



**Odiango v Kamunde & another (Environment & Land Case
137 of 2017) [2024] KEELC 7363 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7363 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 137 OF 2017**

BN OLAO, J

NOVEMBER 7, 2024

BETWEEN

MOSES ONYANGO ODIANGO PLAINTIFF

AND

REBECCA KAMUNDE 1ST DEFENDANT

GERALD OTHIENO OLAISA 2ND DEFENDANT

RULING

1. The dispute between Moses Onyango Odiango (the Plaintiff) and Rebecca Kamunde and Gerald Othieno Olaisa (the 1st and 2nd Defendants respectively) over the land parcel No Marachi/esikoma/1201 (the suit land) was heard and determined by Omollo J vide a judgment delivered on 3rd June 2020, the Judge made the following disposal orders:
 - a. The Defendants to remove any of their structures built on the Plaintiff's land within 90 days from the date of service of this decree upon them. In default of compliance within the time stated, an order be and is hereby issued for the eviction of the Defendants and their agents and family members from land parcel No Marachi/esikoma/1201 and removal of any and all offending structures at the Defendants' costs.
 - b. An order of permanent injunction be and is hereby issued restraining the Defendants by themselves, their servants, agents or otherwise from howsoever entering, remaining on, cultivating, planting any crops, removing boundary features, erecting or maintaining structures thereon or continuing to be in occupation or use of land parcel No Marachi/esikoma/1201.
 - c. Costs of the suit awarded to the Plaintiff



The 1st Defendant complied with the judgment.**

2. I now have for my determination the Plaintiff's Notice of Motion dated 1st March 2024 and premised under the provisions of Section 3A of the *Civil Procedure Act* as well as Orders 40 and 51 of the Civil Procedure Rules. He seeks the following orders against the 2nd Defendant and one Margaret Okotsi:

1. Spent

2. The 2nd Defendant and his agent Margaret Okotsi be arrested and committed to civil jail for a period of 6 months.

3. That the Police at Butali Police Station do accompany the Plaintiff and/or his agent to ensure that the 2nd Defendant is evicted and escorted out of the land parcel No Marachi/esikoma/1200 and Marachi/esikoma/1201 with all their belongings.

4. Costs be provided for.

The application is based on the grounds set out therein and is supported by the Plaintiff's affidavit of even date.

3. The basis of the application is that the 2nd Defendant and his agent were served with the decree of this Court dated 6th July 2020 which directed them to vacate the land parcels No Marachi/esikoma/1200 and Marachi/esikoma/1201. However, the 2nd Defendant and his agent, though served with the said decree have deliberately refused to vacate the said parcels of land and continue to trespass thereon and interfere with the Plaintiff's occupation of the same. They should therefore be punished for disobeying the said order.

4. The Court directed that the application be served upon the 2nd Defendant and his agent and be canvassed by way of written submissions.

5. Though served with the application, the 2nd Defendant did not file any response. It is not clear if his agent one Margaret Okotsi was served with the same. The application is therefore not opposed.

6. I have looked at the application and the supporting affidavit as well as the submissions by Ms Lumala counsel for the Plaintiff as instructed by the firm of Maclaw Advocates.

7. It is not in doubt that vide a judgment delivered on 3rd June 2020, the 2nd Defendant as well as the 1st Defendant (who has since vacated) and their agents were ordered to vacate the land parcel No Marachi/esikoma/1201 within 90 days. They were also enjoined from interfering with the said land. The judgment did not relate to the land parcel No Marachi/esikoma/1200. Therefore, no orders can be issued in relationship to the land parcel No Marachi/esikoma/1200 as sought with by the Plaintiff.

8. The first prayer is that I direct the arrest and committal to civil jail of the 2nd Defendant and one Margaret Okotsi who is named as his sister-in-law. I think the Plaintiff should first have sought an order for this Court to find the 2nd Defendant and Margaret Okotsi in contempt of this Court's judgment. That judgment was quite expansive in the orders which the Judge issued. In as far as is relevant for this ruling, Omollo J directed that:

“In default of compliance within the time stated, an order is hereby issued for the eviction of the Defendants and their agents and family members from land parcel No Marachi/esikoma/1201 and removal of any and all offending structures at the Defendants costs.”



The decree was served and was therefore binding on both the 2nd Defendant and all those claiming the said land parcel No Marachi/esikoma/1201 through him. That included Margaret Okotsi who is named as the 2nd Defendant's sister-in-law. And since the application is not opposed, the inevitable conclusion is that both the 2nd Defendant and all those occupying the suit land as his family and agents were required to vacate the same within 90 days from the date of judgment. In the case of *Hadkinson -v- Hadkinson* 1952 2 ALL E.R 211 it was stated that:

“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 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 an order believes it to be irregular or even void.”

