



**Njenga & another v Kenya National Highways Authority; Mwirigi (In charge, KENHA Webuye Weighbridge) & another (Contemnor) (Constitutional Petition E013 of 2024) [2024] KEHC 9995 (KLR) (12 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9995 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CONSTITUTIONAL PETITION E013 OF 2024  
AC MRIMA, J  
AUGUST 12, 2024**

**BETWEEN**

**JEREMIAH KARURI NJENGA ..... 1<sup>ST</sup> PETITIONER**

**SAMSON KABIRO CHURU ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... RESPONDENT**

**AND**

**PAUL MWIRIGI (IN CHARGE, KENHA WEBUYE  
WEIGHBRIDGE) ..... CONTEMNOR**

**KUNG’U NDUNG’U (DIRECTOR GENERAL, KENHA) ..... CONTEMNOR**

**RULING**

**Introduction:**

1. This is a composite ruling in relation to three applications. They are the Petitioners’ two Notices of Motion dated 19<sup>th</sup> June 2024 and 24<sup>th</sup> June 2024 respectively and the Respondent’s Notice of Motion dated 26<sup>th</sup> June 2024.
2. By the directions of this Court, upon concurrence of the parties, the three applications were heard together, hence, this ruling.

**Background:**

3. Jeremiah Karuri Njenga and Samson Kabiro Churu, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners respectively, are the owners of lorries or trucks registered as Motor vehicles registration Nos. KBZ 845R– ZF 5724, KBB



271G – ZG 2639 and KBB 738F – ZF 1596 (hereinafter jointly referred to as ‘the suit motor vehicles’ or ‘trucks’).

4. On 28<sup>th</sup> May 2024, the trucks were transporting cement from Kitale to Lodwar when they were stopped by Agents of Kenya National Highway Authority, the Respondent herein, at a place called Aruba, for allegedly carrying excess loads.
5. It is the Petitioners’ case that the Respondent weighed the trucks and without disclosing to them the excess loads, the drivers were directed to head back to Kitale Police Station for processing.
6. The Petitioners claimed that that upon arriving at the said Police Station, they were directed to further drive to Webuye-Malaba bound weighbridge station.
7. The Petitioners asserted that on their way to said weigh station, the Respondent arrested the drivers and held them in custody at Maili Tatu Police Station. They then took control of and drove the trucks to the weigh station where they were charged with the offence of overloading and heftily fined Kshs. 49,689,964/-, 2,368,132/- and Kshs. 4,267,705/- for the three trucks as per the provisions of Section 7 of the East African Community Vehicle Load Control Act, 2016.
8. The Petitioners claimed that their trucks were subsequently impounded and detained.
9. Aggrieved by the conduct of the Respondent, the Petitioners instituted the instant Petition dated 3<sup>rd</sup> June 2024.
10. In the main, they sought the following reliefs: -
  1. A declaration that the directive made by the Respondent on or about 28<sup>th</sup> May 2024 with regard to the detention of motor vehicles registration No. No. KBZ 845R – ZF 5724, KBB 271G – ZG 2639 and KBB 738F 1596 belonging to the Petitioners at Webuye Malaba Bound station and further order that the same will remain detained thereof until the sum of Kshs. Kshs. 49,689,964/-, 2,368,132/- and Kshs. 4,267,705/- respectively are paid to the Respondent herein be declared to be a directive and in order that were made in contravention of the right to fair administrative action natural justice and the rule of law thus unconstitutional and null and void.
  2. An order of certiorari to bring into this court and quash the directive made by the Respondent on or about 28<sup>th</sup> may 2024 with regard to the detention of motor vehicles Registration. No. KBZ 845R – ZF 5724, KBB 271G – ZG 2639 and KBB 738F 1596 belonging to the Petitioners at Webuye-Malaba Bound weigh bridge station and further order that the same will remain detained thereof until the sum of Kshs. Kshs. Kshs. 49,689,964/-, 2,368,132/- and Kshs. 4,267,705/- respectively is paid to the Respondent.
  3. An order that motor vehicles registration No. KBZ 845R – ZF 5724, KBB 271G – ZG 2639 and KBB 738F 1596 detained at Webuye weighbridge station be and are hereby released to the Petitioners by the respondent unconditionally.
  4. An order of prohibition to prohibit the Respondent from ever detaining any of the Petitioners’ motor vehicles Registration No. KBZ 845R – ZF 5724, KBB 271G – ZG 2639 and KBB 738F 1596 with a clear directive that should any of those motor vehicles violate the law, the same be dealt with through the recognized legal systems whereby the traffic police prosecute and a court of law determines guilt or otherwise.
  5. The Petitioners be awarded damages for violation of their fundamental rights and freedoms by the respondent.



