



**Wamalwa v Ekirapa (Environment and Land Miscellaneous Application
2 of 2022) [2022] KEELC 13267 (KLR) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13267 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 2 OF 2022
FO NYAGAKA, J
OCTOBER 5, 2022**

BETWEEN

BEATRICE WAMALWA PLAINTIFF

AND

ALBERT ALEXANDER AGGREY EKIRAPA DEFENDANT

RULING

1. Before me are two (2) Applications; each of which the substantive prayer is for punishment of the respective Respondents in them for Contempt of Court. One Application was dated April 13, 2022 and the other May 24, 2022. Although the two (2) Applications were canvassed separately, both came hot on the heels of the other and in fairly similar factual backgrounds hence the need to determine them jointly. The only main factual difference between them is that the alleged violation of the Court Order which was the basis for both was said to have been committed on different dates. There is also the contention as to whether or not the Plaintiff or the Defendant was in actual possession of the ten (10) acres comprising of the suit land. I will thus give separately, the summary of the facts, arguments and submissions made in respect of each before I analyze the law regarding contempt of Court and then determine each of the Applications jointly towards the tail end of this Ruling.

The First Application

2. Before me is a Notice of Motion dated April 13, 2022. It was brought under Section 7(A) of the *Environment and Land Court Act* 2011, Sections 4(A) and 5 of the *Contempt of Court Act* and Order 40 Rule 3 of the *Civil Procedure Rules*, 2010. I will, while determining the Application, comment on the provisions of the *Contempt of Court Act* cited. Nevertheless, the Application was filed by the Plaintiff and sought the following Orders:

- (1) ...spent.



- (2) That this Honourable Court be pleased to find that the Respondent Albert Alexander Aggrey Ekirapa is guilty of Contempt of Court by willful disobedience of this Court Order given on February 28, 2022 and issued the same day and order that he be punished by committal to jail for six (6) months or be fined as the court may deem fit.
 - (3) That the Defendant/Respondent be evicted forthwith from the suit land, and the status quo be maintained pending the hearing and determination of the suit.
 - (4) That costs be in the cause.
3. It was grounded on three (3) points and supported by the Affidavit of one Beatrice Wamalwa which was sworn on April 13, 2022. The grounds were that the Defendant having been duly served with the Court Order of February 28, 2022, willfully disobeyed it by reploughing the suit land and uprooting the plaintiff's/applicant's maize and planting sugarcane on the suit land which already had a maize crop on it; the defendant demolished the plaintiff's structure which was on the suit land, contrary to the Court Order; and the act of disobedience of the Court Order is intended to diminish the dignity and authority of this Honourable Court.
 4. In support of the Application, the Applicant deponed that on the February 28, 2022, this Court issued Orders for maintaining the status quo on the suit land. She annexed a copy of the Court Order and marked it as "EX-BW1". Her further deposition was that the Order, together with the Directions of the Court, were duly served on both the Respondent and his Advocates. She deponed further that on March 14, 2022, this Court confirmed the Orders, pending the hearing and determination of this suit and that despite being aware of the Orders, on April 7, 2022 the Respondent reploughed the suit land, weeding out the Applicant's maize crop in contempt of the said Orders. She stated further that on the same day the Respondent pulled down her structure which was on the ground and after pulling it down, stole all the iron sheets and other materials the Applicant used. She deponed further that she reported the matter at Sirende Police Station on January 20, 2022, February 21, 2022 and April 7, 2022 vide OB Nos 11, 20 and 7 of the respective dates but did not get any assistance therefrom. She annexed and marked as EX-BW2 copies of the OB Reports of the respective dates. Her contention was that the Respondent had been persistently disobeying the Court Orders and ought to be stopped forthwith and punished for contempt of Court.
 5. The Application was opposed strongly through an Affidavit sworn by the Defendant on May 4, 2022. He deponed first as to the genesis of the Orders whose non-compliance was complained about. He further deponed that contrary to the assertions by the Applicant in the Originating Summons dated February 8, 2022 that she had taken possession of the land, constructed a farm house for her workers, and tilled the land since 2007, she did not annex any photos to support it and that he opposed the Originating Summons vide his Replying Affidavit sworn on February 24, 2022. He deponed further that at paragraph 8, he denied the Plaintiff's assertions terming them as utter lies, a total fabrication and figment of the Plaintiff's imagination. He repeated the contents of the order in issue.
 6. He went on to emphasize that Learned Counsel representing him had emphasized the fact that the status quo was that he was in possession and not the Plaintiff. His argument was that upon the Applicant being directed to file an Application for injunction, she filed one dated March 4, 2022, pleading in it that "the Defendant/Respondent's agents together with the Area Chief have demolished the plaintiff's/Applicant's house on her Ten (10) acre parcel" but did not stated when exactly that happened. He then reiterated how he had replied to the said Application on March 10, 2022 deponing that the Plaintiff had never been on the suit land. He repeated that the latter Application was compromised on March 14, 2022 by the parties agreeing to maintain the status quo obtaining on



