



**Kimechwa v County Land Adjudication & Settlement, Trans Nzoia & 3 others; Simeon (Interested Party) (Environment & Land Petition E002 of 2023) [2024] KEELC 4713 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4713 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND PETITION E002 OF 2023  
FO NYAGAKA, J  
JUNE 13, 2024**

**BETWEEN**

**JOSEPH KIMECHWA ..... PETITIONER**

**AND**

**COUNTY LAND ADJUDICATION & SETTLEMENT, TRANS  
NZOIA ..... 1<sup>ST</sup> RESPONDENT**

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

**THE LAND REGISTRAR, TRANS NZOIA COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**ALICE MOKEIRA SIMEON ..... INTERESTED PARTY**

**RULING**

1. This matter came up before this Court on 11/06/2024 for mention to confirm whether the Directorate of Criminal Investigation (DCI) had prepared a report of their findings regarding the authenticity of signatures alleged to be of the Interested Party but disputed by or denied by the Petitioner. Learned counsel for the Petitioner informed the court that the DCI had not finalized the report and requested for one more week to complete the process. Immediately after learned counsel gave the information, learned counsel for the Interested Party made an oral application by which he prayed that the Interested Party be permitted to weed maize she had planted on the suit land, which was growing thereon and had reached weeding stage. She pleaded that without the orders then the maize would overgrow.



2. The background and genesis of the application can be properly understood against the backdrop and proceedings herein following the institution of the instant suit. On 22/12/2023, *vide* a Notice of Motion dated 20/12/2023 the Petitioner moved this court for conservatory orders restraining the Interested Party, her family, agents and or servants or any other person claiming interest or acting through the Interested Party from charging, leasing, selling, moving onto, ploughing or planting on the land comprised in Title Number Trans Nzoia/Zea/292 situate at Zea Scheme of Kwanza Sub-County pending the hearing and determination of the Petition inter partes, and in the interim, a similar order be granted.
3. When the matter was placed before the duty Judge on 27/12/2023, the learned judge made orders that urgency was disclosed, the matter be served within 10 days, the Respondent to reply within 7 days, hearing be on 23/01/2024, the status quo to be maintained, and no person to be evicted.
4. Through an Affidavit of Service sworn by the process server, one Jackson Nyongesa Simiyu, on 30/12/2023 he deposed that on 30/12/2023 he received a copy of the court order issued on 29/12/2023 and proceeded to the suit property in the company of one Mr. Ruto, a police officer. Upon arrival, they met one Mr. Dan, the manager or caretaker of the subject property on behalf of the Interested Party. He introduced himself and his mission and served the court order. The manager accepted service, retained a copy of it but declined to sign.
5. On 23/01/2024 the application came for inter partes hearing when both the Petitioner's and Interested Party's learned counsel appeared before this Court, but in the absence of learned counsel for the 1<sup>st</sup> to 4<sup>th</sup> Respondents. On that date, learned counsel for the Petitioner sought leave to respond further to the replying affidavit already filed and served through the office of the Interested Party's counsel. Learned counsel for the Interested Party did not object hence the Court gave the Petitioner 14 days to file a supplementary affidavit. Learned counsel for the Respondent too were given 14 days to file a Further Affidavit if need be. Further the Court directed that the parties submit within 14 days and scheduled the inter partes hearing which for 06/03/2024.
6. Worthy of note is that on 07/03/2024 the Petitioner moved the Court through a Notice of Motion brought under certificate of urgency for prayers that the Interested Party be found to have committed contempt of Court or disobeyed the orders the Court made on 27/12/2023, and she be committed to civil jail for a period of six months or less. The grounds were that the Interested Party was served with the orders but she proceeded onto the disputed land which had all along been in possession and occupation of the Petitioner, constructed a new fence thereon and interfered with the previous fences and boundaries. She fenced the land, ploughed it and was then about to plant crops for the season. Upon the court reading the application, it directed that the same be served before the close of business the following day and the parties appear in person before it on 13/03/2024, when the matter would be mentioned for further orders.
7. Come the 13/03/2024 both learned counsel for the Petitioner and the Interested Party appeared but the Petitioner did not turn up. Then counsel for the Petitioner indicated that he served the court's directions and filed an affidavit of service to that effect but the Interested Party was still on the farm. On her part, learned counsel for the Interested Party acknowledged the service on 11/03/2024 but she (counsel) could not secure their attendance of the Interested Party and requested to be given another mention date. The court granted leave to the Petitioner to file a further affidavit. However, it directed that the matter be mentioned the following day for the Applicant/Interested Party to appear in person on 14/03/2024. Both counsel and the Interested Party appeared. It was upon that appearance that learned counsel for the Interested Party submitted that her client ploughed the suit land on 11/03/2023, which was three days before that date. Surprised by this submission, and bearing in mind



