



REPUBLIC OF KENYA



**Chepawoy v Yano & another (Environment & Land Case E018 of 2023)
[2024] KEELC 13547 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13547 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E018 OF 2023
EO OBAGA, J
DECEMBER 5, 2024**

BETWEEN

ROBERT OLEITEREM CHEPAWOY PLAINTIFF

AND

EZEKIEL KIPKEMBOI YANO 1ST DEFENDANT

STEPHEN KEMBOI MARABA 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 29th February, 2024 the Plaintiff/Applicant moved this court seeking the following orders:
 - a. Spent
 - b. That the Defendants be cited for contempt of court in violating the order of Court given on 1st February, 2024, with a view to being committed to civil jail up to six months or a fine or both.
 - c. That the Defendants Respondents do purge the contempt already committed.
 - d. That the costs of the application be awarded to the plaintiff.
2. In the Plaintiff's Affidavit of even date sworn in support of the Motion, the grounds presented are that on 29th February, 2024 he found fresh construction of a fresh perimeter wall on the suit land, Eldoret Municipality/Block 14/533. The order issued on 1st February, 2024 had been served upon the Defendants' Advocate and the 2nd Defendant was personally served on 23rd February, 2024. The 1st Defendant however begun construction of the perimeter wall upon being served with the order of court. That the order of court has been contemptuously ignored as the contractor clearly stated that he will not respect the order which was served upon him also. The Applicant prayed that the 1st Defendant and his servants or assigns be punished for contempt and that the Defendants be ordered to purge the contempt.



3. The Application was opposed through the 1st Defendant's Replying Affidavit, which I believe is erroneously dated 25th March, 2023 since it was clearly filed on 27th March, 2024. He deponed that the allegation that they are in contempt is untrue because nothing has happened on the ground since the last order of the Court nor have they commenced any fresh construction. He averred that they were never served with the order, and further that he had not disobeyed any court order. According to the Defendant, the application for contempt does not spell out the alleged contempt, the person committing the said contempt, the date and terms of the order breached, the date of service, the person served and the facts constituting the alleged contempt or any evidence thereof to the standard of beyond reasonable doubt. He denied the allegations of contempt and prayed for dismissal of the application with costs.

Submissions:

4. The Application was canvassed by way of written submissions. The parties complied with the Plaintiff filing his submissions dated 28th May, 2024 whereas the Defendant's submissions are dated 24th June, 2024.

Plaintiff's Submissions;

5. In his submissions, Counsel for the Plaintiff submitted that the order was extracted and served on the Defendant and his advocate on record on 24th February, 2024. The Defendant breached the order on 29th February, 2024 just 5 days after service. He invited the court to compare the photographs annexed to this current Motion to those filed in the Application for injunction and confirm that the status of the site has changed. Counsel submitted that court orders are not in vain, they have the sanction of the law and the constitution and the Defendant is guilty of disobeying them so he must be punished. Counsel pointed out that the dignity and integrity of the court must be upheld and respected by all.
6. Counsel argued that the casual and evasive explanation given by the Defendant shows the casual manner he views the orders of the court, and thus the court should not countenance his disobedience and casual conduct. Counsel relied on the case of *Bia Tosha vs Kenya Breweries (Pet No. 15 of 2020) (2023) KE SEC 14 KLR*. Counsel submitted that this court has jurisdiction to punish contemnors and that the consequences of breach of an injunction are spelt out under Order 40 Rule 3 of the Civil Procedure Rules.

Defendant's Submissions;

7. The Defendant's Advocate on the other hand argued that before a party is committed for contempt, it must be proved that the order was served personally (*Kihoto Munyaka Buidling Company Limited vs David Mwangi Gitau & 9 Others (2013) KLR*). From this argument, Counsel submitted that it is not clear what each of the two Defendants is alleged to have committed since in his Notice of Motion he accused the two Defendants but in the Supporting Affidavits, he pointed to the 1st Defendant. Further, that it is not shown on the order when the Defendants or their Advocates received it.
8. Counsel also submitted that although the Plaintiff deponed that Ezekiel was served personally on 23rd February, 2024 no Affidavit of Service was attached. It was also submitted that there is no evidence that the photographs were taken at the scene of the suit property. Counsel asserted that the photographs match the date, time and the events sought to be attributed to the Defendants, and that they do not meet the requirements of the Data Protection Act. Counsel bolstered his arguments by relying on *Sam Nyamweya & 3 Others vs KPL Ltd & 2 Others (2015) eKLR* and *Eldoret HC P&A Cause No. 112 of 2012, Estate of William Cherop Murgor*, urging that the Application is for dismissal with costs.



