



Gitau (Suing as Administrator of the Estate of Jane Wairimu Gitau) v Kariuki (Environment & Land Case E077 of 2022) [2023] KEELC 21317 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21317 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E077 OF 2022
OA ANGOTE, J
NOVEMBER 2, 2023**

BETWEEN

**ANNE NJERI GITAU (SUING AS ADMINISTRATOR OF THE ESTATE OF
JANE WAIRIMU GITAU) PLAINTIFF**

AND

TERRY WANJIRU KARIUKI DEFENDANT

RULING

1. This Ruling arises out of the Plaintiff's Notice of Motion application dated 18th January, 2023, which is a contempt application seeking the following orders:
 - a. That the court be pleased to commit the Respondents Terry Wanjiru Kariuki and Stephen Oncha Kimoi herein for disobeying and violating valid orders given on 15th March, 2022 and on 22nd March, 2022 by this Honourable Court.
 - b. The costs of the application be provided for.
2. The application is based on the grounds on the face of the Motion and is supported by three affidavits sworn by Anne Njeri Gitau, the Plaintiff herein, being the Supporting Affidavit sworn on 18th January, 2023, as well as a Further Affidavit sworn on 10th February, 2023 and a Second Further Affidavit sworn on 23rd May, 2023.
3. The sum total of the averments in these Affidavits are that by the orders of this court given on 15th March, 2022 and issued on 22nd March, 2022, the court restrained the 1st Defendant from interfering with the Plaintiff's access to the premises known as LR No. 1/563 situated along Tigon Road, Kilimani (the suit property).
4. It is the Plaintiff's case that the Defendant was duly served with the order and even has a pending application seeking to set aside the said orders and is therefore aware of the orders and that on



- numerous occasions, in blatant disregard of the said orders, the 1st Defendant has wilfully, deliberately and purposely persisted in obstructing her and her agents/servants from accessing the suit premises, frustrating her attempts at putting a tenant into the premises known as Maisonette “C” on the suit premises which the Defendant admits was owned by the Plaintiff’s daughter, now deceased.
5. The Plaintiff further deponed that despite being aware that she is the appointed administrator of the Deceased’s estate, the Defendant has on numerous occasions denied the Plaintiff entry into the suit property in utter disregard of the orders, and in particular, on 30th September, 2020, on which date the Defendant’s Counsel had been advised by the Court to advise the Defendant that the orders were still in force, yet on the same date, she denied the Plaintiff’s servant from accessing the property.
 6. According to the Plaintiff, on 1st November, 2022 his agent, Julius Ngugi, and a potential tenant, were denied entry into the suit property and that the said Julius Ngugi recorded a conversation with the 2nd Defendant that he was under strict instructions not to allow the Plaintiff or anyone associated to her into the premises.
 7. It was deponed by the Plaintiff that on 16th January, 2023, she personally went to the premises in the company of one Titus Gitau but was denied access into the suit premises by the Defendant and her employee, one Stephen Oncha Kimoi and had to seek assistance from the OCPD, Kilimani Police Station, to gain access thereto. It was the deposition of the Plaintiff that the 1st Defendant informed the Police that she was intentionally denying the Plaintiff access to the suit property pending the determination of her objection proceedings that she had lodged in High Court Succession Cause No. 100 of 2021, *In the matter of the Estate of Jane Wairimu Gitau* and that she has even requested approval from Nairobi County to construct a second entrance but the request was denied.
 8. The Plaintiff deponed that the intention to block her from accessing the premises started before commencement of the suit and was communicated vide a letter dated 16th September, 2021; that the deceased was a co-owner of the suit premises and the Defendant has no right to dictate how other owners can access the suit property and that as late as 12th May, 2023, herself, accompanied by her driver and cleaners were again denied entry into the suit property.
 9. It was deponed that the fact that the Defendant has applied to set aside the Orders is no excuse to disobey the Orders in the first place; that she is sickly and cannot go to the premises thus has to rely on others to do it on her behalf and that the Defendant admitted in a tele-conversation with a former tenant that she would never allow the Applicant access or put a tenant into the house owned by the deceased.
 10. Lastly, it was the Plaintiff’s deposition that the Defendant is deliberately and rudely ignoring a valid court order with impunity and utter disregard of the serious implications of such disobedience; that she has lowered and insulted the dignity and authority of the court that and the court ought not condone it and that the Defendant must face the consequences of her actions.
 11. Opposing the application, the Defendant filed Grounds of Objection dated 25th January, 2023 in which she averred that the application was defective and ought to be struck out; that she has never been directly served with the Orders cited in prayer 2 of the application; that the said Stephen Oncha Kimoi is not a party to the suit and had not been properly joined to the suit; that no order or penal notice was ever served to her directly and specifically and that she was not in contempt of court.
 12. In further reply to the application, the Defendant deponed that the Plaintiff was a mere purported temporary Administrator who lived in Kikuyu and not on the suit premises; that the Plaintiff had become a nuisance who kept sending strangers to the suit premises and insults the people in the estate;



that the premises requires security which she pays for and consequently all people coming into the compound have to be vetted and that she had reported the matter to Kilimani police station

13. Admitting that Stephen Oncha Kimoi is her gardener, the Defendant deponed that the Plaintiff never paid for utilities, services or maintenance of the suit property; that she is not in contempt of court orders that are not specific and were issued ex-parte without her being served and consequently the orders are subject to setting aside; that she lived peacefully with the deceased but the Plaintiff has been harassing her and bringing strangers to the suit property and that the Plaintiff's intended tenant wanted to open a hotel/bar which cannot be allowed in a residential estate.
14. It is the Defendant's case that the Plaintiff has never personally been denied access into the suit property but any other person must be vetted, and this information was relayed to her potential tenants; that the security measures are necessary as the suit premises has previously experienced several thefts; and that the letter dated 16th September, 2021 is proof that the Plaintiff knew her advocates on record yet did not serve them but instead filed a fictitious Affidavit of Service. The parties filed submissions which I have considered.

Analysis and Determination

15. By way of a brief background, this matter was commenced by way of a Plaint dated 28th February, 2022 and filed in court on 1st March, 2022. The matter came up for hearing of the application for injunction on 15th March, 2022 before this court. Counsel for the Plaintiff informed the court that they had served the pleadings and filed the return of service.
16. There is indeed filed in court an Affidavit of Service sworn on 6th June, 2022 by one Francis Mithamo Maina, a process server. The process server deponed that he proceeded to the suit premises on 23rd March, 2022 with instructions to serve upon the 1st Defendant copies of the pleadings filed herein, the Notice of Motion dated 28th February, 2022 and accompanying documents thereto as well as the Order of the Court issued on 2nd March, 2022 indicating that the application was fixed for inter-partes hearing on 15th March, 2022.
17. According to the process server, he was directed to the Defendant's door and that the Defendant was known to him by virtue of previous service, and that upon being informed of the purpose of the visit, the Defendant accepted service but declined to sign on his copies.
18. On 15th March, 2022, when this matter came up for hearing of the application dated 28th February, 2022, the Defendant had not filed a response to the application. The record indicates that the court issued orders allowing the application in terms of prayers 2, 3 and 4. The order was extracted in the following terms:
 - i. That pending hearing and determination of the application inter-partes the Defendant/ Respondent whether by herself, her agents, servants or otherwise howsoever is restrained from interfering with the Plaintiff's and/or her agents, servants and tenants' access to the premises known as Land Reference No. 1/563 pending determination of the dispute herein.
 - ii. That the Defendant/Respondent whether by herself, her agents, servants or otherwise howsoever is restrained from interfering with the Plaintiff's and/or her agents, servants and tenants' access to the premises known as Land Reference No. 1/563 pending determination of the suit herein.



- iii. That the Defendant/Respondent whether by herself, her agents, servants or otherwise howsoever is restrained from interfering from demanding rent from tenants occupying premises designed as maisonette “A” on Land Reference No. 1/563.
- iv. That mention on 20th June, 2022 for pre-trial directions.
19. The Plaintiff alleges that contrary to the orders issued by the court in the above terms, the Defendant by herself and through her servant, one Stephen Oncha Kimoi, have continued to deny him and people acting under her, including intending tenants, from accessing the suit premises.
20. Whereas there are other applications filed earlier pending in the matter before this court, on 15th May, 2023, this court directed that the instant application for contempt to be heard first.
21. In an interesting twist, when the Plaintiff filed the instant application, he included the said Stephen Oncha Kimoi as a 2nd Defendant. The Defendant, at paragraph 3 of her Affidavit sworn on 25th January, 2023, has deponed that the alleged 2nd Defendant was not a party to this suit and has no role in the case.
22. Under our laws, the issue of joinder of defendants is dealt with at Order 1 Rule 3 of the Civil Procedure Rules which provides as follows:
- “All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”
23. As to when the joinder of a Defendant may be done, Order 1 Rule 10 provides that:-
- “The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
24. With regards to the procedure of joinder of parties, Order 1 Rule 10 (4) provides as follows:
- “Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”
25. Additionally, Order 1 Rule 25 directs that applications under Rule 10 for addition and substitution of parties are to be made either orally in Court or by way of Chamber Summons. From the above provisions, it becomes clear that a party to a suit, who wishes to join a party not already part of the proceedings, must first make an application to court and obtain leave before undertaking such a venture. Case law also shows that parties can only be joined to a suit upon leave being granted by the court to do so.
26. For instance, in Sammy Kanyi Kareithi v Barclays Bank of Kenya & 2 Others; Ross Xavier Whitbey (Applicant) ELC Case No. 51 of 2017 [2021] eKLR, it was held that “...the court is empowered to join a party to a suit at any stage of the proceedings with or without an application by any party.”



27. This is properly explained in *Zepbir Holdings Limited v Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya* Misc. Civil Application No. 248 of 2012 [2014] eKLR, where the court expressed itself in the following terms:

“Any party, who comes in a proceeding after pleadings have been closed, will only join on application except where the court makes the joinder suo moto or the party comes as an objector to attachment of the suit property. A proceeding is not jumped into in a haphazard manner. Equally, except a proceeding in the nature of objection to attachment or any other instance provided in law, a party does not become a party until there is an order of joinder whether on application or suo moto by the court. I should state here that even amicus curiae will join on the order of the court. See the practice in constitutional petitions for example. Therefore, in ordinary circumstances, admission to a judicial proceeding especially where you are not the primary party is an important aspect in adjudication of cases which follows after the principle that “presence of proper parties before the court is sine qua non exercise of jurisdiction by the court”, and that principle will be defeated if parties were to enter existing proceedings without permission of the court or anyhow.”

28. Therefore, it is only the court that can, by exercising its discretion, either allow parties leave to bring on board additional parties to a suit already filed, or of its own motion, order for additional parties to be joined. A perusal of the court record shows that no application was made, either orally or by Chamber Summons, seeking to join the said Stephen Oncha Kimoi to this suit.

29. Consequently, the joinder of Stephen Oncha Kimoi was not done unprocedurally. In the circumstances, this court must agree with the Defendant that he is a stranger to these proceedings.

30. That notwithstanding, Order 1 Rule 9 of the *Civil Procedure Rules* provides that a suit may not be dismissed for misjoinder or non-joinder of parties. The application for contempt cannot therefore be dismissed on the ground of misjoinder of a party.

31. Every person against or in respect of whom an order is made by a Court of competent jurisdiction, has an obligation to obey it unless and until that order is discharged. This obligation is uncompromising and it applies even where the person affected by the order believes it to be irregular or void. Consequently, courts do not condone deliberate disobedience of orders and will deal firmly with proved contemnors.

32. In *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui*, Kajiado Civil Suit No. 19 of 2020 [2021] eKLR, the court defined contempt of court in the following words:-

“Contempt of court is that conduct or action that defies or disrespects authority of court.

