



**Mutura v Director of Criminal Investigations & 3 others (Petition E167 of 2022)
[2023] KEHC 490 (KLR) (Constitutional and Human Rights) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 490 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E167 OF 2022
M THANDE, J
JANUARY 27, 2023**

BETWEEN

BENSON MUTURA PETITIONER

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. By an Application dated May 6, 2022, the Petitioner seeks the following orders:
 - a. Spent.
 - b. That Mr Kassim Baricha, being an officer of the 1st Respondent herein, be held to be in contempt of court sue to his wilful disobedience of the orders issued on the April 21, 2022.
 - c. That consequent to the grant of prayer 2 above, the contemnor be committed to jail for a duration not exceeding six (6) months and/or such other duration as this Honourable Court may deem fit and expedient and in addition to or in the alternative to this, this Honourable Court do impose an appropriate penalty/fine upon the contemnor.
 - d. That this Honourable Court do impose such other sanctions as it deems fit until the said contempt is purged.



- e. That the costs of this application be in the cause.
 - f. That such further and/or other orders be made as this Honourable Court may deem just and expedient in the circumstances.
2. The grounds upon which the Application is premised are that pursuant to an application dated April 20, 2022, the Court did on April 21, 2022 give orders restraining the 3rd Respondent, his officers, servants, agents or anyone acting on his behalf from instituting, charging or prosecuting the Petitioner in respect of or in connection with the complaint or allegations giving rise to a petition filed by the Petitioner. The Court also directed that that application be served upon the Respondents within 3 days.
3. In his Petition dated April 20, 2022, the Petitioner sought the following orders:
 - a. A declaration that the arrest and detention of the Petitioner is not only baseless but is also arbitrary and illegal and in blatant violation of his Constitutional rights.
 - b. A permanent injunction restraining the Respondents by themselves, their officers, servants and assigns or anyone acting on their behalf or instructions from arresting, charging or prosecuting the Petitioner herein on account of the issues raised in this Petition.
 - c. General damages.
 - d. Costs of the suit.
 - e. Such further reliefs that this Honourable Court may deem just and fit to grant in the interest of justice.
4. The Petitioner averred that the application and order was served upon the Respondents on April 25, 2022. However, in blatant disregard of the said orders, and in in attempt at interfering with the proceedings herein, the 1st Respondent's officers have been summoning and requesting documents from the Nairobi County Assembly for purposes of investigations into matters subject of the Petition. It is the Petitioner's contention that the Respondents were aware of the Court orders the terms of which were plain, obvious, unambiguous and unequivocal. Further that the intentional frustration of valid Court orders is contemptuous and this Court needs to intervener to protect its authority. The Petitioner urged that the orders sought be granted.
5. The 1st, 2nd and 3rd Respondents opposed the Application vide an undated replying affidavit sworn by No xxxx, CI Felix Karisa Banzi, an officer attached to the Serious Crime Unit based at the Directorate of Criminal Investigations. He averred that he was served with the said Court order allowing prayer 2 of the application in question. The order did not however stay the investigations and Kassim Baricha thus proceeded to write a letter dated April 25, 2022 requesting the Deputy Clerk of the Assembly to instruct 5 officers named therein to report to DCI headquarters for statement recording. A second letter of even date requested the Deputy Clerk to furnish Kassim Baricha with assorted documents including certified imprest warrants for trips undertaken by the Petitioner, payment vouchers for air tickets and copies of the air tickets. This was done to complete the investigations file pending final determination of the petition herein. He stated that there was nothing in the order stopping him from getting any documents from any quarter other than from the Petitioner. In the premises the Respondents urged that the Application be dismissed in its entirety.



6. In a supplementary affidavit sworn on June 9, 2022, the Petitioner averred that the Respondents being fully aware of the orders in question, continued to pursue the matter by issuing the letters dated April 25, 2022, in complete disregard of the said orders. He further stated that courts should not watch as their orders are disobeyed with impunity as this would amount to abdication of their constitutional duty. The dignity and authority of the court must be protected by punishing those who flagrantly disobey court orders.
7. The jurisdiction of this Court to punish for contempt of Court is contained in Section 5(1) of the Judicature Act which provides:

'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.'
8. This was reiterated by the Court of Appeal in the case of Woburn Estate Limited v Margaret Bashforth [2016] eKLR, as follows:

'The jurisdiction of the High Court (or any other court for that matter) to punish for the violation of its orders cannot be in question. Apart from section 5 (1) of the Judicature Act that vests in the High Court the power, like those of the High Court of Justice in England, to punish any party who violates its orders, the court, by virtue only of being a court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times.'
9. Kenya is a country governed by the rule of law. Indeed, under Article 10 of the Constitution, the rule of law, is one of the national values and principles of governance that bind all persons. Once a court order is made, it must be obeyed by every person bound by the same. Failure to comply with court orders is a serious threat to the maintenance of the rule of law. As such the authority and dignity of our courts must be upheld at all times.
10. In the case of Gulabchand Poptlal Shah & Another Civil Application No 39 OF 1990, (unreported), the Court of Appeal observed:

It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors.
11. A party who seeks that another be punished for contempt of a court order, must bring the application within the threshold required, namely demonstration of the terms of the order in question, knowledge of the terms by the respondent and disobedience by the respondent of the order.
12. In the case of Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2014] eKLR, the Court of Appeal stated:

(33) 'Were the appellants in contempt of court? The duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule of law and the due administration of justice. In Hadkinson v Hadkinson, [1952] ALL ER 567, Romer, LJ stated'
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, LC, 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. For this Court to punish the Respondent for contempt, the Petitioner must demonstrate that the Respondents were aware of the terms of the orders and that failure to comply with the orders was deliberate and wilful. This was the holding in the case of *Samuel MN Mweru & Others v National Land Commission & 2 others [2020] eKLR* where Mativo, J (as he then was) restated what an applicant was required to prove in contempt proceedings, as follows:

'It is an established principle of law 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.'

14. When the petition and application both dated April 20, 2022 first came before the Court on April 21, 2022, Mrima, J gave directions for service upon the Respondents. He listed the matter for directions on May 9, 2022. The learned Judge then granted prayer 2 of the application, pending further orders of the Court. In order to gain perspective on the matter, it is necessary to reproduce prayer 2 of the application.

'That pending the hearing and determination of this Application, this Honourable Court be pleased to issue orders restraining the Respondents whether by themselves, their officers, servants, agents or anyone acting on their behalf from arresting, detaining, pursuing, confining or in any other way interfering with the liberty of the Petitioner/Applicant herein in connection with the complaint or allegations giving rise to the Petition.'

15. In his replying affidavit, CI Banzi stated that he was indeed served with the Court order. However, that on the face of it, there was no stay on investigations and so Kassim Baricha proceeded to write the 2 letters dated April 25, 2022 addressed to the Deputy Clerk of the County Assembly.

16. I have considered the explanation given by the Respondents. The question that is before the Court therefore is whether the order restrained the Respondents from continuing with the investigations into the matter, the subject of the petition. A careful reading of the order will show that the Respondents were restrained from arresting the Petitioner, detaining the Petitioner, pursuing the Petitioner, confining the Petitioner or in any way interfering with the liberty of the Petitioner in connection with the complaint and allegations giving rise to the Petition. In prayer 2 which was granted by the Court, the Petitioner sought stay of his arrest, detention, being pursued, confined and any form



of interference with his liberty. Clearly what he was concerned about, was his liberty. He did not seek that the Respondents be restrained from investigating the matter. The Court could not therefore grant orders not sought.

17. 'It is trite law that a party seeking orders in contempt proceedings has the burden of proving that the terms of the order were unambiguous and binding on the respondent. Such party must also prove that the actions of the respondent are in clear violation of the terms of the said orders. As seen above, there was no order restraining the Respondents from carrying on their investigations.'

18. The standard of proof in contempt proceedings is well established and though it is higher than proof on a balance of probabilities it is not proof beyond reasonable doubt as that remains in the realm of criminal cases. This is as was held in the case of Mutitika v Baharini Farm Limited [1985] KLR 229, 234, where the Court of Appeal stated:

'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.'

19. A successful prosecution of contempt proceedings may result in a party being deprived of their liberty. As such an applicant must discharge the burden of proof placed upon him to the required standard, which is higher than proof on a balance of probabilities but not beyond reasonable doubt. In the instant case, no evidence was placed before the Court to demonstrate that the 1st Respondent's officers disobeyed the Court order of April 21, 2022. Indeed, nowhere in that order does it say that the investigations shall not be carried out. In order to succeed in his Application, the Petitioner was required to lay before this Court proof beyond a balance of probabilities that the 1st Respondent's officer disobeyed the Court order of April 21, 2022. This Petitioner has not done.

20. After applying the principles for an application for contempt to the facts of this case, I am not persuaded that there was disobedience of the Court orders and intentional violation of the Court's dignity, repute or authority, on the part of the Respondents as alleged. I do not therefore consider that the Petitioner has made out a case to warrant the grant of the orders sought. Accordingly, the Application dated May 6, 2022 being devoid of merit is hereby dismissed with costs.

DATED AND DELIVERED IN NAIROBI THIS 27TH DAY OF JANUARY 2023

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M. THANDE

JUDGE

In the presence of: -

.....**for the Petitioner**

.....**for the Respondents**

.....**Court Assistant**

