



Simandi Investments Limited v Njeru & 2 others; Bwomawa & another (Intended Contemnors) (Environment and Land Case Civil Suit 1035 of 2016) [2024] KEELC 1144 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1035 OF 2016
OA ANGOTE, J
FEBRUARY 29, 2024**

BETWEEN

SIMANDI INVESTMENTS LIMITED PLAINTIFF

AND

ROSALINE MACHARIA NJERU 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY 3RD DEFENDANT

AND

GERSHOM OTACHI BWOMANWA, CHAIRMAN NATIONAL LAND COMMISSION INTENDED CONTEMNOR

KABALE ARERO, CHIEF EXECUTIVE OFFICER NATIONAL LAND COMMISSION INTENDED CONTEMNOR

RULING

1. The Plaintiff filed a Notice of Motion dated 1st April, 2021, seeking the following orders:
 - a. That this Honourable Court be pleased to find that Gershom Otachi and Kabale Arero as the Chairman and Chief Executive Officer respectively of the 2nd Defendant/Respondent and Rosaline Njeri Macharia the 1st Defendant herein be cited for contempt and Notice to Show Cause issued against them.
 - b. Spent.
 - c. That monies transferred from the 2nd Defendant/Respondent's Account Number 0010010XXXXXXX at the National Bank of Kenya Limited to Equity Bank Limited



Account Number 14062XXXXXXXXX amounting to Kenya Shillings One Billion (KShs. 1,000,000,000,000/-) to Kenya Commercial Bank Limited Account Number 12794322284 amounting to Kenya Shillings Five Hundred and Twenty-Two Million Two Hundred and Seventy-Seven Thousand Seven Hundred and Ninety (KShs. 522,277,790/-) and the Guardian Bank Limited amounting to Account Number 00110018016 amounting to Kenya Shillings Twenty-Five Million (KShs. 25,000,000/-) held in the names of the 1st Defendant/Respondent be deposited into this Honourable Court to await the hearing and determination of this suit.

- d. Withdrawn on 21st February, 2023.
 - e. That this Honourable Court be pleased to grant any other orders for the preservation of the subject matter of this suit.
 - f. That the costs of this Application be in the cause.
2. The Motion is supported by the Affidavits of Simon Nyamanya Ondiba the Managing Director of the Plaintiff, who deponed that by Orders of this court issued on 17th December, 2020, the 2nd Defendant was directed not to release any compensation on behalf of the 3rd Defendant to the 1st Defendant, her servant, agents or employees in respect to compulsory acquisition of L.R. No. 209/11293/1 (the suit property) until 2nd February, 2021 and extended to 4th March, 2021 when the Ruling was delivered in the matter.
 3. It was deponed by the Plaintiff's Director that the Ruling was delivered on 4th March, 2021 directing the 2nd and 3rd Defendants to withhold one half (1/2) of the total compensation payable in respect of the compulsory acquisition of L.R. No. 209/11293/1 pending hearing and determination of this suit and that whilst the orders were in force, on 1st March, 2021, the 2nd Defendant, acting on behalf of the 3rd Defendant, transferred Kshs. 1,547,277,590 to the 1st Defendant and that the 1st Defendant, who was represented in Court by counsel on 4th March, 2021 during the delivery of the Ruling did not disclose this fact.
 4. It was deponed by the Plaintiff's Director that court orders are not made in vain; that orders are meant to be obeyed and not second-guessed even if one was appealing to a higher court; that in the instant case, the orders were breached, flouted and disregarded with impunity and that the court should issue a Notice to Show Cause to the contemnors why they should not be punished for contempt of court, including invoking Article 10 of *the constitution*.
 5. The Plaintiff stated that the transfer of funds aforesaid was meant to defeat the ends of justice and render the proceedings herein an academic endeavour and that the 1st and 2nd Defendants, including the Chairman and the CEO of the National Land Commission (1st and 2nd alleged contemnors respectively) acted in contempt of court yet they were aware of the existence of the court orders and had knowledge thereof, as well as the pending Ruling on whether or not to release the funds meant for compensation in respect of the suit property.
 6. The 1st Defendant filed Grounds of Opposition in which she averred that the application is threadbare without any proof of contempt and goes against Section 107 of the *Evidence Act*; and that the Plaintiff had approached the court with unclean hands and ulterior motives.
 7. The 2nd alleged contemnor (hereinafter "the CEO") filed a Replying Affidavit in which she deponed that she is the Acting CEO of the 2nd Defendant (NLC); that the 2nd Defendant is created under Article 67 of *the Constitution* and established under the *National Land Commission Act* of 2012 which sets out its functions and powers; that the 1st Defendant, Rosaline Njeri Macharia, appeared before the



