



Lapana Limited v County Government of Trans-Nzoia (Environment & Land Case 8 of 2023) [2024] KEELC 45 (KLR) (18 January 2024) (Ruling)

Neutral citation: [2024] KEELC 45 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 8 OF 2023**

**FO NYAGAKA, J
JANUARY 18, 2024**

BETWEEN

LAPANA LIMITED PLAINTIFF

AND

THE COUNTY GOVERNMENT OF TRANS-NZOIA DEFENDANT

RULING

1. Lapana Limited, the Plaintiff herein, lodged the Notice of Motion Application dated 24/03/2023 (hereinafter ‘The Application’). It is supported by the Affidavit and a Further Affidavit of Fredrick Sululu Masinde, its Director, deposed to on 24/03/2023 and 15/06/2023 respectively and the Supplementary Affidavits of Patris Agui Kevin, Emmanuel Okello and Jesca Maggy Kageha all deposed to on 15/6/2023.
2. The Application seeks the following Orders:
 1. That for wilful, deliberate and flagrant disobedience of the Order of this Honourable Court issued on the 27/02/2023 and served upon the Respondent/Defendant, this Hon. Court be pleased to punish for contempt by ordering the detention in prison for a term not exceeding six months the Governor, County Government of Trans-Nzoia; namely George Natembeya, the County Secretary County Government of Trans-Nzoia namely; Truphosa Amere, the County Executive Committee member of Lands Housing and Physical Planning and Urban Development County Government of Trans-Nzoia namely Hon. Nasimiyu J. Mutama and the Director of Enforcement County Government of Trans-Nzoia namely Fredrick Ndubi.
 2. That costs be provided for.
3. The Applicant sought the foregoing Orders on the grounds that, on 27/02/2023, this Court restrained the County Government of Trans-Nzoia from entering or in any way whatsoever interfering with the



Plaintiff's entry and user of land comprised Title No. Kitale Municipality Block IV/443 (hereinafter 'The Suit Land) pending the hearing and determination of the Application on the 09/02/2023.

4. The Applicant pleaded that the extracted Order was served upon the Legal Officer of the Respondent on 28/02/2023, receipt thereof accordingly acknowledged by stamping.
5. It is the Applicant's case that on 7/03/2023, the County Government of Trans-Nzoia through its servants deliberately and wilfully disobeyed the Court Order by entering the suit land and pulling down all the standing development and taking away the building materials leaving behind an empty ground.
6. The Applicant urged the Court to uphold its dignity and respect by punishing the contemnors.

The Submissions

7. In its written submissions dated 26/06/2023 the Applicant submitted that disobedience of Court Orders is a serious matter since the whole administration of justice would be brought to scorn.
8. This Court's decision in ELC Case No. 23 of 2018, Racheal Wanjiku Tonui -vs- Enes Sitachi & 5 Others and the Court of Appeal's decision in Shimmers Plaza Ltd. -vs- National bank of Kenya (2015) eKLR were referred to wherein parameters courts take into account before committing a person for contempt of Court were given.
9. In the Court of Appeal decision it was observed:

...It is important however that the Court satisfies itself beyond any shadow of 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.
10. The Applicant submitted that the Respondent does not deny service of the Order and as such knowledge of the Order is not in issue.
11. On the issue regarding the Respondent's denial of being responsible for the demolition, the Applicant submitted that evidence shows that the destruction was effected by the respondent.
12. To that end, the Applicant referred to the Supplementary Affidavit of Jesca Maggy Kageha and Patris Agui Kevin and submitted that upon demolition, the County Government stationed their two guards in the suit land.
13. It was further the Applicant's case that the security guard on night duty on 7/03/2023 stated that he was harassed by three County (Government) officers who drove from the County offices just across the road and informed him that the County had already repossessed the land.
14. To further lend credence to the fact that it is the County that executed the demolition, the Applicant submitted that when Kevin Wanyama Walela was taking a video of the destruction using the Applicant's Director's phone, it was confiscated and he (Kevin Walela) was advised to go to the County Government offices the following day to collect it.
15. It was submitted that upon going to the Governor's office the following day, Fredrick Sululu Masinde was handed back the Director's phone.
16. The Applicant submitted that the four officers of the County Government to Trans-Nzoia ought to have ensured compliance with Court orders.