that the Petitioner's learned counsel had submitted the previous day that the Interested Party was busy planting while the parties were in Court, this prompted the court to call upon the Interested Party to take the witness stand and state briefly on oath the allegations in the affidavits in support of the application for contempt of Court and the other allegations.

8. The Interested Party stated that she was not informed of the orders of status quo, that she had an advocate whom she had instructed to represent her. She admitted that she had sent people to the suit land, they erected a fence, and it was true that after the fence was erected, she ploughed the land. But she denied that there were other crops on the land that she cleared in the process of ploughing. She admitted further that she had sent the people the previous day on the 13/03/2024 to plant on the suit land and they completed the planting.
9. It was upon the disclosure of the information above that the Court repeated orally that the import of the orders of status quo were clear, and therefore the Interested Party should stop any further activity on the land, including weeding of the maize she planted in contravention of the orders of status quo. These are the orders that the Interested Party now prays the Court to vary through the instant oral application that is before me.
10. To back this prayer, learned counsel for the Interested Party submitted that he had raised this issue earlier on 22/05/2024 when the court directed that all parties appear on 11/06/2024. Further, that counsel had perused the court record, particularly the proceedings of the 14/04/2024 which showed that the interested party had informed the court that as at the time of service of the order, she had already planted maize. Also, the affidavit of service sworn by the process served on the 30/12/2023 indicated that he had served one Mr. Dan, who was not the Interested Party, yet the orders of status quo were supposed to have been effected on the Interested Party in person. He argued further that if the court found that his client was not in contempt, the maize crop would have been damaged, and she would have no recourse. That it was the reason she prayed that the court intervene and in the interest of justice remedy the situation.
11. Learned counsel for the petitioner opposed the application. She submitted that the Interested Party planted the maize in March 2024, and that was the date she was summoned to court but did not turn up. Further, that the Interested Party had stated then that she was busy planting the maize. Thus, learned counsel prayed that the application dismissed and the Application for contempt be heard first.
12. I have considered the application. In essence, the application seeks to review the orders of the status quo which was to be maintained pending the hearing of the Application dated 20/12/2023. This is because, in terms of the Petitioner's contention, the Interested Party allegedly started fencing the land some time in December, 2023 causing the Petitioner to approach this Court. That during the pendency of the orders impugned, the Interested Party moved onto the suit land. Particularly, his complaint was to the effect that the instant application seeks excuse and immortalize the Interested Party's actions which were allegedly done in contravention to the orders of status quo.
13. I have considered the law, the submissions and the facts of this matter as per the record which is summarized above. Particularly, I have considered whether or not there was an order of status quo issued before the actions of the Interested Party in regard to the fact of ploughing and planting of crop on the suit land. The instant prayer by the applicant calls for a fine, delicate and careful consideration of one fact: a finding on whether the maize alleged to be growing on the suit land on account of the Interested Party was planted during the pendency of orders barring her from doing so. This fact should be weighed carefully *vis-à-vis* the allegations that the Applicant is in contempt of the orders of the Court as prayed in the Application dated 01/03/2024 and the actual act of planting the maize. The determination of the instant application should not and is not in any way to be a pointer of the decision



to be made regarding the application dated 01/03/2024. This Court must separate the two issues so as not to prejudice the decision, hence parties.

