



**County Government of Trans-Nzoia v Onyonka & another; National
Lands Commission (Interested Party) (Environment & Land Case
3 of 2023) [2023] KEELC 20598 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20598 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 3 OF 2023
FO NYAGAKA, J
OCTOBER 12, 2023**

BETWEEN

COUNTY GOVERNMENT OF TRANS-NZOA PLAINTIFF

AND

HON SENATOR RICHARD MOMOIMA ONYONKA 1ST DEFENDANT

SOLOGO ENTERPRISES LIMITED 2ND DEFENDANT

AND

THE NATIONAL LANDS COMMISSION INTERESTED PARTY

RULING

1. The 1st Defendant moved this court vide an application dated 23/03/2023. He brought it under Sections 1A, 3A and 63 (c) of the *Civil Procedure Act*, Order 40 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules. He sought the following reliefs:-
 1. That an order of committal to civil jail be made against the following persons/
parties.
 - a. Honourable, Nasimiyu J. Mutama; the County Executive Committee Member of lands, Housing, Physical Planning & Urban Development, in the County Government of Trans-Nzoia.
 - b. County Secretary, County Government of Trans-Nzoia.



- c. Any other persons/parties the court may consider to have disobeyed the court orders issued herein.

For disobedience and or showing contemptuous behaviours/conduct in respect of the court order made on 17th day of February 2023 maintaining status quo on the suit land Kitale Municipality Block 6/235.

2. That the costs of this application be provided for.
2. The Application was supported by the Affidavit of the 1st Defendant, one Richard Momoima Onyonka. It was based on a number of grounds. These were that the Plaintiff instituted the instant suit against him seeking, among others, injunctive orders. He responded to the application, annexing photographs showing the status of the suit property. Through his learned counsel who wrote a letter dated 16/02/2023, the 1st Defendant annexed bundles of photographs of a constructed perimeter wall and other materials on site depicting the said status. The 1st Defendant asserted that on 17/02/2023 this Court issued the terms of the status quo which were to be observed by parties till the determination of the instant suit.
3. The Applicant contended further that pursuant to directions of the Court, the Deputy Registrar conducted a site visit on 27/2/2023 and prepared a report on the status quo on the suit property. The 1st Defendant asserted that the Plaintiff and its learned counsel were fully aware of the orders of status quo issued herein, and they in fact participated in giving views to the Court on how to formulate the orders. Further, despite the subsistence of the orders, on 18/03/2023 the Plaintiff through its agent (the County Executive Committee Member - Hon. Nasimiyu J. Mutama) sent its enforcement officers to the suit property and they demolished the perimeter wall and structure.
4. Further, that on 03/03/2023 the Plaintiff's County Executive Committee Member, contemptuously, wrote a letter to the 1st Defendant warning him of dire consequences if he persisted in the cultivation, planting and or growing of crops on the suit property, hence the instant application. To this end, he asserted that the Court had power and discretion to cite the persons who had notice of court orders for contempt as was the case for the Plaintiff.
5. In support of the Application, the Respondent deponed that, on 17/02/2023 this Court issued orders of status quo on the suit property. The orders were to last the hearing and determination of the suit. He annexed and marked as "RMO1" a copy of the Order (extracted). He deponed further that on 27/02/2023 the Deputy Registrar, on directions of the court, conducted a site visit on the suit property in the presence of all learned counsel and made a report on the status. He asserted that the specific orders of status quo were, among others, that he was to remain in occupation or possession and use of the suit property; the construction of the incomplete perimeter wall on the suit property was to be halted but not demolished; and that he was to continue ploughing and growing crops as he had been doing before the institution of the instant suit.
6. He swore that on 18/03/2023 he was informed by his workers that, in total defiance of the status quo orders, the Plaintiff's agents and/or servants went to the suit property, pulled down the perimeter wall and caused destruction to the constructed iron sheet structure. He annexed and marked as RMO 2(a)-(k) copies of the destroyed iron sheet structure and wall. He swore further that in continued defiance of the orders of the court the Executive Committee member for Lands, Housing, Physical Planning and Urban Development, one Hon. Nasimiyu J. Mutama, wrote a letter dated 03/03/2023 directing and prohibiting further cultivation and or planting of crops on the suit property failure of which they will be destroyed.