17. It was its case that the Replying Affidavit that was filed in April, 2023 by Oringe Waswa & Company Advocates ought to be expunged from the record since the said Firm filed the Notice of appointment of Advocates on 5/06/2023.
18. In conclusion, they stated that they had satisfied the threshold for contempt of Court and urged the Court to convict the four county officers of the contempt charge.
19. In the Supplementary Affidavit dated 30/10/2023, the Applicant challenged the Respondent's Replying Affidavits stating that the deponent did not disclose the source of the information contained therein.
20. It urged the Court, based on the decision in Alfa Motors Limited -vs- Toyota E.A Limited, to expunge the Affidavit.
21. It was further submitted that since the Affidavit was sworn on her behalf of Truphosa, she is not the one to whom the oath was administered and as such should be struck out.

The Response

22. The County Government of Trans-Nzoia challenged the Application through the Replying Affidavit of Truphosa Otwala, the County Secretary and Head of County Public Service. It was deposed to on 24/04/2023.
23. She deposed that she is a stranger to the allegations that any of the County's agents/officers were involved in any form of destruction or demolition of any manner.
24. She deposed that the County had never defied any court orders and the Applicant had not in any way attached evidence to prove its case. It was her case that the Application was incompetent, an abuse of process and a tactic to delay the hearing and determination of the main suit. She urged the Court to dismiss the Application with costs.
25. In response to the Applicant's supplementary affidavits Truphosa Otwala deposed in her Affidavit of 03/08/2023 that none of his officers were on the ground to harass anyone as alleged.
26. She deposed that the Governor never visited the site nor did he order any demolitions. It was her position that the County Government does not operate at night and his agents cannot be said to have executed the Orders of the Defendant to demolish the property.

The Submissions

27. The Defendant filed supplementary written submissions dated 04/08/2023. The said submissions make reference to 'initial submissions' which are not on record.
28. It was its case that the Application is bad in law and an abuse of process since the Governor and Jane Rose Mutama are improperly before the Court. The Defendant submitted that according to County Government Act, the Order from the Court ought to have been served upon the County Government not the Governor or the CEC for Lands.
29. The decision in St. Mary Academy Limited & Another -vs- Grace Njeri Mukora & Another; Yvonne Jeruto & Another (Contemnors) 2021 eKLR and the one in Civil Application NAI 5 and 48 of 2002, Anthony Francis Wareheim T/A Wareheim & 2 Others -vs- Kenya Post Office Savings were relied on where it was observed inter-alia that where there is a disclosed principal the agent is not to be sued.



30. The defendant stated that the Plaintiff had not proved its case to the required standard which is higher than the balance of probability and not far from beyond a reasonable doubt.

Issues for Determination

31. From the foregoing appreciation of the parties' rival arguments, the issues that arise for determination are:-
- i. Whether the Application is merited
 - ii. Who should bear the costs of the Application?

Analysis and Determination

i. Whether the Application is merited

32. A preliminary issue that I must address is the question whether the Applicant's Affidavit deposited to on 30/10/2023 is properly on record as raised by the Counsel for the Defendant in Court on 31/10/2023. As I do so, the parties herein are reminded that the duty of this Court is to do justice to all irrespective of social status: all, including the judge, are equal before the law and are answerable to it. That the Bible, for those who believe in it, cautions us all in Leviticus 19:15 that, "You shall do no injustice in court. You shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbour." This is in line to my oath of office and *the Constitution*. Therefore, as anyone appears before me they should remember that my focus is to be just true to my duty before God first and man as God requires of me and my oath of office does.
33. That said, learned counsel contended that it ought to have been a Replying Affidavit as opposed to a Supporting Affidavit. It was also his case that the Affidavit raised issues in ELC Case No. E21 of 2023 a file that does not relate to this matter.
34. I have perused the Affidavit. It draws the Court's attention to fact that the deponent of the Defendant is not the one who signed the Replying Affidavit.
35. Leave to file the said affidavit was granted by this Court on 12/10/2023. As to whether it is referred to as a Replying Affidavit, Supporting Affidavit or any other title I am of the view that the reference title is a matter of form and not substance which should go to the root of the document. Article 159(2)(d) of *the Constitution* of Kenya enjoins this Court to decide matters on substance rather than technicalities. In view of this, I find that the Affidavit is properly on record.
36. Having so found, I now turn to the substance of the Application.
37. From the outset, contempt of Court as defined by The Black's Law dictionary (Eleventh Edition) Thompson Reuters, 2019) is:
- "a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."
38. The legal underpinning of contempt of Court is provided for generally by The *Judicature Act* and specifically for cases before this Court, by Section 29 of the *Environment and Land Court Act* as read alongside Section 63(c) of the *Civil Procedure Act* and Order 40 Rule 3 of the Civil Procedure Rules 2010.



