



**Republic v Nairobi Metropolitan Services (NMS) & 5 others; Kaka Travellers Cooperative Savings and Credit Society Limited (Exparte Applicant); Omurwa (Contemnor); Metro Trans EA Ltd (Interested Party) (Judicial Review E131 of 2022) [2023] KEHC 1384 (KLR) (Judicial Review) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1384 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E131 OF 2022  
AK NDUNG’U, J  
FEBRUARY 23, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NAIROBI METROPOLITAN SERVICES (NMS) ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF ROADS, PUBLIC WORKS & TRANSPORT,**

**NMS ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF ENFORCEMENT, NMS ..... 3<sup>RD</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 4<sup>TH</sup> RESPONDENT**

**DTO CENTRAL POLICE STATION ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**KAKA TRAVELLERS COOPERATIVE SAVINGS AND CREDIT SOCIETY**

**LIMITED ..... EXPARTE APPLICANT**

**AND**

**ROSANA OSCAR OMURWA ..... CONTEMNOR**

**AND**

**METRO TRANS EA LTD ..... INTERESTED PARTY**



## RULING

1. The Application before court is dated 8<sup>th</sup> December 2022. It is brought under section 5(1) of the Judicature Act; Part 81.1, Rule 81.1 of the English Civil Procedure Rules (Amendment No.3) Rules, 2020; and Part 81.1,2,3,4,5,6, and 7 thereof; and Rule 39 of the High Court (Organization and Administration) (General) Rules. The *ex parte* Applicant (Kaka Travellers Co-operative Savings and Credit Society Limited) seeks orders that:
  - i. Spent
  - ii. Rosana Oscar Omurwa, the Managing Director of the Interested Party herein, Metro Trans E.A. Ltd be forthwith enjoined in these proceedings as the Cited Person/Contemnor.
  - iii. Upon the grant of prayer 2 herein, Rosana Oscar Omurwa, the Cited Person/Contemnor herein, do show cause why he should not be held in Contempt of Court for having expressly breached, and acted in violation of paragraph 6 of the Order of this Honourable Court dated 1 November 2022 prohibiting the Interested Party herein Metro Trans E.A. LTD (and consequently as its Director having authority to represent the Interested Party herein) in specific terms, prohibiting the Respondents and the Interested Party (Metro Trans E.A. Ltd, or any other party or entity acting at their behest and/or agency), from unlawfully blocking the *Ex Parte* Applicant's and its members' PSV vehicles operating as such PSV along the Githunguri – Nairobi CBD route, access to, from (and at) the Applicant's designated Tom Mboya slated passenger-picking and dropping off bay, or any other place within their licensed Road Service Licensed (RSL) route.
  - iv. Rosana Oscar Omurwa be held in Contempt of Court for having acted, and in acting in breach of paragraph 6 of the Order of this Court issued on 1s November 2022, duly served upon him and whose terms were known to him at all material times.
  - v. Rosana Oscar Omurwa, the Cited Person/Contemnor do show cause why in consequence of his Contempt of Court acting in breach of paragraph 6 of the Order of this Court issued on 1s November 2021, he should not be committed to civil jail for such period not exceeding six month or such period as shall be determined by this Honourable Court, and/ or fined in lieu thereof such sums of money as this Honourable Court shall determine, and/ or in lieu thereof the assets of Metro Trans E.A. LTD be sequestered under such terms as this Honourable Court shall determine, and/ or such expedient sentence be imposed on the Cited Person/Contemnor as this Honourable Court shall deem fit.
  - vi. The cited Rosana Oscar Omurwa, the Cited Person/Contemnor, be personally present in Court on all the dates appointed for the hearing of this Application.



