



REPUBLIC OF KENYA



Namini & 2 others v Town Council of Eldama Ravine & 14 others (Environment & Land Case 786 of 2012) [2024] KEELC 4232 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4232 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 786 OF 2012**

JM ONYANGO, J

MAY 16, 2024

BETWEEN

**SAMUEL KIPLAGAT NAMINI 1ST PLAINTIFF
MARK KIMUTAI YAGAN 2ND PLAINTIFF
ISAAC KIPRUTO BETT 3RD PLAINTIFF**

AND

**THE TOWN COUNCIL OF ELDAMA RAVINE 1ST DEFENDANT
MARY KEMBO 2ND DEFENDANT
SMITH KIPLECH TANUI 3RD DEFENDANT
JOSPHAT KIYEND 4TH DEFENDANT
ERIC MALEI 5TH DEFENDANT
UCHUZI SUPERMARKETS LTD 6TH DEFENDANT
CYRUS THUKU 7TH DEFENDANT
MAMA KIUMBA 8TH DEFENDANT
MAINA 9TH DEFENDANT
CHARLES CHEBET 10TH DEFENDANT
REUBEN CHELAGAT 11TH DEFENDANT
MICHAEL KIMANI 12TH DEFENDANT
BARINGO COUNTY SECRETARY 13TH DEFENDANT
THE CHIEF LAND REGISTRAR 14TH DEFENDANT
NATIONAL LAND COMMISSION 15TH DEFENDANT**



RULING

1. The 10th - 12th Defendants/Applicants have placed before this court a Notice of Motion Application dated 11th May, 2023 which seeks the following orders;
 - i. This matter be certified urgent and the same be dispensed with in the first instance.
 - ii. That this Honourable Court be pleased to summon Bismark Kosgeito show cause why he should not be committed to civil jail for a period of up to 6 months for blatantly disrespecting this Honourable Court by disobeying its orders dated and issued on 21st November, 2013.
 - iii. The Respondents be ordered to pay costs of this application.
2. The Application is founded on the grounds on its face and on further grounds adduced in the Supporting Affidavit of even date sworn by Reuben Chelagat, the 11th Defendant. Mr. Chelagat deponed that the suit properties herein constitute public utilities being a market, bus terminus and stage that the Applicants have been in actual and physical possession of since 2010. He averred that on 21st November, 2013 the Court issued injunctive orders restraining the Plaintiffs from evicting the Applicants and their members therefrom pending hearing and determination of the suit. That on the 17th day of April, 2023 they served the said order on the alleged Contemnor/Respondent through his office as the Eldama Ravine Town Administrator after he informed them of plans to evict them from the suit property.
3. Mr. Chelagat deponed that in an act of impunity and contrary to the said order, despite service thereof, the Respondent summoned the Applicants on 10th May, 2023 and ordered them to remove their structures and business establishments before 15th May, 2023. He averred that they immediately reported the matter at Eldama Ravine Police Station. He asserted that the Respondent has threatened to continue interfering with the suit properties despite knowledge of the order and is therefore in voluntary contempt of the court's order aforesaid. That the Respondent's actions are aimed at changing the nature of the suit property and defeating the substratum of the suit. Mr. Chelagat deponed that court orders are not issued in vain hence the Respondent's actions are deliberate and pronged at lowering and demeaning the dignity and authority of this court. For these reasons, it is necessary to allow this application so that the rule of law can prevail.
4. The Respondent, Bismark Kipkurui Kosgei, filed a Replying Affidavit sworn on 2nd June, 2023. He urged that the Application is incompetent, devoid of merit and brought in bad faith and ought to be dismissed with costs to the 1st and 13th Defendants. He deponed that vide Public Notice dated 15th December, 2022 Baringo County informed members of the Public that all illegal development on road reserves will be removed within 3 months. That the Applicants and their members through Mr. Gilbert Kimongo wrote to the Town Planner vide letter dated 27th March, 2023 and received by the Respondent on 31st March, 2023 requesting an amendment of the 15 Metre Mosque-Market-Eldama Ravine Girls Road to 9 Metres to accommodate some of their members who are on the road reserve. That since the survey exercise had commenced he planned a stakeholders' meeting for 3rd April, 2023.
5. The Respondent deponed that he attended the survey exercise alongside the Physical Planner and County Surveyor. That it was established that 35 traders of the Eldama Ravine Business Community who are supposed to be within Land Parcel No. 498/654 and 655 had structures encroaching onto the 15 Metre Mosque-Market-Eldama Ravine Girls Road Reserve (hereinafter referred to as "the road reserve"). Pursuant to this, he published a Public Notice dated 31st March, 2023 for a meeting with