- February 28, 2022, pending the hearing and determination of the suit. To him, the status quo as at the material date was that it was him who was in possession of the suit land and not the Plaintiff.
7. The Respondent then deponed that it was his advocates on record who extracted the Court order on March 2, 2022 and not the Applicant's. He still denied that the Plaintiff has had possession of the suit land and wondered aloud where the evidence was that the Plaintiff had planted any maize on the suit land as alleged. One thing to note here though is that this deposition was made before he testified orally about the facts on the ground and he admitted to there having been maize crop on the suit land. It means by so claiming on oath about absence of a maize crop by the Applicant on the suit land, he lied on oath.
 8. The above untruth notwithstanding, he still reiterated that he had leased the land to one Engineer Peter Barasa Wanyama, as stated in the Affidavit in response to the Originating Summons. He then stated on oath that it was unclear when the Plaintiff rebuilt the purported house. He challenged the Applicant to clarify which orders he had persistently disobeyed.
 9. The Respondent then turned the accusations on the Applicant, stating that indeed it was she who had sought to disobey the clear orders of this Court by arranging for a gang of people to attempt to invade the land with building materials – some sticks and iron sheets – in an attempt to put up a structure on the land on April 7, 2022, which attempt was unsuccessful, and that on April 29, 2022 and May 2, 2022 the Plaintiff sent an even bigger gang who planted maize on the land contrary to court orders.
 10. The Respondent termed the suit frivolous and an attempt to use the Court to take over his suit land by whatever means. He stated that the Applicant had approached the Court with unclean hands. He asked the Court to visit the suit land to confirm by itself the situation as it was rather than being misled by the Plaintiff. He asked for the dismissal of the Application with costs.
 11. On April 27, 2022 when the Application was presented to Court under certificate of urgency, this Court directed that it be heard on May 12, 2022 when the Respondent was required to attend in person and state, on oath, his version of the issues raised. Upon attending Court, he stated on oath that he was aware of the orders of status quo and that to him, he understood them to mean that it was not that nothing be done on the ground. He repeated that he leased the land three (3) years before to someone, one Eng. Peter Wanyama, who already began planting sugarcane two (2) weeks prior to the hearing on May 12, 2022.
 12. On cross-examination, he admitted that by the time the orders of the Court were issued on February 28, 2022 there was a structure built by the Plaintiff. However, as at the time of testifying, it was not. He admitted further that by February 3, 2022, there was a structure built by the Plaintiff on the land but it had since been removed. He still denied that the Plaintiff was in possession. He could not, however, explain how the structure had been removed while orders for maintenance of status quo were in place.
 13. He stated that he went to the ground three (3) weeks prior to the date of testifying that he found that the structures whose photographs were annexed to the Originating Summons were not on the ground. He admitted that they were brought to the ground by the Plaintiff to use to construct. He also admitted that as at March 22, 2022, his advocate wrote a demand letter asking the Plaintiff not to plough on land. He admitted further that he was aware that the Plaintiff had planted maize on the land but as at the time of testifying, it was not there. At first, he stated that he did not know if his tenant or lessee had uprooted the maize but he admitted to it soon afterwards that he had actually done so the Friday prior to testifying.
 14. Upon Re-examination by his Learned Counsel, he denied there being a house on the suit land by February 28, 2022 and that the letter dated March 22, 2022 did state that the Plaintiff had erected the



- house on the suit land. He also restated that the letter did not confirm that the Plaintiff was on the land. He then testified that he was not sure that the maize that had been planted was that of the Plaintiff. To him a group of people came onto the farm in a lorry and planted the maize. He repeated that it was his lessee who was on the ground.
15. The Court directed that the parties submit on the Application. By the time of writing this ruling, only the Respondent's submissions were on the record. Be that as it may, this Court shall determine the Application on merits, based on the material before it, and the submissions filed.
 16. In brief, the Respondent submitted by first summarizing the Respondent's case in opposition to the Application. He then set forth three (3) issues for determination before the Court. These were, what the status quo was as at the date of the Order; the date and in what manner the Court Order disobeyed; and if the Plaintiff satisfied the Standard of Proof in Contempt proceedings.
 17. After that, he relied on the Court of Appeal cases of *Michael Sistu Mwaura Kamau v DPP & 4 Others* (2018) eKLR and *Shimmers Plaza Ltd Shimmers Plaza Ltd* (2015) eKLR, (sic) (NB: this is a wrong citation by the Applicant) and the Environment and Land Case of *James Gachiri Mwangi v John Waweru Muriuki & 3 Others* (2020) eKLR
 18. On the status quo at the time of the Order, he submitted that the Applicant was not on the ground as at the time. For that fact, he invited the Court to rely on paragraphs 11 & 12 of his Replying Affidavit sworn on February 24, 2022, paragraph 4 of his Replying Affidavit sworn on March 10, 2022 and paragraph 5 of his Replying Affidavit sworn on May 4, 2022. He restated his contention that he had possession through one Engineer Barasa to whom he has leased the land in 2020. He repeated that he requested the Court to visit the suit land to confirm the position on the ground.
 19. Regarding the date and manner the Court Order was disobeyed, he submitted that the application did not state the date when the disobedience is alleged to have occurred. He submitted that paragraphs 5 - 8 of the Supporting Affidavit alleged that the disobedience occurred on April 7, 2022 through the Defendant's acts of re-ploughing the suit land and weeding out the Applicant's maize crop, pulling down the Plaintiff's structure, and stealing the Plaintiff's iron sheets and other materials. He attached the import of the three (3) Occurrence Book (OB) reports relied on by the Plaintiff by stating that none could tell if they were indeed in respect of reports connected with the suit land hence did not support the claim of disobedience the status quo order as April 7, 2022. He submitted that the Applicant should have pressed for prosecution for such serious allegations as theft.
 20. On the allegation of re-ploughing the land, he submitted that on February 24, 2022, Defendant deponed at paragraph 11(c) of his Replying Affidavit that the land had been tilled by Eng. Barasa awaiting the planting season for sugarcane and this was never rebutted. He questioned when the fact as to when the Plaintiff tilled/ploughed the land to plant maize and did actually plant it.
 21. About the Plaintiff's claim on March 4, 2022 that her structure had been demolished, he submitted that it was not clear between March 4, 2022 and April 7, 2022 when the structure was it rebuilt.
 22. On the Plaintiff satisfying the Standard of Proof in Contempt proceedings, especially regarding the breach of the orders as complained of herein, he submitted that the onus was on the Plaintiff to prove it. He stated that the Plaintiff failed to satisfy or discharge the burden of proof, not just on the higher standard of slightly below beyond reasonable doubt, but even on the lesser one of a balance of probabilities. He urged the dismissal of the Application, by restating the holding in the Court of Appeal in *Michael Sistu Mwaura Kamau v DPP & 4 Others*. The Respondent submitted that the Application be dismissed with costs to him.



