



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamau & another v Karuga & another (Environment & Land Case  
267 of 2018) [2023] KEELC 16334 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16334 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 267 OF 2018**

**JG KEMEI, J**

**MARCH 13, 2023**

**BETWEEN**

**LUCY WAMBUI KAMAU ..... 1<sup>ST</sup> PLAINTIFF**

**PETER KIBE KAMAU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LEONARD NGANGA KARUGA ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR, KIAMBU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Vide the Notice of Motion dated the 21/6/2022 the Applicants moved this Court for orders that;
  - a. Spent
  - b. This Court issue summons to the 1<sup>st</sup> Defendant/Respondent to personally appear before the Hon Court and show cause why he should not be cited for contempt of the Court by disobeying Court orders issued on the 28/11/2018 and 29/4/2021.
  - c. That the Hon Court do mete out appropriate punishment by way of committal to civil jail for a period of six months or as this Court may deem just in the circumstances
  - d. That this Court do grant such further orders as may deem appropriate in the interest of justice.
  - e. That the costs of this application be paid by the contemnor.
2. The application is premised on the grounds set out in the annexed affidavit of Peter Kamau Kibe sworn on the 21/6/2022. In it the deponent avowed that he and the 2<sup>nd</sup> Respondent filed a suit against the Defendants vide ELC 267 of 2018 claiming title by way of adverse possession. on the 28/11/18 the Court granted interim conservatory orders interalia restraining the 1<sup>st</sup> respondent from transferring alienating leasing and or whatsoever dealing with the suit property l.r no kabete/gathiga/t.180 pending



- the hearing and determination of the suit. a copy of the said order has been annexed as PKK-1. That the 1<sup>st</sup> Respondent was present in Court on both diverse dates when the orders and the Judgement were issued by the Court.
3. The 1<sup>st</sup> Respondent on 19/4/2022 the 1<sup>st</sup> Respondent transferred the suit land to a third party namely Paul Muraya Gachambi despite knowledge of the existence of the Court orders prohibiting all dealings on the suit land. PKK2 is a copy of the transfer and PKK3 is the copy of the green card exhibiting the transactions.
  4. He averred that the actions of the 1<sup>st</sup> Respondent are in utter contempt and disregard of express Court orders of this Court and were calculated to defeat justice by keeping the land away from the Applicants. That the willful disobedience of this Court's orders undermine the Court process, public confidence and brings the administration of justice into disrepute. The Court should restore public confidence in the administration of justice by meting out sanctions against the 1<sup>st</sup> Defendant.
  5. The Court is able to glean from the further affidavit of the 2<sup>nd</sup> Applicant that the 1<sup>st</sup> Respondent filed a Replying Affidavit and Grounds of Opposition dated the 26/9/2022. With diligence I am unable to trace these pleadings on record.
  6. In his further affidavit sworn on the 28/9/2022, the 2<sup>nd</sup> Applicant in response to the 1<sup>st</sup> Respondent's Replying Affidavit and Grounds of Opposition dated the 26/9/2022 (which are missing on record). He stated that the 1<sup>st</sup> Respondent and his Counsel namely Mwaura Shairi were present in Court when the Court delivered the interim conservatory orders as can be seen in the record of even date. That shortly thereafter the order was served personally upon the 1<sup>st</sup> Respondent and his Counsel on the 30/11/2018. The 1<sup>st</sup> Respondent declined to acknowledge service by signing but his Counsel did so through his official stamp. See PKK3 exhibiting receipt.
  7. Further on the 29/4/2021 the 1<sup>st</sup> Respondent's said Counsel was present in Court on the delivery of the Judgment in favour of the Applicants that ordered inter alia that the 1<sup>st</sup> Respondent's title had been extinguished under Section 17 of the *Limitation of Actions Act* and further that the Applicants be registered as the absolute proprietors of the suit land. PKK 4 is a copy of the said Judgement. He was of the opinion that personal knowledge of the terms of the Court order supersedes personal service upon the 1<sup>st</sup> Defendant.
  8. Additionally, he urged that the actions of the 1<sup>st</sup> Respondent in transferring the suit land to a third party in the face of Court orders prohibiting him from doing so is in utter contempt and disregard of express orders of this Court and the said actions were intended to defeat justice and deny the Applicants the fruits of their Judgment. Further that the willful disobedience of this Courts orders serves to undermine the Court process, public confidence and brings the administration of justice into disrepute.
  9. Both parties have filed written submissions which I have read and considered. The law firm of Kamau Wa Kamau & Co Advocates filed written submissions on behalf of the Applicants while that of Makena M'Mwirichia Advocate filed on the 14/10/2022 and 26/10/22 respectively.