the Bondeni Containers Business Community to be held on 3rd April, 2023 ensuring each member received it via their cell phone numbers. He indicates that the 10th to 12th Defendants/Applicants were present at the meeting which started at 1.30pm on the set date and were part of the consensus reached on that day. That the 11th Defendant addressed the meeting as Chairman of the Bondeni Business Community giving cognisance of the Gazette Notice of 15th December, 2022 and urging members to cooperate with the Respondent's Office. The 10th and 12th Defendants also addressed the meeting confirming the encroachment and requesting more time for their affected members to plan themselves better and relocate.

6. The Respondent further deponed that Mr. Kimongo asked about his letter dated 27th March, 2023 requesting a reduction of the road reserve. The Respondent deponed that he agreed to the extension of the notice but informed them that the issue of reduction of the road reserve was not his mandate, he could not confirm on that but he advised that public participation on the same was necessary and as at now the road reserve is still 15 Metres. The Respondent pointed out that the road reserve borders Land Parcel No. 498/654 and 655, which are the subject of the order of status quo issued on 21st November, 2013 and the litigation herein. Further, that the said order is not in respect of the 15 Metre road reserve. In addition, he deponed that until the Physical Planner approves the amendment of the road reserve from 15 Metres to 9 Metres, the said 35 Members are encroaching on the road reserve. The Respondent deponed that in any event, the Applicants herein voluntarily moved from road reserve after the meeting of 3rd April, 2023. He asserted that he is thus not in contempt of and has not violated the order as alleged.

Applicants' Submissions

7. Pursuant to directions of this Court issued on 7th June, 2023 the Applicants filed their submissions on 22nd September, 2023. Counsel outlined the elements required for a party to succeed in an application for contempt as were set out in *Samuel M.N. Mweru & others v National Land Commission & 2 others* [2020] eKLR, which are 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.”
8. Counsel then submitted that the order issued on 21st November, 2013 is very plain and clear with no ambiguity at all. He submitted that the order was issued over the suit properties in dispute being Land Parcels No. 498/654 and 498/655 pending the outcome of the suit herein which is yet to be determined thus satisfying the first element. Counsel submitted that the Respondent had full knowledge of the orders having been served on 17th April, 2023 as evidenced by the return of service sworn on 20th April, 2023. He relied on Embu ELC No. 351 “A” of 2015 (O.S.), *Abida Werimba Mwaniki & 2 others* [2017] eKLR (sic). Counsel argued that despite being served with the orders, the Respondent ordered the Applicants and their members to remove their structures and businesses before 15th May, 2023 contrary to the said orders. That this is a clear indication that the Respondent deliberately disobeyed court orders that were well within his knowledge.
9. Counsel submitted that court orders are not issued in vain and the Respondent's conduct is aimed at lowering and demeaning the dignity and authority of the court (*Hon. Basil Criticos v A.G & 8 Others*



[2012] eKLR). He urged that the Respondent is guilty of wilful disobedience and must be punished accordingly. Counsel relied on *Shimmers Plaza Ltd v National Bank of Kenya Limited* [2015] eKLR on the importance of respecting court orders. The Applicant's Advocate added that they had proved the Respondent's contempt beyond reasonable doubt therefore the application herein is merited and ought to be allowed. He also relied on Section 29 of the *Environment and Land Court Act* which prescribes a penalty of 2 years imprisonment or a fine of KShs 20,000,000/- or both and asked that this punishment be meted out to the Respondent. He referred the court to the case of *Suleiman Murunga v Nilestar Holding Ltd & 6 Others* [2019] eKLR.

