



**UAP Insurance Company Limited v Mungai (Civil Suit 275 of 2016)
[2024] KEHC 9760 (KLR) (Civ) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9760 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL SUIT 275 OF 2016
CW MEOLI, J
JULY 30, 2024**

BETWEEN

UAP INSURANCE COMPANY LIMITED PLAINTIFF

AND

KEVIN KIMANI MUNGAI DEFENDANT

RULING

1. Kevin Kimani Mungai (hereinafter the Defendant/Contemnor), was convicted for contempt pursuant to the Court’s ruling delivered on 28.10.2022. The background events have in part been captured in the said ruling, obviating the need for restatement. In summary, UAP Insurance Company Limited (hereafter the Applicant) had moved the Court vide a motion dated 10.06.2021 seeking inter alia that the Court finds, holds and declares that the Defendant, in contempt of Court for disobeying the consent order made on 24.01.2017 and to issue an order to commit the Defendant to prison for a term not exceeding six (6) months or a term the Court may deemed just and fit, as punishment for contempt of Court.
2. The motion was subsequently heard, and in the ruling delivered on 28.10.2022, the Court stated in conclusion that; -

“In this case, the Defendant has admitted by his affidavits and submissions that that his conduct is in contempt of the Court but has expressed remorse and pleaded for a lenient sentence. The Court hereby finds the Defendant guilty of contempt of Court in terms of prayer 3 of the Plaintiff’s motion. In *Christine Wangari Gachege v Elizabeth Wanjiru Evans and 11 Others* (2014 eKLR, the Court of Appeal stated that in punishing for contempt, the Court exercises ordinary criminal jurisdiction. In the circumstances, pursuant to the finding of contempt of Court, this Court directs the contemnor Defendant to file an affidavit or



submissions in his mitigation and the Plaintiff to file submissions, both within 14 days of today's date, in preparation for sentencing hearing on the date to be hereafter taken. The costs of the motion are awarded to the Plaintiff.”

3. The court directed that the Contemnor does appear in person for sentencing. Subsequently, the parties appeared in Court on 24.11.2022, when the Court directed the Contemnor to comply with its directions on the filing of an affidavit and submissions in mitigation, with corresponding leave being accorded to Applicant.
4. In compliance with the directions, the Contemnor filed an affidavit dated 17.02.2023 in mitigation. The gist of his deposition being that he was genuinely embarrassed and ashamed for disobeying the order of this Court therefore requests for forgiveness and mercy. He further made an undertaking never to disobey Court orders and stated that he was at the time facing serious financial constraints and health issues. He stated that he had sought forgiveness from the Applicant through its counsel, for the embarrassment occasioned and cited mental health issues that may have contributed to his outbursts and actions against the Applicant. In summation he implored the Court not to give a custodial sentence, given his mental infirmity; and not to impose a fine because he was unemployed and without any source of income. Stating that warning from the Court or some other punishment as the Court may be more appropriate.
5. On its part, the Applicant filed brief submissions, in which counsel contended that the Contemnor's contempt ought to attract the maximum punishment of six (6) months imprisonment based on several grounds. Namely, that the Contemnor's affidavit has not provided any mitigating grounds to guide the Court's discretion, while the hospital discharge summary attached to his affidavit in mitigation shows that the main cause for the Contemnor's admission was a fracture of his mandible bone, sustained from a fall; that the medical documents evinced do not reveal any mental infirmity or committal to a mental health institution; that the conduct of the Contemnor leading up to the ruling of this Court reveals that he is a person who should be sanctioned to protect the Court's dignity and ensure obedience of Court orders; and that the Contemnor's actions not only had the effect of disparaging the Applicant's reputation and causing loss of business but also injury to the Applicant's employees who were only acting in the course of their employment.
6. The decisions in *Benard Kimani Gacheru vs Republic* [2002] eKLR and *Wendano Matuu Co Ltd & 2 others v Joshua Kimeu Kioko & 6 others* [2020] eKLR were called to aid. In conclusion, counsel submitted that the nature of the Contemnor's contempt warrants a sentence of up to six (6) months imprisonment to serve as a deterrence and to ensure that the contemnor appreciates the gravity of his actions.
7. The Court has considered the affidavit material and submissions filed by the respective parties. Section 5 of the *Judicature Act* provides that:-
 - (1) 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.
 - (2) 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.
8. What is the appropriate sentence here? Odunga, J (as he then was) in *Miguna Miguna v Fred Matiang'i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others* [2018] eKLR rightly observed that:-



