



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KITALE**

**ELC PETITION NO. 2 OF 2014**

CHRISTOPHER KURUTYON LONYALA.....1<sup>ST</sup> PETITIONER  
MUSA TINYANG.....2<sup>ND</sup> PETITIONER  
LONYANGAREN LOKORRIONKOR.....3<sup>RD</sup> PETITIONER  
ROBERT MATANDA.....4<sup>TH</sup> PETITIONER  
JOHN MATANDA.....5<sup>TH</sup> PETITIONER  
JOSEPH KANTICH.....6<sup>TH</sup> PETITIONER  
ELIZABETH CHEPSERET NDURURU.....7<sup>TH</sup> PETITIONER  
PAMELA CHEPKEMOI NGEINWA.....8<sup>TH</sup> PETITIONER  
ISAAC ATODO SIRE.....9<sup>TH</sup> PETITIONER  
TEGLA LOROUPE.....10<sup>TH</sup> PETITIONER  
MARKO CHEMASWET KAPSANDUI.....11<sup>TH</sup> PETITIONER  
MOSES KABURU.....12<sup>TH</sup> PETITIONER  
LOKALE.....13<sup>TH</sup> PETITIONER  
RAMANYANG PRECH BIWOTT.....14<sup>TH</sup> PETITIONER  
ABRAHAM MARIAH KAMAKU.....15<sup>TH</sup> PETITIONER  
KAKUTO YARANGOLE ALUKUNYANG.....16<sup>TH</sup> PETITIONER  
STEPHEN K.N. NGEIYWA.....17<sup>TH</sup> PETITIONER  
ALEXANDER M. T. SIYWET.....18<sup>TH</sup> PETITIONER  
BEN M. NGEIYWA.....19<sup>TH</sup> PETITIONER  
MNANGAR RITENYANG SEPITOI.....20<sup>TH</sup> PETITIONER  
BOAZ NAIYWA.....21<sup>ST</sup> PETITIONER  
LOWGUROPUS LOKORKOU.....22<sup>ND</sup> PETITIONER

SAMWEL K. KAPAILEL.....23<sup>RD</sup> PETITIONER  
LOTANY LOTILIMAT.....24<sup>TH</sup> PETITIONER  
JAMES KABURU.....25<sup>TH</sup> PETITIONER  
BENJAMIN URIO.....26<sup>TH</sup> PETITIONER  
LORNAL EWOI.....27<sup>TH</sup> PETITIONER

AND

EKITALE EKAL LODIO.....1<sup>ST</sup> INTERESTED PARTY  
MARGARET LONGELESHE.....2<sup>ND</sup> INTERESTED PARTY  
MICHAEL NGOLESHE.....3<sup>RD</sup> INTERESTED PARTY  
CLAY MADARA OCHIENG.....4<sup>TH</sup> INTERESTED PARTY  
WILSON OTIENO OBURE.....5<sup>TH</sup> INTERESTED PARTY  
BENJAMIN ORIA.....6<sup>TH</sup> INTERESTED PARTY  
JAMES K. KABURU.....7<sup>TH</sup> INTERESTED PARTY  
MARY SIMON LOKAMAR.....8<sup>TH</sup> INTERESTED PARTY  
KENETH ESINYEN.....9<sup>TH</sup> INTERESTED PARTY  
EPEYON NKURUKA ETABO.....10<sup>TH</sup> INTERESTED PARTY  
WILFRED OGUTU.....11<sup>TH</sup> INTERESTED PARTY  
SYLUS ODONGO WERE.....12<sup>TH</sup> INTERESTED PARTY

