



**Zaheer v Cabinet Secretary, Ministry of Interior and Cordination of Government & another  
(Constitutional Petition E010 of 2021) [2023] KEHC 452 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 452 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E010 OF 2021**

**JN ONYIEGO, J  
JANUARY 26, 2023**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF  
RIGHTS UNDER ARTICLES 22(1) OF THE CONSTITUTION (2010)**

**BETWEEN**

**AHMAD ZAHEER ..... PETITIONER**

**AND**

**CABINET SECRETARY, MINISTRY OF INTERIOR AND CORDINATION OF  
GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR DEPARTMENT FOR IMMIGRATION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide a petition dated February 1, 2021, the petitioner herein moved to this court seeking various declaratory orders against the respondents inter alia; a declaration that the decision to deport the petitioner from kenya was illegal and unconstitutional; the petitioner’s right to fair administrative action was infringed by the respondents in deporting him from the republic of kenya; the petitioner’s rights under articles 25, 29, 45, and 50 of the Constitution had been infringed by the respondent in deporting him from kenya; the petitioner be supplied with written reasons informing the decisions to declare him a prohibited immigrant by the 1<sup>st</sup> respondent; a certiorari order to issue to quash the decision by the respondents declaring the petitioner as a prohibited immigrant/inadmissible person in kenya; an order of mandamus to issue directing the respondents to remove the petitioner’s name from the list of prohibited immigrants/inadmissible persons; an order directing the respondents to rectify and correct any and all inaccurate information in their records relating to the petitioner that may have led them to arrive at the impugned decision to illegally deport the petitioner and; compensation for violation of the petitioner’s fundamental rights and freedoms by the first respondent;



2. Upon hearing the petition fully, the court delivered its judgment on July 29, 2021 thus allowing the petition and subsequently declared the deportation of the petitioner illegal and unconstitutional. It also issued a certiorari order quashing the decision declaring the petitioner an illegal immigrant or an inadmissible person in Kenya. The court made further orders directing that; the respondents to remove the petitioner's name from the list of inadmissible persons pending investigation on the allegations made against him; the applicant be allowed to enter Kenya upon acquiring the necessary visa; upon entry by the petitioner in Kenya, any criminal allegations upon him be investigated in accordance with the laws of Kenya and necessary actions be taken pursuant to any such investigations.
3. Subsequently, by a notice of motion dated November 14, 2022 and filed on November 16, 2022, the petitioner applicant moved this court seeking orders that;
  - a) Spent
  - b) The honourable court be granted leave to institute contempt of court proceedings against the respondents and to issue summons to prof. Kithure Kindiki and Mr. Alex Muteshi Imbenzi, to attend to and appear before the honourable court on a date to be determined, to show cause why they should not be committed to civil jail and penalized for contempt.
  - c) That prof. kithure kindiki and Alex Mutheshi imbenzi, be committed to jail for six months; or penalized on such terms as the honourable court may determine, for contempt of court for having deliberately disobeyed orders of this court issued on 3<sup>rd</sup> December 2020.
  - d) That the respondents and prof. Kindiki and Alex Muteshi imbenzi be ordered to pay the petitioner GDP860 costs incurred in his travel from the united-kingdom to kenya on November 12, 2022.
  - e) That prof. Kithure Kindiki and Alex Muteshi Imbenzi be barred from holding or executing any functions of a public office for the duration that they shall continue to be in contempt of the orders of this honourable court
  - f) That any other or further orders of the court geared towards protecting the dignity and authority of the court to issue.
4. The application is anchored on grounds stated on the face of it and averments contained in the affidavit in support sworn by willis Owino counsel for the petitioner who averred that despite the respondents having been served with the express court order issued on August 20, 2021 directing that the petitioner/ applicant be allowed into the country, the respondents and more particularly prof. kithure Kindiki and Alex Mutheshi the immigration officer barred and denied the applicant from gaining entry into the country on November 13, 2022 at Moi international airport for no good reason thus acting in contempt of the said court order.
5. In response, the respondents filed a replying affidavit sworn on November 30, 2022 by Jimmy Nyikuli the principal immigration officer in-charge of enforcement section who opposed the application on grounds that; in compliance with the court order, the petitioner's name was removed from the list of prohibited immigrants; the applicant applied for a visa on line sometime in September 2022 and the same was granted and issued on September 20, 2022.
6. It was further deposed that possession of a visa is not the only and final authority to enter Kenya as entry ought to be approved by the immigration officer at the point of entry in accordance with the immigration Act of 2011. That the applicant was denied entry into kenya on 13<sup>th</sup> November 2022 as he