The Second Application

23. By a Notice of Motion dated May 24, 2022, the Defendant moved this Court for orders of punishment of the Plaintiff for Contempt of Court. It was brought under Section 13(7) of the Environment & Land Court Act No 19 of 2011, Section 3A of the Civil Procedure Act and Article 159(2)(d) of the Constitution. It sought the following specific Orders:
- (1) ...spent
 - (2) That this Honourable court do find the Plaintiff/Respondent Beatrice Wamalwa guilty of willful, malicious and blatant disobedience of the orders of this Court made on February 28, 2022 and extended on March 14, 2022 and May 12, 2022 and order that she be punished by committal to jail for six (6) months or such other period and or fine as the court deems fit.
 - (3) That the costs of this Application be paid by the Respondent.
24. It is important at the outset to state that the Application was filed exactly one (1) month and ten (10) days after the Plaintiff filed one, dated April 13, 2022, which sought similar orders against the Defendant. It is therefore appropriate to understand the historical context of the Application but while determining it on an independent and impartial plane, devoid of any influence of thought by antecedents.
25. Worth noting also is that both the Applicant and the Respondent appear to have strong and deep emotions about the parcel of land in issue and each of them passionately puts forth a case that they are in possession thereof hence the two applications mentioned herein. This Court shall make a determination of the other (earlier) Application at the same time as this instant one, in this combined ruling.
26. The instant Application was based on seven (7) grounds, namely, that on February 28, 2022, this Honourable Court made Orders, which were reproduced as follows:
- “Status quo is hereby issued to the effect that the parties who are on the ground remain there and the parties who are not on the ground shall not move into the land. Further, no other structure (if any) should be put on the land or any party pull down any structure there.”
27. The Orders were extended by the Court at the court appearances on March 14, 2022 and May 12, 2022: On April 7, 2022, the Plaintiff/Respondent arranged for a gang of people to attempt to invade the land with building materials – some sticks and iron sheets – in an attempt to put up a structure on the land which attempt was unsuccessful; on April 29, 2022 and May 2, 2022 the Plaintiff sent an even bigger gang who planted maize on the land. Despite the status quo orders being extended on May 12, 2022 on May 17, 2022, three (3) of the agents of the Plaintiff attempted to enter the property but were repulsed by the caretakers on the property; the Plaintiff's actions were wilful, deliberate and in blatant disobedience and disregard of the direct and clear orders of this court which warranted punishment for Contempt of Court and committal to jail.
28. The Application was supported by the Affidavits sworn by Albert Alexander Aggrey Ekirapa, the Defendant/Applicant, and Engineer Peter Barasa Wanyama, his lessee. In the Affidavit of the Defendant/ Applicant, he deponed that in instituting the instant suit by way of Originating Summons dated February 8, 2022, the Plaintiff sought to be declared owner of ten (10) acres belonging to him by way of adverse possession. He denied the Plaintiff having been on the land, facts which he believed he as ably presented to the Court through three (3) Affidavits sworn on February 24, 2022, March 10,