VERSUS

CABINET SECRETARY

MINISTRY OF LANDS AND SETTLEMENT.....1<sup>ST</sup> RESPONDENT

DIRECTOR OF LAND ADJUDICATION.....2<sup>ND</sup> RESPONDENT

DISTRICT LAND ADJUDICATION

TRANS-NZOIA.....3<sup>RD</sup> RESPONDENT

COUNTY COMMISSIONERTRANS-NZOIA.....4<sup>TH</sup> RESPONDENT

DEPUTY COUNTY

COMMISSIONER KWANZA.....5<sup>TH</sup> RESPONDENT

POLICE COUNTY COMMANDANT

TRANS-NZOIA.....6<sup>TH</sup> RESPONDENT

ADMINISTRATION POLICY COUNTY

COMMANDANT-TRANS NZOIA.....7<sup>TH</sup> RESPONDENT

INSPECTOR GENERAL OF POLICE.....8<sup>TH</sup> RESPONDENT

HON. ATTORNEY GENERAL.....9<sup>TH</sup> RESPONDENT

FRANCIS KAPCHANGA.....10<sup>TH</sup> RESPONDENT

PETER CHAKALI.....11<sup>TH</sup> RESPONDENT

### RULING

1. This ruling is with regard to an application by way of Notice of Motion dated 2/12/2019 brought under **Order 1 Rule 8, Order 45 Rules 1, 2, 3, 5 and 6 of the Civil Procedure Rules**. I will set out the main prayer that the interested parties seek verbatim herein below:

(1) ...spent

(2) That based on the documentary evidence exhibited before court through this application by the applicants/interested parties herein, the court be pleased to commit the defendants/respondents as provided by the law to civil jail for a period of six (6) months for willful and intentional disobedience of the order/decreed issued by this court on 3/10/2019 to act as an exemplary punitive action against the offenders through a revision order by the court invoking the penal notice on the court order.

(3) That costs be in the cause.

2. The application is premised on the grounds set out in the notice of motion and is supported by a sworn affidavit of **Wilfred Ogutu** dated 2/12/2019.

3. The grounds relied on are that an order was issued by this court and the defendants/respondents were duly served in person; that the defendants have willfully and intentionally ignored, refused or neglected to obey the order and have continued their disobedience by harassing, intimidating, arresting, threatening with evictions and arraignment in court the genuine settlers with the offence of trespass contrary to the order.

4. **Francis Kapchanga**, the 10<sup>th</sup> respondent filed a replying affidavit on 3/2/2020 in which he stated that the applicant has not demonstrated personal service of the order; that the exhibits in the supporting affidavit pre-date the order alleged to have been contemned and that the alleged victims have not demonstrated that they have any interest in the suit land.

5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed grounds of opposition dated 5/2/2020 stating that the application is fatally defective and it offends the provisions of Sections 21 and 23 of the **Government Proceedings Act Cap 40**; that there is no evidence of service upon them as required by law and that it enjoins parties who are not participating in the proceedings.

6. The interested parties filed what they term as “*replying and counter statement against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> contemptors (sic) grounds of opposition*” on 13/2/2020.

7. The interested parties’ written submissions were filed on 3/2/2020. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their submissions on 5/2/2020.

8. I have considered the application as well as the responses including the submissions of the parties.

### Determination

9. The issues arising for determination in the instant matter are as follows:

(a) *Whether the application meet the threshold of a contempt application;*

(b) *Whether the respondents named are in contempt of the order issued on 3/10/2019.*

(c) *What orders should issue?*

10. The issues are discussed as hereunder:

(a) *Whether the application meet the threshold of a contempt application;*

11. In the case of **Jacinta Njeru Kaitha v David K. Kanyiri [2015] eKLR** it was stated as follows:

**“It is now trite that the duty to obey the law by all individuals and institutions is paramount in the maintenance of the rule of law, good order and the administration of justice. This now age old principle was ably set out inter alia by Romer L.J. in Hadkinson versus Hadkinson [1952] ALLER 567 thus:-**

**“It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular even void. Lord Cottenhom L.C., said in Chuck Vs. Cremor (1) (1 Coup. Temp. Cott 342);**

**“A party who knows of an order, whether null or valid , regular or irregular cannot be permitted to disobey it....It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.**

**See also the decision in the case of Refrigeration and Kitchen Utensils Limited versus Gulabchand and Popatlal Shah & Another; Civil Application No.39 of 1990 (UR) for the proposition that, it is essential for the maintenance of the rule of law and good order that the authority and dignity of our court is upheld at all times.”**