- enquiry to present her claim for compensation and that she presented both the original and copies of her ownership documents over the suit property.
8. It was deponed by the 2nd alleged contemnor, the CEO of the National Land Commission, that a competing claim over the suit property was submitted by the Plaintiff, who also had a Lease from the County Government of Nairobi for the suit property in its favour and that the 2nd Defendant made a full inquiry and determined via official search that the 1st Defendant was the rightful owner of the suit property.
 9. Consequently, it was deponed, a compensation award was made to the 1st Defendant and a notice to that effect was published as per Section 114 and payment made as per Section 115 of the Land Act. She deponed that the award to the 1st Defendant was paid to the 2nd Defendant to hold until the issue of ownership of the suit property was resolved.
 10. It was deponed by the CEO of the 2nd Defendant that the Office of the Deputy Inspector General concluded its investigations and found that the land belonged to the 1st Defendant and that based on this, the 2nd Defendant approved payment of the compensation award for the land to the 1st Defendant, which was done procedurally and within the law.
 11. In response to the allegations that she is in contempt, the CEO deponed that the application as drawn contravenes her right under Article 50(1) and (2) of the Constitution of Kenya; that she is a stranger to the proceedings as she was not a party to the suit when the orders were issued; that the application is ambiguous against her as there are no specific directives in the said orders against her and that the orders sought are untenable as she was not served personally served with the order.
 12. According to the CEO of the 2nd Defendant (NLC), she is a law abiding citizen and had she had knowledge of the order, she would have advised the 2nd Defendant not to act on payment of the said compensation and that in the circumstances and to meet the ends of justice, the application ought to be dismissed.
 13. The Attorney General opposed the application by way of Grounds of Opposition dated 2nd May, 2023 on grounds that the application as against the 2nd Defendant and the proposed contemnors is res judicata and that the power to punish for contempt is drastic and must be exercised with caution, and the right procedures must be followed.
 14. It was averred by the Attorney General that the Plaintiff must show that he has himself complied strictly with the procedural requirements and his failure to comply cannot be answered by a mere assertion that the other side was aware or ought to have been aware of what the order required them to do.
 15. The 1st alleged contemnor (hereinafter “the Chairman of NLC”) filed his Replying Affidavit sworn on 13th July, 2023 in which he deponed that the order of 17th December, 2020 was made when there were only two parties in this suit, the Plaintiff and the 1st Defendant; that the above mentioned order was issued temporarily barring the release of compensation by the 2nd Defendant until 2nd February, 2021 and that he was not personally served with the order and there is no Affidavit of Service as proof that he was served.
 16. The Chairman of the NLC deponed that he has now come to learn that the order was extended by the court on 2nd February, 2021; that the order was not extracted until 24th April, 2023 which is over 2 years after it was made and that the failure to extract the order is the reason it was not annexed to the Plaintiff’s Supporting Affidavit.