Analysis and Determination

9. I have considered the application before me alongside the Affidavit filed in support thereto, the Replying Affidavit as well as the rival submissions of both counsel. The only issues for determination by this court are:
- i. Whether the Defendants are in contempt of the order of court granted on 1st February, 2024 and issued on 5th February, 2024.
 - ii. Who shall bear the costs of this Application?
10. Before I embark on the determination of the Application herein, I find it relevant to address the issue of the laws cited upon which the Application is grounded. The Contempt of Court Act, 2016 on which the Plaintiff brought this Application was declared unconstitutional by the High Court in Kenya Human Rights Commission Vs Attorney General & Another (2018) eKLR. The said decision declared the Contempt of Court Act of 2016 invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution, and for encroaching on the independence of the Judiciary.
11. However, even though the Plaintiff's application has been brought under the wrong provision of the law, in the spirit of Article 159(2) of the Constitution and Section 1A and B of the Civil Procedure Act, this court will proceed to determine the Application herein on its merits. I am guided by the case of Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) Civil Appeal No. 212 of 2015 [2019] eKLR, where the Court of Appeal held that:-

“Lastly, having established that the respondent’s application dated 17th December 2010 had been brought under the wrong law, we agree with the court’s finding that the irregularity was not serious enough to prevent the court from exercising its discretion, hearing and determining the said application on its merit. Taking note that the rules of procedure should be used as handmaids of justice but not to defeat it, the court weighed the issues before it and found that there would be no injustice visited on the appellant in the spirit of Article 159 (2)(d) of the Constitution and Sections 1A and B of the Civil Procedure Act.”

i. Whether the Defendants are in contempt of the order of court granted on 1st February, 2024 and issued on 5th February, 2024.

12. It is trite that court orders must be obeyed and that parties against whom such orders are made cannot be allowed to trash them with impunity. It has been held that obedience of Court orders is mandatory and parties cannot choose whether to obey them or not. Lord Justice Romer, in the now famous case of Hadkinson vs Hadkinson, (1952) ALL ER 567, 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 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 even void. Lord Cottenham, L.C., said in *Chuck –vs- Cremer* (1) (1 Coop. temp. Cott 342):

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party



knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

13. This duty to obey court orders by all persons is necessary in the maintenance of the rule of law, good order and the due administration of justice. The disobedience of court orders is what constitutes contempt of Court, which is defined in the Black’s Law Dictionary, 11th Edition at Page 397 as:-

“3. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

14. The punishment for contempt of court therefore is meant to preserve/protect the dignity and authority of the Court. Courts draw their jurisdiction to punish for contempt from Section 5 of the Judicature Act which provides that:-

“Contempt of court

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 such power shall extend to upholding the authority and dignity of subordinate courts.

An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

15. Since the liberty of the alleged contemnor is at stake in such an application as this one, courts have held that the standard of proof is higher than the standard in civil cases. In this case therefore, it is incumbent on the Plaintiff to prove that the Defendants’ conduct was deliberate in the sense that they deliberately or wilfully acted in a manner that breached the order. The elements required to be proved in an application for contempt are laid out in the case of *Katsuri Limited vs Kapurchand Devar Shah* (2016) KEHC 6447 (KLR), where the court held that:-

The High Court of South Africa in the case of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005, held 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.[21] As pointed out earlier, the alleged order was not annexed, nor was it shown that it the corporate veil had been lifted in order for the directors to be held personally liable.

Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand*[22] have authoritatively stated as follows:-

“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.”

16. There has been no allegation that the impugned order herein was not clear or that it was ambiguous. There can also be no dispute that the order is binding on the Defendants. Thus the first point of controversy is whether the Defendants had knowledge of the order. It was submitted on behalf of the Defendant that the order was not personally served on them. It was also pointed out to the court that there is no Affidavit of Service filed as proof of the service as alleged by the Plaintiff.
17. There is no dispute that the formal order was extracted and duly executed by the Deputy Registrar on the 5th day of February, 2024. The Plaintiff averred that he served the Defendant’s Advocate and personally served Ezekiel, who I take to be the 1st Defendant, on 23rd February, 2024. Indeed, I have perused the court record, both the physical and virtual one, and seen no proof of the alleged service on the Defendants. The copy of the Court Order annexed to the Supporting Affidavit bears no stamp or signature evidencing receipt thereof by either of the Defendants, their Advocate on record or even their agents. I agree with the 1st Defendant that there is also no Affidavit of Service filed as proof of service as alleged. There is a time in the jurisprudence of this country when that would have meant the death of any application seeking to punish for contempt.
18. Currently however, the law has changed with regards to the requirement of personal service of the orders on the parties. Courts have in recent years shifted to the position that knowledge of the order is sufficient in Applications for contempt of court. In *Shimmers Plaza Limited vs National Bank of Kenya Limited* (2015) KECA 945 (KLR), the Court of Appeal held that:-

“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”

This position has been affirmed by this Court in several other cases including the *Wambora* case (supra).”