### **Analysis and determination**

10. Having read and considered the application, the affidavit evidence, the written submissions, the precedent and all the material placed before me by the parties, I find the key issue for determination is whether the 1<sup>st</sup> Respondent is in utter contempt of Court orders and if yes whether he should be punished.



11. The background of the case leading to this application is worth stating here. Vide an Originating Summons filed on the 5/11/2018 the Applicants filed suit by way of Originating Summons and sought orders that-

“The right of the Defendant and his predecessors in title to recover the suit land from the Plaintiffs are barred under Section 17 of the LAA and their titles are extinguished under Section 17 of the said Act on the grounds that the Plaintiffs have openly and peacefully been in occupation of the suit property for a period of over 12 years.

That the Kiambu Registrar of Lands be ordered to register the Plaintiffs as the absolute proprietors of the suit land.”

12. Simultaneously, the Applicants filed an amended motion dated the 20/11/2018 seeking orders inter alia interim conservatory orders restraining the Defendants from transferring alienating and or dealing with the suit land pending the hearing and determination of the Court.

13. On the 28/11/2018 the Hon Court determined the application in the following terms;

- a. That an interim conservatory order be and is hereby issued restraining Defendant whether by himself, his agents, employees, servants and/or whomsoever from transferring, alienating, leasing and/or whatsoever dealing with LR. NO. Kabete/gathiga/T.180 (hereinafter referred to as the suit property) pending the hearing and determination of the Summons filed herewith.
- b. That an interim conservatory order be and is hereby issued restraining Defendant whether by himself, his agents, employees, servants and/or whomsoever from evicting, ejecting and/or demolishing the Plaintiff's homes on LR. NO. Kabete/gathiga/T.180 (hereinafter referred to as the suit property) pending the hearing and determination of the Summons filed herewith.
- c. That an interim conservatory order be and is hereby issued restraining Defendant whether by himself, his agents, employees, servants and/or whomsoever from harassing, causing the arrest, charging, prosecuting and/or in any other manner whatsoever interfering with the Plaintiff's peaceful possession and occupation of LR. NO. Kabete/gathiga/T.180 (hereinafter referred to as the suit property) pending the hearing and determination of the Summons filed herewith.
- d. That the Officer Commanding King'eero Police Station and the Chief Gathiga Location be and are hereby ordered to enforce the orders above.
- e. That the Defendant be and is hereby restrained from seeking vacant possession from the Plaintiffs until the Originating Summons is heard and determined.
- f. That costs shall be in the cause.
- g. That the Respondent is granted leave of 14 days to file his response to the Originating Summons and Plaintiffs have correspondence leave to file any response if need be and mention on 27/2/2019 for taking directions on how to proceed with the Originating Summons.

14. Consequently, the suit was heard on merit and the Court delivered its Judgment on the 29/4/2021 in the following terms;

“The upshot of the foregoing is that the Court proceeds to find and hold that the Originating Summons dated 5<sup>th</sup> November 2018 is merited and the same is allowed entirely with costs to the Plaintiffs.”