17. According to the Chairman of the NLC, neither the order of 2nd February, 2021 nor the one of 17th December, 2020 was served on him or brought to his attention; that the Plaintiff failed to serve the order of 2nd February, 2021 on him on time and that he had no means of knowing the order was made.
18. With regards to the order of 4th March, 2021 directing the 2nd and 3rd Defendants to withhold half the compensation amount, he deponed that the NLC was joined as a party to the suit on 4th March, 2021 as can be seen on the face of the said order; that until then, the orders made had been issued to the Plaintiff and the 1st Defendant as the only parties in the suit and that the orders of 4th March, 2021 were therefore not made in the presence of the 2nd Defendant.
19. The Plaintiff filed a Supplementary Affidavit in response to the issues raised and deponed that he took issue with the allegation that the 2nd Defendant carried out an inquiry vide Gazette Notice No. 6601 of 4th September, 2020; that he has shown his interest in the suit property since 2016 when he filed this suit and that the Plaintiff was not invited to ventilate its claim.
20. It was deponed that the process of compensating the 1st Defendant was prohibited by the court orders; that the suit has been alive since 2016 and the court is yet to determine the issue of ownership of the suit property; that the DCI's purported investigation of a matter without reference to the court is irregular and sub-judice and that the payment to the 1st Defendant was done on 1st April, 2021 yet the court order was in place.
21. It was deponed that the 2nd Defendant was served with the court order but disobeyed it; that since the orders was served, they knew about them; that knowledge is superior and supersedes personal service; that the CEO and the Chairman are the minds that direct the affairs of the 2nd Defendant while the 1st Defendant was the recipient of the money in defiance of the court order and that their Affidavits are therefore of no substance.
22. It was deponed that the matter is not res judicata; that the matter has not been determined by the ELC and as acknowledged by the Court of Appeal, it is still alive; that the Plaintiff complied with all procedural requirements in filing the application; that court orders must be obeyed and that there was no lacuna in the court order because it was extended at all times yet on 1st March, 2021 the entire compensation amount was paid.
23. In response to the Chairman's Affidavit, the Plaintiff's Director deponed that as an officer of the 2nd Defendant, he had authority to receive documents on behalf of the organisation and that the Plaintiff did not have to get into their offices and nudge the 2nd Defendant's officers.
24. It was deponed that the allegation that the order was extracted and served late is just a ploy to avoid accountability as they had knowledge of the order; that the Chairman is mischievously relying on the very same order served on the 2nd Defendant's officers to extricate himself from the allegations against him and that the order was issued against the 2nd Defendant and the CEO and the Chairman were under a duty to obey it whether or not the NLC was a party to the suit.
25. It was deponed by the Plaintiff's Director that the responses tendered lack merit; that the 2nd Defendant's actions were intended to pre-empt the judgment of the court and render it nugatory and that the court should allow the prayers in the application.

Submissions

26. The Plaintiff's advocate submitted that the 1st Defendant, the Chairman and the CEO of the 2nd Defendant are guilty of contempt because they were all aware of the existence of the court orders