12. The essential conditions required for conviction of any person for the offence of contempt are well known: there must be a court order directing the doing or prohibition of a certain act or acts and that person must have knowledge of the existence of that order and must have wilfully and deliberately disobeyed it. See the case of **Michael Sistu Mwaura Kamau -vs- the Director of Public Prosecution & 4 Others [2019] eKLR**. Knowledge can be imputed and therefore personal service of the order is not mandatory in all cases. See the case of **Basil Criticos versus Attorney General and 8 others [2012] eKLR** where it was observed as follows:

**“...the law has changed and as it stands today, knowledge supersedes personal service----where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”**

13. It need not be gainsaid that there was an order of *status quo* issued by this court on 3/10/2019.

14. Other than the existence of an order, the other elementary issue to be considered in this application is whether there are identifiable alleged contemnors.

15. In the supporting affidavit to the notice of motion the deponent states that the defendants were personally served with the order on 30/11/2019. I have looked at the notice of motion in search of the names of the persons sought to be committed to civil jail. The principal prayer in the application describes them merely as defendants/respondents. However at the heading of the application the applicant has given the names with a description as follows:

**“In the matter of willful and intentional disobedient of court decree/order of 3/10/2019 contrary to the provisions of contempt of court Act 2017 by:-**

**The DCIO Endeless police station**

**The OCS Endeless police station**

**The O/C Chepchoina Police Patrol Base**

**Peter Chakali, the 10<sup>th</sup> co-respondent in this matter**

**Francis Kapchanga, the 11<sup>th</sup> co-respondent in the matter.”**

16. I will refer to the above respondents as the 1<sup>st</sup> - 5<sup>th</sup> respondents for ease of reference for the purposes of this application.

**(a) Whether the Respondents named are in contempt of the Order issued on 3/10/2019**

17. Other than the last two who are the 10<sup>th</sup> and 11<sup>th</sup> respondents respectively none of the others in the list appear in the list of respondents in this petition.

18. The court considers the orders sought by the applicants against the respondents to be of a serious nature. The seriousness of a contempt charge was demonstrated in the case of **Woburn Estate Limited -vs- Margaret Bashforth [2016] eKLR** where it was stated as follows:

**“We reiterate that contempt proceedings being of quasi - criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning In Re Bramblevale Ltd [1970] 1 CH 128 at page 137 that;**

**“A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”**

19. All the proper steps of proving that the respondents are guilty of contempt in the instant application must be followed.
20. As stated before this court must either impute knowledge of the order alleged to have been contemned on the part of the respondents or demand proof of actual personal service on the alleged contemnors, as may be appropriate.
21. In view of lack of participation of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents in these proceedings knowledge of the order on their part cannot be imputed and this court must rely on evidence of personal service.
22. The applicant merely alleges that he served them with the order. I would have expected the applicant to attach sworn affidavit evidence of such service but I find none annexed to the application. For that reason I find that the application cannot stand as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
23. With regard to the last two respondents I note they are represented by Mr. Karani in these proceedings who was present on **3/10/2019** when the ruling was read though the record for that day reads that he was representing only the 9<sup>th</sup> and 10<sup>th</sup> respondents.
24. By virtue of their counsel being in court at the time of delivery of the ruling the two may be deemed to have had knowledge of the order. Proof of service of the order will not be demanded of them in this application.
25. However I find no evidence attached to show that the 4<sup>th</sup> and 5<sup>th</sup> respondents committed any acts which may be deemed to be wilful and deliberate contravention of the order.

***(b) What Orders should issue?***

26. For the above reasons I find that the application dated **2/12/2019** has no merit and the same is hereby dismissed with costs to the respondents.
27. As parties had filed their submissions and this matter was only pending judgment by the time the instant application was filed under certificate of urgency, judgment in this matter will be delivered on **30/6/2020**.

**Dated, signed and delivered at Kitale on this 5<sup>th</sup> day of March, 2020.**

**MWANGI NJOROGE**

**JUDGE**

**5/3/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Karani for the 10<sup>th</sup> and 11<sup>th</sup> Respondents

Mr. Kuria for A.G - (1<sup>st</sup> - 9<sup>th</sup> Respondents)

N/A for Interested Parties

N/A for Mr. Rono for the Petitioners

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**5/3/2020.**