



**Chepkowny & another v Chiri (Civil Appeal 128 of 2020)
[2024] KEHC 15568 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15568 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 128 OF 2020
SM MOHOCHI, J
DECEMBER 6, 2024**

BETWEEN

JACOB KIBET CHEPKOWNY 1ST APPELLANT

CHRISTINE KIPROTICH CHEPKWONY 2ND APPELLANT

AND

JOHN WACHIRA CHIRI RESPONDENT

RULING

1. The present application by way of Chamber Summons dated 27th August, 2024 seeks:-
 - a. Spent
 - b. Spent
 - c. That an order of committal to civil jail for contempt be issued against the Respondent herein for term of six months or such other period of time this Honourable Court deems fit, for not adhering to this Honourable Courts judgement delivered on 29th July, 2021 by failing to execute all necessary documents to effect the transfer of the property L.R. No. Miti Mingi/ mbaruk Block 3/1552 (Barut) to the Applicants.
 - d. The Costs of this application be borne by the Respondent

Applicant's Case

2. In the affidavit support of the Application sworn by Jacob Kibet Chepkowny, it is averred that vide judgment entered on 29th July, 2021 the Respondent was ordered inter alia to execute all necessary transfer documents and the Land Control Board consent pertaining the subject property.



3. That the judgement together with the Transfer and the application to the Land Control Board were forwarded to the Respondent in the letter dated 13th September, 2021 but the Respondent insisted on ignoring the Court Orders.
4. That the actions of the Respondent thus forced the Applicants to file the application dated 29th November, 2021 seeking that the Deputy Registrar executes necessary documents which was allowed on 23rd May, 2023 but the Respondent has refused to relinquish the original title deed to the suit property.
5. It was averred that the Applicants have been attempting to get the Respondent to execute the documents since 2011 with the Respondent persistently declining thereby subjecting them to unending litigation.
6. That unless the Respondent is cited for contempt he will continue with his negligent acts and expose the Court to ridicule and disrepute since Court Orders are not made in vain and are fundamental to the Rule of Law and Administration of Justice.
7. It was their case further that they are unable to enjoy the full rights to the suit property as they are apprehensive the Respondent intends to dispose of the property to unsuspecting third parties.

Respondent's Case

8. The Respondent opposed the application by way of Replying affidavit sworn on 2nd October, 2024 and stated that the application lacks merit, is incompetent, frivolous and ought to be struck out or dismissed with costs.
9. He averred that the terms of the said judgment were never relayed or explained to him by his advocates, that he has never been served with the letter dated 13th September, 2021 or the purported enclosures and only saw them in the subject application and that he has never been served with a decree for his perusal, compliance or records.
10. It was his case that even if the purported letter dated 13th September, 2021 and the enclosures were served upon his Advocates, the same were not transmitted to him due to breakdown in communication between his former Advocates and which necessitated the appointment of Counsel now on record.
11. That his failure to comply with the judgement was not deliberate and although he intends to challenge the judgement now that he has been appraised of it, he was willing to do what is required of him. Further that the elements required to be proved before an application such as the instant one is allowed, have not been proved to the required standard and as such, the application ought to fail.

Applicants' Submissions

12. It was the Applicants' submission that this Court has been power to punish contempt under Section 28 of the [Contempt of Court Act](#).
13. The Applicant submitted that the application has met the requirements for proving contempt and relied on the case of Samuel M. N. Mweru v National Land Commissions & 2 Others [2020] eKLR where the Court laid down the requirement to establish whether contempt of Court had been established.
14. It was submitted that the Respondent was aware of the judgement and the documents as evidence by service to his legal counsel and his current advocates filed notice of change proving the Respondent continued knowledge.



15. On costs the Applicant submitted that costs follow the even that the losing party bears the cost and the costs should be borne by the Respondent. The Applicant also prayed that the Court considers the conduct of the Respondent in awarding costs and reliance was placed in *Jasbir Singh Rai & 3 Others v Tarlachan Singh Rai & 4 others* [2014] eKLR where it was stated that the Court exercises discretion in awarding costs in consideration of the factors as motivation and conduct of the parties.

Respondent's Submissions

16. The Respondent framed his issues for determination by relying in the case of *Kristen Carla Burchell us. Baryt Grant Burchell*, Eastern Cape Diuision Case No. 364 of 2005 as cited by the Court of Appeal in *Marain Opiuo Ambala & Another vs Oduor Hawi Ambala & 3 Others* [2023] eKLR, as follows
- a. 0 was deliberate.
17. Pertaining the first issue, it was submitted that the Respondent was never served with the judgement nor the documents and by virtue of Section 107 of the *Evidence Act* the Applicants were required to discharge that burden of proof to the required standard which they failed to. He placed reliance in the case of *Mutitika v Baharini Farm Ltd* (1985) KLR 229 as cited in *Simon Nqusi Nienqa as Tabitha Waniiku Mururua* [2023] eKLR.
18. It was further submitted that the Respondent was not in breach of the judgement since the Applicants have failed to show that they served the judgment or the transfer documents.
19. As regard the third issue the Respondent relied on the case of *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR to submit that to submit that for contempt to succeed, it was necessary for the Respondent to demonstrate the Respondent's willful disobedience of the judgment and by not being aware and neither was he served, his conduct was not contemptuous.
20. The Respondent nevertheless submitted that he was willing to comply with it now that he was in the know.