Respondent's Submissions

10. The Respondent's Submissions were filed on 25th October, 2020 with Counsel arguing that the order issued on 19th November, 2013 and dated 21st November 2013 is with regards to the stay of execution of a judgment and decree issued on 17th July, 2013. That the said Judgment/Decree was in relation to Land Parcel Nos. 498/654 and 498/655. However, in the instant Motion, the Applicants have filed a contempt application against the Respondent with regards to their voluntary relocation from the road reserve which they had encroached. He submitted that the instant Motion was thus an afterthought aimed at perpetuating the encroachment on the road reserve. On his part, Counsel relied on the Canadian Case of *Carey v Laiken* [2015] SCC 17 (16th April, 2015) for the elements of civil contempt which are listed as:
 - i. The order alleged to have been breached must state clearly and unequivocally what should and should not be done. This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
 - ii. The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
 - iii. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.
11. The Respondent's Advocate reiterated that the road reserve borders the two properties subject of the order and the litigation herein as well as the Judgment/Decree of 17th July, 2013, that is L.R. No. 498/654 and L.R. No. 498/655. That during the voluntary relocation process, the status quo order over the said properties have been complied with and no eviction took place on the said properties, hence the contention that the present Application is a clear abuse of the court process. Counsel submitted that the Applicants have not proved existence of orders restraining their relocation from the road reserve or, that being aware of any such orders regarding the road reserve, the Respondent chose to disobey them. In addition, Counsel contended that the relocation of the Applicants was voluntary pursuant to the meeting of 3rd April, 2023 where they consented to relocate from the encroached land within 30 days. Counsel submitted that before a person is cited for contempt, it must be proved that he actually disobeyed the court orders (*Peter K. Yego & Others v Pauline Wakesa Kode*, Acc No. 194 of 2014). Counsel urged that the Applicants have failed to prove deliberate disobedience of orders by the Respondent and the Application dated 11th May, 2023 ought to be dismissed with costs to the Respondent for lack of merit.



Analysis And Determination

12. I have considered the Application herein and Supporting Affidavit thereto, the Affidavit in Reply as well as the rival submissions of counsel and authorities relied on and the only issue for determination is whether the Respondent is in contempt of the order issued on 1st November, 2013.
13. Vide Plaint dated 13th May, 2008 the Plaintiffs herein sought among other prayers, a declaration that they were the lawful owners of Land Parcel Nos. 498/654 and 498/655. The matter was heard to its conclusion and judgment delivered in favour of the Plaintiffs on 17th July, 2013 declaring them the owners of the suit properties. Among the prayers allowed is one for eviction of the Defendants and/or their agents or servants from the suit properties. Pursuant to this, the 1st Defendant/Applicant filed an Application dated 15th November, 2013 seeking orders of stay of execution of the Decree and stay of the eviction orders. The 1st Defendant sought to have the judgment set-aside as it wished to re-open its case citing its inability to adduce evidence for reasons better explained in that Application. The said Application came up for hearing on 19th November, 2013 and Justice Sila Munyao allowed the application, essentially issuing stay of execution orders which were extracted on 21st November, 2013 and are the subject of the instant application.
14. 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.”
15. The power of courts to punish for contempt of court is derived from the *Constitution*, Section 5 of the *Judicature Act*, Section 29 of the *Environment and Land Court Act* 2011 (Revised Edition 2015) and Section 63 of the *Civil Procedure Act* as read together with Order 40 of the *Civil Procedure Rules*. This power is aimed at protecting the dignity and the authority of the court. The court therefore is clothed with the power to punish those who undermine its authority, whether in or out of court, to ensure the rule of law is upheld and the fair administration of justice.
16. Further explaining the need to punish for contempt, in the case of *Econet Wireless Kenya Limited v Minister for Information and Communication of Kenya Authority* [2005] eKLR the Court stated as follows: -

It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void.



17. The standard of proof in applications for contempt was outlined in *Mutitika v Babarini Farm Limited* [1985] eKLR as follows:

“In, *Re Breamblevale Ltd* [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063, had this to say,

‘A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt.’

With the greatest possible respect to that eminent English judge, that proof is much too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined. We agree with Mr. Khaminwa’s submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved ‘with such strictness of proof ... as is consistent with the gravity of the charge’.”

18. Before a court punishes for contempt, it must be satisfied that the key ingredients required to prove an application for contempt of court have been met. These ingredients are set out in the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR which is cited by the Applicants, where the court held that:

“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’.”