- vii. In purging his Contempt, and only in lieu of sequestering the Cited Person/Contemnor's/Interested Party's assets, and monies held in his bank accounts, and/ or otherwise held, this Honourable Court be pleased to direct the said Rosana Oscar Omurwa, the Cited Person/Contemnor to forthwith, and not later than 7 days of the making of this Order issue a public apology to the *Ex Parte* Applicant herein and the Judiciary of Kenya (or in such manner as the Court may direct).
  - viii. This Honourable Court issues such further directions on the determination of this Application as may be expedient.
  - ix. The Interested Party and Rosana Oscar Omurwa, the Cited Person/Contemnor pay the *Ex Parte* Applicant's costs of these proceedings in any event.
2. The gist of the Application is that on the 21<sup>st</sup> November 2022, this court issued interim orders directing: "That the DTO Central Police Station (5<sup>th</sup> Respondent herein) do forthwith oversee the strict and immediate enforcement of the terms of paragraph 6 of the Order issued in these proceedings on 1 November 2022 to effect: That an interim Order of Prohibition be and is hereby issued prohibiting the Respondents and the Interested Party (Metro Trans E.A Ltd or any other party or entity acting at their behest and/or agency), from unlawfully blocking the *exparte* Applicant's and its members' PSV vehicles operating as such PSVs along Githunguri-Nairobi CBD route, access to, from (and at) the Applicant's designated Tom Mboya Street slated Passenger picking-up and drop off bay or any other place within their licensed Road Service Licensed (RSL) route pending further Orders of this Court."
  3. That despite the aforementioned interim court orders, the Interested Party, and in particular the Contemnor/Cited Person Rosana Oscar Omurwa is deliberately ignoring the courts orders, and engaging in contumacious conduct, despite having knowledge of the courts directive, thus openly disobeying this court.
  4. The Interested Party, and the Contemnor/Cited Person, in opposing the Contempt Application, and by a Replying Affidavit dated 15<sup>th</sup> December 2022, stated in their case that they complied with this Honourable Court's order and categorically denied violating the court order as alleged by the *ex parte* Applicant. Moreover, that the *ex parte* Applicant has been operating from the passenger picking-up and drop off bay as ordered by this honourable court.
  5. In response to the Interested Party's/Contemnor's/Cited Person's Replying Affidavit, the *ex parte* Applicant filed their Supplementary Affidavit dated 5<sup>th</sup> January 2023, where it was averred that the contemnor/cited person admitted to being the Chief Executive Officer of the Interested Party, and the overall person with the highest responsibility in the Interested Party. To that extent, that the Contempt of Court Orders sought against him are warranted, as they are still continuing with acts of contempt of court.
  6. The Application was disposed of by way of written submissions. The *ex parte* Applicant filed their written submission dated 5<sup>th</sup> December 2023. In sum, it submitted that the Contempt Application is properly in court as envisaged in law. That it is the duty of everyone, including the contemnor/cited person, to respect and uphold the Constitution; and where it is found that contemptuous actions have been committed, the same cannot go unpunished by the courts; and the courts may impose an order of committal, confiscation of assets, fine, or other punishment permitted under the law.



7. That the Interested Party and particularly the contemnor/cited person did not comply with the court order, and continues with the conterminous acts. That the court orders were clear, unambiguous; and were binding on the Interested Party and all its directors including the cited Person, Rosana Oscar Omurwa; and that in the event that the order was unclear, no clarification was sought in court by the contemnor. Reliance was placed on Section 5(1) of the Judicature Act; Rule 39 of the High Court (Organisation and Administration) (General) Rules; and the cases of Kenya Human Rights Commission v Attorney General & Another [2018] eKLR; Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005]1KLR 828; Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others [2017] eKLR; and Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR.
8. The Interested Party in its written submissions dated 16<sup>th</sup> January 2023 advancing their case and opposing the Application, submitted that the Applicant cited one Rosana Oscar Omurwa blatantly for the reasons that he is not the Managing Director nor is he an employee of the Interested Party. Further, that he has no legal capacity nor authority to conduct any business or affairs on behalf of the interested party. Therefore, to hold Rosana Oscar Omurwa, in contempt is clearly a fishing expedition. The Interested Party maintained that they were served with the court order and complied with the orders therein. That the burden of proof in contempt as alleged by the Applicant is on the *ex parte* Applicant, and which burden is higher than the balance of probabilities. It is urged that it is clear that the Applicant has failed to prove the contempt allegations and wants to mislead this court by citing a stranger as the managing director of the Interested Party herein. Reliance was placed on the cases of Oilfield Movers Ltd v Zahara Oil & Gas Limited [2020] eKLR, Gatharia K. Mutikika v Baharini Farm Limited [1985] KLR 227, Peter K Yego others v Pauline Wekesa Kode (Acc No. 194 of 2014)
9. It is common ground that the court's order still remains in force. It is thus the duty of any person against whom the order was made to comply with it. In Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 the court observed that,
 

Respondents were obliged to comply with the said decision. It is essential for the maintenance of the rule of law and order that the authority and the dignity of Courts is upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, 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 void.
10. Further, in Awadh v Marumbu (No 2) No. 53 of 2004 [2004] KLR 458, the court stated that,
 

“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilized societies from those applying the law of the jungle. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.”



