



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**PETITION NO. 5 OF 2017**

**OGIEK INDEPENDANT COUNCIL OF SOUTH WEST**

**MAU FOREST (KONOIN-BOMET).....PETITIONER/APLLICANT**

**VERSUS**

**PRINCIPAL SECRETARY MINISTRY OF LANDS,**

**HOUSING & URBAN DEVELOPMENT.....1<sup>st</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....2<sup>nd</sup> RESPONDENT**

**KENYA FOREST SERVICE.....3<sup>rd</sup> RESPONDENT**

**THE DIRECTOR KENYA SURVEY.....4<sup>th</sup> RESPONDENT**

**ATTORNEY GENERAL.....5<sup>th</sup> RESPONDENT**

**AND**

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**CONSTITUTIONAL PETITION NO. 6 OF 2017**

**JOHN K.KENY.....1<sup>st</sup> PETITIONER/APLLICANT**

**RICHARD CHEPKWONY.....2<sup>nd</sup> PETITIONER/APLLICANT**

**RICHARD KIBET TOO.....3<sup>rd</sup> PETITIONER/APLLICANT**

**WILSON MARITIM ARAP MAGEREO.....4<sup>th</sup> PETITIONER/APLLICANT**

**DANIEL KIPKEMBOI SAWE.....5<sup>th</sup> PETITIONER/APLLICANT**

**SAMWEL KIPNGETICH TUM.....6<sup>th</sup> PETITIONER/APLLICANT**

**SAMWEL KIPLANGAT SANG.....7<sup>th</sup> PETITIONER/APLLICANT**

**VERSUS**

**THE PRINCIPAL SECRETARY MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT.....1<sup>st</sup> RESPONDENT**

THE NATIONAL LAND COMMISSION.....	2 <sup>nd</sup> RESPONDENT
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ATTORNEY GENERAL.....	5 <sup>th</sup> RESPONDENT

### RULING

1. Pursuant to an Application by way of a Notice of Motion under certificate of urgency dated the 10<sup>th</sup> October 2019, and brought pursuant to the provisions of Section (sic) of the Judicature Act, *Section 3, 3A, of the Civil Procedure Act, Rule 5(d) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, and Rules 81.4, 81.16 and 81. 17 of the Civil Procedure Amendment No. 2 Rules 2021 of England and all other enabling provisions of the Law*, the Petitioners/Applicants sought for the following orders -:

i. **spent**

ii. **Spent**

iii. That the Chairman National Land Commission be committed to civil jail for a period not exceeding six months for their disobedience and contempt of the court orders made on the 27<sup>th</sup> July 2018 and 24<sup>th</sup> October 2018 and for the ridiculing and undermining the institution of the court.

iv. That this court be pleased to make any other orders as it deems fit in the circumstance.

v. And costs of this application be provided for.

2. The Application was supported by the grounds on its face and on an Affidavit, dated the 2<sup>nd</sup> October 2019 sworn by John K Kenny, the 1<sup>st</sup> Petitioner/Applicant herein on his behalf and on the behalf of other Petitioners.

3. The Application was opposed via a Replying affidavit by one Brian Ikol, the 2<sup>nd</sup> Respondent's Deputy Director legal Affairs and Enforcement dated the 18<sup>th</sup> September 2000 to the effect that the 2<sup>nd</sup> Respondent was in charge of settlement programs which would commence with the identification of beneficiaries by a sub county selection committee. That pursuant to the amendment of Section 134 of the Land Act No. 6 of 2012 by the Land Amendment Act No. 28 of 2016, the Commission was substituted with the National Government and therefor the settlement program was taken away from the 2<sup>nd</sup> Respondent. That the identification of beneficiaries is now carried out and verified by the cabinet Secretary of the Ministry of Lands, the 1<sup>st</sup> Respondent herein. That in that sense, the orders of the Judgment were incapable of being implemented. That further, the office of the Chairman National Land Commission fell vacant in February 2019 and had not had a Chairman until the 2<sup>nd</sup> October 2019.

4. On the 5<sup>th</sup> November 2019, by consent, parties took directions that the Application to be disposed of by way of submissions. Further orders were that a Notice to show cause do issues for the Chairman, National Land Commission to appear in Court to explain why he had not complied with the judgment of the court. He was also to be served with a copy of the application.