7. The 1st Defendant asserted that the Plaintiff was determined to disobey the orders of the Court despite being aware of them and having participated in crafting the same. Consequently, he beseeched the Court to punish the contemnors and reinstate the substratum of the court orders which had been interfered with by the Plaintiff.

The Response

8. The Application was opposed by way of a Replying Affidavit sworn on 24/04/2023. It was deposed by Truphosa Otwala, the County Secretary on behalf of the Plaintiff. The Plaintiff asserted that indeed on 17/02/2023, the Court issued orders of status quo to be maintained by all the parties pending the hearing and determination of the suit. The Plaintiff, however, reiterated that it never disobeyed the said court orders and neither did it intend to do so at any time pending their subsistence. It argued that the alleged demolition of the perimeter wall and damage to the house by its agents were just mere unsubstantiated allegations as the 1st Defendant did not annex any evidence in that regard be it in form of a police report or an order. To this end, the Plaintiff asserted that it was also considering filing of a defamation suit on account of the said allegations since they had been circulated on social media but also printed on various newspapers.
9. The Plaintiff argued that the instant application was brought prematurely and in total abuse of the court process as the letter dated 03/03/2023 done by the Plaintiff's agent did not amount to any action as against crops yet to be planted and one could not destroy crops which were yet to be planted. It stated further that a reading of the Court's orders, specifically order number 2, indicated that there was dry maize stock and soya beans growing on half an acre and according to its interpretation of the order the Defendants could only grow crops on the aforementioned half an acre. The Plaintiff invited the court to interpret the order to avert further misunderstanding of the same.
10. To this end, the Plaintiff maintained that no court orders had been defied yet as crops had not been destroyed as indicated in the letter and that the instant application ought to be dismissed as it is ill-conceived but also bad in law as the 1st Defendant had approached court with non-existent acts of contempt but in anticipation of the same.

Supplementary Affidavit

11. The 1st Defendant filed a supplementary affidavit sworn on 21/04/2023. It was deposed by one Anthony Khisa Wafula, an employee as a security guard or watchman of the 1st Defendant on the suit property. He deposed that on the morning of 18/03/2023 while he was on duty, a group of people came to the suit property threatened to beat him up and proceeded to pull down the perimeter wall and to destroy the constructed structure made of iron sheets. He further deposed that during the process of demolition, the group of persons claimed that the 1st Defendant unlawfully occupied the County Government Land and he ought to vacate. He confirmed that he called the 1st Defendant informing him of the demolition to which the 1st Defendant came to the suit property and confirmed the same.

Submissions

12. The Application was disposed of by way of written submissions. Both the Plaintiff and the 1st Defendant filed their respective written submissions.
13. In his submissions the 1st Defendant reemphasised the grounds espoused in its Notice of Motion and Supporting Affidavit. In summary, he maintained that the court should cite Hon. Nasimiyu J. Mutuma CEC Lands, Housing Physical Planning and Urban Development and the County Secretary (Truphosa Otwala) for contempt of court.