Analysis and Determination

21. I have considered the application and the affidavit is support and against. I have also considered the submissions filed by counsel for the parties and the authorities relied on. The issue this Court is called upon to determine is whether the Applicants have met the threshold for grant of contempt orders.
22. In *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR Mativo J (as he then was) stated:-

“ 40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove

- i. the terms of the order,
- ii. Knowledge of these terms by the Respondent,
- iii. Failure by the Respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-



"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

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

23. the Respondent has insisted that he was not aware of the terms of the judgment since his former advocates never relayed the information to him as there was breakdown of communication. He added that even the letter forwarding the transfer documents and the application to the Land Control Board never reached him as they were served on his former advocates.

24. The Applicants have to show that the Respondent was aware of the terms of the judgment, that he failed to comply with the terms of the judgment and that the noncompliance or disobedience was willful for contempt of Court order to issue.

25. I have perused the record and a copy of judgement and transfer forms together with the application for consent were served on 14th September, 2021 vide forwarding letter dated 13th September, 2021 to the Respondents then advocates, the firm of M/S Oumo & Co. Advocate. The said advocates acknowledged receipt and stamped the forwarding letter.

26. The Respondent's current advocates, the firm of M/S Gatonye & Gatonye Advocates came on record on 27th August, 2024 vide consent with the Respondent's former advocates. All along the former advocates were still on record and the record shows that they received documents on behalf of the Respondent on numerous occasions in this matter.

27. The Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR held that:

"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings" We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him/her to report back to the client all that transpired in court that has a bearing on the client's case."

28. Similarly, in *Tuiyot J.*, as he then was, stated in the case of *Oilfield Movers Limited v Zahara Oil and Gas Limited* [2020] eKLR that:

"It would seem that the rationale for the rule is to protect the integrity and dignity of Court orders. To excuse a contemnor who has knowledge of a Court order simply because he has not been personally served is to open up Court orders and process to contemptuous and cynical disobedience.

And where a party is represented by an advocate, the party is deemed to have knowledge of a Court order if the party's advocate is aware of it."



29. The Court went on further to state that: -

“...The law as restated in Shimmers (supra) is that knowledge of a Court order on the part of a litigant can be inferred from knowledge of the order by the advocate appearing for the party. This is drawn from the assumption that it behooves on every advocate a duty to report back to his client what has transpired in Court and more so where the party is required to obey a Court order. Where the litigant is a corporation, there is a duty on the Advocate to inform the officials who bear the responsibility of implementing the Court order of the existence of the order.”

30. An advocate essentially represents the interests of their clients. They are officers of the Court and a voice of their clients. It is expected that once service is effected to an advocate the advocate will inform his or her client.
31. The gist of the appeal was property in form of land which in the country is regarded to be quite precious and valuable. The Applicants had moved Court to challenge the lower Court’s decision. It is surprising that for 3 years from the time judgement was entered, the Respondent was not aware of the terms of the judgment bearing in mind the value of the case. Cases belong to the parties and not advocates. It was the Respondent duty to follow up on the judgement regardless.
32. I find that the Respondent was aware of the existence and terms of the judgement and proper notice was given by virtue of his counsel’s awareness as evidenced by acknowledgement of service of the same.
33. Having found that the Respondent was aware of the existence and the terms of the judgement the next question to be answered is whether the failure to comply with the terms of the judgement was deliberate. The Applicant forwarded the documents for execution as evidenced by the letter dated 13th September, 2021 for purposes of compliance with the said judgement. The same were received and stamped. There was no follow up thereafter. The next time the Applicants moved to Court they sought to have the Deputy Registrar execute the necessary documents in compliance with the judgment. The Application was unopposed.
34. The allegation that the Respondent has been frustrating their efforts is not supported by any other evidence besides the fact that documents were sent in 2021 and there has been no subsequent follow up. The claim that the Respondent has refused to hand over the titled deed is not backed up by any evidence. There was no request for the original tile deed.
35. Be that as it may, the Court by Order dated 9th June, 2023 ordered that the documents be executed by the Deputy Registrar. The Applicants forwarded the documents to the Deputy Registrar through forwarding letter dated 13th June, 2023. It is not clear at what point thereafter the Respondent began frustrating their efforts to warrant committal to civil jail. The intention of this application is also not clear.
36. The standard of proof in contempt proceedings is higher than the one in ordinary civil proceedings. Prayer No. 3 seeks the Respondent’s committal to civil jail which will mean curtailing his liberties. The Applicants have to prove that the Respondent refused to sign the documents on purpose or deliberately.
37. Disobedience is not sufficient to justify contempt and is not sufficient to demonstrate that the same was intentional or willful. Curtailing somebody’s liberties cannot be done on a whim. There have to be compelling reasons why those liberties should be curtailed albeit temporarily.



38. In Samuel M. N. Mweru & Others v National Land Commission & 2 others (supra) the Court stated that:

“in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established. And as O’Regan J pointed out, the power to imprison for coercive and non-punitive purposes is ‘an extraordinary one’:-

‘The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of *the Constitution* unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.’”

39. I am not convinced that the Applicants have proved adequately that the Respondent willfully and deliberately failed to comply with the Court order or the disobedience was deliberate.

40. In any event the Respondent in his response did however depone that he was willing to execute any documents that he was required to do so. The Respondent has demonstrated willingness to meet his obligations. Contempt Orders cannot issue. At least not yet.

41. I view of the forgoing,

- a. the Applicants Application found to be without merit and is therefore disallowed.
- b. The Respondent is Ordered to forthwith execute All documents for transfer of land within the next fifteen (15 days from the date of this Ruling.
- c. Each party shall bear their own costs

It is So Ordered.

RULING DELIVERED, DATED AND SIGNED AT NAKURU ON THIS 6TH DAY OF DECEMBER 2024

MOHOCHI S.M.
JUDGE

