



**Wamalwa v Ekirapa (Environment and Land Miscellaneous Application  
2 of 2022) [2023] KEELC 16129 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16129 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 2 OF 2022  
FO NYAGAKA, J  
MARCH 13, 2023**

**BETWEEN**

**BEATRICE WAMALWA ..... PLAINTIFF**

**AND**

**ALBERT ALEXANDER AGGREY EKIRAPA ..... DEFENDANT**

**RULING**

1. This is the third Application made in this suit, in which a party prays for the other to be found guilty of contempt of Court. In the first one by the Plaintiff the Court found the Defendant guilty while in the second one by the Defendant it did not. Now in this one the Defendant has once more moved the Court.
2. From that historical perspective, it appears that the parties herein want to use the Court to settle some scores between themselves before the main suit is heard and determined. It would be advisable for them to concentrate on the main issue before the Court or settle this matter rather than engage in fist-fights and delay the determination of the main suit. Be that as it may, this Court will determine the instant application on merits since each party is entitled to a day in Court.
3. Thus, before me is an Application dated 30/11/2022. It is a Notice of Motion which was brought under certificate of urgency. In it, the Applicant prayed for the following orders:-
  1. ...spent
  2. That this Honourable Court do find the Plaintiff/Respondent Beatrice Wamalwa and her agents Robert Wamalwa and Jane Nasimiyu Wamalwa guilty of wilful, malicious and blatant disobedience of the orders of this Court made on 28<sup>th</sup> February, 2022 and extended on 14<sup>th</sup> March, 2022 and 12<sup>th</sup> May, 2022 by destroying the Defendant's tenant's cane crop on 4<sup>th</sup> November, 2022 and order that she be punished by committal to jail for six (6) months or such other period and or fine as the Court deems fit.



3. That the costs of this Application be paid by the Respondent.
4. The Application was brought under Section 13(7) of the *Environment and Land Court Act*, Act No 19 of 2011, Section 3A of the *Civil Procedure Act*, 2010 and Article 159(2)(d) of the *Constitution*. Its grounds were that on the 28/02/2022 this Court issued orders of *status quo* in this matter. On 14/03/2022 and 12/05/2022 the orders were extended. On 04/11/2022, the Plaintiff together with her brother Robert Wamalwa and her mother Jane Nasimiyu Wamalwa procured a tractor which descended on the suit land and ploughed the entire of it bare, completely destroying sugarcane crop thereon which was waist-high. That the Plaintiff, her brother and mother were guilty of wilful and blatant disobedience of the clear orders of this Court hence in contempt of Court, having been aware of the orders allegedly disobeyed. Lastly, that the three Respondents should be punished for challenging and defying the authority of this Court.
5. The Application was supported by the two Affidavits, being one of the Defendant/Applicant and another of Engineer Peter Barasa Wamalwa. In his Affidavit sworn on 31/11/2022, the Applicant repeated the contents of the grounds in support of the Application. He added that the sugarcane destroyed belonged to Engineer Peter Barasa Wamalwa who was his tenant who also had sworn an Affidavit in support of the Application. He reproduced the order of *status quo* as given on 28/02/2022 which were as follows:-