did not provide proof of the source of sufficient funds to sustain himself as required by section 33(2)(c) of the immigration Act 2011.

7. In his rejoinder, the applicant filed a further affidavit sworn on December 14, 2022 by his lawyer Willis Otieno who averred that the respondents' response was a mischievous attempt intended to circumvent compliance with the court order and more particularly order number (v) which provided that the applicant was to gain entry upon acquiring a visa which he did and travelled to Kenya only to be returned back to the UK at the point of entry to Kenya.
8. He further stated that any other condition other than the one set by the court is irregular and illegal hence an admission of disobedience to the court order; the applicant is a person of means who has a family in Kenya and had already booked a return ticket to UK and; court orders must at all times be obeyed.
9. When the matter came up for hearing, Mr Otieno for the applicant basically reiterated the averments contained in the affidavit and further affidavit in support of the application. Equally, M/s Opio counsel representing the AG's office which is appearing for the respondents also adopted the averments contained in the affidavit in support.

### **Determination**

10. I have considered the application herein, the response thereof and oral submissions by both counsel. The only issue for determination is whether the respondents are in contempt of the subject court order. There is no dispute that the court did make various orders dated July 29, 2021 directing the respondents to lift any entry or directive declaring the applicant a prohibited immigrant hence denying him entry into the country. There is no dispute either that the court had directed the respondents to issue the applicant with a Kenyan visa which they did. Under order number five the court directed that the applicant was to enter the country upon being issued with the necessary Visa.
11. It is trite that court orders are not made in vain. They are made for a specific purpose. The main objective is to enforce and uphold; court's authority and dignity, confidence to the rule of law, certainty and predictability in the application of the law. Therefore, court orders are never issued as a matter of course and obedience is not optional. The party to whom such order is issued is duty bound to obey the same. Unless an order for stay of execution or setting aside is obtained, then, it must be obeyed regardless of the status or standing in society of the person or body against whom it is issued.
12. In the case of *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR the court had this to say.

“When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issued 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.

We note that authorities have been placed before us which espouse the position that once a party is found to have breached, disobeyed or violated court orders such person will not be



given audience before court until he first purges his contempt. In *Hadkinson v Hadkinson* [1952] 2 ALL ER 562, the English Court of Appeal returned these categorical holdings;

“Held (per Somervell and Romer, LJJ), that it was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged; that the mother in the present case had not brought herself within any of the exceptions to the general rule which debarred a person in contempt from being heard by the courts whose order he had disobeyed; and that she being in continuing contempt by retaining the infant out of the jurisdiction her appeal could not be heard until she had taken the first and essential step towards purging her contempt by returning the child within the jurisdiction.

Held Per Denning, LJ:

...The fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice.”

