



Republic v District Land Adjudication & Settlement Officer Igambang’ombe Sub-County & 3 others; Gitonga & another (Exparte); Mwangangi (Interested Party) (Environment and Land Civil Miscellaneous Application E007 of 2022) [2023] KEELC 446 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 446 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION E007 OF 2022
CK YANO, J
FEBRUARY 1, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER
IGAMBANG’OMBE SUB-COUNTY 1ST RESPONDENT**

DEPUTY COUNTY COMMISSIONER 2ND RESPONDENT

LAND REGISTRAR MERU SOUTH/MAARA DISTRICT 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

FREDRICK GITONGA EXPARTE

M’NGERENI MATHAIYA EXPARTE

AND

DOMINIC MWANGANGI INTERESTED PARTY

RULING

1. This ruling is in respect of the notice of motion application dated 5^h June, 2022. It is brought 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* Cap 21 laws of Kenya and Article 21,22,25 (c) 40 and 50 (1) of the *Constitution of Kenya* in which the exparte Applicants seek the following orders:



- i. That the interested party herein Dominic Mwangagi, be and is hereby cited for contempt, convicted and committed to Civil Jail for a period 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 March 24, 2022.
 - ii. That the Honourable Court be pleased to cite the interested party named herein above, their agents, and/or servants for contempt for breaching the court orders issued on March 24, 2022.
 - iii. That this Honourable Court be pleased to grant any other or further orders geared towards protecting the dignity and authority of the court.
 - iv. The orders issued herein by this Honourable Court be served upon the OCS Kathwana Police Station for compliance.
 - v. That the interested party be condemned to bear the costs of this application.
2. The application is based on the grounds in the face of the motion and supported by affidavit of Fredrick Gitonga sworn on June 5, 2022. The said grounds are inter alia, that the subject matter herein is land parcel No Kamwimbi/adj Set No 804, which is in possession of the ex parte applicants since time in immemorial.
 3. The applicants aver that on March 24, 2022 an authorized Court process server received orders issued by the Court on March 31, 2022 for service upon the interested party and the process server duly effected the service.
 4. The applicants further aver that the interested party has deliberately disobeyed the Court Orders issued on March 31, 2022 by entering into parcels No, LR Kamwimbi/Adj.section No 804 and cutting down trees as well as destroying beehives which has caused damage to the Applicants. It is therefore the applicants' contention that the interested party herein is in breach of Court Orders issued on March 24, 2022.
 5. The applicants aver that the acts of the interested party have been reported to the police on several occasions to help them enforce the Court Orders but they have chosen to ignore and/disregard the orders.
 6. The Applicants state that court orders should be obeyed at all times and that the servants, agents and/or family members of the Interested party were requested to stop causing destruction on the suit premises but they have turned hostile and continued with the acts. It is the applicants' contention that the case is a test case about impunity and respect for the rule of law and due process.
 7. That the ex parte Applicants aver that, as a result of the trespass by the interested party, the ex parte applicants have continued to suffer massive loss and damage as well as mental anguish together with loss of use of their land and a sense of insecurity.
 8. That unless the interested party is restrained from trespassing and/or entering, destroying, damaging the properties thereof the ex parte Applicants will suffer irreparable damage and great loss. The applicants aver that the interested party herein is in flagrant and blatant disobedience of this Honourable Court's Orders issued on March 24, 2022 that the minister's decision be stayed from implementation for a period of one year.
 9. That the interested party continues to act in contempt of the court order issued on March 24, 2022 as he cut down trees, selling, making charcoals, destroying beehives and causing damage thereof.



10. That the Honourable Court's dignity has greatly been undermined and eroded by the said acts of the interested party and that it is in the interest of justice that the interested party be punished for being in contempt of the Court orders issued on March 24, 2022 for they were not issued in vain.
11. In the supporting affidavit the deponent has annexed a copy of the affidavit of service dated April 4, 2022, a copy of the order, a copy of OB Number and a copy of a letter from the OCS Kathwana Police Station to the sub-county Agriculture Officer as well as Photographs of the trees that were allegedly cut down and the beehives destroyed.
12. The applicants aver that the interested party has totally ignored, disregarded and/or disobeyed the said court orders and has gone ahead to instruct one Zakayo Mugo to carry out the acts complained of.
13. In opposing the application, the interested party filed grounds of opposition dated July 7, 2022. It is the interested party's contention that the application is fatally defective and bad in law for the reasons that the application 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 on March 24, 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 party prays that the application be dismissed with costs.
14. The court, with the consent of the parties directed that the application be canvassed through written submissions.
15. 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.”
16. 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.
17. The *ex parte* Applicants submit 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 order 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

18. The *ex parte* Applicants submitted that to prove the first principle, they submitted that an order was given by the court on March 24, 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.”