19. Elsewhere in its judgment in *Shimmers Plaza Case* (Ibid), the Court of Appeal held that:-
- “As per rule 81.8, dispensation of service on the basis of notice or knowledge of the terms of an order will only apply to a court judgment or order requiring a person not to do an act, that is, a prohibitory order. 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.”

20. Courts have therefore inferred knowledge of the order on the part of the client from the fact that their Advocate was informed. From the Court record in the matter before me, on the date of delivery of the ruling on the Application for injunction dated 24th October, 2023, the Defendant was ably represented by Mr. Mitei who was holding brief for Dr. Chebii, the 1st Defendant’s Advocate on record. The Ruling was delivered in the presence of said Counsel appearing for the 1st Defendant who must be presumed to have informed the 1st Defendant of the same. Furthermore, at Paragraph 2 of the 1st Defendant’s Replying Affidavit, he deponed that “nothing has happened on the ground since the last order of the court”. Aside from directions of the court on the matter, no other order has been issued in this court save for the impugned orders herein. For this reason, the 1st Defendant cannot hide behind the lack of personal service of the orders, as it is, this court finds that the 1st Defendant had sufficient knowledge of the impugned orders.
21. The next limb of that test is whether defendant has acted in breach of the terms of the order. As already stated above, there was no complaint that the said orders were not clear and unambiguous on what was required of the Defendants. At item (1) of the extracted Order, the Defendants were restrained from further constructing, trespassing, selling, disposing or in any manner interfering with the suit property herein. The 1st Defendant has argued that there has been no further action since the last order and specifically, that he had not done any construction or put up any structure on the suit property. I have indeed compared the photographs annexed to the initial application for injunction and the photographs annexed to the instant Motion. Although the perimeter wall existed at the time of the application for injunction, there were gaps between portions of that wall. In the photographs annexed in the present Motion, some of these gaps appear to have been boarded up with wooden planks. In the photographs which have been dated 27th February, 2024 there are clearly workers undertaking construction.
22. It is clear therefore that the orders issued by this court have been disobeyed and there is a party on the ground who decided to proceed with construction contrary to the orders herein. It is not in dispute that the said construction is being undertaken in utter disobedience of the court order. The Plaintiff claimed that he served the contractor on the ground but he stated that he would not obey the order of the court. The contractor is proceeding with the construction on behalf of the 1st Defendant.
23. I have not heard from the 2nd Defendant, who entered his own Appearance on 21st November, 2023. He is not represented by Counsel in this suit. So whereas it is clear that the 1st Defendant had knowledge of the injunction issued by this court, I cannot in good conscience make the same finding with regards to the 2nd Defendant. For the avoidance of doubt, the 2nd Defendant was neither in court nor was he represented by counsel on the date of delivery of the ruling from which the orders herein arose. In the absence of an Affidavit of service confirming that he was indeed served with the orders, this court cannot presume his knowledge of the said orders. The Memorandum of Appearance filed on 18th November, 2023 by Chebii & Company Advocates was on behalf of the 1st Defendant, and the



record clearly indicates that the said firm has been appearing for the 1st Defendant only. So knowledge of the order by the 1st Defendant is definitely not knowledge by the 2nd Defendant.

24. The 1st Defendant is the person responsible for the contemptuous construction being conducted on the suit property. The Court of Appeal in the Shimmers Plaza Case (Supra), went on to hold that:-

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty. This standard has not changed since the old celebrated case of Ex parte Langley 1879, 13 Ch D. 110 (C.A), where Thesiger L.J stated as follows. at p. 119:

“...the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.

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.

This is the position in other jurisdictions within and outside the commonwealth.”

25. Consequently, I find that the Plaintiff has proved the alleged contempt to the required standard against the 1st Defendant. The 1st Defendant shall bear the costs of this Application. I further order that the 1st Defendant appears in court on 11.12.2024 so that he can be sentenced failing which a warrant of arrest do issue against him.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 5TH DAY OF DECEMBER, 2024.

E. O. OBAGA

JUDGE

5TH DECEMBER, 2024

In the virtual presence of;

M/s Salim for Mr. Mwetich for Applicant.

Mr. Wabomba for Dr. Chebii for 1st Defendant/Respondent.

M/s Kipseii for Applicant in application dated 2.4.2024

Court Assistant –Laban

E. O. OBAGA

JUDGE



5TH DECEMBER, 2024