“Status quo is hereby issued to the effect that the parties who are on the ground remain there and the parties who are not on the ground shall not move into the land. Further, no other structure (if any) should be put on the land or any party pull down any structure there.”
6. In the other supporting Affidavit sworn by one Eng. Peter Barasa Wanyama, he deponed how in July, 2020 he leased several parcels of land from the Defendant herein among them being parcel LR No 8699/22 (sic) which is the land the subject matter of this suit. He referred to a copy of the Lease Agreement dated 01/07/2020 at pages 26 - 27 of the Defendant’s List of Documents.
7. His further deposition was that in March, 2022, he tilled the land in readiness for planting sugarcane and that he had by the time of the Application planted it. He swore that sometime in March, 2022, the Applicant informed him that the Respondent had filed suit against him over the land and that an order of *status quo* had issued on 28/02/2022.
8. He then was informed by the Applicant about the extension of the orders of *status quo* to 14/03/2022 and 19/05/2022. He then deponed how on 04/11/2022 the Respondent and her brother and mother went onto the land and ploughed it, thereby destroying all the cane that was growing thereon and had reached waist-high in height. He repeated the contents of the Affidavit of the Applicant regarding how disruptive the activities of the Respondent were, and how they were contemptuous of the Court orders and called for punishment therefor.
9. To the Affidavit he annexed as “PBW A” seven photographs of the alleged sugarcane farm before and after the destruction, “PBW B” an Occurrence Book (OB) extract from Sirende Police Station, “PBW C” copies of cane growing and supply contracts he entered with the West Kenya Sugar Company Ltd and PBW D” a copy of the Agricultural Extension Officer’s Report about the destruction. All these annexures the Court considered them deeply and in extensu when considering this Application.
10. The Respondent filed a Replying Affidavit sworn on 13/12/2022. She deponed in it that the Application was similar to the one filed by the Applicant on 24/05/2022 which the Court determined together with hers dated 12/04/2022 on 05/10/2022. She went on to state that by the said ruling, this Court found that she was the one in occupation of the 10 acres of the suit land. Her further



- deposition was that by the ruling, the Applicant and her agents were directed not to interfere with her quiet possession of the land and that “cleared the mist and the clouds surrounding the orders” of 28/02/2022. She deponed that she had not disobeyed the orders of 28/02/2022 and that to the contrary she obeyed the same by reploughing the land in readiness for planting beans in the coming season.
11. The Respondent stated that she was on the land pursuant to the orders of this Court and that by the said orders she was required to remove whatever was unlawfully planted on the land. That instead it was the Applicant’s tenant who unlawfully uprooted her maize plant from the suit land and planted the said sugarcane. She stated further that the Application was *res judicata* since the issues herein were raised in the application whose ruling was made on 05/10/2022.
  12. She deponed further that her mother and brother were not parties in this suit hence no adverse orders should be made against them since they cannot be in a position to defend themselves. Her further deposition was that the Application was an abuse of the Court process and was fit for dismissal.
  13. The Respondent then filed a Preliminary Objection on 15/12/2022. It was dated 13/12/2022. She raised three grounds thereto. First, that the Application was *res judicata* and contravened Section 7 of the *Civil Procedure Act*. Second, that the Court had pronounced itself vide the ruling of 05/10/2022 on the orders of 28/02/2022 which were extended to 14/03/2022. Third, the instant application was brought under the wrong provisions of law.
  14. This Court directed the parties to hear the Application by way of written submissions. Both parties filed their submissions. The Applicant did file his on 29/07/2022 while the Respondent did so on 08/07/2022.
  15. Although the Applicant prepared his submissions on 09/12/2022 it would appear that he either did not file them on time or forwarded them to the registry and never paid for them. It was until the Court, in preparing its ruling from 01/03/2022 that it called for them if any to be filed and forwarded that they were filed on 03/03/2023, paid for on the said date and printed on 07/03/2023. That explains the postponement of the delivery of the Ruling from 02/03/2023 to 09/03/2023. That notwithstanding, the submissions extensively as is clear below.
  16. At the beginning of the submissions, the Applicant summarized the Application and the Respondent’s case. He also summed up what, in his view, came out due to cross-examination of the Respondent when she was called upon to state the facts about the acts complained of.
  17. The Applicant summed up the content of the Application, the Directions of the court as given on 2/12/2022 and 07/12/2022 and the Respondent’s position at the time of the site visit by the Deputy Registrar. He submitted that during the visit the Respondent’s mother confirmed that she was the one who procured the tractor that completely ploughed and destroyed the sugarcane at the beginning of November, 2022.
  18. He submitted that the court was supposed to consider two issues, namely, on what date and in what manner the Court order was disobeyed, and secondly, whether the Applicant had satisfied the standard of proof in contempt proceedings. He then gave the analysis thereof by first relying on the Court of Appeal case of *Michael Sistu Mwaura Kamau v DPP and 4 others* (2018) eKLR and *Shimmers Plaza Ltd Shimmers Plaza Ltd* (2015) eKLR (*sic*) but which is *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR. He also relied on the ELC case of *James Gachiri Mwangi v John Waweru Muriuki & 3 others* (2020) eKLR. He quoted excerpts from the three matters in extensu.
  19. Regarding the date and manner, the order was disobeyed, he first repeated the order in question, being the one issued on 28/02/2022 and submitted that from the Affidavits of both the Defendant