19. 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.

20. The *ex parte* Applicant stated that the second principle is the knowledge of the terms by the parties, and submitted that the Interested Party was served with among other documents the said orders issued by the court by a licensed court process server on April 4, 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 submitted 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.

21. The *ex parte* Applicants submitted 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.”

22. The *ex parte* Applicants submitted that it is clear from the affidavit of service that the interested party was properly served and was served in person hence was aware of the court order for stay of execution of the decision of the minister.

23. 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 Party being aware of the court orders staying the execution of the minister’s decision, the Interested party has gone ahead to cut down trees, remove beehives and burning charcoal in the suit parcel of land.

24. The *ex parte* Applicant relied on the case of Samuel MN Mweru & Others v National Land Commission & 2 others [2020] eKLR where 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.’”

25. The *ex parte* Applicants submitted that they have proved that there was a court order issued by this Honorable Court and the Interested party was well aware of the terms of the court orders and he failed to obey the said court orders. The *ex parte* Applicants further submitted that the interested party should be cited for contempt of court orders and be punished for disobeying the said court orders.
26. The *ex parte* Applicants prayed that the court grants orders for the interested party to be cited for contempt of court orders and be punished for disobeying court orders
27. The interested party submitted that the order alleged to have been breached specifically stayed the execution of the decision of the Minister delivered on February 13, 2022 in Appeal Case No 125 of 2018 and granted the *ex parte* applicants leave to institute judicial review proceedings.
28. The interested party stated that the *ex parte* applicant’s complaint is that the interested party is in contempt of those orders for allegedly entering the suit properties and cutting down trees and argues that the stay of execution order was directed at the Minister’s decision.
29. 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 he argued is beyond the purview of judicial review proceedings.
30. Further, the interested party submitted that the *ex parte* applicants placed reliance on order 40 Rule 3 of the *Civil Procedure Rules* and submitted that the said provision 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.
31. The interested party 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.
32. The interested party relied on the decision made in *Republic v Sub County Commissioner Baringo North & 2 others ex parte Francis Kimosop & Another* [2021] eKLR.
33. The interested party submitted that the application before the court for consideration is incompetent, lacks merit and the same should be dismissed with costs.



34. I have considered the application and the submissions herein. The Applicants herein contend that the orders of the court that were issued on March 24, 2022 were disobeyed by the interested party. The issues that call for determination are whether the interested party is in contempt of the said court orders and whether the *ex parte* applicants are entitled to the orders sought herein.
35. It is not in dispute that the court issued orders on March 24, 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 January 13, 2022.
 4. In line of Order 53 Rule 1 (3) *CPR*. The *ex parte* applicant 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 elapse.
 5. The Notice of motion to be filed and served within 21 days from the date hereof.
 6. Mention on May 17, 2022”
36. 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.”
37. 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.
38. 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.”
39. 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 party herein was duly served and accepted service of the said orders of court by signing the principal copy. Further, the application has only been opposed by the interested party by way of grounds of opposition. The interested party has not controverted the averments made by the Applicants herein in the affidavit in support of the application. There is therefore no dispute that the orders were personally served on the interested party and the interested party had knowledge of the terms of the orders and failed to comply with the terms of the orders which stopped implementation of the minister’s decision.
40. 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 party was 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 January 13, 2022 and certified on March 9, 2022 by the Director of Land Adjudication Nairobi in relation to parcel No 804. The interested party submitted that the order of stay of execution as granted is 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 he argues is beyond the purview of judicial review proceedings. I am however not persuaded by that argument. In my view, the orders prohibited everyone from implementing the said decision. It cannot be said that the orders were only directed to the ministry of lands officials.

41. From the evidence before me, I am satisfied that the interested party has disobeyed the said court orders.
42. 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.”

43. Clearly, this court’s orders still remain in force, hence I find no difficulty in finding that the interested party were obliged to comply with the said orders.
44. 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.”

45. 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.”



46. 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.”

47. 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 flagrant 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.

48. In the result, and applying the above principles, and considering the circumstances of this case and the material placed before this court, I find that the application has merit. The applicants have satisfied me that there was disobedience of the orders of court issued on March 24, 2022, and I find the interested party guilty of contempt. Consequently, the notice of motion application dated June 5, 2022 is allowed in the following terms:

- a. The Interested party is found to be in contempt of court orders given on March 24, 2022.
- b. The Officer Commanding Police Station (OCS) Kathwana Police Station is directed to arrest Dominic Mwangangi, the Interested Party herein and produce him 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 Party.
- e. It is so ordered.

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

In the Presence of:

C/A: Martha

Muriithi for Interested Party

No appearance for Ms. Musyimi for Applicants

Ms. Kendi for Respondent

C. K. YANO,

JUDGE.