6. That the Petitioners be awarded damages for loss of user of the three suit motor vehicles at Kshs. 150,000/- per week from the date of the detention until release thereof.
  7. Costs of this Petition be borne by the Respondent.
  8. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of Justice.
11. Contemporaneously with filing of the main Petition, the Petitioners filed an application by way of Notice of Motion which sought the following orders: -
1. Spent
  2. That Pending the hearing and determination of this Application, this Honourable Court be pleased to issue an interim order directing Respondent herein to release motor vehicles Registration Nos. No. KBZ 845R – ZF 5724, KBB 271G – ZG 2639 and KBB 738F 1596 to the Petitioners unconditionally.
  3. That Pending the hearing and determination of this Petition, this Honourable Court be pleased to issue an interim order directing Respondent herein to release motor vehicles Registration Nos. No. KBZ 845R – ZF 5724, KBB 271G – ZG 2639 and KBB 738F 1596 to the Petitioners unconditionally.
  4. That costs of this Application be provided for.
  5. That this Honourable Court be pleased to issue any further orders that it deems fit.
12. The above application was heard and determined by Hon. Nyakundi, J. In a Ruling rendered on 12<sup>th</sup> June 2024, the Learned Judge found that the penalties of Kshs.49,689,964/- Kshs. 2,368,132/- and Kshs. 4,267,705/- respectively prescribed for the trucks were not proportional punishment by all means and standards, bearing in the circumstances of the case.
13. The Court also observed that under Section 58 of the [Traffic Act](#), the Respondent had no justification for the hefty fines. The Court expressed its displeasure in the manner the fines were arrived at. It noted that even on application of East African Community Load Control Act 2016, the Respondent did not adhere to the process laid out therein.
14. In reference to Section 41(a) 2, 3, 4, 5 and 6 of the [Traffic Act](#) that provides for scaling of sentences based on severity of the breach on limitation on loads under Section 56, the Court observed that proportionality ought to have been taken into consideration since the concept is concerned with measuring the severity to facilitate fairness, consistency, parity and predictability in sentencing those found culpable.
15. The Court, upon making the finding that there were not criminal proceedings against the Petitioners and upon assessing the evidence on record, took the position that there was no justification for imposition of the hefty fines.
16. Based on the uncontroverted evidence, the Court made the tabulation that there was an overload weight of 17,770 kilograms, 14020 Kilograms and 31960 Kilograms in respect of KBB 738F, KBB 271G and KBZ 845R respectively.
17. The Court then found that the circumstances of the case fell within the provisions of Section 58 of the [Traffic Act](#). Accordingly, it ordered the release of the trucks subject to payment of the necessary fines for Axle overload within the prescribed fines under Sections 41 and 58 of [Traffic Act](#) and the Schedule.



18. It is the foregoing sequence of events that instigated the institution of the three applications, subject of this composite ruling.
19. Having laid the background, the Court will now deal with the applications.