8. Contempt of court is no doubt an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the court..... I reiterate what I said in the earlier ruling that those who disobey Court orders risk being declared by the Court to have breached Article 10 of *the Constitution* which prescribes national values and principles of governance with the attendant consequences among other appropriate sanctions.....
9. In deciding what sanction to mete this Court must reflect on the need to maintain the rule of law and to ensure that the authority and the dignity of our Courts are upheld at all times and to stamp the Court's authority and uphold the values and principles of governance enshrined in Article 10 of *the Constitution*.
9. Significantly, the Contemnor's contemptuous actions ought to be punished in order to uphold the sanctity and or dignity of the Court and the rule of law. Ojwang, J (as he then was) fittingly stated in *B vs. Attorney General* [2004] 1 KLR 431 that:-

“The Court does not, and ought not to 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.”
10. In mitigation, the Contemnor has stated that he is genuinely embarrassed and ashamed for disobeying the order of this Court, hence requests for forgiveness and mercy; that he has equally reached out to the Applicant's through their counsel seeking forgiveness for the embarrassment occasioned (see annexure marked Exhibit 1); that he has been experiencing mental health challenges that may have contributed to his outbursts and actions as against the Applicant (Annexure marked Exhibit 2); and that the Court should neither award a custodial sentence given the Contemnor's mental infirmity, nor impose a fine him because he is impecunious. All these claims being dismissed by the Applicant's counsel as lacking material support and urging a custodial sentence.
11. The annexure marked Exhibit 2 asserts a diagnosis of a fracture of the mandible bone, with BRD/PTSD earlier on 24.10.2019 and later bipolar disorder on 21.12.2022. The authenticity of the said documents has not been confirmed or contradicted and the court may in the circumstance give the benefit of doubt regarding the Contemnor's alleged mental infirmity. Nevertheless, as to his financial position no material support has been tendered by Contemnor.
12. That said, it would be remiss not to note at this juncture that, during the intervening period after the ruling of the court, the parties appeared before the Court on 24.11.2022. Then, the Contemnor was absent despite earlier directions requiring his physical presence, his counsel asserting that the Contemnor had been committed to a psychiatric hospital and due for discharge in January of 2023. The annexure marked Exhibit 2, appears to indicate that the Contemnor had attended the Mathari National Teaching & Referral Hospital, Life Bridge Cottage Hospital and Blessed Talbot Medical Hospital Centre Ltd regarding his asserted medical condition, suggesting that he was eventually discharged from the latter facility on 21.12.2022.
13. After 20.02.2023, the Contemnor was absent at all times, while his advocate's attendance was erratic. The matter subsequently came up on 13.03.2023 and 02.05.2023 and given the absence of counsel and client, the Court issued a warrant of arrest in respect of the Contemnor for his failure and that of his counsel to attend to Court. On 12.10.2023, counsel appearing for the Contemnor indicated to the Court that he had been unsuccessful in tracing the Contemnor and therefore sought to move the Court vide a motion to cease from acting. The Court directed counsel for the Contemnor to file the intended application to cease acting and serve the Contemnor personally. An examination of the record reveals that no such motion to cease acting was filed and in subsequent dates when the matter



was scheduled, on 13.12.2023, 06.05.2024, 25.06.2024 and 23.07.2024 neither the Contemnor nor his Counsel attended. On all accounts, the Contemnor has absconded and or intentionally kept away from the Court after his conviction for contempt.