- endorsed with a penal notice and the various extensions thereto and that court orders to stop payment were directed at the 2nd Defendant and was served on the Chairman's office at the 2nd Defendant's premises and duly received.
27. It was submitted that the order directing the 2nd Defendant to withhold the half payment went to the Court of Appeal who found that the trial court herein was exercising its jurisdiction to issue administrative directions; that the Court of Appeal only dealt with the issue of the one-half payment which in any event was authorised on 4th March, 2021 and that the issue in the instant application is that the entire compensation was paid to the 1st Defendant on 1st March, 2021 by the 2nd Defendant.
 28. It was further submitted that the purported inquiry of the matter outside the court and during the pendency of the suit herein amounted to sub-judice and was not aimed at resolving the matters but instead added fuel to the fire; that the 1st Defendant, the Chairman and CEO of the 2nd Defendant acted in defiance of the court order and ought to be punished and that the entire substratum of the suit has disappeared.
 29. Counsel for the Plaintiff submitted that court orders are not made in vain and that they must be obeyed at all times. Counsel relied on the cases of *Hadkinson vs Hadkinson* (1952) All ER 567, *Awadh vs Marumbu* (2004) KLR 458, *Kenya Human Rights Commission vs Attorney General & Another* (2018) eKLR and *Republic vs Chesang Resident Magistrate & Another ex Parte Paul Karanja Kamunge t/a Davisco Agencies & 2 Others*.
 30. It was further submitted that the alleged contemnors had knowledge of the existence of the court orders and that while initially, personal service was necessary, the law has changed and as it stands today, knowledge supersedes personal service; that in *Kenya Tea Growers Association vs Francis Atwoli & 5 Others*, Petition No. 64 of 2010, the court held that where a party has been served or has knowledge but ignores and incites others to ignore it, the threshold for contempt would have been met.
 31. The 1st Defendant's advocate submitted that the application does not meet the evidential threshold requisite for citing a party for contempt; that it is threadbare without proof whatsoever; that in *Kenya National Union of Nurses vs County Government of Meru & Another* (2022) eKLR, it was held that contempt proceedings call upon the party alleging contempt to put in a high degree of proof and that where he fails to discharge that burden, then the application must be dismissed.
 32. The 1st Defendant submitted that the Plaintiff has approached this court with unclean hands as he has not established ownership of the suit property; that the Plaintiff has forged documents which cannot establish ownership; that the application was filed to pressurise the 1st Defendant to concede to the Plaintiff's extortion as it has no bona fide claim in the main suit and that the Plaintiff is stalling the main suit by prosecuting applications so as to vex the 1st Defendant.
 33. The Attorney-General submitted that it is fundamental that a person has a right to be heard before an adverse decision is taken against him; that as a result, proceedings that affect a party's life and property should not continue in their absence and that where an adverse order is made against a party who is affected by it without notice to him/her, the order is liable to be set aside *ex debito justitiae* to uphold the integrity of the judicial process.
 34. With regard to service of the orders, counsel submitted that Order 52 Rule 3(1) of the Supreme Court Practice Rules makes it mandatory for the alleged contemnor to be served and failure to do so renders the application defective and that no order will be issued for committal of a person, unless he has been personally served with the order.



35. The Attorney General submitted that the power to punish for contempt is drastic and ought to be exercised with caution; that limiting a person's liberty is a bold step that should be taken jealously and that the Plaintiff has not met the threshold of showing that the proposed contemnors disobeyed any order issued by this Court.
36. The 1st alleged contemnor's (the Chairman) advocate submitted that there is no legal or factual basis for holding him in contempt of Court, as he was not a party to the suit when the orders were issued; that there are three sets of orders, those of 17th December, 2020, those of 2nd February, 2021 and those of 4th March, 2021 and that it is not absolutely clear which of the above three (3) Orders he breached.
37. It was submitted by counsel that as regards the orders of 17th December, 2020 and 2nd February, 2020, he and the 2nd Defendant were not parties to the suit, neither was he personally served with the orders; that there is no proof of service of the said orders, despite allegations to the contrary and that the order of 2nd February, 2021 was extracted 2 years after it was issued and there is no evidence of service on the 2nd Defendant or the Chairman thereto.
38. With regards to the orders of 4th March, 2021, counsel submitted that it is by the said order that the 2nd Defendant became a party to the suit; that there is an ambiguity regarding directions on payment between this order and the one issued on 2nd February, 2021 and that there is no evidence that the payment was made while the Chairman and the 2nd Defendant had knowledge of the existence of the order as there is no proof of personal service thereof.
39. It was the submissions of the Chairman's advocate that the orders to withhold half payment were made at a time when unbeknown to the court, payment had already been made to the 1st Defendant and that any alleged non-compliance with the three (3) orders by the 2nd Defendant and/or the Chairman was purely un-intended and excusable and they ought not be held responsible as it occurred independent of the will and corporate will of the Chairman or the 2nd Defendant.
40. Counsel submitted that without justifying the payments made, the court should question whether an order extracted 2 years after its making can be the basis of a contempt application; that the court should also consider whether annexing the order to the Plaintiff's Supplementary Affidavit can cure the requirement of personal service on the person required to comply with it and that bearing in mind that the 2nd Defendant and its Chairman were not parties to the suit as at 1st March, 2021, the court also ought to consider whether in the circumstances, the Plaintiff has met the threshold for the 2nd Defendant and its Chairman to be cited for contempt.
41. In conclusion, it was submitted that the orders were unclear, ambiguous and vague in that they initially sought to prohibit payment of the full amount while the order of 4th March, 2021 sought to halve the amount of compensation withheld although the suit was pending before the court.
42. The 2nd alleged contemnor (the CEO)'s advocate submitted that the foundation for punishing for contempt of court is Section 5 of the *Judicature Act* and Section 63 of the *Civil Procedure Act* as read with Order 40 Rule 3(1) of the Civil Procedure Rules and that the consideration is whether the breach was committed deliberately and mala fides.
43. Counsel for the CEO admitted that the clarity and unambiguity of the order was not in contention; that the payment was not deliberate or mala fides because the CEO was not aware of the orders of this court as she was not a party to the suit and that the payment was made as a result of a legitimate cause and in strict compliance with the relevant statute.



