



**Nassoro v Lukio & another (Environment and Land Appeal
26 of 2018) [2023] KEELC 16122 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16122 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 26 OF 2018
SM KIBUNJA, J
MARCH 15, 2023**

BETWEEN

ABDALLA ALI NASSORO APPELLANT

AND

WYCLIFFE W. LUKIO 1ST RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA 2ND RESPONDENT

RULING

[NOTICE OF MOTION DATED 20TH SEPTEMBER 2022]

1. Wycliffe W. Lukio, the applicant, moved the court through the notice of motion dated and filed on the September 20, 2022 seeking for the appellant and the County Secretary to the 2nd respondent to be punished both by way of committal to jail for six (6) months and a fine for knowingly and willfully disobeying court orders granted and issued on the March 24, 2021. The application is based on the six (6) grounds on its face and supported by the applicant's affidavit sworn on the September 20, 2022. It is the applicant's case that the court on the March 24, 2021 issued orders that the appellant and the 2nd respondent by themselves, their servants, employees and or agents pull down the offending wall and structure on the road reserve, and to not in any way interfere with the applicant's quiet enjoyment of the road reserve. That despite the appellant and 2nd respondent being aware of the orders, and reminders through his counsel, they have not fully complied with them. That the letter from Sherman Nyongesa & Mutubia of April 30, 2022 purporting that the appellant and 2nd respondent had complied with the said order is inaccurate in view of the report dated April 7, 2021 that says otherwise.
2. The application is opposed by the appellant through the replying affidavit sworn by Abdalla Ali Nassoro on the November 14, 2022. The appellant contends that the applicant's application is bad in law, misconceived, and intended to interfere with his right to quiet and peaceful enjoyment and use of his land No. 4179/11/MN. That after the court's judgement of March 24, 2021, and the surveyors



report dated the April 7, 2021 that indicated the perimeter wall had encroached the road reserve at beacon HK 18 by 0.7 meters, he demolished the encroaching part of the wall and reconstructed it within the confines of his plot. That the applicant appears to hold the view that the appellant was to demolish the entire perimeter wall when that was not the import of the court order. That he has been ready and willing to have a survey exercise done to prepare a joint report on condition the applicant meets the costs. That the construction of his wall is within his property and has not denied the applicant access to his property.

3. The learned counsel for the applicant and the appellant filled their submissions dated the November 23, 2022 and December 20, 2022 respectively, which the court has considered.
4. The issues for the determinations by the court are as follows;
 - a. Whether the applicant has proved that the appellant and or the 2nd respondent are in contempt of court for having disobeyed the court orders of March 24, 2021, and if so what sanction to issue.
 - b. Who pays the costs.
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings;
 - a. The learned counsel for the appellant, has submitted that contempt is define in the *Black's Law Dictionary*, 9th Edition as;

“The act or state of despising; the conduct of being despised/conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.”

In their submissions, the learned counsel for the applicant submitted that contempt is conduct that impairs the fair and efficient administration of justice. The counsel cited the decision of the Court of Appeal in the case of *R v Tony Gachoka*, Criminal Application No 4 of 1999 [1999] eKLR, that held that;

“Contempt of court means an interference with the administration of justice and it is unfortunate that the offence should continue to be known by a name which suggests to the modern mind that its essence is a supposed affront to the dignity of the court.....

.....it is not the coercive power of the court; but it is homage and obedience rendered to the court, from the opinion of the qualities of the judges who compose it; it is a confidence in their wisdom and integrity, that the power they have is applied to the purpose for which it is deposited in their hands; that authority acts as the great auxiliary of their power, and for that reason the Constitution gives them this compendious mode of proceeding against all who shall endeavor to impair and abate it.....”

Both counsel are in agreement in their submissions that section 5 of the *Judicature Act* chapter 8 of Laws of Kenya, provides the court with the jurisdiction and procedure in dealing with contempt of court proceedings since the decision in *Kenya Human Rights Commission v The Attorney General & another* [2018] eKLR, in which the *Contempt of Court Act* No. 46 of



2016 was declared invalid for lack of public participation. That further, section 29 of the [Environment and Land Court Act](#) no. 19 of 2011 is relevant and provides as follows on offences;

“29. 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 or to imprisonment for a term not exceeding two years, or to both.”

There is no dispute that the court has been properly moved by the applicant, and is definitely with jurisdiction to sanction those parties that are proved to have disobeyed the court orders or are in contempt of the court.

- b. The position taken by the superior courts is that court orders must be obeyed, unless and until they are successfully appealed against, reviewed and or set aside. The Court of Appeal in the case of [Shimmers Plaza Ltd v National Bank of Kenya Ltd](#) [2015] eKLR, held that;

“We reiterate her that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to obey or not.....”

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and center. 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.”

And in the case of [Gulabchand Popatlal Shah & another](#) Civil Appl. No. 39 of 1990 cited in Econet [Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another](#) [2005] eKLR, the Court of Appeal stated that;

“..... It is essential for maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors.....”