14. Be that as it may, there is no prescribed punishment for contempt of Court, save that judicial discretion is donated to the High Court by dint of Section 5 of the *Judicature Act*. (See: Court of Appeal in *Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR and *Alfred Mutua v Boniface Mwangi* [2022] eKLR). The lacuna resulted from the fact that The *Contempt of Court Act* which provided for the mode of punishment for contempt was declared unconstitutional in Kenya Human Rights Commission v Attorney General & another [2018] eKLR. Therefore, presently the punishment of contempt remains in the realm of judicial discretion, which however ought to be exercised judicially, cautiously, depending on the circumstances obtaining and hence, on a case-by-case basis. See *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR.
15. The Applicant has urged that the Contemnor's contempt ought to attract the maximum punishment of six (6) months imprisonment. The right to liberty is enshrined in Articles 29 (1) (a) and 39(1) of *the Constitution*. These rights together with the right to freedom of expression under Article 33 of *the Constitution*, the latter which the Contemnor has espoused in his material, are not absolute and must be exercised in a manner that does not prejudice the rights and fundamental freedoms of other citizens. See Article 24(1) (d) of *the Constitution*. Moreover, the question revolving around the nature and purpose of punishment by committal to civil jail of contemnors has been the subject of litigation in our courts.
16. Kuloba, J (as he then was) in *Mbugua vs. Mbugua* [1992] KLR 448 stated regarding committal to civil jail that:-

“The committal to civil jail will be an end in itself, serving no useful purpose. It will be for vindictiveness only; but civil justice is placatory, not retaliatory or revengeful. As Courts administering civil justice we do not sit here unleashing reprisals of vengeance to satisfy egoistic vendetta veneered with some court orders. Committal to civil jail is redressal, not merely punitive. In this case if the Court sends the defendant to jail for six months, the wrong will not have been redressed; her sojourn in jail will be punishment to her, but it will not enforce the order said to have been disobeyed.”
17. Section 39(1) &(2)(g) of the *High Court (Organization and Administration) Act* mandates the Chief Justice to make Rules on procedures relating to Contempt of Court. Since, the decision in Kenya Human Rights Commission (supra) the Chief Justice and the Legislature are yet to set up rules relating to punishment of contempt. Nevertheless, as a matter of practice Courts seek guidance from the *Judicature Act* alongside English Civil Procedure Rules (Amendment No. 3) Rules, 2020 the latter which presently provide for sequestration and or a fine in punishing contempt. (See the Court of Appeal case of *Voi Development Company Limited v Agam Investments Limited* [2016] eKLR).
18. In conclusion, given the Contemnor's apparent deliberate and unexplained failure to attend court, which further compounds his apparent contempt of court orders, due cognizance of the mitigation presented by the Contemnor against his committal to civil jail and the dicta in Mbugua (supra), the court is of the view that it must vindicate its authority and the rule of law by imposing a sentence against the Contemnor. And not merely give a warning as proposed by the Contemnor, which on the facts of this case would be tantamount to a slap on the wrist. However, noting his alleged medical history, the court will consider, in the first instance, imposing a fine, rather than imprisonment as sought by the Applicant.



19. The amount of fine to be imposed by the High Court upon a contemnor is discretionary and based on the peculiar circumstances of each case. See. *MNN v IMM* [2022] eKLR, *Miguna Miguna (supra)*, *Voi Development Company Limited (supra)*, *Simon Kamau & 19 others v Director of Pensions & another* [2016] eKLR and *Cleophas Wakhungu Malala v Speaker Kakamega County Assembly & 2 others* [2014] eKLR.
20. Thus, considering all the relevant matters, the court will, in the first instance, impose a fine of Kshs. 50,000/- (Fifty Thousand) against the Contemnor as punishment for his contempt. The fine shall be paid within 90 (Ninety) days of today's date, failing which, a fresh warrant of arrest will issue, and the Contemnor shall on arrest, be directly committed to civil jail for 3 (three) months, upon the Applicant making the necessary payments. In which event, the Deputy Registrar of the Court will execute the appropriate committal warrant. The Contemnor will bear the costs attendant to the proceedings herein since the ruling of 28.10.2022.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 30TH DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Njomo

For Respondent/ Contemnor: N/A

Contemnor - Absent

C/A: Erick