Analysis and Determination

44. The background to this application is that the Plaintiff herein filed the suit seeking a determination as to who was the proprietor of LR. No. 209/11293/1, the suit property, and to whom compensation ought to be made for the compulsory acquisition of the suit land by the Kenya National Highway Authority. At the time of institution of the suit, there were only two parties, the Plaintiff and Rosaline Njeri Macharia who was the Defendant (now the 1st Defendant).
45. The Plaintiff then filed an application dated 11th December, 2020 seeking to stop the payment of the compensation amount which had been forwarded to the 2nd Defendant (NLC) for payment pending hearing and determination of the application, and eventually the suit. On 17th December, 2020, the court issued injunctive orders on a temporary basis barring/prohibiting the payment of any part of the compensation amount to the 1st Defendant until 2nd February, 2021.
46. On 2nd February, 2021, the court heard counsel for both parties, and directed that the interim orders issued on 17th December be extended until 4th March, 2021 when it would deliver its Ruling on the application dated 11th December, 2020.
47. In his Ruling of 4th March, 2021, Okong'o J ordered the National Land Commission (the 2nd Defendant) and Kenya National Highway Authority (the 3rd Defendant) to withhold one-half of the total compensation payable in respect of the compulsory acquisition of the suit property and pay out the other half to the 1st Defendant, pending the hearing and determination of the suit.
48. Unbeknown to the court, as at the date of the said Ruling, the 2nd Defendant had already paid the entire compensation amount to the 1st Defendant on 1st March, 2021, a few days before the Ruling was delivered. For this reason, the Plaintiff has brought the instant application to have the 1st Defendant as well as the Chairman and CEO of the 2nd Defendant cited for contempt.
49. The Defendants have raised the defence of res judicata. The Black's law Dictionary 10th Edition defines the term "res judicata" as:-
- "An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."
50. Under our laws, the substantive law on res judicata is found in Section 7 of the [Civil Procedure Act](#) which provides as follows:
- "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"
51. For a matter to be res judicata, the matter in issue must be similar to that which was previously in dispute between the same parties, the same having been determined on merits by a court of competent jurisdiction. The court in the English case of Henderson vs Henderson (1843-60) All ER 378, observed thus:
- "...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward



their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

52. It is clear from the above definition that for a matter or a subsequent application to be found to be res judicata, a court of law should always look at the decision claimed to have settled the issues in question in the previous application or suit as against the instant one to ascertain;
- i. What issues were really determined in the previous suit or application;
 - ii. Whether the issues in the instant suit or application are the same as in the subsequent suit or application and were covered by the earlier decision;
 - iii. Whether the parties are the same or are litigating under the same title; and
 - iv. Whether the previous suit or application was determined by a court of competent jurisdiction.
53. The Attorney-General in his Grounds of Opposition has pleaded that the instant application is res judicata *Simandi Investments Limited vs Rossaline Njeri Macharia, National Land Commission & Kenya National Highways Authority, Civil Application E104 of 2021*. It is common ground that from the citation of the Appeal case, the parties in Civil Application E104 of 2021 are the same.
54. However, the issues in Civil Application E104 of 2021 and the issues in the current application are not the same. In the Court of Appeal application, the dispute that the Appellant raised for determination by the court was that of withholding half of the total compensation payable in respect of the compulsory acquisition of LR. No. 209/11293/1 and paying out the other half to the 1st Defendant pending the hearing and determination of the suit.
55. The court itself framed the issue for determination as “Whether the Applicant has satisfied the requirements necessary for granting an order for injunction.”
56. In the instant Motion, the Plaintiff is seeking to have the alleged contemnors cited for contempt. It is apparent that the current application arises out of the initial order made on 17th December, 2020 and extended on 2nd February, 2021. The act complained of, that of releasing the full amount of compensation to the 1st Defendant was done on 1st March, 2021.
57. It is therefore safe to say that the current application is not res judicata. The issues raised herein are entirely different from those raised in Civil Application E104 of 2021. They were neither in issue in the previous application before the Court of Appeal nor have they been dealt with by any other court of competent jurisdiction.
58. The Black’s Law Dictionary (Ninth Edition) defines contempt of court as:-
- “Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
59. Kenyan courts possess the inherent power to enforce compliance with their orders through sanctions. The [Contempt of Court Act](#) having been declared unconstitutional in Kenya Human Rights