14. He argued that that in order for one to establish contempt, he was required to prove the terms of the orders complained of, knowledge of the terms by the Respondent and failure by it to comply with the terms of the said order. He asserted that the Respondent and its agents had knowledge of the terms as its counsel on record was present when the orders were issued and that knowledge of a court order suffices to prove service and therefore dispenses with personal service for purposes of contempt proceedings. He placed reliance on the case of Kenya Tea Growers Association Vs Francis Atwoli & Other, Petition No. 64 of 2010 and Basil Criticos Vs Attorney General & 8 Others (2012) eKLR.
15. He submitted that Nasimiyu J. Mutuma, the contemnor had not purged the Respondent's contempt which was on the basis of the letter that she wrote on 03/03/2023 which not only proved impunity but bad faith also on her part. Further, that it only demonstrated that the Respondents were the ones who even went to the suit property on 18/03/2023, demolished the perimeter wall and the construction structure of iron sheets claiming that the 1st Defendant was unlawfully and illegally occupying the suit property. He submitted that he had proved contempt on the part of the Plaintiff and before the court could hand down any penalty for the said disobedience, the Plaintiff ought to be ordered to rebuild the perimeter wall at their own costs and Hon. Nasimiyu J. Mutuma to purge the contempt in her letter dated 03/03/2023 before they could be allowed to participate in the proceedings herein. They further buttressed their application by placing reliance in the case of Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR and Oil Field Movers Limited Vs Zahara Oil and Gas Limited (2020) eKLR.
16. In turn, the Plaintiff identified in its submissions two issues for determination by the court. These were whether the 1st Defendant proved contempt case against it above the balance of probability and not far below beyond a reasonable doubt and who ought to bear the costs of the application. It urged that whoever alleges the existence of facts must prove the same and considering the gravity of contempt proceedings, it would only be fair for 1st Defendant to prove his case above the ordinary preponderance of convenience and almost or not far below beyond a reasonable doubt. It placed reliance on the case of Sheila Cassatt Issenberg & Another Vs Antony Machatha Kinyanjui (2021) eKLR where the court stated that the standard of proof for any party alleging contempt should be higher than that of balance of probability. It submitted that the 1st Defendant had failed to meet the standard as he did not provide evidence that proved that it actually participated directly or indirectly in pulling down the wall and or even gave the instructions complained of.
17. It further submitted that the 1st Defendant was also under a duty to prove all the ingredients of what constitutes disobedience of a court order by showing that Plaintiff understood the terms of the order, had knowledge of the terms, and deliberately and wilfully failed to comply with the terms thereof, as espoused in the case of Samuel M.N. Mweru & Others Vs National Land Commission & 2 Others (2020) eKLR.
18. Additionally, the Plaintiff contended that the purported photographs of the suit property taken to prove contempt of court failed to relay the periodic content under which they were taken diminishing their probative value as provided under Section 9 of the *Evidence Act*. They relied on the case of Stephen K. Sang & Another Chebii Boiyo & another (2021) eKLR. To this end, the Plaintiff asserted that the 1st Defendant had failed to prove his case to the required standard and their application ought to be dismissed with costs.

Issues, Analysis And Disposition

19. The Application seeks the committal to civil jail of the alleged contemnors for the disobedience of orders issued by this court on 17/02/2023. I have considered the application, the facts antecedent and



after the orders complained of as presented to me, the law, the submissions by learned counsel and the authorities the parties relied on. I am of the view that two issues lie before me for determination. These are:

- a. Whether the Plaintiff acted in contempt of the orders in issue.
- b. Who pays the costs of the application?

Whether the Plaintiff acted in contempt of this Court's orders

20. The 1st Defendant argued that the Plaintiff's actions amounted to contempt of Court and should be punished therefor. The Plaintiff denied the actions and prayed for dismissal of the application.
21. The power to punish for contempt, in this 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.”
22. The provision is to be read together with Section 5 of the [Judicature Act](#), Chapter 8 of the Laws of Kenya, Revised Edition 2012 [2010]. It is for this Court to define from the onset the phrase contempt of court. In Black's Law Dictionary, 11th Edition, Thompson Reuters, 2019, p. 397, Bryan A. Garner borrows from Edward M. Dangle's definition of contempt in his work, "Contempt" S 1, at 2 (1939) to render the term as;

“...a disregard of, or 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 impair the respect due to such a body...”
23. Thus, if it is not an act done on the face of the Court, that is to say, during the actual conduct of court proceedings, there must be an order issued by a court of law which is disobeyed. The disobedience must be wilful hence the mens rea of the offence is knowledge of the order or the conduct of proceedings by a court. It is indeed true that the record bears it that on 17/02/2023 this Court made an order for maintenance of status quo on the suit property. The order was in terms of the annexure marked as RM01 to the Affidavit of Richard Momoima Onyonka. It is not a contested fact that the order was issued in the presence of both learned counsel for the Applicant and the Respondent, and the Court called on them to clearly define what constituted the status quo at the time and they did hence the order. I am alive to the fact that the orders have never been varied, reviewed or appealed from.
24. It is beyond peradventure and settled law that orders of court are not given in vain. They must be obeyed, respected and or fulfilled, notwithstanding that the party to whom they were directed was not specifically served with them. What is important regarding service or lack thereof is proof that he/she was aware of the same in one way or other: what matters is that the party had knowledge of the existence of the order. To this end, it is trite that in an Application for contempt, a party is required to meet certain parameters in order be granted the orders.
25. The principles were enunciated by the court in Samuel M.N. Mweru & Others Vs National Land Commission & 2 Others (2020) eKLR, thus:

"It is an established principle of law 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 wilfulness 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. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:

"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."

