



**Kenya Institute of Business & Technology & 2 others v Kandie & 2 others (Environment & Land Case E026 of 2023) [2024] KEELC 7048 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7048 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E026 OF 2023  
JM ONYANGO, J  
OCTOBER 29, 2024**

**BETWEEN**

**KENYA INSTITUTE OF BUSINESS & TECHNOLOGY ..... 1<sup>ST</sup> PLAINTIFF  
CALVIN CHEPCHUMBA MASE ..... 2<sup>ND</sup> PLAINTIFF  
PROF PHILIP KIPKEMBOI RONO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**LEAH KANDIE ..... 1<sup>ST</sup> DEFENDANT  
DAVID KIPKEMBOI KANDIE ..... 2<sup>ND</sup> DEFENDANT  
DAVID KIPSANG KIPYEGO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. What is before me for determination is the Plaintiffs' Notice of Motion dated 18<sup>th</sup> January, 2024 seeking that the Defendants, namely Leah Kandie, David Kipkemboi Kandie and David kipsang Kipyego do show cause why they should not be cited for contempt for blatantly disobeying the court order issued by thie Honourable court on 22<sup>nd</sup> November 2023.
2. The application is supported by the affidavit of Professor Philip Kipkemboi Rono sworn on 18<sup>th</sup> December 2023 in which he deposes that the Defendants despite being aware of the order of injunction dated 22<sup>nd</sup> November, 2023 as per the annexed affidavit of service, have blatantly ignored and /or refused to comply with it by trespassing on the suit property to the detriment of the Applicants.
3. He further deposes that the Defendants have threatened the Applicants not to use the suit property by placing a sign post with the following remarks:

“Notice!!!, Notice!!!



This land was not sold. this is a high voltage zone

XXX???"

4. He contends that the Defendants' conduct is intended to lower the dignity and authority of the court. He adds that it is contempt of court to disobey a court order as the same are not issued in vain. He prays that the defendants be cited for contempt of court and punished accordingly.
5. The application is opposed by the Defendants through the Replying Affidavit of Leah Kandie sworn on 20<sup>th</sup> February 2024. She denies that they were served with the order of injunction as alleged in the Affidavit of Service sworn by one Kenneth Mutoro.
6. She further depones that the second Defendant died on 2<sup>nd</sup> November, 2023 as indicated in the Death Certificate annexed to her affidavit and that her advocate is in the process of applying for substitution.
7. She adds that the 3<sup>rd</sup> Defendant is out of the country and it is therefore not true that the Process Server met him at Mugundoi within Uasin Gishu County. She has annexed copy of the 3<sup>rd</sup> Defendant's passport indicating that he left the country on 7<sup>th</sup> November 2022.
8. She argues that the order of injunction is a negative order which cannot be implemented as the said order was issued when they were already in the suit property while the Applicant was not in possession of the suit property. Further, that since the order did not require them to vacate the suit property, they have not disobeyed the said order.
9. She depones that the 3<sup>rd</sup> Plaintiff lied on oath that they had constructed a school on the suit property thus misdirecting the court. She further depones that the signage on the suit property was in existence before the suit was instituted.
10. The application was canvassed by way of written submissions and but only the plaintiff filed their submissions.

### **Plaintiff's Submissions**

11. In their submissions dated 27<sup>th</sup> September 2024 learned counsel for the Plaintiff submitted that the Defendants were served with the court order issued on 22.11.23 stopping the Defendants from interfering with the Plaintiff's parcel of land. He contends that the said order was not ambiguous and was capable of enforcement. It was his contention that the said order was served upon the defendants by a duly authorized Process Server who subsequently filed his Affidavit of Service in Court indicating that he had served the Defendants and the OCS Cheptiret Police Station.
12. With regard to the elements of contempt counsel relied on the case of *Cecil Miller v Jackson Njeru & another* (2017) eKLR.
13. The singular issue for determination is whether the Respondents should be held to be in contempt of court.
14. The court obtains its power to punish for contempt of its court orders at Section 5 of the *Judicature Act*.