5. The Applicants complied and filed their written submission. There was no compliance by the Contemnor.

6. The Applicants therefore submitted that pursuant to the orders of this court, via a Judgment delivered on the 27<sup>th</sup> July 2018 directing that the National Land Commission to resettle them, after they had been forcefully and wrongfully evicted from their natural habitat, these orders had not been complied with.

7. The Applicants framed the issues for determination as follows;

i. What is the legal framework for contempt of court proceedings.

ii. What constitutes contempt of court.

iii. What must a party do before being granted audience in court.

iv. Whether the National Land Commission and its Chairman are in contempt of court.

v. What orders does the court grant when one is found to be in contempt.

vi. Whether the National Land Commission has the mandate to enforce the judgment.

vii. Whether the Petitioners/Applicants ought to be awarded costs.

8. The Applicants submitted that pursuant to the Contempt of Court Act being declared unconstitutional in the case of **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR**, the laws which now govern contempt of court proceedings include:

- i. The Judicature Act
- ii. Section 36(1) of The High Court (Organization and Administration) Act 2015
- iii. Section 29 of The environment and Land Court Act 2011
- iv. Section 20 (7) and (8) of The employment and Labour Relations Court Act 2011
- v. para 81 Laws of England that govern contempt at the making of the application for contempt

9. That via the above captioned judgment, the National Land Commission had been given a time frame of 10 months to ensure that the process of the settlement was actualized but they had not taken any steps to implement the judgment or purge the contempt of court proceedings in any way. Instead they had now distanced themselves from the judgment stating that it was the National Government to conclude the role.

10. The Applicant submitted, that court orders and judgments ought to be respected so as to protect the rule of law otherwise the very cornerstone of our Constitutional scheme would give way in which would disappear the rule of law and a civilized life in the society. That courts were entrusted with extraordinary powers of punishing those who engaged in acts, whether made in or outside the courts, which tended to undermine the courts' authority and bring them in disrepute and disrespect.

11. That the case of **Stephen Mbugua Gituthi & 2 Others vs National Land Commission & Another [2020] eKLR** had set out the necessary factors to consider in matters relating to contempt of court.

12. The Applicants further submitted that a party in contempt could not be heard or apply to set it aside with a view of appealing unless he has purged the contempt. In this regard, the National Land Commission being aware of the orders issued by the court on the 27<sup>th</sup> July 2018 had neither Appealed against the said orders or applied to review and /or set the same aside. To this effect, the Judgment was still in place.

13. That the appointment of the current Chairman of the National Land Commission on 2<sup>nd</sup> October 2019 during the pendency of the orders did not exclude him from implementing the orders as the National Land Commission was not distinct from its Chairman when it came to the issue of having the knowledge of the existence of the court orders.

14. That according to Article 67 of the Constitution, the National Land Commission had the mandate to enforce the Judgment as it had all the information on unoccupied Government land to which it could resettle the Applicants and their refusal to enforce the said Judgment was contemptuous and therefore its Chairman ought to be punished by an imprisonment for a term of 6 months.

15. That the discretion of awarding costs as envisaged under Section 27 of the Civil Procedure Act ought to be in favour of the Applicants. The Applicants thus sought for their application to be allowed.

#### **Determination.**

16. I have considered the Applicants' Application and submissions hereto as well as the 2<sup>nd</sup> Respondent's response to the Application. **The Black's Law Dictionary (Ninth Edition)** defines contempt of Court as:-

*“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”*

17. The law guiding the present Application is Order 40 Rule 3(1) of the Civil Procedure Rules which stipulates as follows:-

*In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.*

18. In the case of **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** the Court of Appeal held as follows:

*For many years in the history of the Judiciary of Kenya the Courts have, pursuant to **section 5 (1)** of the Judicature Act, resorted to the prevailing law of England in the exercise of the power to punish for contempt of Court.....*

*Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when section 5 of the Judicature Act was enacted. By Act No.7 of 2011, **Article 163 (9)** of the Constitution was operationalized by the enactment of the Supreme Court Act (CAP 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt.*

*Under **section 29** of the Environment and Land Court Act, it is an offence punishable, upon conviction to a fine of not exceeding Kshs.20,000,000 or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey*

an order or direction of the Court given under the Act.