26. The Court of Appeal in *Michael Sistu Mwaura Kamau Vs DPP & 4 others* (2018) eKLR stated as follows;

"It is trite that to commit a person for contempt of court, the court must be satisfied that he has wilfully 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 *Jihan 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."

27. 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".

28. Thus, given the above, the principles the Court should follow are clear, simple and straightforward. In the instant case, both the Plaintiff and the 1st Defendant agree that on 17/2/2023 this court issued orders of status quo which were to be maintained on the suit property being Kitale Municipality Block 6/235. Further they asserted that the orders were to be adhered to pending the hearing and determination of the suit. The orders were clear as to what constituted the status quo, and I need not repeat the same here. They still subsist.

29. Suffice it to say that by the time this Court issued the orders, there was contestation between the Plaintiff and 1st Defendant as to what constituted the status quo. The contest led to this Court directing the Deputy Registrar to visit the suit land and establish the status thereof and make a report on



28/02/2023. The report formed the basis of the clarification in the presence of learned counsel for the parties as to what constituted the status quo and the record bears as much. Thus, there is no doubt that both parties had knowledge of the orders and it was clear to them as to what was to be done. To this end, the paramount question before this court is whether the Plaintiff disobeyed the orders and if so, it did so willfully.

30. Punishment for contempt of Court is a quasi-criminal process which, if proven, ends up in depriving the contemnor of his/her liberty or free movement exacting from him/her by way of forfeiture to the state a sum of money for a fine. The standard of proof of contempt of court must be beyond a balance of probabilities but not beyond reasonable doubt. The burden of proof of the alleged contempt against the Plaintiff was on the 1st Defendant/Applicant. And the rule of evidence is that he who alleges must prove hence it was incumbent that the Defendant ought to prove it, as Section 107 of the Evidence Act provides.
31. To find whether or not the Application was merited, this Court has to ask and answer a number of questions, namely, if it is in relation to the complaint that a wall and a structure on the suit property were destroyed, were there a wall and structures existing thereon before the orders were issued? Were the structures destroyed or defaced? By who? Did the person who acted in that manner do so with permission of Court? Indeed, there was a perimeter wall, but not complete, round the suit land. This was common knowledge to the parties at the time of the orders as was evidenced by the independent report of the Deputy Registrar of this Court. After the orders were issued, the wall was substantially destroyed and the mabati structure on the land demolished.
32. It is not denied by the Respondent that the two events occurred: destruction of the wall and the mabati structure. The party attacks the Applicant's reliance on these facts by arguing that they are not substantiated by way of a police report and that the photos not verified by the date as per the Evidence Act. In my humble view, the argument by the Plaintiff that the destruction should have been evidenced by a report made by the 1st Defendant at a police station is at best misconceived. The issued herein stems from a civil suit. Moreover, the applicant swore as to how the photographs were taken and that it was after the destruction complained of. The photographs indeed show the wall pulled down and the bricks thrown on the ground along the perimeter of the suit land where there was a wall erected as shown by photographs previously given to the Court, particularly by the Deputy Registrar in his report.
33. While malicious destruction of property is a criminal offence, it does not preclude one from demonstrating in a civil process, absent of a criminal process, that a fact that existed previously has since ceased to exist or changed. The Deputy Registrar of this Court took photographs of the wall and structures that existed on the suit land as at the time of issuing the orders and filed them before the Court. This court finds that this fact of change of the state of things the 1st Defendant demonstrated.
34. The Plaintiff claimed in its submissions that it was not its agents who carried out the impugned activities. It only decried the absence of a police report about the destruction. Actually, it did not deny the specific allegation that its agents were involved in the destruction process. The 1st Defendant, through the affidavit of one Khisa Wafula stated clearly how persons descended on the property on 18/03/2023 and carried out the activities complained of, threatened to beat him up, claimed that he occupied the property of the County hence should vacate.
35. Numerous complaints by the 1st Defendant about interference by the Plaintiff of the status quo were raised on some days when the matter was mentioned. But on 27/04/2023 learned counsel for the Plaintiff submitted orally that the Plaintiff's enforcement officers were on the ground only to keep security. This was an express admission that indeed the Plaintiff's officers were actively involved in the



interference process. My finding on the foregoing facts is that I am convinced beyond a balance of probabilities, and near beyond reasonable doubt, that it was the Plaintiff's agents who carried out the activities which were complained of as being contemptuous of the Court order. All the Plaintiff did in answer to this claim was to make a mere or bare denial.