Black’s Law Dictionary 9th Edition, defines contempt 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.’

Properly put, contempt is conduct that impairs the fair and efficient administration of justice. Section 5 of the *Judicature Act* confers jurisdiction on the superior courts to punish for contempt. The applicants also cited provisions of the *Contempt of Court Act* No. 46 of 2016. That Act was however declared constitutionally invalid and nullified in 2018, (See *Kenya Human Rights Commission v Attorney General & 2 Others* [2018] eKLR).”



33. The Environment and Land Court has been expressly clothed with jurisdiction to punish for contempt of court. Therefore, apart from Section 5 (1) of the *Judicature Act* that vests in the superior courts the power, like those of the High Court of Justice in England, to punish any party who violates its orders, under Section 29 of the *Environment and Land Court Act*, it is an offence to refuse, fail or neglect to obey an order or direction of the court given under the Act. The section 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.”

34. This court, therefore, has inherent powers under Section 29 of the *Environment and Land Court Act* to ensure that its process is not abused and its authority and dignity is upheld at all times. This is partly the reason why courts punish contemnors, the other reason being that contempt of court by its very nature demeans the integrity and authority of Courts and disparage the rule of law.

35. Notably, however, the standard of proof in contempt matters is higher than that of ordinary civil matters. In the case of *Mutitika v Babarini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature. The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she wilfully acted in a manner that flouted the Court Order.”

36. This then means that the violation for which an alleged contemnor is cited must not only be precisely defined but also proved to a standard which is higher than proof on a balance of probabilities, but not as high as proof beyond reasonable doubt.

37. *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR, cites *Carey v Laiken*, 2015 SCC 17 (16th April 2015), where Cromwell J, writing for the Supreme Court of Canada expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:-

“(i) The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.

(ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine.



(iii) The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.”

38. In the instant Motion, the Plaintiff’s case is that the Defendant violated the court’s order given on 15th March, 2022 and issued on 22nd March, 2022 directing her not to interfere with the Plaintiff’s access into the suit property before the hearing and determination of this suit, as well as not to collect rent from the unit alleged to belong to the Plaintiff’s deceased daughter.
39. Prayer 2 of the application is couched in very clear terms as to what orders the Defendant violated. There is therefore no ounce of truth in the submission that the application is ambiguous and not precise.
40. Secondly, it is a requirement that the party alleged to have breached the order must have had actual knowledge of it. The Plaintiff has stated that the Defendant was duly served with the order but failed to comply with it. In addition, the Plaintiff has claimed that the Defendant was aware of the orders herein and that she has ignored several requests for compliance.
41. The Defendant on her part asserts that she was never served with the pleadings in this suit and that since the orders were issued ex-parte, she cannot be in contempt thereof. Essentially, what the Defendant is saying is that although she is aware of the orders issued by this court, she does not hold them in high regard since they were issued ex-parte.
42. The Defendant deponed that the Plaintiff has never at any time been prevented from accessing the suit property and that the Plaintiff has in fact been able to undertake renovations on her unit. It is not clear when these renovations took place. However, this court notes that other than the two earlier instances where the Plaintiff went to the suit premises and was denied entry, from the Plaintiff’s second Supporting Affidavit of 23rd May, 2023, she visited the suit premises as recently as 12th May, 2023 in the company of her driver and two cleaners and was still denied access.
43. Even if this court were to disregard the averments in the Affidavit of Service confirming service of the pleadings and the orders of the court on the Defendant, it is difficult to understand how the Defendant would at this point still claim lack of knowledge of the orders of the court. The Defendant having filed an application to set aside those orders is proof enough that she was very much aware of the existence of the orders.
44. Previously, courts have held that for a party to succeed in contempt proceedings, he must prove personal service of the subject orders and the attendant penal notice upon the alleged contemnor (see the Court of Appeal dicta in *Nyamogo & Another v Kenya Posts and Telecommunications Corporation* (1994) KLR 141).
45. This position has however shifted in recent years, and courts have stated that where the applicant is able to demonstrate awareness of the orders by the alleged contemnor of the orders, such awareness is sufficient.
46. The emphasis is on the wilful, deliberate disobedience of court orders, and there cannot be deliberate and wilful disobedience, unless the contemnor had knowledge of the existence of that order. In *Kenya Tea Growers Association v Francis Atwoli & others* (2012) eKLR, the court held as follows:

“On this issue, our Courts seem to have moved steadily towards the position that although Order 52 Rules 3 and 4 of the *Supreme Court Practice Rules* of England would point towards personal service as a factor in determining contempt, in fact knowledge of an order is higher than service. It is common ground that neither of the alleged contemnors was ever directly served and that leaves the issue whether they had knowledge of the order prior to 18th



October 2010. On that issue, I have the evidence of Isaac Kiprotich Maswai, Philip Kibii Cheruiyot and Emmanuel Ng'etich before me. They all stated, on oath, that they heard Francis Atwoli uttering words whose import was to confirm that not only was he aware and had knowledge of the Order but he also challenged it as having been given without jurisdiction. Cheruiyot went further to produce a transcription of words that he recorded as having been uttered by Atwoli and which I have reproduced above.”

47. The final limb is that the party alleged to be in contempt must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. In the current motion, although the Defendant claims that she was not aware of the suit herein because she was never served with the pleadings and the application herein, it is not in dispute that she is and has been well aware of the orders issued thereunder for quite a while now.
48. The Defendant admits having denied access to the suit property persons sent by the Plaintiff, including the prospective tenants. The Defendant has tried to justify her actions by alleging that the people that were sent by the Plaintiff to the suit property posed a threat to the security of the suit property.
49. It is not clear to this court what formula was used by the Defendant in determining that the Plaintiff's agents were indeed a threat to the peaceful existence of the Defendant and any other individuals on the suit property. The Plaintiff has mentioned two instances where she visited the suit premises in the presence of her agent and her nephew but she was denied access to the suit property, not forgetting the visit of 12th May, 2023 with her driver and cleaners.
50. The Defendant has not denied these accusations, save to indicate that the Plaintiff went to the suit premises to insult her and the tenants on the premises. Again, no evidence or documentation has been tendered as proof of these allegations.
51. That aside, on 30th September, 2022, when the matter was mentioned, Mr. Macharia for the Plaintiff informed this court that the issue of disobedience of court orders by the Defendant was still persisting and that his client had not yet been able to access the premises.
52. The Defendant states at paragraph 15 of her Affidavit sworn on 25th January, 2023 that she is “not in contempt of orders which aren't specific and obtained ex-parte without me being served.” This court would like to point the Defendant in the direction of the Court of Appeal's decision in Woburn Estate Limited v Margaret Bashforth [2016] eKLR which cited the decision in Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & another, Nairobi Civil Application No.39 of 1990, where it was observed that:-

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question...he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”
53. From the foregoing, it is apparent that the Defendant's disobedience of the orders of the court is intentional and is calculated at denying the Plaintiff and her agents and/or servants access into the suit property, and in furtherance of her intention to so deny the Plaintiff access into the suit property, she is in express violation of the orders of this court.



54. Obviously therefore, the two related ingredients of wilful disobedience and knowledge of the order have been satisfied, and the Defendant is indeed in contempt of the orders of the court given on 15th March, 2022 and issued on 22nd March, 2022.
55. In conclusion, the Court of Appeal in *Fred Matiangi the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR held that when courts issue orders, they do so not as suggestions or please to the persons at whom they are directed.
56. This Court, as must all courts, will always firmly and decisively deal with any party who decides to disobey court orders and will do so not only to preserve its own authority and dignity but to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.
57. From the foregoing, this court allows the application by the Plaintiff against the Defendant, and finds the Defendant to be in contempt.
58. The Defendant shall appear in this Court on a date to be agreed upon by the parties for mitigation and when an appropriate sentence and/or sanctions shall be meted out to her.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF NOVEMBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Macharia for Plaintiff/Applicant

Mr. Kahuthu for Defendant/Respondent