- and Eng. Peter Wamalwa, the Plaintiff's brother and mother did plough the suit land on 4/11/2022 and completely destroyed cane whose value was up to the tune of Kshs 7,334,000/=. The Court was notified of the same and also a report made to Sirende Police Station and that on 07/12/2022 the said Mrs. Jane Wamalwa confessed that she actually ploughed the land, destroying the sugar cane. He then stated that the Plaintiff's agents had owned up to the acts of disobedience.
20. Regarding the standard of proof, he submitted that the Respondent was aware of the orders of 28/02/2022 which were extended on 4/11/2022 by virtue of their conduct of the Applicant had discharged the burden of proving contempt against them. He relied on the case of Justus Wanjala Kisiangani & others versus City Council of Nairobi and 3 others [2008] eKLR and that one of Duncan Manuel Murigi versus Kenya Railways Corporation [2008] eKLR.
  21. He then submitted that the Respondents be found guilty as prayed and be committed to jail therefor.
  22. After the Deputy Registrar visited the site, the Applicant, in compliance with the directions of the Court filed supplementary submissions dated 06/02/2023. In them he submitted that by her own admission indeed Jane Wamalwa, the Plaintiff's mother brought a tractor onto the suit land in late November and ploughed the sugarcane growing on it. She also did the same in early December, while with the full knowledge of the orders of the Court.
  23. Again, he submitted that the Deputy Registrar found out that a structure put up on the land in March, 2022 was brought down in hours, and that Defendant through Engineer Peter Barasa prepared the land for farming in early January, 2022 but Jane Wamalwa planted maize on it in April, 2022. He then submitted that the Deputy Registrar found without a doubt that the Respondent maliciously and deliberately disobeyed the orders of the Court and therefore the Applicant had proved his case to the required standard and the Respondent be found to be in contempt of the Court orders and be punished.
  24. The Respondent, on her part, filed her submissions dated 27/01/2023 on 30/01/2023. She submitted that the Application was bad in law, malicious, a design to delay the fair process of the law. She submitted that the Application was a replica of the one dated 24/05/2022 by the same applicant. She reminded the Court that when her earlier application, filed dated 13/04/2022 was determined, the Court found the Applicant in contempt of Court. In the said ruling the Court reiterated that the Defendant, now Applicant, and his agents were not to enter, interfere and or in any manner do anything inconsistent with the quiet possession of the ten (10) acres consisting the suit land, pending the hearing and determination of the suit.
  25. She then submitted that the Application was an abuse of the process of the Court and *res judicata* for reason of being similar to the one the Defendant made in May, 2022. She then stated that she re-took possession of the suit land by uprooting the cane wrongfully planted on the land by the Applicant's agent. She submitted that she was not served with any order stopping her from uprooting the cane and there was no order staying the ruling of 05/10/2022.
  26. Regarding the prayers against the Respondent's brother and mother, she submitted that both were not parties to the suit hence could not be punished. She argued that the two had not been joined in the suit as parties by the Applicant and mentioning them in the Application was not enough.
  27. In her supplementary submissions dated 7/02/2023 and filed on 10/02/2023, which was done after the Court directed the Deputy Registrar to visit the site and establish the *status quo* and she filed her Report, the Respondent stated that the 10 acres in issue were clearly delineated from those of the Defendant's parcel of land by a fence. She submitted that although the fence was damaged by the local



people as the Deputy Registrar found, it had been put up her in December, 2007. She submitted that the findings of the Deputy Registrar were sketchy and brief.

28. She then submitted that ten people was permitted to speak during the visit but only statements of two were recorded. She wondered where the statements of eight others went, only for the Deputy Registrar to give those of two that a structure was put up on the land in March, 2022 and brought down in hours. She listed the other witnesses whose evidence she alleged was left out. She then stated that the report did not find as to who fenced the parcel of land yet she was the one. Her submission was that the Report found out that Jane Wamalwa farmed the land until 2021 but does not indicate that she did so in 2022. She then stated that from the photographic evidence of the Report, the Plaintiff was the one again ready to farm the land. She prayed that the Application be dismissed with costs.

### **Issues, Analysis and Determination**

29. I stated at the beginning that this is the third application for contempt of court in this matter and regarding the same orders that were issued on 28/02/2022 on maintenance of *status quo* herein. Each Application must be determined on its own merits in relation to the alleged disobedience of orders. I have carefully considered the Application, the rival Affidavits both in support and opposition, the preliminary objection thereto by the Respondent, the submissions filed, and the authorities as well as law cited. I find that three issues for determination are:
- a. Whether the Preliminary Objection dated 13/12/2022 is merited.
  - b. Whether all the three alleged contemnors are properly cited for contempt.
  - c. Whether each application is merited.
  - d. What orders to issue and who to bear the cost of the Application.
30. This Court proceeds to determine the issues sequentially since the finding on one lead to the settlement of the others either fully or in part. For instance, if the preliminary objection succeeds, then the Court does not have to take time determining the entire application.

#### **a. Whether the Preliminary Objection dated 13/12/2022 is merited**

31. This is the first issue to settle, that is, to find if the preliminary objection by the Respondent that the instant Application was *res judicata* was merited. A preliminary objection was defined in the seminal case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696. In it the main point by the court was that a preliminary objection has to be on a pure point of law on the assumption that the facts as pleaded are correct. It should not be supported by subsidiary or additional facts than from pleadings. Herein, the Respondent argues that this is a pure point of law. I think not. It required her to annex evidence to support her point because she did not plead it in her deposition in opposition to the Application and either did the Applicant depose to it in his Affidavit. I would dismiss it on that account. But be that as it may, the Court renders itself briefly on it as below.
32. I will not delve much into the meaning and application of the doctrine of *res judicata*. Suffice it to say that it is provided for under Section 7 of the [Civil Procedure Act](#). In it the prohibition is given to same parties litigating under the same title over the same issues that have been determined on merit previously by a court of competent jurisdiction. As was stated by the Court of Appeal in [Suleiman Said Shabbal v Independent Electoral and Boundaries Commission & 3 others](#) [2014] eKLR, the issues must have been conclusively determined by way of settling the rights of the parties regarding all or any of the matters in issue.



33. In this Application, the Applicant argued that the acts of the Respondent of 04/11/2022 of ploughing the entire land and destroying the entire sugarcane crop constituted contempt of the orders of 28/02/2022. The Respondent, by the preliminary objection, contended that the issues were raised in the Application dated 24/05/2022 which was decided on 05/10/2022. It should not take much time and thought to see that, although the parties are the same and litigating under the same title, the two sets of actions complained of are diverse from the other by time even though they relate to the same orders of *status quo*. Thus, the Application was not *res judicata*. Therefore, the preliminary objection is hereby dismissed and that is why this Court now sets its mind to determine the merits of the Application.

**b. Whether all the three alleged contemnors are properly cited for contempt**

34. The first issue to consider is on whether all the three alleged contemnors are properly cited for contempt of Court. To answer the question, it is important to understand the nature of decisions of courts. It is noteworthy that they may be *in rem* or in personam. Where there is a decision then, first point of call to ascertain of which nature of the two it was and getting to define them is apt.

35. About a decision *in rem* in *Kamunyu and others v Attorney General & others* [2007] 1 EA 116, it was held:-

“In a suit seeking judgement *in rem*, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world.”

36. Regarding the above, the point to note is that where a judgement is *in rem*, it sets the record straight as to the rights of the party in the suit or claim as against anyone who may want to take away those rights from the party. In essence, it makes the whole world to know that the party is entitled to those rights now and in the future or until such time or upon such conditions as the court may find fit to declare. Thus, where an individual is not a party to the matter, the decision of the Court does not bind him or her until he sets upon to interfere with the rights which have been found for the party. He cannot be bound by a decision that is not directed at him as a person. Therefore, in *Gitau & 2 others v Wandai & 5 others* [1989] KLR 231, Tanui, J held that:

“The plaintiffs in this suit were not party to the suit in which the consent judgement was entered and consequently they are not bound by a compromise made between the advocate who acted for the second, third, fourth, fifth and sixth defendants on one part and the advocates for the first defendant on the other.”

