



**Kenya African National Union v Lughanje & 6 others (Environment & Land Case 102 of 2018) [2023] KEELC 17351 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17351 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 102 OF 2018**

**EK MAKORI, J**

**MAY 3, 2023**

**BETWEEN**

**KENYA AFRICAN NATIONAL UNION ..... APPLICANT**

**AND**

**EMMANUEL ZIRO LUGHANJE & 6 OTHERS ..... RESPONDENT**

**RULING**

1. The applicant filed a notice of motion application under certificate of urgency dated May 25, 2022 against the 1<sup>st</sup> defendant/ respondent seeking the following orders: -
  - i. Spent
  - ii. A warrant of arrest be issued to arrest the 1<sup>st</sup> defendant/ respondent so that he be brought to court to show cause why he should not be committed to jail for a term not exceeding two (2) years or be fined a fine not exceeding twenty (20) million shillings or both for disobeying the court orders of October 8, 2019; despite the penal notice on the said court order.
  - iii. The 1<sup>st</sup> defendant/ respondent be committed to civil jail for a term not exceeding two (2) years for disobeying the said court orders of October 8, 2019 or he be fined a fine not exceeding twenty (20) million shillings or both as the honourable court shall find it.
  - iv. Costs be in the cause.
2. Parties were directed to file written submissions in the matter – they complied.
3. In the heart of the application is the averment that court issued restraining orders against the 1<sup>st</sup> defendant/ respondent on October 8, 2019.



4. That despite the court's orders, the 1<sup>st</sup> defendant/ respondent disobeyed the very orders of the court by interfering with the suit property. The 1<sup>st</sup> defendant/ respondent has not only disobeyed the court orders, but also determined not to abide by the same.
5. This averment is opposed by the 1<sup>st</sup> respondent who states that the allegations are false and that the application has not made the threshold required to cite a party for contempt.
6. That the plaintiff filed a notice of motion application against the 1<sup>st</sup> defendant/respondent for contempt of court.
7. According to the applicant, the 1<sup>st</sup> respondent has disobeyed court orders by this court issued orders on the October 8, 2019 which was extracted and served upon the 1<sup>st</sup> defendant/respondent restraining the 1<sup>st</sup> defendant herein either by himself, his agents and/or servants, legal representatives or any other person acting on his behalf from trespassing on, demanding rent or threatening to evict tenants, wasting, constructing on, alienating or otherwise interfering or dealing with the plaintiff's property commonly known as KANU Office situated on plot No 4090 Malindi within Malindi Town in any manner whatsoever pending the hearing and determination of this suit. The orders of this honourable court were duly extracted and served upon the 1<sup>st</sup> defendant/respondent through their advocate then on record M/s Mouko & Company Advocates.
8. Despite being served with the court orders, the 1<sup>st</sup> defendant/ respondent through his workmen has since gone ahead to interfere with the suit property by using his agents/workmen to renovate one of the shops and has further leased the said shop to one Gikundi Alex Gichuru.
9. The 1<sup>st</sup> defendant's actions that he has clearly violated the court's orders and he has not only disobeyed the court orders but also determined not to abide by the same. The 1<sup>st</sup> defendant has clearly undermined the authority and dignity of this court.
10. 1<sup>st</sup> respondent avers that the premises were sold to him by the applicants *vide* sale agreement dated September 1, 2008 with tenants inside and that it was the responsibility of the applicant to remove them at its costs. That from September 30, 2008 the rent was to be paid to the respondent.
11. At no time has the respondent brought in a new tenant to the premises. No photographs taken of the alleged renovation, the workers involved in the renovations or assessment report to show the renovations done.
12. The applicant submits that this court has the jurisdiction and power to punish for contempt as among others emanating from the Constitution an statute and meant to safeguard the authority and the independence of the judiciary see Kenya Human Rights Commission v AG & another [2018] eKLR, Samuel M. N Mweru & others v National Land Commission & 2 others [2020] eKLR
13. The applicant submits that the application has met the threshold to cite the 1<sup>st</sup> respondent for contempt. See Econet Wireless Kenya Ltd v Minister of Information & Communication of Kenya & another [2005] KLR 828, Barasa Obango Okwako & another v Alex Wandera Makokha [2021] eKLR, which cases highlight the importance of safeguarding the integrity of court orders and need to preserve the authority of the court by punishing proven contemnors who deliberately disobey court orders.
14. The 1<sup>st</sup> respondent submits that whereas this court has jurisdiction and powers the applicant has not proved trespass in this matter see Nyangeri Obiye v Yunuke Sakagwa [2014] eKLR, the applicant has also not proved ownership of the property in question as he who asserts must prove pursuant to section 107 (1) and (2) of the Evidence Act see also Katherine Isobel Mary Sanders v Khuzema Salim & Anor [2022] eKLR.