13. Whereas contempt proceedings are quasi criminal in nature, the degree of proof that the subject court order was indeed disobeyed is higher than that of proof on a balance of probability. Therefore, the applicant is duty bound to prove that; the subject court order was brought to the attention of the alleged contemnor; the subject order is clear hence unambiguous; the alleged contemnor did disobey the order and that the disobedience was deliberate. See [Samuel MN Mweru & others v National Land Commission & 2 others](#) [2020] eKLR

“...The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’[40] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. [41] Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).[42]

39. These requirements – that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces. [43] Honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa, [44] underlined the importance to the Rule of Law, of compliance with court orders in the following terms: -

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our



society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

40. It is an established principle of law that<sup>[45]</sup> 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. In the instant case, there is sufficient evidence that service of the said order was effected upon the respondents and that fact was not denied implying that they had knowledge of the existence of the said order. Secondly, the order was clear hence unambiguous. This is because, the only condition attached to warrant entry of the applicant into kenya was issuance of the necessary visa which the respondents have since issued after removing his name from the list of prohibited immigrants/inadmissible persons. The claim that there was another condition involving verification of the applicant’s financial ability to be able to live in kenya is an afterthought purely crafted to intentionally defeat the whole purpose of getting clearance to gain entry into the country.

15. According to M/s Opio, the applicant had failed to prove that he was capable of sustaining himself while in kenya pursuant to section 33(2)(c) of the [Kenya Citizenship and Immigration Act](#) of 2011. For avoidance doubt, I wish to reproduce that provision as hereunder;

33(2)“Prohibited Immigrants and inadmissible persons

- (1) For purposes of this [Act](#), a prohibited immigrant is a person who is not a citizen of Kenya and who—
  - (a) not having received a pardon—
    - (i) has been convicted in Kenya or any country of an offence created under a statute for which a sentence of imprisonment is for a minimum term of three years;
    - (ii) has been acquitted by a court of any offence and who at the time of acquittal has no valid immigration status;
    - (iii) has committed or is suspected of having committed an offence provided for under international treaties and conventions ratified by Kenya;
  - (b) a person engaged in human trafficking, human smuggling, sexual exploitation and sex crimes;
  - (c) a person who procures or attempts engage in trafficking or smuggling into and out of Kenya any person for the purpose of engaging in sexual offenses;



- (d) a person who is reasonably suspected to be engaged in or facilitates the trafficking of narcotics, prohibited, controlled or banned substances;
- (e) a person who there is reasonable cause to believe that he is engaged in or facilitates trafficking in persons;
- (f) a person whose presence in or entry into Kenya is unlawful under any written law;
- (g) a person in respect of whom there is in force an order made or deemed to be made under section 43 directing that such person must be removed from and remain out of Kenya;
- (h) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates any activity detrimental to the security of Kenya or any other state;
  - (i) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates or is sympathetic to acts of terrorism or terrorist activities directed against Kenya or detrimental to the security of Kenya or any other state;
- (j) a person involved in or is reasonably suspected to be engaged in money laundering;
- (k) a person convicted of war crimes or crimes against humanity, genocide, murder, torture, kidnapping or in respect of whom there are reasonable grounds for believing they have financed or facilitated any such acts;
- (l) a person engaged in or suspected to be engaged in illicit arms trade;
- (m) a person engaged in or suspected to be engaged in illegal human body organs trade;
- (n) a person involved or reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cyber- crimes and related crimes;
- (o) a person involved in or reasonably suspected to be involved in piracy or has been convicted of piracy and served his sentence;
- (p) a person who is or has been at any time a member of group or adherent or advocate of an association or organization advocating the practice of racial, ethnic, regional hatred or social violence or any form of violation of fundamental rights;
- (q) a person whose conduct offends public morality;
- (r) a person who knowingly or for profit aids, encourages or procures other persons who are not citizens to enter into Kenya illegally;
- (s) a person who is seeking to enter Kenya illegally;
- (t) a person who is a fugitive from justice;
- (u) a person whose refugee status in Kenya has been revoked under the Refugee Act, 2006 (No. 13 of 2006);
- (v) any other person who is declared a prohibited immigrant by the order of Cabinet Secretary subject to the approval of parliament or who was, immediately before the commencement of this Act, a prohibited immigrant within the meaning of the Immigration Act (now repealed); and