14. In the instant application the issue is about maize that was planted and is overgrowing wedding. In the application for contempt the complaint is that in contravention of the order of status quo the Interested Party moved onto the suit land, destroyed the older fence, erected a new one and ploughed, destroying or clearing the Petitioner's crops that there before. Thus, the issue of the Interested Party's maize on the land is not in contention in the application for contempt. Rather, as will be seen below, it is a development after the filing of the Application. Whether it is a continuation of disobedience or not is a matter that may be determined in another application. Therefore, this Court is only concerned in the instant application with whether it should permit the Applicant to weed or tend the maize or not.
15. I am of the view that only one issue is for determination. It is whether there is sufficient information, and therefore reason, to warrant the review of the orders of this Court regarding the directions that the status quo hearing be maintained.
16. It must be recalled that where orders of status quo are issued, they serve a similar purpose as those of injunction or conservatory ones: they are aimed at maintaining the subject matter in a state the Court wishes it to be as per the request of a successful party at that instant they are made. For that reason, it goes without saying, and must be recalled, that in order for a court to vary its orders or decision the party moving it has to do so in accordance with Section 80 of the *Civil Procedure Act* and or Order 45 of the *Civil Procedure Rules*, 2010. These provisions oblige the party to prove that there are sufficient reasons to warrant the court to review its orders. Additionally, the Applicant has to demonstrate to the satisfaction of the court that he or she has moved it without delay. Also, in relation to such a matter as the instant one where the court has exercised its discretion and issued orders, it is my humble view that the Applicant ought to come to court with clean hands in order to avail himself or herself the exercise of the discretion of the court.
17. Order 45 Rule 1(1) of the *Civil Procedure Rules* provides as follows:
  1. any person considering himself aggrieved-
    - a. by a decree or order from which an appeal is allowed but which no appeal is preferred; or
    - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
18. Section 80 of the *Civil Procedure Act* provides as follows:

“any person who considers aggrieved-

  - a. by a decree or order from which an appeal is allowed by this *Act*, but from which no appeal has been preferred, or
  - b. by a decree or order from which no appeal is allowed by this Act may apply for review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.



19. Thus, Order 45 of the *Civil Procedure Rules* 2010 is explicit that a court can only review its orders if the following grounds exist:
- a. There must be discovery of a new and important matter or evidence which after the exercise of due diligence was not within the applicant’s knowledge and which could not therefore produce at the time the order was made; or
  - b. There was a mistake or error apparent on the face of the record; or
  - c. There were other sufficient reasons
20. Further, an application of this nature must be made without unreasonable delay. The Applicant did not submit that she moved the Court under these provisions. Nevertheless, under Article 159(2)(d) of the *Constitution* of Kenya, 2010 this Court considers that failure an incurable deficit which is a mere technicality. In any event Order 51 Rule 10(2) of the *Civil Procedure Rules* provides that “No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.” For the instant application, this court regards the infraction a technicality that does not go into the substance.
21. In the instant case, it is not in dispute that on 27/012/2023, the Court made an order for status quo to be maintained the suit land. Further, it is not in dispute that service of that order was made. However, in relation to that service learned counsel for the Interested Party submitted that it was affected upon one Dan who was not the Interested Party and that it ought to have been effected on the Interested Party. Additionally, that on the 14/03/2024, the said party herself stated on oath that she was unaware that orders had been issued, and that it was the reason she proceeded to carry out the activities on the suit land.
22. Regarding service of orders on parties in order for them to be effective or calling for obedience, this Court draws from the deep wisdom, knowledge, reasoning and holdings of courts about allegations of contempt of Court. In in *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR where he stated:

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

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

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

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



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

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

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

24. Again in *Basil Criticos v Attorney General and 8 Others* [2012] eKLR Lenaola J. (as he then was) stated 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."

25. What I understand the authorities above to mean is that the issue is not about personal service of an order of the Court but knowledge of the same. The knowledge may be express, that is to say, personal service, or constructive, that is to say again, receipt of information about the order through media, a friend, the party's lawyers, and many other sources. Thus, turning to the instant application, it must be recalled and noted from the record that after the service of the orders that were extracted on the 29/12/2023. The Interested Party who alleges now that she was not served with the order instructed learned counsel, who is still on record for her to file a response to the application and he did so by filing Replying Affidavit which she swore on 17/01/2024 and filed on 19/01/2024. In brief in it she responded that she had read and understood the application dated 22/12/2023 and wished to reply thereto. Then he proceeded to respond accordingly. On the 23/01/2024 both learned counsel for the instant Applicant and for the Petitioner appeared before me. A number of directions were granted on that day in their presence as stated in paragraph.