- 2022, and May 4, 2022. He restated the orders of status quo issued on February 28, 2022 and extended on March 14, 2022 which gave rise to the instant Application.
29. He then deponed that the Respondent herein/Plaintiff had, on April 7, 2022, breached the orders by arranging a gang of people to attempt to invade the land with building materials to put up a structure on the land and further on the April 29, 2022 and May 2, 2022 when, allegedly, the Plaintiff sent an even bigger gang who planted maize on the land and on May 7, 2022 when three (3) of the agents of the Plaintiff attempted to enter the property but were repulsed by the Applicant's caretakers on the property.
 30. He repeated that the land was leased to one Engineer Peter Barasa Wanyama who has tilled and planted sugarcane thereon. He deponed that the Plaintiff's illegal actions are disruptive to his tenant and warranted punishment to safeguard the authority of the Court.
 31. In the Affidavit sworn by one Eng. Peter Barasa Wanyama, he deponed that in July, 2020 he leased several parcels of land from the Defendant herein among them being parcel LR No 8699/22 (sic) which is the land the subject matter of this suit. He referred to a copy of the Lease Agreement dated July 1, 2020 at pages 26 - 27 of the Defendant's List of Documents. He stated on oath further that he had been possession of the suit land since then.
 32. His deposition was that in the year 2022, he tilled the land in March in readiness for planting sugarcane and that he had by the time of the Application planted it. He swore that sometime in March, 2022, the Applicant informed him that the Respondent had filed suit against him over the land and that an order of status quo had issued on February 28, 2022.
 33. He deponed further that on April 7, 2022, a gang of people sent by the Plaintiff, attempted to invade the land with building materials in the nature of some sticks and iron sheets in an attempt to put up a structure on the land but the attempt was unsuccessful. He then informed the Applicant about it and the Applicant assured him that he would instruct his advocate to raise this matter with the court at the date of May 19, 2022.
 34. He then deponed that the Respondent's action by the Plaintiff was clearly in disobedience of the Court Order that was made on February 28, 2022 and extended on March 14, 2022. He stated that the actions of disobedience continued on April 29, 2022 and May 2, 2022. The Plaintiff again sent an even bigger gang of people who planted maize on the land, and on May 17, 2022, three (3) of the agents of the Plaintiff attempted to enter the property but were repulsed by his caretakers on the property. He stated that the actions of the Respondent were disruptive to his farming activities and that was in clear disobedience of the orders of this court of February 28, 2022, for which the Plaintiff ought to be punished.
 35. Upon the Application being presented to Court under Certificate of Urgency, the Court required the physical attendance, in Court, of the Respondent on June 14, 2022 for purposes of her oral examination on the issues raised. She attended Court and testified that she had been on the parcel of land since 2007 when she began the process of purchasing it. She emphasized that she is in possession thereof and had been farming on it year in year out without interruption.
 36. The Applicant denied sending a gang of people to the land on April 7, 2022. She stated that in January, 2022, her family prepared the land for planting and then someone whom she was informed to be the Applicant's agent came and ploughed the land. She complained through her brother to Sirende Police Station. It was then that they received a letter dated February 3, 2022 from the Applicant's Advocates evicting the family out of the land and remove their structures therefrom.



37. The Respondent testified further that on April 7, 2022, the Applicant, through his agents, invaded the land and reploughed it, weed out the maize crop that had already been planted and germinated. She also stated that they pulled down her structure which was on the land and that is how she got to complain to Court vide the Application dated April 13, 2022. Her evidence in cross-examination, was that the structure destroyed was built between December 2021 and January, 2022. Her testimony was that the structure was destroyed around March 4, 2022. She emphasized that she reported about the demolition through her family members.
38. She stated further, and which she confirmed in cross-examination, that on April 29, 2022, her family replanted in the parcel of land and on May 7, 2022, the Defendant again replanted the sugarcane. On May 12, 2022, the Applicant admitted that his agents were on the ground planting. She stated further that by May 11, 2022, when she invited a County Agricultural Officer to visit the land, there was planting of sugarcane being done on land parcel No LR 8699/1 on top of germinating maze seeds which was about two (2) leaves. The Officer estimated the loss on the cultivated and destroyed maize at between Kshs 625,000/= and Kshs 750,000/=. She repeated the reports made to police about the interference and gave a report by the Agricultural Officer that maize had already germinated when the sugarcane had was replanted.
39. Upon cross-examination, the Respondent confirmed that she had ploughed the land in January, 2022 through her family represented on the ground by her siblings and mother. She restated that she had been on the ground since 2007 although she had never spent a night on it. She stated further that she complained to the Police about the interference by the Defendant's agents through her brother, one Robert.
40. This Court directed the parties to hear the Application by way of written submissions. Both parties filed their submissions. The Applicant did file his on July 29, 2022 while the Respondent did so on July 8, 2022.
41. At the beginning of the submissions, the Applicant summarized the Application and the Respondent's case. He also summed up what, in his view, came out due to cross-examination of the Respondent when she was called upon to state the facts about the acts complained of.
42. He submitted that the Respondent was unable to explain how a structure she claimed on March 4, 2022 had been demolished was again demolished on April 7, 2022; conceded that she was not present on the land on April 7, 2022 and that all she stated concerning the occurrences of that day was reported to her; she accepted and confirmed that she had indeed sent her agents to plant maize on the land on April 29, 2022; and conceded that neither she nor any of her family members had ever spent a night on the land.
43. Three (3) issues were given by him for the Court to consider, which were, what the status quo was as at the date of the Order; on what date and in what manner the Court Order was disobeyed; and whether the Plaintiff satisfied the Standard of Proof in Contempt proceedings. About liability, for Contempt of Court he relied on the Court of Appeal cases of *Michael Sistu Mwaura Kamau v DPP & 4 Others* (2018) eKLR, Shimmers Plaza Ltd Shimmers Plaza Ltd (2015) eKLR,(sic) and the ELC case of *James Gachiri Mwangi v John Waweru Muriuki & 3 Others* (2020) eKLR
44. He one again summarized the status quo as it was on February 28, 2022. He stated that as at that date, the Plaintiff was not on the land.
45. In regard to the date and manner the court order was disobeyed, he submitted more in opposition to the Application dated April 13, 2022 rather than how the Respondent herein disobeyed that order complained about.