*We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of Court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of Court has been expressly clothed with jurisdiction to punish for contempt of Court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of Court Applications*

19. The Contempt of Court Act commenced on the 13<sup>th</sup> January, 2017 but had been declared invalid by the High Court in the case of **Kenya Human Rights Commission vs Attorney General & Another [2018] eKLR**. In their Application, the Applicants have filed their Application pursuant to various provisions of the law. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court Act, to avoid a lacuna in the enforcement of Court's orders.

20. It was in this respect as observed in the case of **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008**, that the High Court (read Environment and Land Court) has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the Application of the rule of law.

21. In addition, in the case of **Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR**, it was held that where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

22. Section 5(1) of the Judicature Act which provided that:

*“The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate Courts.”*

23. Section 29 of the Environment and Land Court is clear to the effect that;

*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*

24. In the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** the Court held that

*A Court without contempt power is not a Court.[30] The contempt power (both in its civil and criminal form) is so innate in the concept of jurisdictional authority that a Court that could not secure compliance with its own judgments and orders is a contradiction in terms, an “oxymoron.” Contempt power is something regarded as intrinsic to the notion of Court; even obvious, I would say. In the common lawyer’s eye, the power of contempt “is inherent in Courts, and automatically exists by its very nature.....*

*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.*

*It is a crime unlawfully and intentionally to disobey a Court order.*

*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. [36] The offence has in general terms received a constitutional ‘stamp of approval,’ 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.’*

25. It is an established principle of law as was held in the case of **Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005** 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.

26. From the sworn affidavit, annexures, submissions by the Applicants’ Counsel, the applicable law and the decided cases, the following issues stand out for determination:-

i. Whether there was any valid Court orders issued by this Court on the 27<sup>th</sup> July 2018 and 24<sup>th</sup> October 2018.

ii. Whether the 2<sup>nd</sup> Respondent’s Chairman herein was served with or was made aware of the orders of 27<sup>th</sup> July 2018 and 24<sup>th</sup> October 2018.

iii. Whether the 2<sup>nd</sup> Respondent's Chairman is guilty of contempt of Court orders issued on 27<sup>th</sup> July 2018 and 24<sup>th</sup> October 2018.

27. On the first issue for determination, I find that in the Judgment of 27<sup>th</sup> July 2018, the Court had ordered that:

a) *The 2<sup>nd</sup> Respondent is directed to within 10 months from the date of this judgment, in consultation with the chiefs, and Ogiek Council of elders identify and open a register of members of the Ogiek community to whom these proceedings relate and who were evicted from South Eastern Mau Forest specifically Konoin- Bomet. The 2<sup>nd</sup> Respondent shall identify land for the resettlement of the members of the said Ogiek community evicted from MF who have not been resettled in line with the Report of the Government Task Force on the Conservation of the Mau Forest complex 2009.*

b) *A copy of this judgment be served upon the Chairman of the National Land Commission for necessary action.*

c) *Each party shall bear its own costs.*

28. It is clear that the above orders were valid and the acts impugned according to the Petitioners thereof was that the Chairman of the 2<sup>nd</sup> Respondent has never taken any steps to organize a meeting with the Petitioners to ensure compliance with the said order yet he had been given 10 months from the date of the judgment to ensure compliance.

29. On the second issue as to whether the 2<sup>nd</sup> Respondent herein was served with or was made aware of the order of the court of the 27<sup>th</sup> July 2018 and 24<sup>th</sup> October 2018, in the case of **Kenya Tourist Development Corporation vs Kenya National Capital Corporation & Another, Nairobi High Court Civil Case No. 6776 of 1992** it was held that the knowledge of an order supersedes personal service.

30. The Applicants' contention as per their supporting Affidavit is that the Chairman of the 2<sup>nd</sup> Respondent had been served with the copy of the Judgment of the 28<sup>th</sup> November 2018. That vide their Advocate's letter dated the 24<sup>th</sup> January 2019 seeking for a strategy meeting with the 2<sup>nd</sup> Respondent's Chairman, the elders of the Ogiek Community in Petition No.5 and the Petitioners herein in Petition No. 6 of 2017, a copy of the said Judgment had also been forwarded to the Chairman. That despite service and having knowledge of the said Court order, the 2<sup>nd</sup> Respondent did not take any step in compliance which was in utter disrespect of the order.