**The Notice of Motion dated 19<sup>th</sup> June 2024:**

20. This application will, henceforth, be referred to as the 1<sup>st</sup> Application. As stated before, it was instituted by the Petitioners.
21. The 1<sup>st</sup> Application was lodged as a result of the failure by the Respondent to release the trucks pursuant to the Orders and directions of the Court.
22. It sought the following orders;
  - a. Spent
  - b. Pending hearing and determination of this Application, this Honourable Court be pleased to issue a Notice to Kung'u Ngung'u being the Director General of the Respondent, to appear in person at the hearing of this Application to show cause why he should not be held in contempt of the Orders of this Court as issued on the 12<sup>th</sup> June 2024.
  - c. Upon hearing and determination of this Application, this Honourable Court be pleased to find the said Kung'u Ndung'u, the Director General of the Respondent, in contempt of the Orders of this Honourable Court as issued on the 12<sup>th</sup> of June 2024 and commit him to civil jail for a term not exceeding six months.
  - d. The costs of this Application to be personally borne by the Contemnor.
23. On 21<sup>st</sup> June 2024, the 1<sup>st</sup> Application came up before Court for directions on its hearing. On hearing Counsel, this Court issued further orders in effecting the ruling of the Court made on 12<sup>th</sup> June 2024 since the Respondent had failed and/or refused to render the fines to the Petitioners as decreed by the Court.
24. This Court, therefore, directed the Petitioners to deposit the entire penalties under Section 58 of the [Traffic Act](#) in Court being a cumulative sum of Kshs. 1,200,000/-. The Court further directed that upon such compliance, the trucks be released immediately to the Petitioners and that the Petitioners do ensure that the trucks are produced in Court as and when required.
25. The Court also gave further directions on the hearing of the 1<sup>st</sup> Application.
26. As directed, the Petitioners deposited the sum of Kshs. 1,200,000/- in Court. Since there was no compliance by the Respondent, the application by way of Notice of Motion dated 24<sup>th</sup> June, 2024 was then filed by the Petitioners.

**The Notice of Motion dated 24<sup>th</sup> June 2024:**

27. In this ruling, the Notice of Motion dated 24<sup>th</sup> June 2024 will be referred to as 'the 2<sup>nd</sup> Application'.
28. The 2<sup>nd</sup> Application was supported by the Affidavit of Jeremiah Karuri Njenga, the 1<sup>st</sup> Petitioner, deposed to on a similar date. The Petitioners sought the following Orders;
  1. Spent



2. Pending hearing and determination of this Application, this Honourable Court be pleased to issue a mandatory Order, directing the contemnors herein, Paul Mwirigi being in charge of the Respondent's weighbridge at Webuye to immediately deliver the motor vehicles KBZ 845R – ZF 5724, KBB 271G – ZG 2639 and KBB 738F 1596 to court for purposes of handing over to the Petitioners/Applicants.
  3. Pending the hearing and determination of this Application, this Honourable Court be pleased to issue a notice to Paul Mwirigi being the in charge of the Respondent's weighbridge at Webuye, to appear in person at the hearing of this Application to show cause why he should not be held in contempt of the orders of this Honourable Court as issued on 21<sup>st</sup> June 2024.
  4. Upon hearing and determination of this Application, this honourable Court be pleased to find the said Paul Mwirigi, being the In Charge of the Respondent's weighbridge at Webuye, in contempt of the Orders of this court as issued on the 21<sup>st</sup> of June 2024 and commit him to civil jail for a term not exceeding six months.
  5. That the costs of this Application be personally borne by the contemnor.
29. The 2<sup>nd</sup> Application was, therefore, a further attempt by the Petitioners as against the Respondent to secure the compliance of the orders.

