



REPUBLIC OF KENYA



B2 Yatta Ranching Co-operative v Kitui County Government & 12 others (Environment & Land Case 21 of 2021) [2023] KEELC 339 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 339 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 21 OF 2021
LG KIMANI, J
JANUARY 26, 2023**

BETWEEN

B2 YATTA RANCHING CO-OPERATIVE PLAINTIFF

AND

KITUI COUNTY GOVERNMENT 1ST DEFENDANT

CEDRIC SAMMY MWANZIA 2ND DEFENDANT

MUTHENGI MULAMBAYA 3RD DEFENDANT

MUSYOKI SYUKI 4TH DEFENDANT

NGUU NDONGA 5TH DEFENDANT

BENSON NGUTHU 6TH DEFENDANT

FESTUS MUSUMBI KAKYA 7TH DEFENDANT

JOSEPH NDELI MUSYOKA 8TH DEFENDANT

PIUS KAKONO KAU 9TH DEFENDANT

GEOFREY KISINGA SAMBI 10TH DEFENDANT

BEATRICE MATHEKA 11TH DEFENDANT

MUNINI KITHAMI 12TH DEFENDANT

ATTORNEY GENERAL 13TH DEFENDANT

RULING

1. By a ruling of the court delivered on July 15, 2020, the Hon Angote J made the following order as relates to contempt of court application dated March 5, 2020;



- a. Engineer Jacob Kakundi, the Defendants County Executive Committee member, Lands, Infrastructure, Housing and Urban Development, be and is hereby found to be in contempt of the orders of this court of February 12, 2009, July 29, 2019 and September 24, 2019
 - b. That the said Engineer Jacob Kakundi, the Defendants County Executive Committee member, Lands, Infrastructure, Housing and Urban Development, to appear in this court for mitigation and sentencing
2. It is for the purpose of mitigation and sentencing that this matter came up for mention on October 3, 2022 when the Engineer Jacob Kakundi appeared before this court together with his Counsel Mr. Musyoki and Counsel representing other parties in this suit. Mr. Musyoki, Counsel for the contemnor then indicated that he had instructions to offer mitigation on behalf of his client.
 3. Counsel submitted that at the time when the ruling of the court dated July 15, 2020 was delivered, his client was the County CEC for Lands, Infrastructure, Housing & Urban Development but he was soon after moved to a different ministry. That as Minister, he put up a newspaper advertisement inviting members of the public on how to plan on the suit land. Counsel stated that at the time his client was not aware of the existence of the court orders and that there were several advocates dealing with the matter and he was not on record then.
 4. Counsel stated that Eng. Kakundi was only executing his duties in putting up the advertisement and when he got to know of the orders he withdrew the advertisement and did not take any action on what the advert was inviting people to do. Subsequently no planning on the suit land was done and none of the parties was affected in any way by publication of the advertisement. No adversity was caused to them. The contemnor claims that to-date no further action was taken with regard to the property since he was waiting for further court orders. He apologises to the court and stated that had he known of the court orders he would not have placed the advertisement. He further stated that he believes in the rule of law and respect of court orders.
 5. The contemnor stated that he has since moved from the office he was working in and the Government he was serving was removed from power at the last elections. He stated that in spite of that he came to apologise to the court and confirm that he believes in the rule of law. He reiterated that there was no actual harm caused to the parties and he apologised to the said parties to the suit. He further prayed for leniency and confirmed that moving forward in whatever capacity, he is going to serve whether in public or private life he is going to obey court orders. The contemnor claims that he is now jobless and is not sure how things are going to turn out and he begs for mercy.
 6. Mr. Odhiambo Counsel for the plaintiff reiterated his previous submissions that Eng. Kakundi was found in contempt but left the issue of sentencing to the court.
 7. Mr. Koyoko Counsel for the 2nd to 6th defendants submitted that the statement by Counsel for the contemnor that Eng. Kakundi was not aware of the court orders was not true since when the application was being heard, he filed a replying affidavit and he did not state that he was unaware of the court order. He sought to justify his actions by stating that he was executing the functions of his office notwithstanding the status quo order made by the court on a number of occasions.
 8. Counsel confirmed that the orders were first made on February 10, 2019 and repeated on September 29, 2019 and November 24, 2019. It is unlikely that the CEC for Lands dealing with over 20,000 acres of land which was very controversial that had been heard by the court in Nairobi, Machakos and now Kitui was unaware of the court orders.



9. Counsel submitted that the purpose of the advertisement was to render the outcome of the court process on academic exercise and the court should take a firm stance so that its orders are respected. He claimed that his clients are squatters, paupers and are subject to Government operators and can only rely on the court and the rule of law. He further stated that even though he was not aware of any specific loss that may have been suffered by the parties he submitted that the court should make orders that prevent Government bodies and officers from running roughshod on citizens He confirmed that the notice that had been advertised was withdrawn and no harm was suffered by his client.