15. The Court of Appeal in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* (2014) eKLR, found that the English law on committal for contempt of court is applied in Kenya by virtue of section 5(1) of the *Judicature Act* which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

16. In addition to that, this court has special jurisdiction to punish for contempt donated under Section 29 of the *Environment and Land Court Act*, which provides that:-

“29. Offences

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.”

17. In the case of *Samuel M. N. Mweru & others v National Land Commission & 2 others* [2020] eKLR, the court observed that:-

It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is 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, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.

34. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors. The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.
35. A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with...
18. In order to make a case for civil contempt the applicant must prove certain elements which were set out in the case of *Cecil Miller v Jackson Njeru* (2017). The court cited the book entitled “*Contempt in Modern New Zealand*” which sets out the elements of Civil contempt as follows:
- That the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant.
  - That the defendant had knowledge of or proper notice of the terms of the order
  - That the defendant acted in breach of the terms of the order.
  - That the defendant’s conduct was deliberate.



19. In the instant case, it is not in dispute that the terms of the injunction were clear and unambiguous even though the Respondent claims that the order was unenforceable. It is important to recall that the reason why the Applicant sought the orders of injunction is because the Respondents who had previously been evicted from the suit property were making attempts to go back to the suit property. They can therefore not use their unlawful return to claim that they are in occupation and that the order of injunction cannot be enforced against them.
20. The second element that the Applicant must prove is that the defendants had knowledge of or proper notice of the order. The defendants have argued that they were not properly served with order and that they were therefore not aware of it. They have faulted the Affidavit of Service sworn by one Geoffrey Kipkemboi Koech in which he claims that he served Defendants on the 22<sup>nd</sup> day of February 2024. In particular, they have pointed out that the 2<sup>nd</sup> defendant died on 2.11.23 and that the 3<sup>rd</sup> defendant is out of the country and they could therefore not have been served as indicated in the Affidavit of service.
21. Although previously the jurisprudence was that one must establish personal service, this has since changed. Thus, as the law stands right now, knowledge of an order supersedes personal service. See *Kenya Tea Growers Association v Francis Atwoli & others* (2012) eKLR, where the court held that:-

“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. It is common ground that neither of the alleged contemnors was ever directly served and that leaves the issue whether they had knowledge of the order prior to 18<sup>th</sup> October 2010. On that issue, I have the evidence of Isaac Kiprotich Maswai, Philip Kibii Cheruiyot and Emmanuel Ng’etich before me. They all stated, on oath, that they heard Francis Atwoli uttering words whose import was to confirm that not only was he aware and had knowledge of the Order but he also challenged it as having been given without jurisdiction. Cheruiyot went further to produce a transcription of words that he recorded as having been uttered by Atwoli and which I have reproduced above.”
22. In the instant case, the Applicant annexed an Affidavit of service to his Supporting Affidavit indicating that the Respondents were served with the order of injunction on 27<sup>th</sup> November, 2023. The 1<sup>st</sup> Respondent has refuted this assertion in her Replying Affidavit by stating that the 2<sup>nd</sup> Defendant died on 2<sup>nd</sup> November, 2023 as indicated in the annexed copy of the Death Certificate. She has also annexed a copy of the 3<sup>rd</sup> Defendant’s passport indicating that he has not returned to Kenya since then. This casts some doubt on the averments in the Affidavit of service.
23. I am therefore unable to rely on the said Affidavit of Service to prove that the Respondents were served with the court order.
24. On whether the Respondents deliberately acted in breach of the court order, the 1<sup>st</sup> Respondent has argued that prior to the filing of this suit, they were in actual occupation of the suit property as they had erected their homestead hereon and they were ploughing the suit property. This is a contested issue which can only be proved during the hearing.
25. In view of the foregoing I am unable to find that the Respondents have deliberately acted in breach of the court order. Consequently, the application is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 29<sup>TH</sup> DAY OF OCTOBER, 2024.**

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**J. M. ONYANGO**

**JUDGE**

In the presence of;

1. No appearance for the parties

Court Assistant: Brian