**The Notice of Motion dated 26<sup>th</sup> June 2024:**

30. On its part, the Respondent filed an application by way of a Notice of Motion dated 26<sup>th</sup> June 2024. This, will be referred to as 'the 3<sup>rd</sup> Application'.
31. The 3<sup>rd</sup> Application was supported by the affidavit of Seth Ongwae, its Operations Manager, deposed to on a similar date.
32. The application sought the following reliefs;
  - a. Spent
  - b. Spent
  - c. That there be a stay an Order of Stay of execution of the enforcement of the orders of this Court as issued on the 12<sup>th</sup> of June 2024 and the 21<sup>st</sup> June 2024 relating to the release of the motor vehicle registration numbers KBZ 845R ZF5724, KBB 271G-ZG 2639 and KBB 738F ZF 1596 respectively including the present execution proceedings already commenced by the Petitioner's Notice of Motion Application dated 19<sup>th</sup> June 2024 or any such proceedings by any subsequent applications, if any, while pending the hearing and determination of the Respondent's intended Appeal against the said orders.
  - d. That the cost of this Application be ordered to abide by the result of the instant Appeal.
33. The 3<sup>rd</sup> Application together with the Grounds of Opposition dated 10<sup>th</sup> July 2024 were also the Respondent's rebuttal to the 1<sup>st</sup> and 2<sup>nd</sup> Applications.
34. In urging this Court to allow the 3<sup>rd</sup> Application so as for the Respondent to articulate the issues before the Court of Appeal, the Respondent claimed that it had already lodged and served appropriate Notices of Appeal of its intended appeals to the Court of Appeal against the rulings of 12<sup>th</sup> June 2024 and 21<sup>st</sup> June 2024 respectively.



35. The Respondent averred that it had a valid and legitimate claim of statutory right to detain the trucks by dint of Sections 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the East Africa Community Vehicle Load Control Act 2016 as read with Article 2(6) of *the Constitution*.
36. The Respondent further claimed that it was mandated under Sections 4(2)(d) and 50 of the *Kenya Roads Act* 2007 as read with Sections 52(1)(a), 55(2) and 56 and 2 of the *Traffic Act* with the management and administration of designated weighbridges in Kenya by monitoring and enforcing compliance of motor vehicles using the roads in Kenya.
37. It was, therefore, its case that the orders for release of the trucks were issued in contravention of the express provisions of the law and had the effect of negating the very safeguards established by legislation to protect the interest of the Government to secure the payment of penalties prescribed and to protect the roads in Kenya from being damaged by overloaded vehicles.
38. It was its further case that despite having good prospects of success on appeal against the orders of release, its case would be rendered nugatory should the trucks be released without the guarantee of ever getting them back.
39. The Respondent asserted that unless the two rulings and the resultant orders are immediately stayed, including the contempt proceedings, their undeniable statutory right of appeal enshrined under Section 66 of the *Civil Procedure Act* would be unduly compromised.
40. The Petitioners opposed the 3<sup>rd</sup> Application through the Replying Affidavit of Jeremiah Karuri Njenga deposed to on 2<sup>nd</sup> July 2024.
41. The parties then filed respective comprehensive written submissions wherein they referred to various decisions in urging their positions. The submissions shall be considered in the analysis part of this ruling.

#### **Analysis:**

42. Having carefully appreciated the tenor and import of each of the three applications before this Court, the issues that arise for determination are largely whether the applications ought to be allowed.
43. To that end, this Court will deal with the issues as under: -
  - i. Whether an order staying the execution of the impugned rulings of 12<sup>th</sup> June 2024 and the 21<sup>st</sup> June 2024 and the orders emanating therefrom ought to issue.
  - ii. In the event the first issue is answered in the negative, whether the applications for contempt are merited.
44. The issues will now be considered in seriatim.

#### **a. Whether an order staying the execution of the impugned rulings of 12<sup>th</sup> June 2024 and the 21<sup>st</sup> June 2024 and the orders emanating therefrom ought to issue:**

45. The law and relevant decisions on stay of execution have been so ably referred to by Counsel in their respective submissions. This Court is grateful for Counsel's diligence and industry.
46. However, as a recap thereof, Order 42 Rule 6(2) of the Civil Procedure Rules gives the conditions precedent to granting a stay of execution order. The conditions are that the Applicant must demonstrate that it will suffer substantial loss unless the order is made, the application is made without



any unreasonable delay and the Applicant offers security for the due performance of the decree. (See Antoine Ndiaye vs. African Virtual University [2015] eKLR.)

47. The Court of Appeal in *Butt vs. Rent Restriction Tribunal* [1979] KLR discussed what ought to be considered in determining whether to grant or refuse stay of execution. The Court stated that the power of the Court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal Court reverse the Judge's discretion. Thirdly, a Judge should not refuse a stay if there are good grounds for granting it merely because, in his or her opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
48. The Court will now apply the above principles to this matter.