36. To the Application the 1st Defendant annexed also as RMO-3 a letter dated 03/03/2023 headed "Notice to Stop Further Cultivation or Planting/ Growing of Crops on Block 6/35", written by the CEC Lands, Housing, Physical Planning and Urban Development on behalf of the Plaintiff, cautioning the 1st Defendant against cultivating of plaintiff on the suit land. Included in it was a threat of destruction of growing crops. The 1st Defendant submitted that this constituted outright contemptuous conduct by the Plaintiff through its servant.
37. On its part, the Plaintiff countered this assertion by arguing that the letter was only a mere caution against the 1st Defendant against doing the activities stated, that there were no crops destroyed or to be destroyed since none had been planted, and that the letter was written as result of the party's interpretation of the status quo to mean that the 1st Defendant was only to cultivate the portion of land which had dry maize stocks as at the time of the issuance of the orders.
38. Regarding the Plaintiff's argument on the issuance of the letter by the Executive Committee Member Hon. Nasimiyu J. Mutama, ordering the 1st Defendant to stop the further cultivation and or growing of crops on the suit property, I am of the view that the Plaintiff was in direct violation of the orders of the court, demonstrating a clear disregard for the authority of the court.
39. The Plaintiff admitted that through its agent it sent the letter threatening the actions stated therein. In my humble view, this was done with intent to intimidate the 1st Defendant and was a design to undermine the court's authority, especially regard to the directions that status quo be maintained. The letter was a direct act of distorting the status quo and it certainly was one of contempt. The Court did not stop the 1st Defendant from cultivating seasonal crops on the suit land: only the planting of perennial ones.
40. If the Plaintiff was not sure of what the orders regarding cultivation of the suit land was it should have moved this Court appropriately for interpretation thereof. It had no legal basis to arrogate itself the power to direct the 1st Defendant on what he was to do on the suit property as part of the status quo. Open to it was the process of an application for contempt of court if it felt that the 1st Defendant disobeyed the orders of the court.
41. The Plaintiff's actions were a smack on the face of the court. They do not auger well for a society, such as Kenya, that now prides in being led by the value and principle of the Rule of Law. Its action was trained at obstructing the due process of law in regard to the proceedings herein. However high ranking in society or government on is placed, parties who do such acts should be stopped in their tracks otherwise it will breed impunity and total disregard of the law. One thing should not escape such people: power has been delegated to them for a short while and therefore is transient. So much so that it is clearly stipulated under Article 1(1) of *the Constitution* 2010 that sovereign power belongs to the people of Kenya who are as a collective. Under Article 1(3) the power is to be exercised through the bodies or organs duly given the respective mandates.
42. I have stated above that this court has the authority to enforce its orders and maintain its dignity, and actions that its authority through punishment for contempt of court. To this end, this court emphasizes the critical role of respect for and adherence to court orders. This is central and integral to preserving the integrity of the judicial system. The Plaintiff's conduct demonstrates a defiance of the court's authority and merits appropriate sanctions. Top of Form



43. For the foregoing reasons, I find that the application dated 23/03/2023 succeeds in terms of that the County Executive Committee Member for Lands and Housing, Physical Planning & Urban Development, Honourable Nasimiyu J. Mutama is hereby found guilty of contempt and is convicted accordingly. It is not clear what the role of the County Secretary was in process of disobedience of the Court orders. Therefore, this Court does not find him/her guilty of contempt of Court.
44. This Court directs that the said Honourable Nasimiyu J. Mutama (now contemnor) does attend the physical court personally on 23/10/2023 at 9.30 am for purposes of mitigation and sentencing.

Who bears the cost of the Application?

45. It is clear that the prayers by the 1st Defendant been granted as indicated in the previous paragraph but one. Since costs follow the event, the Plaintiff shall bear the costs of the application.
46. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC EMAIL THIS 12TH DAY OF OCTOBER, 2023.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE

