



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bagha v Katuga t/a Katuga and Company Advocates (Civil Case  
38 of 2016) [2023] KEHC 27631 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 27631 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 38 OF 2016  
F WANGARI, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**AHMED MOHAMED SALEH BAGHA ..... APPLICANT**

**AND**

**LEO KATUGA T/A KATUGA AND COMPANY ADVOCATES ... RESPONDENT**

**RULING**

1. The Applicant (Client) instituted this suit against the Respondent (Advocate) via Originating Summons dated 7/11/2014 over an Advocate/ Client dispute on legal fees paid. Through a ruling dated and delivered by D.O Chepwoy J. on 30/4/2021, it was ordered;
  - a. That the Respondent do file a Bill of Costs to be taxed by the Taxing Maser, within thirty (30) days from the date of service of the order of the Honourable Court.
  - b. That the Respondent do render an account of all monies received on behalf of the Applicant within thirty (30) days from the date of service of the order of the Honourable Court.
2. The Applicant subsequently filed the Application Notice dated 4/20/2021, seeking to have the Respondent cited for Contempt of Court's Order of 30/4/2021. The Order which was issued on 10/6/2021 by the Deputy Registrar of the High Court was personally served upon the Respondent on 15/5/2021, and later on the same date, through the Respondent's postal address. An Affidavit of Service to this effect, dated 17/6/2021 was filed on the even date.
3. The Respondent did not put a replying affidavit to the Application Notice. This court on 8/11/2021, 22/2/2022, 26/4/2022 gave the Respondent opportunities to file the Replying affidavit. The same was not done, instead, the Respondent filed a Notice of Preliminary objection dated 28/6/2022, and now which is the subject to this ruling.



4. On 29/6/2022, directions were taken that the Preliminary Objection be disposed of by way of written submissions. Both parties did not comply despite having several mentions on the matter to confirm the same. The court directed that the Preliminary Objection be disposed of by way of inter-partes hearing on 5/6/23.

### **Analysis and Determination**

5. Iddi Advocate for the Respondent submitted that the ‘Notice of Motion’ was brought under the *Contempt of Court Act* which was declared unconstitutional, hence this court had no jurisdiction to punish the Respondent based on the impugned Act. He relied on the case of *Human Rights Commission v The Attorney General & another* (2018) eKLR where the *Contempt of Court Act* was declared unconstitutional. He prayed that the application be struck out.
6. Mango Advocate for the Applicant submitted that the application was brought under Section 5 of the *Judicature Act* and the Civil Procedure Rules of England, which are the laws that existed before the impugned Contempt of Court. It was submitted that the Respondent was in contempt of the court order that required him to file a Bill of Costs, and failed to do so. The Applicant relied on the case of *Samuel M. Mweru & others v National Land Commission & 2 others* (2020) eKLR where the court held that Section 5 of the Judicature was still applicable in contempt of court proceedings.
7. I have considered the parties’ pleadings, the Preliminary Objection, the oral submissions together with the authorities relied upon by the parties as well as the law and in my view, the following issues are for determination;
  - a. Whether the preliminary objection is merited
  - b. Based on the outcome of (a) above, whether the Application Notice dated 5/10/2021 has merits.
  - c. Who bears the costs?
8. On the first issue, the Respondent raised a Preliminary Objection on the basis that the Application Notice (which the Respondent referred to as the Notice of Motion) was based on the *Contempt of Court Act* which was declared unconstitutional.
9. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles Newbold, P added: -

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are



correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

10. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit or application.
11. The *Contempt of Court Act* was nullified after it was found to have been unconstitutional in *Kenya National Human Rights Commission case (supra)*. The impugned Act had repealed section 5 of the *Judicature Act*. After its nullification, the courts reverted to section 5 of the *Judicature Act* which 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 the exercise of the ordinary original criminal jurisdiction of the High Court.
12. In the case of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others* [2014] eKLR, section 5 of the *Judicature Act* was recognized as the only statutory basis for contempt of court law in the Court of Appeal and the High Court.
13. I have perused through The Civil Procedure (Amendment No 3) Rules 2020 of England and more specifically, Rule 81 on “Applications and Proceedings in Relation to Contempt of Court”. Rule 81.4 provides for the “Requirements of a contempt application”