**Substantial loss:**

49. On the aspect of substantial loss, the Court of Appeal in *Mukuna vs. Abuoga* (1988) KLR 645 stated as follows: -

..... Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

50. In *Daniel Chebutul Rotich & 2 Others vs. Emirates Airlines Civil Case No. 368 of 2001* (unreported) as referred to in *Beatrice Nanyama Murunga vs. Benjamin Amchat and Another* (2019) eKLR the Court held that: -

.... 'substantial loss' is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted  
.....

51. The parties herein also referred to other decisions where the aspect of substantial loss was discussed.
52. The Respondent claimed that it will suffer loss once the trucks are released since it will be impossible to get them back more so given that the statutory fines it is demanding runs to over Kshs. 50 Million.
53. The Respondent further contended that the goods in the trucks which were subject of its actions will be disposed of once the trucks are released, hence, the substratum of the case will be destroyed and as such it stood to suffer immense substantial loss.
54. The decision in *John Kipkoech Maritim -vs- Kenya National Highways Authority & 7 Others* was relied on demonstrating that the trucks ought to be held further by the Respondent.
55. On their part, the Petitioners contended that the Respondent's fear was too far-fetched. They cited the rulings of this Court and the effort they had undertaken including depositing the sums of Kshs. 1,200,000/= in Court as to secure the release of the trucks. They also reminded that an order to avail the trucks at anytime is on record.
56. The Petitioners also asserted that the trucks were acquired on hire purchase financing and can only service the loans if allowed to undertake the transportation business otherwise they risk repossession. They also contended that the goods in the trucks belonged to third parties and that they further risk resultant suits.



57. This Court has undoubtedly considered the aspect of loss with a lot of care and caution.
58. There is no doubt that the trucks were overloaded. The extent of the overloads was ascertained when the trucks were weighed at the Weighbridge in Webuye. The Petitioners are not disputing the overloaded weights. Therefore, even when the goods are either released or, for any reason destroyed, still none of the parties in this case can deny the fact and extent of the overloads.
59. In other words, the weighing of the trucks ascertained the exact overloaded weight for each truck.
60. Further, this Court made an order on 21<sup>st</sup> June, 2024 to the effect that the Petitioners shall ensure that the trucks are availed to Court at anytime they are required. That order has not been challenged in any way. There is also no contention that the said order will not be complied with.
61. The Respondent also contended that once the overloaded trucks are released then they will again use and destroy the roads contrary to the law.
62. On this point, this Court makes the following clarification. That, the release of the trucks per se is not tantamount to allowing the Petitioners to drive the overloaded trucks on our roads contrary to the law. Once the trucks are released, it shall be incumbent upon the Petitioners to see how they will comply with the law on the road otherwise the overloaded trucks shall be liable to be subsequent impounding.
63. On the gravity of the fines the Respondent looks forward to the Petitioners paying, which the Respondent fronts for over Kshs. 50 Million, this Court is of the position that once the fines are finally ascertained on appeal, the Petitioners will be under an obligation to satisfy them and in default, the law definitely has adequate mechanisms to enforce compliance. Needless to say, the sum of Kshs. 1,200,000/= is already deposited in Court.
64. This Court also wishes to distinguish the decision in John Kipkoech Maritim case [supra] as referred to by the Respondent. In the said decision, the Court found that the Petitioners had the option of paying the fees charged to secure the release of the vehicles but failed to do so and instead instituted the Petition. That position is diametrically different from the facts in this case and as such, the decision is not binding to this Court.
65. From the above, it is a fact that the Respondent's fear of suffering loss is well taken care of. In fact, the Petitioners are the ones suffering both loss of user and having deposited their money in Court as directed by this Court.
66. On the basis of the foregoing, this Court finds and hold that, in the unique circumstances of this case, the Respondent does not stand to suffer any loss if the stay order is not granted.
67. Having found as such, then a consideration of the other conditions for consideration in granting stay orders will not aid the Respondent in any way. This Court, therefore, now brings the discussion on the 3<sup>rd</sup> Application to a halt.
68. In view of the Court's finding, the next issue is now for deliberation.