37. In *Conflict of Laws* (7<sup>th</sup> Edn. 1974) at page 98 by R H Graveson it is stated:

“An action is said to be in personam when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgement in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action in personam.” See *Black’s Law Dictionary*, 9<sup>th</sup> Edn. Page 862.”

38. In this matter the reliefs sought were by the Plaintiff as against the Defendant and vice versa. They were not against the whole world. It may well be that in this suit the Plaintiff’s mother and brother may be acting and as agents of the Plaintiff, so much so that whatever they do on the suit land are



acts attributable directly to the Plaintiff just as the acts of Engineer Peter Barasa Wanyama are to the Defendant. Otherwise, the said individuals would be sued as parties herein. For that reason, any orders or decision of this Court is not directed to them but to the parties herein. The decisions of this Court in this matter, including the orders of *status quo* made on 28/02/2022, were in personam as against the parties. Thus, they are not directed at the whole world, including the individuals I have named in this paragraph. It goes then that even if the Court shall find that contempt of Court was committed herein, the said Robert Wamalwa and Jane Nasimiyu Wamalwa not being parties herein and the orders complained of having not been directed at them cannot be found culpable. To do so would go against the rules of natural justice as it would amount to condemning them unheard.

#### **b. Whether each application is merited**

39. In this Court, punishment for contempt of Court is provided for under Section 29 of the [Environment and Land Court Act](#). The provision reads as follows:

“....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.”

40. For the Court to determine whether or not there was breach of the orders issued on 28/02/2022, it has to restate the *status quo* as it was on the material date because those are the circumstances which if a party is to be found to have acted to the contrary can be punished of. But what constitutes Contempt of Court?

41. The learned author, Bryan Garner in [Black's Law Dictionary](#), 11<sup>th</sup> Edition, Thompson Reuters, 2019, p. 397, defines contempt as “...disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or impair the respect due to such a body”.

42. It goes then that any party, whether served with a court order or not as long as it is directed to him or her, is bound to obey it provided that he has knowledge of the existence of the order. Court orders are not issued in vain: they must be obeyed, respected and/or fulfilled.

43. The courts in our jurisdiction have had a lot to say about obedience of court. In [Kenya Human Rights Commission v Attorney General & another](#) [2018] eKLR the Court emphasized as follows:

“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.



44. Elsewhere, in *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another* CCT 19/11(75/2015) Nkabinde, J 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 courts 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.”

45. In Canada, the Court was more emphatic than any other in other jurisdictions. It did so in the case of *Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2)* [1975] 48 D.L.R.(30), where it stated that:

“To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrong can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.”

Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society. That is why the court stated in *Carey v Laiken* [2015] SCC 17 that;

“Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect”

It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. (*Louis Ezekiel Hart v Chief George 1 Ezekiel Hart* (-SC 52/2983 2nd February 1990). and in *Hon. Martin Nyaga Wambora and another v Justus Kariuki Mate & another* [2014] eKLR, the Court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice.

It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of



their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim.””

46. Therefore, in its previous ruling of 05/10/2022 in this matter, this Court held that:

“In order for one to be found guilty of the Contempt of Court, four (4) elements must be proved. There must have been:

- (a) a valid order of the Court. .
- (b) the order must have been served or been constructively in the knowledge of the alleged contemnor.
- (c) there must be an action or actions of a contemnor contrary to the order.
- (d) the actions of the contemnor in violation must be deliberate.”

47. Again, in *Michael Sistu Mwaura Kamau v DPP & 4 others* (2018) eKLR, the Court of Appeal stated as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the *Contempt of Court Act* and the ruling of the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & another* (supra). Secondly, as this Court emphasized in *Jiban Freighters Ltd v Hardware & General Stores Ltd* and in *A.B. & another v R. B.* [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See *Mutitika v Baharini Farm* (supra) and *Republic v Ahmad Abolfathi Mohammed & another* (supra)).”