In [Hadkinson v Hadkinson](#) (1952) 2 All ER 567, it was held that;

“It is plain and unqualified obligation of every person against or in respect of, who 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 even void.”

Further, in the case of [Burchell v Burchell](#) No 364 of 2005 cited in [A.B & another v RB](#) [2016] eKLR, the court emphasized the importance of the rule of law and compliance of court orders in the following terms;

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist



and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

- c. To succeed in the application, the applicant must discharge his obligation as set out under sections 107 and 109 of the *Evidence Act* chapter 80 of the Laws of Kenya. Proof in contempt of court proceedings is above balance of probabilities applicable in ordinary civil matters but below beyond reasonable doubts in criminal cases. In the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR, the court stated that;

“Contempt of court is in the nature of criminal proceedings, and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed.”

And in the case of *U-Haul Vehicle Ltd v Kiambu Dandora Farmers Co. Ltd & 5 others* [2020] eKLR, the court held that;

- “(i) The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.
- (ii) The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.”

Similarly, in the case of *Samuel M N Mweru & others v National Land Commission & others* [2020] eKLR, the court stated that;

“Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.

- d. In this matter, the parties are unanimous that on the March 24, 2021 the court issued the order that the applicant believes the appellant and 2nd respondent have failed to comply with, and which the appellant contends to have fully complied with. The court order is at paragraph 21 of the court’s judgement delivered on the March 24, 2021, and is reproduced here below verbatim;

“21. From the foregoing, it will be seen that I see no merit in this appeal. It is hereby dismissed and I proceed to fully affirm the judgement of the trial court. In the judgement the trial magistrate gave the appellant 90 days to pull down the offending wall. Those days are now long past. In my discretion, I order the appellant to ensure that the impugned wall is



removed from the road reserve, within the next 30 days, and to ensure that no part of it encroaches on the road. If he does not do so, within the said 30 days, the 2nd respondent is hereby ordered to proceed and pull it down and the costs thereof be shouldered by the appellant.”

From the affidavit evidence and documents annexed thereto, the applicant contention is that there has been no compliance with the said edict of the court and hence this application. The appellant on the other part has insisted that the order was complied with by removing the portion of the perimeter fence detailed in the report by “Pimatech Land Sueveyors and Consultants” dated April 7, 2021, and erecting it within the confines of his land plot No. 4179/11/MN.

- e. That other than the applicant’s depositions and appellant’s counter depositions on the matter, both sides have annexed copies of correspondences exchanged between their counsel on the matter. The correspondence show that while the parties appear to have agreed on the need to engage a surveyor to prepare a joint report on whether or not there has been compliance with the court order, it is apparent that the exercise was not carried out because the applicant’s proposal that the two parties share the attendant costs was not acceptable to the appellant. The court is of the considered view that such a report would have gone a long way in helping the parties and the court in settling this long outstanding issue of whether or not the court order has been complied with. It is therefore imperative that the exercise be carried out and a report filed before determining with finality whether there has been compliance, and if not, which party or parties are in contempt of the court order. So as to ensure this matter is settled once and for all, it is desirable that each of parties in the appeal do appoint a licensed surveyor. The three appointed licensed surveyors will in turn agree on one surveyor who shall carry out the exercise of inspecting the suit property, prepare and file with the court a report thereof confirming whether or not the court order of March 24, 2021, has been complied with.
6. The court therefore directs as follows;
 - a. That the applicant [1st respondent], appellant and 2nd respondent do appoint a licensed surveyor of their choice within the next ten (10) days.
 - b. The three (3) surveyors appointed in (a) above to consult and agree on one licensed surveyor in ten (10) days, who shall carry out the exercise in their presence of confirming whether or not the court order of March 24, 2021 in respect of the encroachment onto the road reserve has been complied with, and if not which party or parties are to blame for non-compliance.
 - c. The confirmation exercise in (b) above be completed, report thereof prepared and filed with the court in 30 days.
 - d. The parties and or their advocates be at liberty to observe the exercise.
 - e. Each of the parties to meet the fees payable to their appointed respective surveyor and file the supporting documents of the payment with the court.
 - f. The fees of the surveyor to be appointed by the three surveyors representing the parties, as in (b) above, to be shared equally between the applicant and the appellant and payment documents be filed with the court as well.
 - g. That the party or parties who will be found to have disobeyed the court order after the completion of the surveyors’ exercise above shall reimburse the other parties their surveyors’



expenses. However, should it be found that the court order had been complied with, the applicant herein will be responsible in refunding the other parties their surveyors' expenses.

- h. That this order to be extracted by the applicant and served upon any party's counsel not present during the ruling in three (3) days for their information and action as appropriate.
- i. That a mention date to be fixed after the ruling is delivered.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 15th DAY OF MARCH 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

APPLICANT/1ST RESPONDENT : Absent

APPELLANT: Absent

2ND RESPONDENT : Absent

COUNSEL : Mr. Omwenga for the Applicant and M/s Takah for the Appellant.

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