**b. Whether the applications for contempt are merited:**

69. Given that the 3<sup>rd</sup> Application has not succeeded, the focus is now on whether the 1<sup>st</sup> and 2<sup>nd</sup> Applications are merited. Since the applications are in the nature of contempt of Court, there is need to trace the history and current law on the subject, but first what the term 'contempt of Court' relates to.



70. 'Contempt of Court' is defined by The Black's Law Dictionary (Eleventh Edition) Thompson Reuters, 2019) as follows: -

a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.

71. As early as 1952, Courts have held that the duty to obey the law by all individuals and institutions is cardinal in the maintainance of the rule of law and due administration of justice. In *Hadkinson vs. Hadkinson* (1952) ALL ER 567, the Court stated as follows:-

..... 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 it is discharged. The uncomprising 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 slicitors, 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.

72. Closer home, the Supreme Court spoke to the foregoing in SC Criminal Application No 2 of 2018, Republic -vs- Ahmad Abolfathi Mohammed & another [2018] eKLR when it observed as follows: -

.... It is, therefore, evident that not only do contemnors demean the integrity and authority of courts, but they also deride the rule of law. This must not be allowed to happen.

73. Earlier, the Court of Appeal in *Refrigeration and Kitchen Utensils Ltd vs. Gulabchard Popartal Shah & Another*, Civil Application No. 39 of 1990 (unreported) in asserting the need to obey Court orders stated that:

....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.

74. In *TSC vs. KNUT & 2 others* (2013) eKLR, the Court observed as follows:-

38. The reason why Courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the Court or even the personal ego of the Presiding Judge. Neither is it about placating the applicant who moves the Court by taking out contempt proceedings. It is about preseving and safeguarding the rule of law.

75. There is a long line of decisions upholding the above position including *Shah & Another t/a Lento Agencies vs. National Industrial Credit Bank Ltd* (2005) 1 KLR 300, *Mulika vs. Baharini Farm Ltd.* (1985) KLR 227 among others.

76. Returning to the matter at hand, the twin applications under scrutiny were brought under Section 5 of the *Judicature Act*. That is the correct procedure as affirmed by the Court of Appeal in *Christine*



Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 others (Civil Application No. 233 of 2007 (unreported).

77. Section 5 of the *Judicature Act* provides as follows:-

- (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 that 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 exercise of the original Criminal jurisdiction of the High Court.

78. As the law in England has variously changed over time, a Court has to ascertain the applicable law in the High Court of Justice in England as at the time an application for contempt was filed. In this case, the applications were filed in June 2024.

79. This requirement was emphasised by the Court of Appeal in *The Matter of an application by Garbaresh Singh & Sons Ltd – Misc. Civil Case No. 50 of 1983* where the Court expressed itself as follows:-

The second aspect concerns the words of Section 5 - “for the time being”, which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or application being made.

80. Further the Court of Appeal in the *Christine Wangari* case (*supra*) stated as follows: -

... Following the implementation of the famous Lord Woolf’s Access to Justice Report, 1996’, the Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently on 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court of England in its entirety .....

81. Under the Order 52 of the Rules of the Supreme Court of England, an Applicant in contempt application was under a mandatory duty to give notice to the Government Officer of such contempt application prior to filing of the said application and to seek leave of the Court to institute contempt of court proceedings. However, in 2012 the law in England changed and it is no longer necessary to serve the notice upon the Government Officer or to seek the leave of the Court prior to filing of such an application.

82. In this case, the applications for contempt were filed in June, 2024. Therefore, the Petitioners were not under any obligation to mandatorily serve a notice to the Government Officer (the equivalent being the Attorney General) and to seek the leave of the Court.

83. Contempt of Court proceedings are usually quasi-criminal proceedings in nature because the liberty of a party is usually at stake. The standard of proof is, therefore, higher than balance of probabilities since a conviction arising out of such proceedings is appealable as if it were a conviction entered into in the normal exercise of original criminal jurisdiction in the High Court.