15. It is the Applicant's case that in the process of enforcing the Judgement, they discovered that the 1<sup>st</sup> Respondent had on the 19/4/2022 transferred the title to a third party namely Paul Muraya Gachambi. It is this act of transferring the land that has triggered this application.
16. I have perused the record and it is evident that the parties were heard viva voce on the 27/10/2020 when the Applicants and the 1<sup>st</sup> Respondent testified in Court and closed their respective cases. On the 14/12/2020 when the matter came up for mention, the Court gave directions on Judgement date and scheduled it for the 29/4/2021.
17. It is on record that the 1<sup>st</sup> Respondent transferred the suit land to the 19/4/2022 to Paul Muraya Gachambi. See PKK3. This was exactly 10 days shy of one year after the Hon Court delivered its Judgement on the 29/4/2021.
18. The 1<sup>st</sup> Respondent having not opposed the application, the Court was not afforded the opportunity to hear his part of his defence and or explanation.
19. The *Black's Law Dictionary 10<sup>th</sup> Edition* at page 385 defines contempt of Court as;

“Contempt (also termed as contempt of Court, judicial contempt) is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”
20. In the case of *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR the Court observed;

“Contempt is the willful disobedience or disregard of Court orders, Judgments, decrees or directions. It is therefore the offence of being disobedient or discourteous towards Courts and their officers in the form of behavior that opposes or defies the authority, justice and dignity of the Court. Contempt manifests itself in the willful and intentional disregard of or disrespect for the authority of the Courts, a behavior that is regarded illegal because it does not obey or respect the authority of the Courts and their processes and tends to lower the dignity of the Courts.

*The Constitution* Article 4(2) declares Kenya a democratic state founded on national values and principles of governance which include the rule of law and democracy. Disobedience and disregard of the authority of the Courts violates national values and *the Constitution*. In that regard, Courts punish for contempt in order to maintain their dignity, authority, the rule of law, democracy and administration of justice as foundational values in our Constitution.

Article 159 of *the Constitution* recognizes the judicial authority of Courts and tribunals established under *the Constitution*. Courts and tribunals exercise this authority on behalf of the people. The decisions Courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our Constitutional democracy. The judiciary acts only in accordance with *the Constitution* and the law (Article 160) and exercises its judicial authority through its Judgments, decrees, orders and/or directions to check government power, keep it within its Constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority



of the Courts and dignity of their processes are maintained when their Court orders are obeyed and respected thus Courts become effective in the discharge of their Constitutional mandate”.

21. This Courts power is derived from Article 159 of *the Constitution* and enjoys delegated power donated by the people of Kenya. There are a number of decisions on why contempt of Court is necessary for the proper functioning and exercise of the authority of the Court as enacted under Article 159 of *the Constitution*. Under Article 159 (1) of *the Constitution*, judicial authority is derived from the people of Kenya and vests in and shall be exercised by the Courts and tribunals established by or under *the Constitution*. Contempt of Court has the effect of undermining the rule of law judicial authority and public confidence in the administration of justice as a whole. See the case of *Martin Nyaga Wambora & 4 Others Vs. Speaker of the Senate & others* (2014 eKLR it was rightly observed that:

“... the disobedience of a Court order is a grave issue as it undermines the rule of law. Article 10 of *the Constitution* identified the rule of law as one of the guiding principles of governance. Article 3 of *the Constitution* is very clear that every person has an obligation to respect and defend *the Constitution*. So that any person who disobeys a Court order violates *the Constitution*.”

22. This Court being a creature of *the Constitution* is enjoined under Section 29 of the *ELC Act* to punish for contempt in the following manner;

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this *Act*, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

23. The Court is therefore not helpless when it comes to punishing for contempt and for that matter shall not watch and twist its hands in the air as Court orders are being disobeyed. I am guided by the persuasive decision of the Court in the case of *Sbimmers Plaza Limited Vs. National Bank of Kenya Limited* [2015] eKLR thus:-

“The Courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by *the Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us to a state of anarchy. We think we have said enough to send this important message across.”

24. The necessary factors to consider in a matter relating to contempt of Court are;

- a. Whether there was an order made by the Court which was clear and unambiguous.
- b. Whether the party alleged to be in contempt of Court was aware of the Court order.
- c. Whether the party alleged to have acted in contempt indeed acted in a manner contra to the order issued by the Court.