26. It is clear to me from the Affidavit of Service sworn on 30/12/2023 that the order was served on someone alleged to be the caretaker of the Applicant. Subsequent to that the Applicant filed a response aimed at replying to the allegations of the Petitioner. What do the preceding facts import? One it is that as at the 17/01/2024, when the Interested Party responded to the application filed in December, 2023 she was aware of the orders of the Court. She could not have known of the existence and contents of the application she responded to unless she received knowledge of the same through service of a document related to it, and the said document can only be the order served on her on 30/12/2024 as the only document, as per the Affidavit of Service.



27. While she denies that she was not aware of the orders of status quo the affidavit of service sworn by one Jackson Nyongesa is clear that he served copies of the order on 30/12/2023, in the company of a police officer, on one Dan the caretaker of the Interested Party. The question that follows then is. If it would be taken to be true that the Interested Party was unaware of the order of status quo, how did she in the first place get to know that the instant petition had been filed and required a response thereto before the 23/01/2024 thereby instructing her learned counsel to come on record for her as of 19/01/2024, and appear before the court as directed earlier? It is my humble finding that the said Mr. Dan was served with the order, and he in turn handed over the same to the Interested Party thereby making her aware of its existence. Furthermore, even if the order could not have been served on her personally as contended by her lawyer, it should not be lost sight of the fact that her learned counsel attended court on 23/01/2024. He took directions on the hearing of the application and by then, even if his client was not aware of the orders, he too became aware that orders of status quo had been issued. Being her agent for the purposes of the instant matter then and to the present time he was under a duty to inform her that they existed. If he did not, the mistake can only lie on him squarely. As the Interested Party's agent his knowledge of the order made it known constructively by his client, but she chose to ignore them.
28. In his submissions, learned counsel for the Interested Party attempted to convince this court that by the time the ploughing and planting had been done the Interested Party was unaware of the existence of the orders of status quo. I have dispelled this argument and dismissed it. Further, the statement the Interested Party made on oath on 14/03/2024 gives contrary information to that of her learned counsel. And further, contrary to the submission by counsel the Interested Party stated that she planted the maize on the 13/03/2024. What the orders of status quo subsisting by then? Yes. Was the Interested Party aware that she was barred from proceeding to do anything on the suit land? Yes. Was she supposed to disobey the orders of status quo and proceed to carry out the planting of the maize in issue? No. Should this court permit any party who disobeys its orders to benefit from acts of disobedience? No. Therefore, can the Court permit the Interested Party to proceed to tend the maize she planted on the suit land contrary to the orders of the court? No.
29. The Interested Party argued that the food Policy of this country requires that for its sustenance she contributes to it. Well, that is correct, but it must be in a lawful manner. Thus, her argument that she be permitted to weed the maize so that she too furthers the Policy is misplaced in so far as it relates to the act of planting the maize contrary to the orders of the court. The question the Interested Party confronts is, does the food policy of this country require that the parties disobey laws and court order in particular? No. Therefore, will the existence of the food policy be used as an excuse to disobey court orders? Never.
30. The instant prayer by the Interested Party is one that is designed to test and shake the Court to its central foundation, authority, dignity and integrity. I say so because, the Applicant having deliberately disobeyed the orders of the Court, even when she was summoned to appear refused to do so only to appear after she would have completed her acts of disobedience, now calls on the court to weigh her interest of reaping from a disobedience and that of an adverse party who pleaded helplessly with the Court to stop the said party from disobeying its orders. The Petitioner and those who witnessed the acts of disobedience now wait to see how the Court acts when faced with such a disobedience. Similarly, in balancing the said interests, the whole world is watching to see whether the Court shall bend its authority and lean towards agreeing with a party who acts with impunity. Lastly, both adults and the children of this nation depend on this Court to instill social and legal discipline in its citizens and institutions and the respect of authority, with judicial authority being among them.
31. This Court shall not be the first one to permit and encourage any authority to be 'punctured', desecrated and sacrificed at the altar of a carefully designed and effected short-term gain of an



individual: even long-term gain cannot be permitted to interfere with such foundational principle, value and belief.

32. Has the Interested Party placed any sufficient reason, before this court to warrant it to review its orders that were made earlier barring her from carrying out any activities on the suit land pending the hearing and determination of the application before the court. She has not. It is for those reasons that this Court finds no merit in the application and dismisses it with the no order as to costs.

33. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

**In the presence of:**

**1. Ms. Lichuma-----for the Petitioner**

**2. Nakitare-----for the Interested Party.**