84. The correct standard of proof in contempt of Court was succinctly spelt out by the Court of Appeal *Mutitika -vs- Baharini Farm Limited [1985] KLR 229, 234*, a position affirmed by the Supreme Court



in the Ahmad Abolfathi Mohammed & another case [supra]. In the former case, the Learned Judges observed thus: -

.... In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.

85. In attaining the requisite standard of proof, the Court in Petition No. 351 of 2015, Trusted Society of Human Rights Alliance -vs- Cabinet Secretary for Devolution and Planning & 3 others [2017] eKLR in reference to a South African High Court decision, stated as follows: -

.... The High Court of South Africa in the case of Kristen Carla Burchell -vs- Barry Grant Burchell 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 wilfulness 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.

86. For this reason, it is imperative that the law regulating the contempt proceedings must be properly and fully complied with otherwise it may result to miscarriage of justice on the part of the alleged contemnor.

87. One of the cardinal requirements in contempt proceedings is the clarity of the orders sought to be enforced. In this case, the impugned orders as issued and extracted were quite clear. There is no ambiguity on any of them.

88. Next is the issue of service upon or knowledge of the existence of the order by the Respondent.

89. There are two rulings and orders in this matters that were allegedly disobeyed. They were rendered on 12<sup>th</sup> June 2024 and 21<sup>st</sup> June 2024 respectively.

90. Regarding the orders made on 12<sup>th</sup> June 2024, the Petitioners' Advocates averred that, upon receiving the ruling dated 12<sup>th</sup> June 2024 and the extracted orders thereon, they accordingly served the Respondent's Advocates vide their e-mail dated 13<sup>th</sup> June 2024. In the e-mail, the Petitioners' Counsel also brought to the Respondent Counsel's attention the need to comply with the Orders of the Court. In the e-mail, the Petitioners' Advocates attached the ruling and the order.

91. In response to the e-mail, the Respondent's Counsel wrote their e-mail dated 13<sup>th</sup> June 2024 and partly stated as follows: -

...We confirm receipt of your e-mail letter below and its attachment of your letter dated 13<sup>th</sup> June 2024, and the copy of the Court's Ruling thereon...

92. In this matter, therefore, service of the ruling and the resultant orders made on 12<sup>th</sup> June 2024 is not denied. As such, the Respondent was not only served, but it was fully made aware of the ruling and the order.



93. With regard to the ruling and orders made on 24<sup>th</sup> June 2024, upon the Petitioners complying with the requirement to deposit the sum of Kshs. 1,200,000/= into Court, they allegedly proceeded to serve the Respondent with the order and the evidence of service. An Affidavit of Service marked JKN-4 was filed in the record.
94. The Affidavit deposed that the Respondent's Counsel instead declined to receive the copies of the Orders contending that they were heading out to an urgent meeting. In the then prevailing circumstances, the Process Server hung the Order on the Respondent Counsel's office door.
95. On their part, the Respondent's Counsel did not in essence deny service of the order. It is also of essence to note when the orders were issued, they were uploaded into the Court's Case Tracking System and were electronically and automatically served upon all parties mapped into the case. The Respondent herein did not contend that it was not mapped into the matter.
96. Further to the foregoing, the record has it that when the orders were issued, the Respondent was represented by Counsel. Therefore, even if no physical service of the orders was made, still the Respondent was well aware of the said orders given that it was represented by Counsel when the orders were made.
97. In buttressing the above, Courts have variously affirmed that knowledge of the orders by parties' Counsel suffices in contempt applications. In the Court of Appeal decision in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, the Court held thus:
- 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.
98. In *Basil Criticos v Attorney General and 8 Others* [2012] eKLR Lenaola J. (as he then was) 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.
99. This Court is, hence, satisfied that the Respondent was duly served and remains fully aware of the orders of 12<sup>th</sup> June 2024 and 21<sup>st</sup> June 2024 respectively.
100. The last requirement is whether there was wilful disobedience of the orders in issue. In the course of this discussion, it has come out that that the Respondent did not have any reason to disobey the orders. The Respondent simply decided to defy the orders as it was of the view that the Court had wrongly interpreted and applied the law and that it had lodged an appeal against the impugned rulings.
101. The Respondent also submitted that the contempt applications could not succeed since the Respondent's agents were protected from personal liability under Section 42 of the [Kenya Roads Act](#).
102. The said provision states as follows: -
42. Protection from liability