Analysis and Determination

10. I have considered the court's ruling dated on July 15, 2020 and the mitigation by the contemnor Engineer Jacob Kakundi. The application that gave rise to the orders of contempt was brought under Order 40 Rule 1, 2, and 3 of the [Civil Procedure Rules](#) and sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) and article 159 of the [Constitution](#) of Kenya 2010 order of injunction. In my view, the sentencing regime would fall under the provisions of section 63 (c) of the [Civil Procedure Act](#), cap 21, Laws of Kenya; Order 40 Rule 3; and section 29 of the [Environment and Land Court Act](#), Act No 19 of 2011. They provide as follows :-

Section 63(c) of the [Civil Procedure Act](#), 2010 :-

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold”.

11. Order 40 Rule 3(1) of the [Civil Procedure Rules](#), 2010:-

“3(1) In case of disobedience or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release”

Section 29 [Environment and Land Court Act](#)

“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.”

12. While considering the applicable law in sentencing in civil contempt the court in the case of [Ashock Labshanker Doshi & another v County Government of Mombasa & 3 others](#) [2021] eKLR stated as follows;

“It will be seen from the above that under section 63 (c) of the [Civil Procedure Act](#), in case of disobedience of an order of injunction, the court is at liberty to commit the person to prison and also order that his property be attached and sold. It will be observed that there is no pronouncement in section 63 (c) of the term of sentence. Order 40 Rule 3 (1) is what provides the actual term of imprisonment which is prescribed as a term not exceeding six months. The order that was disobeyed was issued by the Environment and Land Court, and that being the case, there would be no bar, in my view, if the court, if so moved or in its discretion, utilizes the provisions of section 29 of the [Environment and Land Court Act](#). The effect of using section 29 is to increase the term of imprisonment to 2 years and there is a hefty fine of up to Kshs. 20 million or both. I think by providing for a heavy penalty in



section 29 of the *Environment and Land Court Act*, Kenyans were making it clear that they detest and abhor a violation of an order that touches on property rights, and were making a huge pronouncement that any person who contravenes an order of the court in relation to proprietary rights ought to be made to suffer a very heavy penalty for the same. I am not surprised by the seriousness in which Kenyans take the protection of proprietary rights given the difficult history over land, and the struggle that ordinary Kenyans go through every day, in order to protect their proprietary rights. Land has a special place for Kenyans and it is imperative that any order issued in relation to land be obeyed. I cannot overemphasize that need for we have seen lives being lost because people do not wish to obey court orders over land. A failure to obey an order of court in relation to property only goes to compound the problem and we have enough problems as matters stand when it comes to land in Kenya and we do not need to make matters any more complicated than they already are.”

13. I have considered the fact that the contemnor states in mitigation that he was unaware of the court order. However this issue was dealt with in the ruling by the Hon Justice Angote who held that;

“The order of maintenance of status quo was on all three instances granted by the court in the presence of the defendants advocates. Indeed the current jurisprudence only requires a party's advocate to be aware of the court order for the purpose of an order of contempt” (see *Sbimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR)

14. In mitigation the contemnor has apologized to the court and sought the courts indulgence and mercy, I do believe that the said apology is genuine and the same is taken into account. He has also confirmed that he respects the rule of law and committed to uphold the same in whatever capacity he will be acting in future. He also confirmed that immediately he learnt of the court order he withdrew the impugned advertisement and did not take any further action on it. He has stated that the parties to this suit did not suffer any prejudice as a result of the advertisement complained of. This was indeed confirmed by Counsel for the respondents that no action was taken on the notice advertised and the parties did not suffer any monetary loss or loss of the suit land. I have further considered the fact that the contemnor is no longer in the employment of the 1st defendant for whom he was acting at the time the impugned advertisement was made.

15. However I am also cognizant of the importance of obeying court orders and upholding the rule of law and the dignity of the court. While dealing with the question of contempt in *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, Ibrahim, J. (as he then was), underscored the importance of obeying court orders, stating:

“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.”



16. In *T. N. Gadavarman Thiru Mulpad v Ashok Khot and anor* [2006] 5 SCC, the Supreme Court of India also emphasized on the dangers of disobeying Court orders, thus:

“Disobedience of this court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that court's orders are to be followed and complied with.”

17. Having taken into account all the above considerations and the mitigation made, I do make the following order;

- A. Engineer Jacob Kakundi, the former County Executive Committee member, Lands, Infrastructure, Housing and Urban Development of the 1st defendant is hereby sentenced to a fine of Kshs 50,000/= in default a term of one month in prison.
- B. Warrants of arrest to be issued and executed by the County Police Commander, Kitui County to arrest and commit the said Engineer Jacob Kakundi to Kitui Prison, unless he can demonstrate that he has paid the above fine.

DELIVERED, DATED AND SIGNED AT KITUI THIS 26TH DAY OF JANUARY, 2023.

L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT

Ruling read in open court in the presence of-

Musyoki Court Assistant

Musyoki for 1st Defendant

Odhiambo Odhim for Plaintiff