#### 81.4.

- (1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
- (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
  - (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
  - (b) the date and terms of any order allegedly breached or disobeyed;
  - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;
  - (d) if the court dispensed with personal service, the terms and date of the court’s order dispensing with personal service;



- (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
- (f) the date and terms of any undertaking allegedly breached;
- (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
- (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
- (i) that the defendant has the right to be legally represented in the contempt proceedings;
- (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
- (k) that the defendant may be entitled to the services of an interpreter;
- (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
- (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
- (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- (q) that if the defendant admits the contempt and wishes to apologize to the court, that is likely to reduce the seriousness of any punishment by the court;



- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.

14. From the above, I find that the Application Notice by the Applicant is in compliance with Rules 81.4 as stated herein above. There is no basis laid by the Respondent on their objection that the application was brought under the annulled Contempt of Court Act. I therefore dismiss the submissions by the Respondent as there is no proof that the application was made under the Contempt of Court Act. Subsequently, the Preliminary Objection is found to be with no merit and is hereby dismissed.
15. On the second issue, having found that the Application Notice is properly on record, I shall proceed to make a finding on the same. The Respondent was served with the application. Though from the proceedings there is no indication as to when the application was served, the proceedings for 18/11/2021 confirms that the application was served. Ms Mulongo Advocate appeared for the Respondent and prayed for time to file the response and was granted 7 days.
16. On 22/2/2022 when the matter came up for directions, the Respondent had not filed the response. He was granted 14 more days to do the filing. On 26/4/2022 when the matter came up for further directions, the Respondent still had not filed the replying affidavit, and a 'final opportunity' was granted to file the response.
17. The Respondent finally responded to the Application Notice by filing the Notice of preliminary Objection dated 28/6/2022. The court directed that the Preliminary Objection be disposed of by way of written submissions. To date, there is no replying affidavit on record. The application is deemed as not opposed, despite the Respondent having had almost two (2) years to put in his response, but failed to do so. Nevertheless, this court had a duty to determine this application on merits.
18. The Applicant seeks to have the Respondent cited for contempt of the orders of the court dated 30/4/2021. The Respondent was served with the orders on 15/6/2021. The court had ordered that the Respondent do file a Bill of Costs and to render an account of all the money received on behalf of the Applicant. This was to be done within 30 days after the receipt of the Court Order. Despite the Respondent being served with the order, there is nothing to show that he complied with the said orders.
19. It has been held that the power to punish for contempt of court is for purposes of upholding the authority of the court. In the case of Econet Wireless Kenya Limited v Minister for Information and Communication of Kenya Authority [2005] eKLR it was held 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 whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void.”



Further, it must be established that the Respondent willfully and deliberately disobeyed the court orders. In *Oilfield Movers Ltd v Zabara Oil & Gas Limited* [2020] eKLR the court stated -

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.....”

20. I find that the Respondent having been served with the court orders willfully and deliberately disobeyed the said orders. In order to uphold the authority of the court, I find the Respondent in contempt of court.
21. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. In the present circumstances, the Applicant chose its path fully aware of the consequences and I thus see no reason why I should deny the Applicant costs of the application.
22. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The Notice of Preliminary Objection dated 25/6/2022 is without merit and is hereby dismissed
  - b. The Application Notice dated 5/10/2021 is hereby allowed and the Respondent is cited for contempt of court.
  - c. That the Respondent to appear in open court for purposes of mitigation on a date to be given after the delivery of this ruling.
  - d. Costs to the Applicant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**F. WANGARI**

**JUDGE**

In the presence of;

Maundu Advocate h/b for Mango Advocate for the Applicant

N/A for the Respondent

Barile, Court Assistant