48. Similarly, in *Shimmers Plaza Ltd v National Bank of Kenya Ltd* [2015] eKLR, emphasized as follows:

“It is important, however, that the Court satisfies itself beyond any shadow of a doubt 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”.

49. This Court issued orders of *status quo* on 28/02/2022. After the instant Application was filed, responded to and submissions therein filed, the Court was of the view that it would be necessary for the Deputy Registrar of the Court does visit the site and ascertain the status because the issues in contest appeared to be getting greyish with time. The Officer visited the site on 07/12/2022 in presence of the parties and/or their representatives. When counsel received the Report, they submitted on it. On the part of the Applicant it was submitted that the Plaintiff’s mother brought a tractor in late November and early December and ploughed the sugarcane growing on the land while she knew of the orders of the Court. He stated the Deputy Registrar found that a structure put up on the land in March, 2022 was brought down in hours. Further, that the Defendant through Engineer Peter Barasa prepared the land for farming in early January, 2022 the Plaintiff’s mother planted maize in April, 2022. He stated that the Deputy Registrar found that the Respondent maliciously and deliberately disobeyed the orders.



50. The Respondent stated that the 10 acres were clearly delineated by a fence although it was damaged by the local people. She submitted that the fence was put up by her in December, 2007. She submitted that the findings of the Deputy Registrar were sketchy and brief. She stated that during the visit, ten (10) people spoke but statements of only two were recorded. She wondered where the statements of eight others went. She stated that those two said that a structure was put up on the land in March, 2022 and brought down in hours. She argued the report did not find who fenced the land yet she was the one and that the Report found out that Jane Wamalwa farmed the land until 2021 but did not indicate that she did so in 2022 hence not full.
51. The Court considered the submissions as against the Report itself. In it, the Deputy Registrar summed it that she observed the site, interviewed the parties and neighbours on the ground and returned the following findings of relevance to the Application herein:
1. Engineer Barasa was the first one to plough the land in January, 2022 but in 2021 it was Jane Wamalwa who ploughed it but did not plant anything on it;
  2. That a structure was put on the land by the Plaintiff's farmhand, one Leonard in March, 2022 but it was demolished in hours;
  3. He added that since the year 2007 no structure had ever been put up on the land;
  4. That in late April, Jane Wamalwa planted maize on the land but soon after Engineer Peter Barasa planted over it sugarcane and they both grew together but the maize was sprayed by the farmhands of Engineer Peter.
  5. Jane Wamalwa had been utilizing the land intermittently since 2007.
52. Whereas the Deputy Registrar found that Engineer Peter Wamalwa farmed the land in January, 2022, the said Engineer repeatedly swore on 19/05/2022 and 30/11/2022 at paragraphs 3 and 3 of the respective Affidavits that he farmed the suit land in March, 2022. It is hardly believable that the complainant could reiterate several times on oath about the action and be not stating the truth yet neighbours place his activities at a different time. He is the one who paid the workers at the times they worked on the farm and he could not possibly forget such important financial expenditure and fix it at some other time.
53. Additionally, the Deputy Registrar found that indeed Jane Wamalwa did plough down the sugarcane growing on the suit land in late November and early December, 2022. She also found that the farmhand workers of Engineer Peter Barasa did spray down the maize that was growing alongside the sugarcane. The Report did not specifically find that Jane Wamalwa had planted maize in late March, 2022 and not April. It also did not find that Engineer Peter Barasa was firm that he did plough the land in March, 2022 and not January, 2022. The Report also did not give the details of the statements which were given by other neighbours besides the two whose statements were given although the Report was clear, at page 3 that "Neighbours and members of the Amagoro Farm Community who were present were allowed to voluntarily speak." It does not give reasons why it took into account only the statements of the two persons, Francis Barasa and Daniel Ongaro. For these reasons, the Court has to consider again the Affidavits that were sworn by the parties in the present Application in comparison with the facts earlier presented in order to determine the Application.
54. The above being the situation on the ground, the Court compares it with what it was at the time when the orders of *status quo* were issued on 28/02/2022 in order to determine whether or not the Respondents were in contempt of them. The issue of what the status was as at 28/02/2022 was made clear and reiterated by this Court by its ruling of 05/10/2022. In it this Court found that the Applicant



in that application, now the Respondent herein was the one who was in occupation of the land and had actually planted maize by the time the Application dated 13/04/2022 was brought. Thus, on that date the Court found and emphasized at paragraph 81 of the Ruling as follows:

“Additionally, under Sections 3 and 3A of the *Civil Procedure Act*, and in the interest of justice and maintaining the *status quo* as was on the material date, it is reiterated that the Defendant and or his agents, lessees and other persons claiming through his are hereby ordered not to enter, interfere with and on in any manner do anything inconsistent with the quiet possession of the portion of the ten (10) acres of the parcel of land known as LR. 8699/1 which form the subject of this suit, pending the final determination of this suit.”

55. The Applicant herein filed a Notice of Appeal dated 06/10/2022 against the said ruling. It appears that after soul searching, the Applicant herein must have settled on the reality that the Notice of Appeal had no basis or the Appeal could not be found meritorious. Thus, on 10/02/2023 he filed herein a document dated 09/02/2023 which he headed Notice of Withdrawal of the Notice of Appeal. He stated in it that he did so under Rule 81 of Court of Appeal Rules, 2010. Granted that it is the case of the Applicant that he no longer wants to pursue an appeal from the said ruling, then the findings of 05/10/2022 by this Court, regarding on who was in possession by the time of the orders of *status quo*, shall remain forever standing. and even if the Applicant did not withdraw the Notice of Appeal, as long as the finding of the Court was neither overturned or reviewed it remained to be the position. Thus, by the actions of Engineer Peter Barasa and his agents insisting on being on the suit land, entering thereon, tending the sugarcane planted after the Court directed the *status quo* as excluding them therefrom, and going to the extent of spraying herbicides the remaining maize from the previous destruction and thereby killing it, and doing any acts inconsistent with the *status quo*, it was the Applicant and his agents who were actually disobeying the *status quo* orders. The fact that the said Engineer consciously destroyed the crop of maize that had been planted by the occupant, an act that led to this Court finding the Applicant guilty of contempt of Court did not of itself mean that his acts and crop substituted the *status quo* as at 28/02/2022. This Court cannot find the Respondent guilty of contempt of Court over a circumstances and acts that were not an alteration of the *status quo* that subsisted on the material date.
56. Moreover, in the supporting Affidavits of Engineer Peter Barasa Wanyama sworn herein in support of this and the previous Applications for contempt against the Respondent, he deponed more than once that he tilled the land in March, 2022 in readiness for planting of sugarcane. That was after the orders had been issued. His oath is that he was informed by the Applicant herein that orders of *status quo* were issued on 28/02/2022 and were extended on 14/03/2022. The depositions of the Applicant are clear that he ploughed the land in March, 2022 contrary to orders of the Court. The depositions of the Respondent were that she had tilled the land in January, 2022 in readiness for planting. It is clear even from the testimony of the neighbours taken on the site by the Deputy Registrar on 07/12/2022 that the suit land was tilled or ploughed in January, 2022. Since the Applicant's tenant insists by deposition that he ploughed it in March, 2022 while the Respondent insists by deposition that she ploughed it in January, 2022 the Court can only infer once more in terms of Section 11 of the *Evidence Act*, that it was the Plaintiff who prepared the land in January, 2022 and was in possession as at the 28/02/2022. Furthermore, on 05/10/2022 the Court found that indeed the Applicant had, through the actions of Engineer Peter Barasa Wanyama of weeding out maize that has been planted by the Applicant, acted contrary to the order of the Court.

#### **d. What orders to issue and who to bear the cost of the Application**

57. The upshot is that the Application dated 30/11/2022 is not meritorious. It is hereby dismissed with costs to the Respondent.



58. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT KITALE IN OPEN COURT ON THIS 13<sup>TH</sup>  
DAY OF MARCH, 2023.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE**