39. Section 29 of the *Environment and Land Court Act* provides 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.”
40. Section 63 of the *Civil Procedure Act* provides that:
- In order to prevent the ends of justice from being defeated the court may, if it is so prescribed, grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order his property be attached and sold.
41. Order 43 of the Civil Procedure Rules, 2010 provides 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 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”.
42. The determination of Contempt of Court Orders calls upon a Court to trace the sequence of events leading up to the claim for disobedience of Court Orders.
43. On 15/02/2023, the gate and the boundary wall of the suit land was destroyed, by officers allegedly from the Conty Government of Trans-Nzoia. Aggrieved by the destruction, the Applicant’s officer reported the matter to the Police Station vide Occurrence Book (O.B.) No. 33/16/02/23. He was advised that he pursues the matter through the civil process
44. Apprehensive of further destruction of his property, the Applicant lodged the Notice of Motion Application dated 27/02/2023 under Certificate of Urgency. It was supported by the Affidavit of Fredrick Sululu Masinde.
45. The Application sought the following Orders:
1. That the Application herein be certified as urgent and prayer No. 2 be granted in the interim.
 2. That while pending the hearing and determination of the Application herein this Hon. Court be pleased to issue a temporary injunction restraining the defendant through its agents and or servants from entering, committing acts of waste, hindering or in any way whatsoever from interfering with the Plaintiff’s entry and user of the land comprised in title No. Kitale Municipality Block IV/443.
 3. That upon inter partes hearing and determination of the Application herein this Honourable Court be pleased to confirm and extend the injunction order to such a time when the suit herein would be heard and determined.
 4. That costs be provided for.
46. Upon considering the foregoing Application, this Court issued the following Directions and Orders on 28/02/2023.
- a. ...
 - b. That the Application together with these Directions be served within three (3) days and an affidavit of service be filed not later than seven (7) days of this date.