15. The 1<sup>st</sup> respondent thinks that the threshold to punish for contempt has not been met. See the essentials elements of civil contempt as laid in [Katsuri Ltd v Kapurch and Depar Shah](#) [2016] eKLR.
16. The issues which fall for determination is whether this court has jurisdiction and powers to punish for contempt and whether the threshold to punish has been met in this matter.
17. In [Samuel M. N Mweru & others v National Land Commission & 2 others](#) [2020] eKLR Mativo J. has extensively discussed the powers of this court to punish for contempt:

“It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.<sup>[33]</sup> The court does not, and ought not 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.<sup>[34]</sup>

35. 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.
  36. It is a crime unlawfully and intentionally to disobey a court order.<sup>[35]</sup> 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.<sup>[36]</sup> The offence has in general terms received a constitutional ‘stamp of approval,<sup>[37]</sup> 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.’<sup>[38]</sup>
  37. In the hands of a private party, the application for committal for contempt is a peculiar amalgam,<sup>[39]</sup> for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.”
18. This court has jurisdiction and powers to punish for contempt arising from the [Constitution](#) and statute. The parties in this matter agreed with that.
  19. On whether the threshold to punish for contempt has been made, in [Katsuri Limited v Kapurchand Depar Shah](#) [2016] eKLR Mativo J. laid bare the ingredients to prove in establishing contempt in this manner:

“In [Peter K Yego & others v Pauline Nekesa Kode](#)[18]the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in an application for contempt must



prove beyond peradventure that the respondent is guilty of contempt. [19] The High Court of South Africa in the case of *Kristen Carla Burchell v Barry Grant Burchell* [20] held that in order 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. Upon proof of these requirements, the presence of willfulness and bad faith on the part of the respondent would normally be inferred, but the respondent could rebut this inference by contrary proof on a balance of probabilities. [21] As pointed out earlier, the alleged order was not annexed, nor was it shown that the corporate veil had been lifted in order for the directors to be held personally liable. Writing on proving the elements of civil contempt, learned authors of the book *contempt in modern New Zealand* [22] have authoritatively stated as follows:- "There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.

20. The 1<sup>st</sup> respondent in this matter knew of the existence of the orders issued by this court. He knew the terms of the order and what the orders required him to do or not to do. The orders were not ambiguous. They were served on him through his counsel. He knew the terms of the orders.
21. What is contested is whether the 1<sup>st</sup> respondent acted in breach of the orders and deliberately so. At the centre of the controversy in this matter is the ownership of plot No 4090 – commonly known as the KANU Office together with all improvements standing thereon.
22. The property is said to have been sold to the 1<sup>st</sup> respondents by the officials of the applicants that is 2<sup>nd</sup> to 7<sup>th</sup> defendant in what the applicants term as utter breach of the applicants Constitution and governing structures,
23. The 1<sup>st</sup> respondent contend that he bought the property at a consideration of Kshs 1,000,000/= and the sale agreement in place empowered him to take possession and receive rent. According to the 1<sup>st</sup> respondent, it was the duty of the applicant to remove the tenants who were in place at its own costs. Further, the applicant states that there is nothing to show that he has brought in a new tenant or at all.
24. The orders served on the 1<sup>st</sup> respondent is such that he was restrained from trespassing, demanding rent, threatening to evict tenants wasting, constructing on, alienating or otherwise interfering or dealing with the suit property.
25. What I get from the 1<sup>st</sup> respondent is that he is receiving rent and by virtue of the sale agreement in place he claims the ownership of the property changed to his hands. The court order in place restrained him from what he is claiming. So he is totally acting contra the court orders.
26. That to me the 1<sup>st</sup> respondent seems to be going contra the orders of the court. However, before he is cited for contempt this court will summon him for cross-examination to establish the extent of the contempt.
27. It is so ordered.



**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS  
3<sup>RD</sup> DAY OF MAY 2023.**

**E. K. MAKORI**

**Judge**

In the Presence of: -

Mr. Omwancha for the Respondent

Mr. Ole Kina for the Applicants

Court Clerk: Happy