The Court then went on to cite Lord Cottenham L.C. in *Chuck -v- Cremer* (1) Coop Temp Cott that:

“A party who knows of an order whether null or void, valid or irregular cannot be permitted to disobey it ...

It would be most dangerous to hold that suitors or their solicitors could themselves judge whether an order was null and void, whether it is regular or irregular. That they should come to the Court and not take it upon themselves to determine such a question. That the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to Court and it may be discharged. As long as it exists, it must not be disobeyed.”

Further, in the case of *Refrigeration And Kitchen Utensils Ltd -v- Gulabchand Popatlal Shah & Another* Civil Application No 39 of 1990, the Court said:

“It is essential for the maintenance of the rule of law and good order that the authority and dignity of our Courts is upheld at all times.”

The consequence of disobedience of a Court order is punishment which can take many forms. This includes a fine or even committal to jail as sought by the plaintiff. Further Section 29 of the *Environment and Land Court Act*, provides that:

29: “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 be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years or to both.”

From the evidence herein, I am satisfied that the 2nd Defendant and his sister-in-law Margaret Okotsi are in contempt of the orders issued by this Court. They are therefore liable to punishment as provided for in the law and reiterated by judicial precedents some of which I have already referred to above. Prayer NO (2) is therefore allowed and I shall be making appropriate orders shortly.

9. With regard to prayer NO 3, the 2nd Defendant and all those claiming under him ought to have vacated the land parcel No Marachi/esikoma/1201 on or before 3rd September 2020 which is over 4 years ago. For reasons best known to themselves, they have refused to do so. It will be interesting for this Court to be informed of the reasons why they have not done so taking into account the fact that the 1st Defendant has already obeyed the order of this Court and vacated. This Court has been asked to direct the Officer Commanding Butula Police Station to accompany the Plaintiff or his agent to ensure that the 2nd Defendant is evicted from the said land parcel No Marachi/esikoma/1201. Generally, Courts



have frowned against involving the police in the execution of civil processes. In the case of *Kamau Mucuha -v- Ripples Ltd C.a. Civil Application No 186 of 1992 (Nairobi) – 1993 eKLR*, the Court of Appeal (per KWACH JA) addressed that issue as follows:

“The only valid criticism of the order of the judge which I can see as of now, but which does not swing the scale one way or the other in this application, is the direction that the assistance of the police should be enlisted to secure compliance by the applicant. The Police should never be involved in such matters as there is a specific provision for the enforcement of an injunction under order 21 rule 28 of the Civil Procedure Rules.” Emphasis mine.

That may be so. However, under Section 24 of the *National Police Service Act*, the role of the Police include:

- a. “provision of assistance to the public when in need;
- b. maintenance of law and order
- c. preservation of peace ...”

the 2nd Defendant and his family having refused to vacate the suit land they are now trespassers. They are not only committing a criminal offence but they have also demonstrated, by refusing to vacate, that they are not likely to do so peacefully. In the face of such anticipated resistance, and in order to ensure that there will be maintenance of law and order to protect both lives and property, it is necessary that the intervention of the Police be invoked to ensure that the eviction process is seamless. The eviction process must also be in accordance with the relevant provisions of Section 152 of the *Land Act* and especially Section 152G (1) (d) which requires that such eviction is carried out in a manner which “respects the dignity right to life and security of those affected.”

10. In the circumstances of this case and particularly bearing in mind that the 4 years, the 2nd Defendant and his family have flagrantly refused to obey the Court order to vacate the land parcel No Marachi/esikoma/1201, prayer NO (2) is also well merited. However, I find it reasonable to keep prayer NO (2) in abeyance subject to what the 2nd Defendant will have to say about prayer NO (1).
11. Having considered the Notice of Motion dated 1st March 2024, therefore, this Court makes the following disposal orders:
 1. The 2nd Defendant is in contempt of the orders issued by this Court in it’s judgment dated 3rd June 2020.
 2. The 2nd Defendant be summoned to appear before this Court on 7th November 2024 for mitigation and sentencing.
 3. Further directions shall be made with respect to prayer NO (2) on 7th November 2024.
 4. No orders as to costs.

BOAZ N. OLAO

JUDGE

7TH NOVEMBER 2024

RULING DATED, SIGNED AND DELIVERED TO COUNSEL BY WAY OF ELECTRONIC MAIL ON THIS 7TH DAY OF NOVEMBER 2024.

The defendants, though served, did not attend Court although I had directed that they do so.



It is hereby directed that the Deputy Registrar serves the same upon the defendants forthwith.

BOAZ N. OLAO

JUDGE

7TH NOVEMBER 2024