31. The 2<sup>nd</sup> Respondent in their Replying affidavit of 18<sup>th</sup> September 2020 deponed that the office of the Chairman of the 2<sup>nd</sup> Respondent fell vacant in the month of February 2019 until the 2<sup>nd</sup> October 2019 and that the current Chairman had never had actual knowledge of the impugned orders as he had never been personally served with the orders, which was a mandatory requirement in contempt proceedings. In my humble opinion the said statement amounts to an admission and even though the incumbent Chairman might not have been served, yet the 2<sup>nd</sup> Respondent as an institution had Knowledge of the existence of the Court orders.

32. I find that apart from the fact that the 2<sup>nd</sup> Respondent's initial Chairman had been served with a copy of the Judgment herein vide a letter dated the 24<sup>th</sup> January 2019, a fact which was not denied. The appointment of the current Chairman to the National Land Commission on 2<sup>nd</sup> October 2019 during the pendency of the orders did not exclude him from implementing the orders as the National Land Commission was not distinct from its Chairman. I therefore find that the 2<sup>nd</sup> Respondent had knowledge of the existence of Court order of 27<sup>th</sup> July 2018.

33. In the case of **Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR** the Court of Appeal recognized that;

*This Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved ..... Kenya growing jurisprudence right from the High Court has reiterated that knowledge of a Court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola J., in the case of **Basil Criticos v Attorney General and 8 Others** ..... This position was affirmed by this Court in several other cases including in the **Wambora Case [Justus Kariuki Mate & Another v Hon. Martin Nyaga Wambora & Another Civil Appeal No. 24 of 2014]**.*

34. On the 24<sup>th</sup> October 2019, the court had reiterated the orders that had been issued in its judgment of 27<sup>th</sup> July 2018. I have however perused the court file and although I do not seem to find the extracted order and subsequent evidence of its service thereto, yet these were the same orders that had been issued via the judgment of 27<sup>th</sup> July 2018 to which the 2<sup>nd</sup> Respondent had knowledge of.

35. Having found that indeed there had been valid orders issued by the Court on the 27<sup>th</sup> July 2018 and 24<sup>th</sup> October 2018, to which the 2<sup>nd</sup> Respondent had knowledge of, the last issue for determination is whether the Chairman of the 2<sup>nd</sup> Respondent is therefore guilty of contempt of the said Court orders.

36. Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Petitioners/Applicants were therefore tasked to endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like any other ordinary matter.

37. The Supreme Court of Kenya in **Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR** held that;

*The 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 willfully acted in a manner that flouted the Court Order.*

38. It is trite that a court order is binding on the party against whom it is addressed and until it is set aside, it remains valid and is to be

complied with. It is thus not in dispute that judgment was delivered on the 27<sup>th</sup> July 2018 with orders directed to the 2<sup>nd</sup> Respondent herein to resettle the Applicants and members of the Ogiek community who had been evicted from the South West Mau and who had not been resettled in line with the Report of the Government Task Force on the conservation of the Mau Forest Complex 2009, within 10 months from the date of the judgment.

39. The time frame issued by the court herein lapsed 10 months from 27<sup>th</sup> July 2018 which in essence was on 27<sup>th</sup> May 2019 and by which time the 2<sup>nd</sup> Respondent had not complied with the court order. I find sufficient evidence disclosed to the effect that although the 2<sup>nd</sup> Respondent had knowledge of the court orders, they had willfully and deliberately refused to comply and acted in a manner that deliberately flouted the Court Order. The upshot is that I find that the 2<sup>nd</sup> Respondent culpable of disobeying the court orders of 27<sup>th</sup> July 2018 and 24<sup>th</sup> October 2018.

40. The Applicant's application dated the 10<sup>th</sup> October 2019 is herein allowed with costs. The matter shall be mentioned on the 29<sup>th</sup> April 2021 for sentencing and further orders

**Dated and delivered via teams Microsoft this 8<sup>th</sup> day of April 2021**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**