review proceedings.
30. As observed by P. Nyamweya J. (as she then was) in *Sauti Communication Limited v Communications Authority of Kenya* (2020) eKLR:
- “The circumstances under which a court may grant a direction that the grant of leave do operate as a stay of proceedings or of a decision, and the factors to be taken into account by the courts in this regard were laid down in the said decisions and in various decisions by Kenyan Courts.”
31. I have perused the Affidavit of service annexed to the affidavit in support of the application herein. It is not in dispute that the interested parties herein were duly served and accepted service of the said orders of court. Further, the application has only been opposed by the interested parties by way of grounds of opposition. The interested parties have not controverted the averments made by the Applicants in the affidavit in support of the application. There is therefore no dispute that the orders were personally served on the interested parties and the interested parties had knowledge of the terms of orders and failed to comply with the terms of the orders which stopped the implementation of the decision of the minister with regard to the suit land for a period of one year.
32. The court will only punish for contempt if satisfied that the terms of the order were clear and unambiguous and the contemnor had proper notice of the terms of the order. In my view, the terms of the orders were very clear. The interested parties were prohibited against implementing or enforcing the offensive recommendation and the decision contained in the proceedings of Appeal to the Minister No.125 of 2018 delivered on the 13th January 2022 and certified on 9th March 2022 by the Director of Land Adjudication Nairobi in relation to parcel No.805. The interested parties submitted that the order of stay of execution as granted was meant to ensure that the decision of the Minister is not implemented by the Ministry of Lands officials and it has no relation with the use and occupation of land, which they argue is beyond the purview of judicial review proceedings. I am however, not persuaded by that argument. In my view, the said orders prohibited everyone from implementing the said minister’s decision. It cannot be said that the orders were directed at only the ministry of lands officials.
33. From the evidence before me, I am satisfied that the interested party have disobeyed the said court orders.



34. In *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution & Planning & 3 Others* [2017] eKLR, Mativo J, in a persuasive decision stated:

“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 cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and a civilized life in the society. It is for this purpose that courts are entrusted with the extra ordinary power of punishing those who indulge in acts whether inside or outside it which tend to undermine the authority and bring them in disrepute and disrespect by scandalizing them and obstructing them from discharging their duties without fear or favour. When the court exercises this power, it does so to uphold the majesty of the law and of the administration of justice. The foundation of the Judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working the edifice of the judicial system gets eroded.”

35. Clearly, this court’s orders still remain in force, hence I find no difficulty in finding that the interested parties were obliged to comply with the said orders.

36. In the case of *Econet Wireless Kenya Ltd v Minister for information & Communication of Kenya & Another* [2005] 1 KLR 828, Ibrahim J (as he then was) stated:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of court is 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, or in respect of whom, 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 void.”

37. In the case of *Awadh v Mambu* (No. 2) No. 53 of 2004 (2004) KLR 458 it was stated as follows:

“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilized societies from those applying the law of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.”

38. Also in the case of *B v Attorney General* (2004) 1 KLR 431, Ojwang J (as he then was) held:

“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.”

39. A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. Willful and fragrant disobedience of court orders undermines the authority and dignity of the courts and must be dealt with firmly so that the court’s authority is not brought to disrepute.



40. In the result, and applying the above principles, and considering the circumstances of this case and the material placed before this court, I find and hold that the application has merit. Consequently, the notice of motion dated 5th June, 2022 is hereby allowed in the following terms:

- a. The 1st, 2nd, 3rd and 4th Interested parties are found to be in contempt of the court orders given on 24. 03.2022.
- b. The Officer Commanding Police Station (OCS) Kathwana Police Station is directed to arrest the 1st, 2nd, 3rd and 4th Interested parties and produce them before this court for purposes of mitigation and sentencing.
- c. The matter shall be mentioned on a date to be given by the court for further orders.
- d. Costs of the application are awarded to the Applicants to be borne by the Interested parties.

41. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 1ST DAY OF FEBRUARY, 2023

in the presence of:

C/A: Martha

No appearance for Ex-parte Applicants

No appearance for Respondents

No appearance for Interested Parties

C. K. YANO,

JUDGE.