Commission vs Attorney General & Another [2018] eKLR, the instructive provision remains Section 5 (1) of the *Judicature Act* which grants the High Court (and courts of equal status) and the Court of Appeal the power to punish for contempt.

60. Further, Section 29 of the *Environment and Land Court Act* provides that:

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

61. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to punish litigants for contempt of court when they fail or refuse to obey court orders is aimed at protecting the effectiveness and legitimacy of the judicial system. As to the test applicable when a court is determining an application for contempt, *Matavo J. in Samuel M. N. Mweru & Others vs National Land Commission & 2 Others* [2020] eKLR held that:-

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“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 wilfulness 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.”

62. The first question to be determined with regard to contempt of court is whether there was a valid order capable of being obeyed, or disobeyed. This limb also requires that the order must be clear and unambiguous. The Chairman of NLC has submitted that there are three sets of orders and therefore, even if he had been served, he would not have been sure how to comply with them.

63. There is therefore need to analyse the orders of the court to determine whether there was an order capable of being obeyed, and if there is any ambiguity in that order.

64. On 17th December, 2020, after hearing both counsel for the Plaintiff and the 1st Defendant virtually, the court granted the following orders:

- “1. That the Defendant shall file her response to the Plaintiff's Application within 14 days from the date hereof.



2. That the Plaintiff shall be at liberty to file a supplementary affidavit should it be necessary within 14 days from the date of service of the Defendant's response.
 3. That the parties shall hereafter file skeleton submissions limited to Eight (8) pages for each party.
 4. That the Notice of Motion dated 11th December, 2020 shall be heard on 2nd February, 2021.
 5. That until 2nd February, 2021 on a temporary basis an order of injunction is issued barring and/or staying the release of any compensation by the National Land Commission on behalf of Kenya National Highway Authority to the Defendant/Respondent herein by herself, her servants, agents and/or employees in respect to compulsory acquisition of the land known as L.R. No. 209/11293/1.”
65. Of import to the current application is item 5 thereof. The orders of 2nd February, 2021 were made in the presence of both counsel for the Plaintiff and the then Defendant (now 1st Defendant), and the orders were issued after hearing counsel. The order of 2nd February 2021 as extracted has only four items and reads:
- “ 1. That ruling on 4th March, 2021.
 2. That interim orders in force extended until then.
 3. That leave to appeal granted.
 4. That the proceedings be supplied upon payment”
66. On 4th March, 2021, the court delivered its Ruling on the application dated 11th December, 2021. By the said Ruling, the 2nd Defendant (National Land Commission) and the 3rd Defendant (Kenya National Highway Authority) were joined to the suit. The said ruling also issued an order directed at the 2nd Defendant and the 3rd Defendant, to withhold payment of one-half (1/2) of the total compensation payable in respect of the compulsory acquisition of all that parcel of land known as L.R. No. 209/11293/1 pending hearing and determination of the suit.
67. As submitted by the Plaintiff, there was no lacuna which would have allowed the payment of the said compensation to the 1st Defendant as the orders were extended and were always in force at the time the payment was made. In any event, the orders of 2nd February, 2021 which are enumerated above were not different in any element as to cause confusion.
68. The orders are clear and unambiguous. On 17th December, 2020, the court granted the injunction on a temporary basis pending the hearing and determination of the application. On 2nd February, 2021, the application not having been determined, the court extended its interim orders earlier given until the date fixed for delivery of the ruling. The order of 4th March, 2021 was made after the court had heard the parties on the application and the court rendered itself on the application.
69. Indeed, the order of 4th March, 2021 was made on the assumption that the 2nd Defendant (NLC) had abided by the earlier order barring the release of the whole payment. Had the 2nd Defendant complied with the earlier order made and extended as set out above, it would have had no difficulty in obeying the further orders of 4th March, 2021 of only releasing half the amount of money it was holding to the 1st Defendant.