46. In regard to whether he had satisfied the Standard of Proof in contempt proceedings, he submitted that based on the material before the Court he had discharged the burden of proof.
47. On her part, the Plaintiff submitted that on June 14, 2022 upon cross-examination by the Court and the Advocates for the Applicant, the Respondent informed the court that she took possession of the suit land plot No8699/1 in 2007 and although she was not the registered owner, she had been farming on the same for the last 15 years. She further testified that sometime in January, 2022, her family ploughed the land measuring 10 Acres and later someone else, the agent of the Applicant, reploughed it. She reported at Sirende Police Station through her brother Robert Wamalwa. Subsequently, she received a letter dated February 3, 2022 from the Defendant's Advocates demanding that her family moves out of the suit land. The Respondent thereafter moved the court for Orders of Injunction to restrain the Defendant from evicting her from the suit land. Following her application, the court issued the orders of February 28, 2022.
48. The Respondent further informed the court that on April 7, 2022, she did not disobey the Court Orders by sending a gang of people to the farm. In order to explain what happened on April 7, 2022, she relied on her earlier Affidavit sworn on April 13, 2022 in which she complained to the court for the Applicant to be punished for Contempt of Court for invading the land, weeding out her maize crop and pulling down the structure that the court directed not to be pulled down.
49. The Respondent gave evidence that on April 29, 2022, her family replanted the maize crop that had been uprooted by the Applicant on April 7, 2022 by reploughing the suit land. Her submission was that on May 7, 2022 the Applicant once again invaded the suit land, uprooted the Respondent's maize crop and instead planted sugar cane. She stated that on April 7, 2022, the Applicant demolished the Respondent's structure and reploughed the suit land and weeded out the Plaintiff's crop. She summed up the Affidavit evidence and testimony as was given in Court by the Applicant and herself on the even dates when oral testimony on the Applications was given. She prayed that the Application be dismissed with costs.

Issues, Analysis And Determination

50. I have carefully, considered both Applications, the rival Affidavits both in support and opposition, the oral testimony by each of the respective Respondents, the submissions filed, as well as the authorities and the law cited. I find that the issues for determination are:
 - a. Whether each application is merited.
 - b. What orders to issue and who to bear the cost of each Application?
51. Punishment for contempt of court is provided for under Section 29 of the [Environment and Land Court Act](#). The provision reads as follows:

“....Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”
52. For this Court to determine whether or not there was breach of the orders issued on February 28, 2022, this Court has to restate the status quo which was obtaining as at that date and which was extended on March 14, 2022 when the Application for injunction came up for inter partes hearing. But before doing so, it is important also to understand what constitutes Contempt of Court.



53. In the case of *Nelson N Obiba v Hira Mokono Nyambwatania; Attorney General (Interested Party)* [2022 eKLR this Court laid down the definition of the term contempt of Court as follows:

“In Black’s Law Dictionary, 11th Edition, Thompson Reuters, 2019, Bryan A. Garner defines contempt as disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or impair the respect due to such a body”.

54. It goes then that any party, whether served with a court order or not, is bound to obey it provided that he has knowledge of the existence of the order. A court of law does not issue orders in vain: they must be obeyed, respected and/or fulfilled.

55. About obedience of orders of the Court, in the case of *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR the Court emphasized as follows:

“Article 159 of *the Constitution* recognizes the judicial authority of courts and tribunals established under *the Constitution*. Courts and Tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with *the Constitution* and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.

56. In *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & Another* CCT 19/11(75/2015). Nkabinde, J observed that:-

“The rule of law, a foundational value of *the Constitution*, requires that the dignity and authority of the courts be upheld.

This is crucial, as the capacity of courts to carry out their functions depends upon it. As *the Constitution* commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

57. In the case of *Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2)* [1975] 48 D.LR(30), the Court stated that;

“To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrong can be ignored, then



there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.”

Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society. That is why the court stated in *Carey v Laiken [2015] SCC17* that;

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

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

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

58. In order for one to be found guilty of the Contempt of Court, four (4) elements must be proved. There must have been:
- (a) a valid order of the Court.
 - (b) the order must have been served or been constructively in the knowledge of the alleged contemnor.
 - (c) there must be an action or actions of a contemnor contrary to the order.
 - (d) the actions of the contemnor in violation must be deliberate.
59. I agree with the submissions by the Defendant/ Applicant in respect of the two (2) Applications, and as was held by the Court of Appeal in *Michael Sistu Mwaura Kamau v DPP & 4 Others (2018) eKLR*, where the Court rendered itself as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the *Contempt of Court Act* and the ruling of the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* (supra). Secondly, as this



Court emphasized in *Jiban Freighters Ltd v Hardware & General Stores Ltd and in A B & Another v R B* [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See *Mutitika v. Baharini Farm (supra)* and *Republic v Ahmad Abolfathi Mohammed & Another (supra)*”).

60. 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”.

61. With the above wisdom in mind, I now turn to the determination of the two (2) Applications. It is clear to me that there are two extreme views which prompted the filing of the two (2) Applications herein. One is based on the facts common to both Applications while the other on the divergent standpoints held by the two parties now Applicants.

a. The Main Common Facts on Each Application

62. Each Applicant prayed that this court finds the respective Respondent in contempt of the court order issued on February 28, 2022. The Respondent disputed, argued and denied that he was in contempt of the order. It is not in dispute that on the material date, the Court issued orders of maintenance of the status quo in the suit land which was said to measure approximately ten (10) acres. The status quo order was that,

“Status quo is hereby issued to the effect that the parties who are on the ground remain there and the parties who are not on the ground shall not move into the land. Further, no other structure (if any) should be put on the land or any party pull down any structure there.”

63. The Order of status quo was extended and or confirmed on March 14, 2022. When the status quo was ordered maintained on this date, the Plaintiff had moved the Court to stop the Defendant from directly or indirectly evicting her from the suit land by entering, ploughing, cultivating, selling, transferring or in any way interfering with the Applicant’s quiet possession of the ten (10) acres which was part of land parcel No LR No 8699/1 which was claimed by the Plaintiff. As early as February 22, 2021, the Defendant complained by way of a letter through his Advocates, which letter was annexed to the Affidavit sworn by him on February 24, 2022 and referenced at paragraph 8(d), that the Plaintiff’s mother desisted to “cultivate, plow (sic), plant or in any other manner deal with the subject parcel of land...”. This was clear that the Plaintiff was by then making use of the land though the actions of her mother. It prompted the Defendant to issue the demand letter.

(b) The Extreme Divergent Contention on Each Application

64. On the one hand, the Plaintiff who was the Applicant in the Application dated April 13, 2022, maintained that she has been on and in possession of the suit land since the year 2007 and has been cultivating the same to date. She argued that as late as January, 2022, she ploughed the land in readiness for planting maize and agent of the Defendant, one Eng. Peter Barasa Wanyama, reploughed the land. On the other hand, the Defendant who is the Applicant in the Application dated May 24, 2022, maintained that the Plaintiff has never been on the suit land all along and that he had been in



occupation thereof and from July, 2020 he leased the land to one Engineer Peter Barasa Wanyama who he has been in occupation thereof and cultivating it.

65. The Applicant in the Motion dated May 24, 2022 prayed that the Court finds that the Plaintiff has never been on the land since 2007 as she alleged. The Plaintiff strongly disputed this fact. Suffice it to say that in inviting the Court to make a determination in regard to the divergent contention, that is to say, a finding on who has been in occupation of the suit land since 2007 to date is a matter (a settlement of fact) that would go to the root of the entire suit. In essence that issue is the backbone of the Plaintiff's case and the bedrock of the Defence case. That would preempt the entire proceedings of the case. Thus, in making a finding as to whether or not there was a violation of the orders of February 28, 2022 as extended on March 14, 2022, the Court can and will only clarify and determine the exact nature of the status quo as it was on the relevant date.
- (a) Whether each of the applications is merited
66. The Applicant in the Notice of Motion dated April 13, 2022 relied on, among others, Sections 4(A) and 5 of the Contempt of Court Act. It is instructive to remind Learned Counsel for the Applicant and all who may make the same error, in future, that the entire statute of the then Contempt of Court Act, Act No 46 of 2016 was declared unconstitutional by the High Court on November 9, 2018 in Constitutional Petition No 87 of 2017, Kenya Human Rights Commission V Attorney General & Another [2018] eKLR To the extent that there is no order varying the judgment, the Act remains unconstitutional and of no effect. It cannot found any legal right. It is null and void.
67. With the above being clear, then the factual issue before me in regard to the two (2) applications is simple: who and what was on the suit land as at February 28, 2022 in respect of which the status quo was to be maintained? The first limb of the order of February 28, 2022 was that the parties who are on the ground, that is to say, the suit land, to remain thereon and any who was not on the suit land was ordered not to move onto the land. The second limb was that no other structure (if any), meaning houses or anything of the sort, was to be erected on the land and if there was any already on it, no party including the one who may have built it was required to pull it down. These issues that this Court sought a clarification thereon on the February 28, 2022 when it was called upon to issue an order of status quo and the parties duly informed the Court the clear position as it was. It is noteworthy here that the Court was deliberate in seeking that clarity on the material date because often parties to cases, in sundry times, have often taken advantage of the general wording of the phrase status quo and violated Court Orders with impunity from time to time.
68. Thus, when the Court sought the clarification by parties as to what the status quo was and was given it, three (3) things were clear, and would not only be gotten from what the parties stated orally in Court through Learned Counsel in Court on February 28, 2022 but also in the Affidavits which were filed during their respective times. That was the reason and wisdom behind the Court calling on the respective Respondents to attend Court during the inter partes hearing of the Applications and orally clarify a few facts; which were clearly confirmed by the said oral testimony of each.
69. Thus, as at February 28, 2022, it was clear to the Court and parties that even the Defendant denied on oath and orally later that the Plaintiff was not on the ground, the facts bore it out differently. His own Affidavits sworn on various dates revealed otherwise. The one sworn on May 4, 2022 and filed on May 5, 2022 had the following depositions. Paragraph 5 (b) read as follows, "I deny categorically the contents of paragraph 5 of the supporting Affidavit and; (b) Wonder where is the evidence that the Plaintiff had planted any maize as alleged or at all?". This contradicted his oral testimony on oath on May 12, 2022 when he stated, "I am aware the Plaintiff planted maize on the suit land. The maize is not there. I do not know if the tenant uprooted the maize..., I am aware the tenant uprooted the maize