No matter or thing done by an officer or employee of an Authority shall, if the thing is done bona fide for executing the functions, powers or duties of the Authority, render such officer or employee personally liable to any action, claim or demand whatsoever.

103. From the reading of the above provision, the protection accorded to officers of the Respondent is qualified. They must demonstrate good faith. Liability is ousted only when the employee is discharging its powers or duties bona fide.
104. As to whether the conduct of the Respondent and its officers in this instance fell short of the protection from personal liability, this Court notes that the orders were duly served and the Respondent and its officers repeatedly reminded to comply with the same, both by this Court and the Petitioners' Counsel, but all in vain.
105. The Respondent and its officers did not, therefore, act in good faith. They glaringly and in a sustained manner disobeyed the orders in force with abandon. As such, the protection under Section 42 of the [Kenya Roads Act](#) does not aid the Respondent and its officers in this matter.
106. In the end, this Court finds and hold that the disobedience was wilful and reckless. In the words of the Court of Appeal in Civil Application No. 1 of 2017 (UR 1/2018) Fred Matiang'i Cabinet Secretary, Ministry of Interior and Co-ordination of National Government -vs- Miguna Miguna & 4 others [2018] eKLR: -

...When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.

107. Adding his voice to the subject, the 26<sup>th</sup> President of the United States of America, one Theodore Roosevelt, once said: -

..... No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour.

108. The Court of Appeal in Shimmers Plaza Limited case [supra] further stated thus: -

... The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by [the Constitution](#). The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this important message across.

109. I believe that this Court has, as well, said enough to send the message across.

110. In the end, this Court hereby finds Paul Mwirigi [In charge, KENHA Webuye Weighbridge] and Kung'u Ndung'u (the Director General, KENHA), in contempt of the Court orders pursuant to the rulings rendered on 12th June 2024 and the 21st June 2024 respectively.



111. The said Paul Mwirigi and Kung'u Ndung'u are hereby convicted of contempt of Court.

**Disposition:**

112. As the stay application fails whereas the contempt of Court applications succeed, this Court now makes the following final orders: -

- a. The Respondent's Notice of Motion dated 26<sup>th</sup> June 2024 is hereby dismissed.
- b. Paul Mwirigi and Kung'u Ndung'u are hereby convicted of contempt of Court.
- c. The said Paul Mwirigi and Kung'u Ndung'u shall forthwith purge the contempt by complying with the orders of this Court made on 12<sup>th</sup> June 2024 and 21<sup>st</sup> June 2024 respectively.
- d. This matter is hereby fixed for hearing on 21/08/2024 before the Duty Judge where the said Paul Mwirigi and Kung'u Ndung'u shall show cause why they should not be sentenced. To that end, the said Paul Mwirigi and Kung'u Ndung'u are at liberty to file and serve any dispositions and/or skeleton written submissions within 3 days of this order.
- e. Once served with the dispositions and/or written submissions in (d) above, the Petitioners shall also file and serve any further dispositions and/or skeleton submissions, if need be, within 3 days thereof.
- f. The Respondent, Paul Mwirigi and Kung'u Ndung'u shall jointly and severally bear the costs of the three applications subject of this ruling.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 12<sup>TH</sup> DAY OF AUGUST, 2024.**

**A. C. MRIMA**

**JUDGE**

Ruling No. 3 delivered virtually and in the presence of: -

Mr. Khaemba and Mr. Were, Learned Counsel for the Petitioners.

No appearance for Mr. Ragot, Learned Counsel for the Respondent and the Contemnors.

Duke/Chemosop – Court Assistants.