70. The argument that the orders were unclear and ambiguous therefore fails. This court finds that there were in existence clear orders capable of being executed and/or obeyed by the Defendants.
71. As to the issue of service of the orders of 17th December, 2020, the alleged contemnors have all averred that for the court to hold them guilty of contempt of its orders, it must be shown that they were personally served with the orders in question. That argument would have passed in 2004 when Lenaola J made the decision in *Kariuki & Others vs Minister for Gender, Sports, Culture and Social Services & Others* (2004)1 KLR 588, 595.
72. Notably, at that time, the jurisprudence in Kenya was that personal service of the order was paramount. However, the law has changed and as it stands today, knowledge of an order supersedes personal service and for good reason. In *Re Tuck Murch vs Loose More* (1906) Ch 692 it was observed that “knowledge is higher than service. Service is unnecessary where there is knowledge”.
73. Indeed, in the year 2012, the same judge who made the determination in the Kariuki Case (*supra*) held in *Kenya Tea Growers Association vs Francis Atwoli & 5 others* [2012] eKLR, as follows:
- “On this issue, our Courts seem to have moved steadily towards the position that although Order 52 Rules 3 and 4 of the Supreme Court Practice Rules of England would point towards personal service as a factor in determining contempt, in fact knowledge of an order is higher than service.”
74. In the case of *Kenya Tea Growers Association vs Francis Atwoli* (*supra*) Lenaola J (as he was then) went on to find that he was satisfied that the contemnor had knowledge of the court order, and allowed the application for contempt. The rationale behind this change appears to be the need 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 deliberate, wilful, contemptuous and cynical disobedience.
75. This position has been endorsed repeatedly by the Court of Appeal. For instance, in *Shimmers Plaza Limited vs National Bank of Kenya* [2015] eKLR, the court held as follows:
- “The dispensation of service under rule 81.8 (1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to wilfulness and mala fides disobedience. This Court in the Wambora case (*supra*) affirmed the application of these requirements.
- We now revisit the issue of service. Was there service of the order said to have been disobeyed on the respondent? There is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect.
- In that respect, this case can be distinguished from *Justus Kariuki Mate & Another vs Hon. Martin Wambora* (Wambora case) *supra* cited by learned counsel for the applicant.
- On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person



before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra).

Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of Basil Criticos Vs Attorney General and 8 Others [2012] eKLR pronounced himself 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”

76. Furthermore, Order 5, Rule 8(1) of the Civil Procedure Rules states that;

“Wherever it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

77. The above provision takes cognizance of the fact that personal service may not be achieved in some circumstances. For these reasons, this court will not hesitate to hold that personal service is not mandatory.

78. It is clear from the face of the order that on the date the first order of 17th December, 2020 was made, and extended on 2nd February, 2021, the 1st Defendant's counsel was present in court. That being so, it follows that the 1st Defendant was aware of the order of the court not only on the date the order was made, but also when the money was released to her on or about 1st March, 2021.

79. Both the Chairman and the CEO of the National Land Commission have stated that they were unaware of the existence of the suit and the Court orders when the payment of the compensation was made. It is also their case that they were not served with the court orders as the 2nd Defendant who they work for was not a party to the suit at the time the orders were made, and therefore the action of the 2nd Defendant to pay the full compensation to the 1st Defendant cannot be said to be contemptuous.