19. The first limb is that the terms of the orders in question are clear, unambiguous and are binding on the Defendant or Respondent as is the case here. In a bid to explain this element, the Court in the *Samuel M.N. Mweru Case* (*Supra*) stated that it is basic to our Constitution that a person should not be deprived of liberty if reasonable doubt exists about the essentials of that order. A look at the orders alleged to have been violated by the Respondent is a necessity. Annexure 3 of the Applicants’ Supporting Affidavit is an extract of the relevant orders dated on 21st November, 2013. The orders read as follows:

- i. That the Application dated 21st November, 2013 is certified urgent.



- ii. That a conservatory order be and hereby issued to preserve the suitlands known as L.R. No. 498/654 and L.R. No. 498/655 pending the hearing and determination of this application inter[partes and the main suit.
 - iii. That status quo be maintained pending the hearing and determination of this application and the main suit.
 - iv. That pending the hearing and determination of this Application and this suit the Defendants, by themselves, their agents and/or servants be and are hereby restrained through a temporary injunction from evicting the Plaintiffs, alienating, transferring. Trespassing, invading, encroaching and/or dealing in any manner with the suit property known as L.R. No. 498/654 and L.R. No. 498/655.
 - v. That an order of inhibition is hereby issued stopping further dealings, registrations and transactions over those parcels of land known as L.R. No. 498/654 and L.R. No. 498/655 (Eldama Ravine Town).
 - vi. That inter-partes hearing be on 27th February, 2014.
20. It is against this order that a complaint of disobedience has been raised by the Applicants. A reading of it confirms that the order was issued in relation to the two parcels of land namely L.R. No. 498/654 and 655 a fact which the Applicants have appreciated in their submissions. These orders were issued with the aim of preserving the two parcels of land and to maintain the status quo pending the hearing of the application inter-parties. I find that indeed there was a valid Court order issued by this Court. As the Applicants have also appreciated, the wording of the said order is very clear and unambiguous thus satisfying the first limb of the test.
21. The second ingredient is whether the Respondent herein was served with or was made aware of the order issued on the 21st November, 2013. As a general rule, a party ought not be cited for contempt unless a copy of the order he is alleged to have violated has been served personally on them or it can be shown that the person had knowledge of the order, and courts have held that knowledge supersedes personal. See *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, where the Court of Appeal pointed out that:
- “...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... 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 purposes of contempt proceedings. For instance, Lenaola, J. in the case of *Basil Criticos v 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’.”
22. Annexure “RC4” of the Applicant’s Supporting Affidavit is a Return of Service sworn by one Vincent Otieno Ogutu, indicating that he served the order personally on the Respondent and he received it, perused it but declined to sign. That aside, the Respondent herein did not deny that he was served with the order or that had been made aware of it. Most importantly, the Respondent works for the 1st



Defendant on whose Application the order was issued. Due to these facts, the Court is convinced that the Respondent was not only served but was also aware of the order of 21st November, 2013.

23. The third element is that the alleged contemnor must have acted in breach of the terms of the order. Now, the Applicants talk of oral summons by the Respondent of 10th May, 2023 where they were informed that they needed to vacate the premises by 15th May, 2023 but there is no proof of the alleged summons or the directive to vacate the suit properties. I have noted also that despite there being two properties in this suit and the Applicants mentioning that they are in occupation thereof, neither the Supporting Affidavit nor the Motion itself mention the parcel of land where the alleged breach occurred. In fact, paragraph 5 of the Supporting Affidavit is cleverly worded to avoid mentioning what property or parcel of land the Applicants were asked to vacate from. At paragraph of the Supporting Affidavit, the Applicants allege that they reported the Respondent's actions to Eldama Ravine Police Station, however they have not attached proof of the said report or even indicated the OB No. of this purported event.
24. On 3rd July, 2023 the Applicants were granted leave to file a Supplementary Affidavit but they did not do so. As matters stand, the averments in the Respondents Replying Affidavit are uncontroverted. Which is why the Respondent's version of events seems more believable, that the events leading up to this Application only relate to 15 Metre Mosque-Market-Eldama Ravine Girls Road Reserve. The Respondent is adamant that the said order was in relation to Land Parcel Nos. 498/654 and 498/655 which land the 1st Defendant had not touched in compliance with the order issued by this court. Notably, the Applicants did not deny this claim. They failed to take advantage of the leave granted by this court to file a Supplementary Affidavit and rebut the claim that the actions of the Respondent do not touch on the suit properties. Even in their Submissions, the Applicants refused to comment on this allegation by the Respondent, insisting only that they were asked to vacate the suit properties with no evidence whatsoever of any directive to that effect.
25. The Respondent however, argued to the effect that the said order did not bind the 1st Defendant or the Respondent working under it in their dealings with the road reserve which borders the two parcels of land. Nowhere in the order of 21st November, 2013 is the 15 Metre road reserve mentioned. I have seen the Public Notice issued by the County Government of Baringo on 15th December, 2022 which is the Respondent's Annexure "BK4". Paragraph 3 thereof reads;