11. The court in *B v Attorney General* [2004] 1 KLR 431 case stated 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.”
12. The rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgment. Wilful and flagrant disobedience of court orders undermines the authority and dignity of the Courts and must be dealt with firmly so that the Court’s authority is not brought into disrepute. See *Moses P N Njoroge & Others v Reverend Musa Njuguna & Another Nakuru* HCCC No. 247 “A” of 2004
13. Further, an order passed by a competent court, whether interim or final has to be obeyed without any reservation. The Constitutional Court of South Africa, in *Burchell v Burchell* Case No 364/2005, 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.”
14. According to *Black’s Law Dictionary 9th Edition, page 36*,
 

“Contempt is a disregard of, 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.”

While in *Halsbury’s Laws of England* it is stated: -

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment ..... an application to court by him not being entertained until he had purged his contempt”
15. In the book *The Law of Contempt Butterwoths {1996} Pages 555-569* learned authors Nigel Lowe & Brenda Sufrin state a follows: -
 

“Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore, it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside.”



16. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* (*Supra*) Ibrahim J (as he then was) stated as follows: -

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by 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 void.”

17. The whole purpose of litigation as a process of judicial administration is lost if court orders are not complied with. A party who knows of an order whether they believe same to be regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that suitors or their solicitors could themselves judge whether an order was null or valid; whether it was regular or irregular. There is need to emphasize that the principle of law is that the whole essence of litigation as a process of judicial administration is lost if orders issued by court through the set judicial process in the normal functioning of courts are not complied with in full by those targeted and/or called upon to give due compliance/effect. A State organ or agency or person legally and duty bound to give due compliance must do so. Court orders cannot be issued in vain. See *Wild Life Lodges Ltd v County Council of Larok and anor*, (2005) Vol 2 EALR p.344; and *Chuck v Cremer* (1) Corp Temp 442
18. The High Court of South Africa in the case of *Kristen Carla Burchell v Barry Grant Burchell Eastern Cape Division* Case No. 364 of 2005 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.
19. Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated as follows: -

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
  - (b) the defendant had knowledge of or proper notice of the terms of the order;
  - (c) the defendant has acted in breach of the terms of the order; and
  - (d) the defendant's conduct was deliberate.
20. Applying the above tests, and considering the facts of this case, I am persuaded that the terms of the subject order were clear and unambiguous, the Interested Party and its CEO Rosana Oscar Omurwa had knowledge of and proper notice of the order, they have acted against the terms of the order and such conduct is deliberate.



21. It is worth of note that Rosana Oscar Murwa readily confirms that he is the CEO of the Interested Party. He does not deny responsibility in the running of its affairs. The belated attempt by his counsel in their submission to insinuate that Omurwa has no responsibility in the running of the affairs of the Interested Party cannot stand. The submission that the Applicant cited Rosana Oscar Omurwa blatantly for the reasons that he is not the Managing Director nor is he an employee of the Interested Party is not only misleading but false as Omurwa himself confirms on oath in his affidavit that he is the CEO of the Interested Party. The photos allege to show compliance alluded to in paragraph 7 of the replying affidavit are not annexed and that assertion remains a mere statement with no proof that the Interested Party complied with the orders of court.
22. From the foregoing and for reasons above stated i find that the Interested Party and its Chief Executive Officer(CEO) Rosana Oscar Omurwa wilfully disobeyed a valid court order. As held by Musinga J (as he then was) in *Moses P.N. Njoroge & Others v Reverend Musa Njuguna and Another*, Nakuru HCCC No. 247'A' of 2004, wilful disobedience of court orders undermines the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute. I therefore allow the application dated 8<sup>th</sup> December 2022 to the extent that the Interested Party and Rosana Oscar Omurwa are held in contempt of court for disobedience of the order of court issued on 1<sup>st</sup> November 2022. The Interested Party and Rosana Oscar Omurwa are directed to appear before this court on a date to be appointed to show cause why they should not be committed to civil jail and/or fined in lieu thereof. The Applicant shall have the costs of this application.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023**

**A.K. NDUNG'U**

**JUDGE**