- c. That the respondents to file responses and serve within 5 days of the service of the Application.
 - d. That a temporary injunction is hereby issued restraining the defendant through its agents and or servants from entering, committing acts of waste, hindering or in any way whatsoever from interfering with the Plaintiff's entry and user of the land comprised in title No. Kitale Municipality Block IV/443 pending the hearing and determination of this Application.
 - e. That the Application dated 27/02/2023 be heard virtually on 09/03/2023 at 8.30a.m.
47. From the Affidavit of George Mumali, the process server, deposed to on 28/02/2023, it is evident that this Court's Order dated 27/02/2023 and issued on 28/02/2023, marked as Exhibit FSM1 was duly served upon the Defendant.
48. The said Order was served together with the Directions of this Court, marked as Exhibit FSM2. They all bear the stamp of the Office of the County Attorney of the Defendant herein. The date is 28/02/2023.
49. Despite the Orders of this Court directing the Defendant to respond within 5 days, no response was filed. Instead, on the night of 7/03/2023, seven days after service of the Court Orders and Directions, all the buildings and perimeter wall standing on the suit land were destroyed.
50. In their response, the Defendant simply denied being involved in the destruction or demolition of the disputed property. It was its case that the Applicant had not satisfied the law on granting of the orders sought.
51. In a bid to demonstrate that it was the Defendant who did the demolition, the Applicant, in its further supporting affidavit deposed to on 15/06/2023 one, Fred Sululu Masinde, the deponent stated that his phone that was used to capture the footage of the demolition was confiscated. He gave a detailed account of how on the material date he gave his phone to one Kevin Wanyama Walela and requested him to take a video of the demolition, while Kevin took the video one of the defendant's officers confiscated it, the deponent and Kevin reported the matter to the CID office the following day and were given an OB number and while there they gave the number of the phone which was confiscated, the CID officer called the number and one Musa received it, he gave his number 0729355689 to the CID officer and informed the officer that the deponent should go to the Governor's Office and collect the phone, that the CID officer gave the individual another number of his, the following date on 09/03/2023 the deponent received a call from the person who asked him to go to the Governor's office to take his phone, he went but did not find him and was directed to Pazuri Hotel where the County Officers were having a meeting, he went there and called the number given earlier to the police and a gentleman by name Moses Mutange identified himself to him and gave him the phone. By that time the videos taken using the phone had been deleted.
52. The Supplementary affidavits of Jescar Maggy Kahega, Emmanuel Okello Wandera and Patris Agus Kevin further link the demolition of the suit property to the County Government.
53. In his Affidavit, Patris Agui Kevin, the Supervisor of Bravo Agencies Limited, the company providing security services to the Applicant, deposed that, on 15/02/2023, Jescar Maggy Kagehi, the duty officer informed him that the Governor County Government of Trans-Nzoia and County Executive Committee members for lands, Hon. Nasimiyu J. Mutama and other people were in the suit property claiming that they were there to repossess it.
54. As early as 15/02/2023, the evidence adduced by both the Applicant and the officers of Bravo Agencies place the Officers of the County Government at the demolition site.



55. The Defendant, through a Replying Affidavit of Truphosa Otwala sworn on at Nairobi on an unnamed date but filed on 07/08/2023 was in answer to the Affidavits of Patris Agui Kevin, Kevin Walela Fredrick Sululu Masinde and Emmanuel Okello Wandera all sworn on 15/06/2023. Save from simply rebutting that the persons referred to by the security officers of Bravo Agencies Limited were not officers of the County Government, the evidence of the said security officers who saw and personally knew of the officers on site was unchallenged. She stated that the Court order was served on strangers and not the Defendant, that Moses Mutange was a stranger and not an employee of the County, that no arrests were made following the Report by the Plaintiff to the police among others.
56. It is strange, contrary to the deposition that Moses Mutange was not an employee of the Defendant, that an order would be issued injunctioning the Defendant from demolishing a building, immediately after the order (only after seven days but before the lapse of the orders) strangers, including a Moses Mutange go to the premises at night, demolish the building, the stranger (Moses) confiscates evidence taking that is going on, directs the owner of the phone to the County Government offices and at the County the officers there seem to know the stranger and where he is and direct the owner of the phone to the exact location he is (Pazuri Hotel) where at the very moment the owner goes he finds the County Government officers convening a meeting there and the stranger is hanging around them or in the meeting and hands over the phone to the owner at that point. This argument about the stranger Moses Mutange not being of the County is too coincidental to be true. I find that the deponent, the County Secretary, lied on oath on this point. If Moses Mutange is not an employee of the County Government then there is absolutely good reason to fear that the County Government of Trans Nzoia rogue persons are using the name and offices or premises of the said County under its watch, to commit criminal acts and acts of impunity, and is unacceptable. Public officers of any institution ought to know the workers therein and busy bodies who use the institutions to fleece innocent persons. I would, on the strength of the Affidavit of the County Secretary the County of Trans Nzoia, that County Government takes a step to audit its employees because it does not make any sense and give any logic at all that a stranger can take actions which are so coincidental to the instant case as to be a lie! Since I have found the deposition of Truphosa Otwala on the 'stranger' fact to be untrue, I further find no tangible evidence controverting the deposition of the Affidavits of the persons who swore them on 15/06/2023. The inevitable conclusion I draw is that the persons who were identified as officers of from the County Government were positively identified.
57. The totality of the foregoing, in view of the fact that the Defendants do not dispute being aware of the Orders of 27/02/2023, is that there was wilful and flagrant disobedience of the Orders by the County Government of Trans-Nzoia.
58. The deliberate nature of the disobedience grossly undermines the dignity and judicial authority of this Court, the constitutional values of respect for the rule of law and principles of governance and equality before the law.
59. The significance of obedience of Court Orders was aptly discussed by the Court of Appeal in Civil Application No. 1 of 2017 (Ur 1/2018) Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government -vs- Miguna Miguna & 4 others [2018] eKLR. The learned Judges observed as follows:-

... When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all



courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities”.