“any illegal developments on deferred/reserve land, settlement land, road reserve, riparian areas, on public land and on Government land should be removed within 3 months (90) days form the date of this notice, failure to which it shall be removed at the developers cost without further notice whatsoever”.

The Notice did not indicate that individuals occupying the suit properties were to be evicted. It is very clear that the affected parties were those who had put up developments on the properties whose description was given in the notice, which the Respondent urges the 15 Metre road reserve falls under.

26. Even in the letter dated 27th March, 2023 by Gilbert Kimongo, which the Applicants have not denied, he makes reference to the 15 Metre road reserve and not the suit properties herein. The 10th Defendant/Applicant herein co-signed that letter as well as the attached list of 35 names alleged to be the people occupying the road reserve. I have also seen the minutes of the meeting of 3rd April, 2023. From the Minutes annexed to the Respondent's Replying Affidavit as "BK6", indeed the meeting convened was with regards to relocation from the 15Metre road reserve. The Applicants herein were part of that meeting. The 11th Defendant/Applicant who is the Chair of the Bondeni Container Business



Community made his comments at the meeting, indicating that he took cognizance of the Notice but sought an extension of the time within which to comply. None of the members raised any concerns about the order of 21st November, 2013. In fact at no point were the two portions, Land Parcel Nos. 498/654 and 655 ever discussed.

27. In the circumstances, the Respondent cannot be said to have disobeyed the order of 21st November, 2013, either wilfully or not. In *Peter K Yego & others v Pauline Wekesa Kode*, (Acc No. 194 of 2014, the court stated that; “it must be proved that one had actually disobeyed the court order before being cited to contempt”. I am also guided by the case of *Katsuri Limited v Kapurchand Depor Shah* [2016] eKLR, where the court cited the South African case of *Kristen Carla Burchell v Barry Grant Burchell* (Eastern Cape Division case No 364 of 2005)a, that:

“(5) In order to succeed in civil contempt proceedings the applicant had to prove the terms of the order, knowledge of these terms by the respondent, and a 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.”

28. To be clear, the 15 Metre Road Reserve only borders the suit properties, it does not form part thereof and there has been no allegation that it passes through the suit properties. It is a completely separate and distinct piece of land from the suit properties and where it is concerned, there are no orders in place capable of being disobeyed. I am not persuaded by the assertions of the Applicants that the Respondent is guilty of contempt in this instance. For the avoidance of doubt, the order of 21st November, 2013 over Land Parcel Nos. 498/654 and 498/655 still stands and any act of evicting the Applicants from the said portions will amount to contempt of court. For these reasons, this court finds that the order of court issued on 21st November, 2013 has been implemented and therefore there is no reason to summon the Respondent because he has not violated the order.

29. With regards to the issue of costs, it is trite that they follow the event. However, although the Respondent has succeeded, I note the delicate nature of the situation herein. The frustration of the Applicants and their members who may be facing uncertainties with regards to relocation to pave way for the expansion and upgrading of the road. For that reason, I will not condemn them to pay the costs of this application. Consequently, the Applicants’ motion dated 11th May, 2022 is dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 16TH DAY OF MAY 2024

.....
J.M ONYANGO

JUDGE

In the presence of;

- 1. Yego for the 1st Defendant/Respondent**
- 2. No appearance for the Plaintiffs**
- 3. No appearance for the 10th – 12th Defendants/Applicants**

Court Assistant: Mr. Brian K.