80. It is not true that the 2nd Defendant had no knowledge of the suit. There is an Affidavit of Service sworn by Mwololo Kilauni, where he states that he received the pleadings in this case as well as an order detailing the directions on the hearing of the application dated 11th December, 2020 which gave rise to the orders complained of herein.

81. He deponed that he proceeded to the 2nd Defendant's premises and served the pleadings and order. The same was received and stamped. He returned a copy of the order endorsed with the 2nd Defendant's stamp bearing the words “Secretary/CEO” which he annexed to the Affidavit of Service. This court therefore concludes that the 2nd Defendant's Chief Executive Officer knew of the existence of this suit and the initial order of 17th December, 2020.

82. This court has perused and seen the Plaintiff's annexure ‘SNO 1’ which is a copy of the order of 17th December, 2020 bearing the stamp of 2nd Defendant that is endorsed with the word “Chairman.” Neither the Chairman himself nor the CEO have disputed the genuineness of the said stamp or alleged that it is not a stamp of or associated to the 2nd Defendant. The assertion by the Chairman therefore that it is not clear who exactly was served with the court order of 17th December, 2020 is not true.

83. However, the order of 17th December, 2020 was to last until 2nd February, 2021. Although the said order was extended by the court on 2nd February, 2021, there is no evidence on record to show that the



- extended order was ever served on the Chairman and the CEO of the 2nd Defendant, who were not parties to the suit.
84. Having not served the Order of 2nd February, 2021, the two alleged contemnors cannot be accused of contempt of court considering that the money was released to the 1st Defendant on 1st March, 2021. Indeed, and for emphasis, the order which was served on the NLC Chairman and CEO lapsed on 2nd February, 2021. Having not been served with the order of 2nd February, 2021 which extended the initial order, they cannot be held liable for having released the money on 1st March, 2021 to the 1st Defendant.
85. Although the 1st Defendant’s counsel, and by extension the 1st Defendant, was aware of the orders of 17th December, 2020 and 2nd February, 2021, the said orders were not directed at her, but to the National Land Commission, “barring it from releasing any compensation on behalf of Kenya National Highway Authority to the Defendant in respect to compulsory acquisition of the land known as L.R. No. 209/11293/1.”
86. That being the case, and the money having been released to the 1st Defendant’s bank accounts without any evidence of her role in the said release of the money, it cannot be said that the 1st Defendant disobeyed the order of the court of 17th December, 2020 and 2nd February, 2021.
87. Had the extended order been served, it is the 2nd Defendant (NLC) and its officials who would have been found to be in contempt of the order of the court. However, as already stated above, the extended order of 2nd February, 2021 was never served on the 2nd Defendant, which was not a party to the suit then.
88. Let me conclude by stating that the release of the money to the 1st Defendant does not exonerate the National Land Commission (the 2nd Defendant) and the Kenya National Highway Authority (the 3rd Defendant) from paying the Plaintiff monies that the court may award it, if at all, after trial.
89. Indeed, in the event the court comes to the conclusion after trial that it is the Plaintiff who is entitled to the compensatory amount, the 2nd and the 3rd Defendants will have to compensate the Plaintiff and pursue any monies paid to the 1st Defendant separately, or in this suit. The Plaintiff will not be under any obligation to pursue the 1st Defendant for the money released to her on 1st March, 2021.
90. Although the Plaintiff has prayed for an order to issue directing the 1st Defendant to deposit half the money released to her to this court, no evidence was presented to this court to show that the money released is still being held in the 1st Defendant’s accounts. Considering that courts do not issue orders in vain, and in view of what I have stated in the preceding paragraph, I decline to allow that prayer.
91. For the reasons I have given above, I dismiss the application dated 1st April, 2021 with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Otieno holding brief for Maosa for the Plaintiff

Mr. Ochieng Oduol for the 1st Defendant

No appearance for the 2nd Defendant



Mr. Allan Kamau for the 3rd Defendant
Court Assistant - Tracy