25. As to whether the order of the Court was clear and unambiguous, I have read the Judgment as set out in the preceding paras and the Court is saying that the Applicants have succeeded in their case against the 1<sup>st</sup> Respondent and ordered that the Land Registrar to register the titles in the names of the Applicants having successfully claimed the suit land by way of adverse possession. The Court was categorical that the title hitherto held by the 1<sup>st</sup> Respondent had been extinguished by operation of law in favour of



the 1<sup>st</sup> Plaintiff. It was the submissions of the 1<sup>st</sup> Respondent that the orders were ambiguous and that explains the act he took to transfer the land to a third party. The 1<sup>st</sup> Respondent has not demonstrated the part of the orders that were either not clear or ambiguous. Even if the same were to be so, it is a cardinal principle of law that a party must of necessity obey the orders however unpalatable they may be and approach the Court to seek clarification. There is no evidence that the 1<sup>st</sup> Respondent took these steps.

26. Was the 1<sup>st</sup> Respondent aware of the Court orders? The 1<sup>st</sup> Respondent has submitted that according to the new rules as they exist in England – (see 2020) for contempt to be founded a party must demonstrate that the contemnor was served personally. That personal service supersedes knowledge. The 1<sup>st</sup> Respondent has argued that he was not served with the Court orders. I have perused the Court record and there is evidence to support that the Ruling and the Judgement were delivered in the presence of his lawyers.
27. The Court must satisfy itself that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty. In the case of *Ex parte Langley* 1879, 13 the Court observed; -
- “ ... the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made” And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.”
28. With respect to the orders issued in the Ruling there is evidence that the same were served upon the 1<sup>st</sup> Respondents Counsel vide the letter dated the 29/11/2018 as seen by the stamp in acknowledgement.
29. With respect to the Judgement rendered on the 29/4.2021, it is evident from the record that the Judgement was delivered in the presence of Mwaura Shairi Counsel for the 1<sup>st</sup> Respondent. The Court cannot accept the 1<sup>st</sup> Respondent’s explanation that he ought to have been served in person. What then is the use of representation by Counsel? It is legally presumed that a Counsel is acting in the best interest of his client and where the Counsel is present it is expected that he will brief his client of the outcome of the Judgement, the contrary view would remove the plug from the practice of law and render Counsels toothless in practice.
30. Was the act of transferring the title to a third party willful on the part of the 1<sup>st</sup> Respondent? Having made a finding that the orders and Judgement was devoid of ambiguity and that the 1<sup>st</sup> Respondent was aware of the said orders I find no other explanation and the answer to this question is an emphatic yes. The entries on the green card dated the 19/4/2022 together with the executed transfer of land from the 1<sup>st</sup> Respondent to one Paul Gachamba speak for themselves.
31. Should the 1<sup>st</sup> Respondent be punished? The reason why the Court punish for contempt is for the purposes of safeguarding the dignity and the authority of the Court. This was the holding in the case of *Nhabiseng Pheko v Ekurbuleni Metropolitan Municipality & another* CCT 19/11(75/2015) when the Court observed that;

“The rule of law, a foundational value of *the Constitution*, requires that the dignity and authority of the Courts be upheld. This is crucial, as the capacity of Courts to carry out their functions depends upon it. As *the Constitution* commands, orders and decisions issued



by a Court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the Courts. It follows from this that disobedience towards Court orders or decisions risks rendering our Courts impotent and judicial authority a mere mockery. The effectiveness of Court orders or decisions is substantially determined by the assurance that they will be enforced.”

32. The Court answers the issue in the affirmative.

33. Final orders;

- a. This Court hereby finds the 1<sup>st</sup> Respondent guilty of contempt of the Court orders issued on the 29/4/2021.
- b. The 1<sup>st</sup> Defendant/Respondent be and is hereby ordered to personally appear before the Hon Court on the 21/3/2023 for mitigation and show cause why he should not be cited for contempt of the Court by disobeying Court orders issued on the 29/4/2021.
- c. That the costs of this application be paid by the contemnor.

34. Orders accordingly

**DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Kamau for 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Applicant

1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondent – Absent

Court Assistants – Esther / Kevin