on Friday last week and planted sugarcane on Friday.” Again, the fact of maize having been planted on the suit land was confirmed by the Plaintiff’s own Affidavit sworn on April 13, 2022.

70. Paragraph 11 of the Affidavit sworn by the Defendant on February 24, 2022 had the following deposition in the relevant part:

“In answer to the contents of paragraph 16 of the supporting Affidavit, and supported by the weight of the foregoing evidence, U deny that the Plaintiff has been in exclusive occupation and possession of the suit land from 2007 and further aver that; (a) the Plaintiff’s mother has been partially farming on the land with my permission as stated in my Advocates, letter of April 26, 2021 aforesaid, and;

(b) The Plaintiff has not built any buildings on the land... On the contrary, it is the Plaintiff’s brother, one Robert Wamalwa, who recently put up some temporary mud structures on the land a few days prior to the filing of this case by the Plaintiff, no doubt to hoodwink the Court, and which action was promptly responded to by my Advocates on record (the Defendant’s Advocates letter to Robert Wamalwa is at pages 23-24.”

71. This Court looked at the document referred to and found that it was the letter dated February 3, 2022 from Ms Waruhiu, K’Owade & Ng’ang’a Advocates. The letter referred to a report made by the said Robert Wamalwa to the OCS Kitale the previous day about an invasion by one Engineer Barasa on land allegedly bought by him (Robert) from the Defendant. Admittedly, the letter demanded that the said Robert Wamalwa does remove “any illegal structures you may have erected thereon Immediately.... failure of which the said structures will be removed at your cost.” It clearly made mention of structures having been put up on the land. As to when, it was not clear. The letter was not written on a “Without Prejudice” basis.

72. The structures referred to in the Affidavits cited above and the letters referenced were the ones which the Plaintiff, now Applicant in the Notice of Motion dated April 13, 2022 claimed as her own and that had been demolished by the Defendant/Respondent or his agents in the Application. Clearly, the structures were on the farm as at February 28, 2022. Similarly, the Plaintiff had ploughed the land by that date (specifically in January, 2022) in readiness for planting, and it was the maize crop that she planted through her agents that the Defendant through the said Engineer Peter Wamalwa weeded or uprooted.

73. The status quo as at February 28, 2022 was that the Plaintiff was on the land and ploughing. She had structures too on the land. This situation ought not to have been disturbed. Any actions to the contrary were a violation of the orders of the Court. As at the time of filing the Application on April 7, 2022, both the structure had been pulled down, and the maize she planted on the parcel of land was actually weeded out or uprooted by Eng Peter Wamalwa who was acting at the permission of the Defendant. All that the Defendant wanted to be shown, but which he admitted in oral testimony in Court, was that the Applicant had planted maize on the farm. This was contradictory on the part of the Defendant, and it actually clearly shows that the Defendant was an untruthful person on the point, even on oath.

74. The Applicant in the Application dated April 13, 2022 swore at Paragraph 5 of the Affidavit that she had planted maize on the farm, which maize crop was destroyed by Respondent through his agents. The presence of the crop on the ten (10) acres of part of the suit land, land parcel LR No 8699/1 which is the subject matter of the instant Applications, was confirmed by the Report of the County Agricultural Officer of the State Department of the County Government of Trans Nzoia, given in the letter dated May 20, 2022. This evidence of maize crop planted by the Plaintiff having been on the ten