60. As regards the County officer responsible for disobedience of the Court Orders, it is my find that it is the County Secretary to be at the heart of the fault. He/she is the principal officer tasked with the execution of the executive decisions of the County Government and should be answerable unless it is clearly shown that the act was specifically carried out by any other officer of the County Government directly and personally.

61. Section 44(3) of the County Government Act, Act No. 17 of 2012, outlines the functions of the County Secretary in the following manner;

“

“(3) The county secretary shall-
be the head of the county public service; be responsible for arranging the business, and keeping the minutes, of the county executive committee subject to the directions of the executive committee; convey the decisions of the county executive committee to the appropriate persons or authorities; and perform any other functions as directed by the county executive committee”.

62. In Judicial Review Case 22 of 2019, Republic -vs- County Secretary, Nairobi City County & 3 others; Koceyo & Co. Advocates (Ex Parte) [2020] eKLR the learned Judge made the remarks regarding responsibility of the County Secretary in satisfying Court Orders. It was observed:

Section 44 of the County Government Act in this respect establishes the office of the County Secretary who is secretary to the County Executive Committee, and is answerable for the operations of the County Executive, and whose functions include being head of the county public service.

63. Since Section 44(3)(c) of the County Government Act bestows upon the County Secretary the responsibility to convey decisions of the County Executive Committee to the appropriate persons or authorities, it follows that it the County Secretary’s duty that the communication and decisions of other authorities and agencies, including Court Orders, are conveyed to the respective County Executive Committee member or offices through the County Secretary. He/she is the one charged with the County’s executive’s duty of ensuring that such decisions are followed. In the circumstances, disobedience of Court Orders will be visited, in the first instance, at the County Secretary, as the important link between the outside world and the operations County Government.

64. I draw persuasion from the decision in Kenya Agricultural and Livestock Research Organization Kisii County Government & 2 Others; Patrick Lumumba & Another (contemnors) (2021) eKLR where it was observed:

“County Secretary’s role places him at the centre of the Count Government operations. Among the Orders granted by the Court was a permanent injunction restraining the Respondents, their agents, servants and or employees from encroaching upon, trespassing onto or in any manner howsoever form interfering with the suit property.



...as the officer responsible for the day to day operations of the county government, the county secretary is accountable and answerable for any acts of omission and commission attributable to the county government which may be in contempt of a valid Court Order.

There is no doubt that the 1st Respondent was aware of the Court order as the County Government was a party to the proceedings and they were represented by counsel. On the other hand, the county secretary was not a party to the proceedings although by virtue of his office he is deemed to have had knowledge of the Judgment”.

65. In the premises it is my conclusion that the Application is merited but to the extent only the named County Secretary of the County Government of Trans Nzoia is guilty of contempt of Court and I convict her accordingly. The prayers for the Governor, the County Executive Committee member of Lands Housing and Physical Planning and Urban Development County Government of Trans-Nzoia and the Director of Enforcement County Government of Trans-Nzoia are declined. Therefore, the following final orders hereby issue:

- i. The County Secretary of Trans-Nzoia County Government, Truphosa Otwala, is hereby found guilty of contempt of Court Orders issued on 27/02/2023.
- ii. An order is hereby issued directing the County Secretary County Government of Trans-Nzoia, Truphosa Amere, to attend the open Court on 01/02/2024 at 9.30 am, when this matter will be mentioned, for mitigation and sentencing.
- iii. The costs of the Application to be borne by the Defendant.

66. It is so Ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 18TH DAY OF JANUARY, 2024.

HON. DR. FRED NYAGAKA

JUDGE, ELC KITALE.