- (w) a person who has been repatriated and or removed from Kenya under any lawful order.
- (2) For purposes of this Act, an inadmissible person is a person who is not a Kenyan citizen and who—
- (a) refuses to submit for examination by a medical practitioner after being required to do so under section 48(1)(d) of this Act;
  - (b) the family and dependants of a prohibited immigrant;
  - (c) incapable of supporting himself and his dependants (if any) in Kenya;
  - (d) is adjudged bankrupt;
  - (e) anyone who has been judicially declared incompetent;
  - (f) an asylum seeker whose application for grant of refugee status has been rejected under the Refugee Act, 2006 (No. 13 of 2006); or
  - (g) is, by order of the Cabinet Secretary, declared inadmissible on grounds of national security or national interest.
- (3) The Cabinet Secretary may make regulations on admission of immigration officer's right to deny entry a person other than an asylum seeker who, upon entering or seeking to enter Kenya, fails to produce a valid and acceptable passport or travel document recognized in Kenya to an immigration officer on demand or within such time as that officer may allow.
- (4) Deleted by Act No. 12 of 2012, Sch.
- (5) Subject to section 34 the entry into and residence in Kenya of a Prohibited Immigrant or an inadmissible person shall be unlawful, and a person seeking to enter Kenya shall, if he or she is a prohibited immigrant or inadmissible person, be refused permission to enter or transit through Kenya, whether or not he or she is in possession of any document which, were it not for this section, would entitle him or her to enter or transit through Kenya.
- (6) An immigration officer may issue a pass to a prohibited immigrant or inadmissible person to enter or remain temporarily in Kenya for such period or authorize such prohibited immigrant or inadmissible to transit through Kenya subject to such conditions as may be specified in that pass or for transit purposes.
- (7) The Cabinet Secretary may make Regulations for the declaration of prohibited immigrants or inadmissible persons.
- (8) The Cabinet Secretary may from time to time review the status of prohibited immigrants and inadmissible persons, subject to the advice of the relevant committee.
16. A simple reading of section 33(2) (c) above quoted will reveal that only an inadmissible person who is not a kenyan citizen is the one who is required to prove his financial ability sufficient enough to support himself or his dependants. In this case, the applicant's name had been removed from the list of prohibited immigrants or inadmissible persons. In the circumstances, it is my understanding and I believe correctly so, that that provision does not apply in the case of the applicant nor does it affect him. It then follows that the immigration officer was wrong in interpreting that section the way he did which was erroneous. In any event, such requirement where applicable should be disclosed as a condition precedent to issuance of a visa so as not to inconvenience an innocent traveler while in a foreign country.



17. Besides, the applicant having been a regular traveler into the country in which his family is residing, he does not need such a condition. In my view, there was blatant disobedience to the court order hence this court will not hesitate to find which I hereby do the respondents guilty of contempt of the court orders made on July 29, 2021 and issued on August 20, 2021
18. As to the order for committal to civil jail, the court will have to act with utmost restraint in implementing this sanction in civil proceedings. I have weight the act of misinterpretation of the law by the immigration officer more particularly section 33(2)(c) aforesaid. I will give him a benefit of doubt hence grant the respondents one more chance to implement the order as it is. For those reasons, I will decline to grant the order for committal to civil jail of the respondents. However, they must comply fully with the orders of July 29, 2021 and issued on August 20, 2021 without any strings or conditions attached with the intention of curtailing full implementation of the said order.
19. The Respondents are warned that in the event of any further disobedience to the said court order, the respondents shall automatically be summoned to show cause why they will not be committed to civil jail for contempt of the said orders. Regarding an order to declare the respondents unfit to hold office, that will be so punitive in the circumstances of this case as not every minor infraction will read to removal from public office. There are elaborate procedures which must be employed before making such an order. Accordingly, the application is allowed only to the extent directed above. As to costs, the same shall follow the event hence the applicant is awarded the same.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26<sup>TH</sup> DAY OF JANUARY, 2023.**

.....

**JN ONYIEGO  
JUDGE**