- (10) acres being the part of suit land, and later destroyed by Eng Peter Wanyama, was admitted to by the Defendant in his oral testimony. Since the crop had germinated by April 7, 2022, the crop must have been planted much earlier than when the actions of destruction by the said Eng Peter Wanyama and his agents took place. This Court draws that inference from the fact of it, taking judicial notice under Section 59 of the *Evidence Act* that under the natural course of events, it takes germinating maize 10 to 14 days to emerge. And for it to have reached the V1 stage (two leaves), as at May 11, 2022, when the field search was conducted by the County Agricultural Officer, it must have taken one (1) to two (2) more weeks.
75. This Court wonders why, if indeed the Plaintiff/Applicant was not in possession and use of the ten (10) acres of land, the Defendant or his agent or lessee, the said Engineer Peter B. Wanyama, could or did not apply for injunction immediately the Plaintiff planted the maize or Contempt of Court when her alleged actions of violation of the Court order took place but waited for the maize crop to germinate and then weed it out. Additionally, this Court still wonders aloud why and finds that the actions of the Defendant unbelievable regarding the fact that ploughing was done by the Plaintiff in early January yet he (Defendant) did not move the Court or report the matter to the police as did the Plaintiff when interference on her work on the portion in question began.
76. It became clear from the totality of facts before me in the two (2) Applications herein that the Defendant's agent, or lessee, went on a deliberate trajectory of destroying a food crop while treating the one he intended to plant and did actually do so as either better or special. In this era, of our Country, where the price of maize has sky-rocketed it was least expected of a human being exercising his proper faculties to do such an act. Moreover, in the African context, that is to say, in many cultures in Africa, it was a taboo for someone to deliberately destroy a crop, more so a food crop. To do so went not only against environmental protection but also the assurance of supply of food and resources. It is abhorrent that a sane human being would set upon and destroy a crop planted, even if illegally, on his parcel of land, without following the law. This irrespective of whether the person who planted the crop was or was not a trespasser.
77. The Defendant's lessee's actions were akin to making use of the rule of the jungle which is not what we pride in as a nation. Article 10(2)(b) of *the Constitution* of Kenya, 2010, gives the Rule of Law as one of the national principles. This applies to all and sundry. It was expected of the said Engineer Peter Wanyama to respect the rule of law. His actions having been sanctioned by the Defendant clearly show that the Defendant acted deliberately in contempt of the very Court that he wished to uphold the dignity thereof.
78. In my considered opinion, the Application dated May 24, 2022 was an afterthought and a deliberate step and reaction to the one which was filed earlier, on April 13, 2022 by the Applicant. I am not convinced beyond a shadow of doubt that the actions of the Plaintiff in planting maize which was destroyed through the actions of a person or agents authorized by the Defendant through the lessee he let to be on the suit land were actions in Contempt of the Court. Much less when the Plaintiff wished to rebuild the structure which was pulled down by the Defendant's agents. On the contrary, the actions by one Engineer Peter Wanyama to move onto the suit land and use, were contemptuous of the Court orders and MUST stop forthwith, failure of which there will be severe action on him as an individual. This Court cannot sanction an illegality. But it does not imply that the said Eng. Peter Barasa Wanyama is prohibited from making use of the portion of land which comprises of other parts other than the ten (10) acres which comprise of the suit land, if the Defendant wishes to him to continue leasing the portion that is not in dispute in this suit.
79. The upshot is that on the one hand I find that the Application dated May 24, 2022 is unmerited and it is hereby dismissed with costs to the Respondent. On the other hand, the one dated April 13, 2022 is



merited. I find, and I am satisfied beyond reasonable doubt, that the Respondent therein deliberately and with zeal set upon the trajectory of wilfully disobeying the Orders this Court issued on February 28, 2022 and extended on March 14, 2022, actually did disobey them by using one Engineer Peter Barasa Wanyama and his agents to, on diverse dates, disturb and succeeded in changing the character of the status quo.

80. His actions were intent on indirectly actively making it impossible for the Applicant to carry out her daily actions on the portion of ten (10) acres of the suit land over which she sued him in this matter. These actions were a design by the Respondent to change the character or nature of the subject matter herein and frustrate the efforts and position of the Plaintiff and put her in position that would make it greatly difficult to proceed with the suit on an even plant.
81. The fact that he is the registered proprietor of the land does not entitle him to take the law unto his hands and act on the subject matter as he wishes, to the detriment of the Plaintiff. It is even more behoving of him as a senior citizen to respect the rule of law and obey Court orders. His actions at this stage cannot be condoned, and must attract punishment by this Court. The Application is allowed with costs in terms of part of Prayer No 2 thereof, at this stage, as the period of committal to jail or the fine to be paid has to depend on the mitigating factors the contemnor may show to the Court at an appropriate time. Additionally, under Sections 3 and 3A of the *Civil Procedure Act*, and in the interest of justice and maintaining the status quo as was on the material date, it is reiterated that the Defendant and or his agents, lessees and other persons claiming through his are hereby ordered not to enter, interfere with and on in any manner do anything inconsistent with the quiet possession of the portion of the ten (10) acres of the parcel of land known as LR 8699/1 which form the subject of this suit, pending the final determination of this suit.
82. In light of the above, I therefore convict the Respondent, one Albert Alexander Aggrey Ekirapa, of Contempt of Court of the Orders issued on February 28, 2022. I direct that the said contemnor attends this Court personally on October 24, 2022 for mitigation and sentencing.

It is so ordered..

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 5TH DAY OF OCTOBER, 2022.

HON DR IUR FRED NYAGAKA

JUDGE, ELC, KITALE

