



**Tonui v Sitachi & 5 others (Environment & Land Case 23 of 2018)
[2023] KEELC 16902 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16902 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 23 OF 2018**

FO NYAGAKA, J

APRIL 20, 2023

BETWEEN

RACHAEL WANJIKU TONUI PLAINTIFF

AND

ENES SITACHI 1ST DEFENDANT

AGNES NAFULA WAFULA 2ND DEFENDANT

FRANKLINE WAFULA 3RD DEFENDANT

WILLIAM WEKESA MUCHELE 4TH DEFENDANT

MAURICE WANJALA WEKESA 5TH DEFENDANT

JOHN WEKESA WABUKE 6TH DEFENDANT

RULING

1. On 18/04/2023 when this matter came up for the inter parties hearing of an Application dated 17/03/2023 filed by the Defendants the same date, counsel for the Plaintiff/Respondent raised the point that the Applicants having not complied with the orders of the Court made on 08/03/2022 had no audience in the matter. She prayed that the court finds so, and dismisses their application.
2. The orders which were relied on were given upon delivery of the judgment of this Court on the material date. They were to the effect that “The parties dissatisfied with the judgment can file a Notice of Appeal and requires for proceedings as the law requires since it is a right for them. But participation in any further proceedings in this Court attendant to the matter they are barred until they comply.”
3. The genesis and history of the orders is that during the course of the hearing of the instant matter, the Defendants applied for adjournment on a number of occasions. The Court indulged them but on 21/06/2022 the Court could not condone further adjournments by the Defendants without punitive



- consequence which was that they pay before the next hearing date the Plaintiff's learned counsel's costs assessed at Kshs.7,500/= together with Kshs.1000/= being his witness' expenses. Further hearing was fixed for 27/07/2022.
4. By that date, the costs were not paid. Learned counsel for the Plaintiff indulged the Defendants and agreed that the remaining witness for the Plaintiff testified but the assessed costs be paid soon after. The Plaintiff's case was closed and a date for defence hearing taken. When the matter came up for defence hearing on 17/10/2022 the defendants once again applied to adjourn the matter on account of changing representation. It was allowed on condition that the learned counsel's costs of Kshs.7,500/= together with the costs previously ordered be paid before the next hearing date. Again, by 2/11/2022 when the matter was to proceed they had not paid the sum then totaling to Kshs. 15,500/=. They undertook to pay the same before the next date and upon that they were indulged to call their only witness. They closed their case.
 5. On the date when the matter came up for confirmation that the parties had filed written submissions, the Plaintiff's counsel raised the issue of non-payment of the costs and prayed that the defendants be denied audience. Counsel detailed then even written requests they had made to the Defendant's learned counsel twice before the date that the costs be paid in vain. On this date, learned counsel for the Defendants undertook to pay the costs soon afterwards. The Court once again indulged them to pay by 5/12/2022 while they ensured that submissions too were filed. By the latter date they had neither paid nor filed written submissions. The Court gave a judgment date as of 22/02/2023. By that again the situation was as 5/12/2023. Judgment was fixed for 8/03/2023.
 6. On the date of judgment, the Defendants having not complied with the Court orders, the Plaintiff moved the Court before the judgment was read that the Defendants be denied audience since they were in blatant breach of the orders issued earlier severally, culminating in the one of 22/02/2023. After the Court weighing all options and bearing in mind that it could not shut out the parties from participating in the taking of the judgment, lest they complain that their constitution right of fair hearing was curtailed, it delivered judgment. It was upon delivery of the judgment that the Court was specific that any processes which were, as of right an entitlement to the Defendants would be undertaken save for the one of denial of audience thereafter until the disobedience was purged.
 7. On 17/03/2023, and as obvious as it appeared at the time of delivery of judgment, indeed the Defendants exercised their constitutional right to appeal against the judgment of the Court. They instructed another firm of lawyers who complied with Order 9 Rule 9 about coming on record after judgment has been delivered. They filed an application, dated 17/03/2023, for stay of execution of the judgment of the Court. The Plaintiff filed a reply to the Application and submissions. On 18/04/2023 when the application came up for hearing, the Plaintiff's learned counsel raised an objection to the audience being given to the Applicants unless and until they purged the disobedience.
 8. On his part, learned counsel for the Applicants submitted that it was a constitutional right for a party to appeal against a decision and the Defendants had done so. They should not be barred from urging the application. On her part learned counsel for the Respondent argued that Court orders are not issued in vain: they must be complied with lest the dignity of Court be lowered. She stated that the Defendants lacked locus standi, for those reasons, to move the Court. She prayed that since the Defendants did not have audience it should be taken that the application was unprosecuted. The Defendants countered the argument that costs had not been taxed yet and that the Plaintiff ought to have taxed them first and enforce them through lawful means.
 9. I have considered the Application made herein and the law. It is indeed true that the record bears it that one several occasions the Defendants chances to comply with the Court orders, as seen above, but in



vain. This culminated with the orders of 08/03/2023 being made. The orders have never been varied, reviewed or appealed from. Orders of court are not given in vain. They must be obeyed.

10. The issue before me is whether it is in order for the party to deliberately disobey a Court order and still be heard by the said or indeed any other Court. Further, the issue this Court is to consider is the nature and import of the order that the Court is called to enforce through the grant of the prayer by the Plaintiff. This stems from the arguments that were made before me that the defendants were in contempt of the court hence not deserving audience until they purge the contempt.
11. The learned author, Bryan Garner in Black's Law Dictionary, 11th Edition, Thompson Reuters, 2019, p. 397, defines contempt as "...disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or impair the respect due to such a body".
12. About disobedience of orders of the Court, courts in our jurisdiction have had a lot to say. But the case of *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR the Court emphasized as follows:

"Article 159 of the *Constitution* recognizes the judicial authority of courts and tribunals established under *the Constitution*. Courts and Tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with *the constitution* and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate".

13. Elsewhere, in South Africa, Nkabinde, J observed in *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & Another CCT 19/11(75/2015)* that:-

"The rule of law, a foundational value of *the constitution*, requires that the dignity and authority of the courts be upheld.

This is crucial, as the capacity of courts to carry out their functions depends upon it. As *the constitution* commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."

14. In Canada, the Court in *Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2)* [1975] 48 D.L.R.(30), stated that:

"To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrong can be ignored, then



there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.”

Courts therefore Without this power (to punish for contempt) or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society.

It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. (*Louis Ezekiel Hart v Chief George 1 Ezekiel Hart* (-SC 52/2983 2nd February 1990). And in *Hon. Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another* [2014] eKLR, the Court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice.

It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim.”

15. Again, in *Michael Sistu Mwaura Kamau v DPP & 4 Others* [2018] eKLR, the Court of Appeal stated as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the *Contempt of Court Act* and the ruling of the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* (supra). Secondly, as this Court emphasized in *Jiban Freighters Ltd v Hardware & General Stores Ltd* and in *A.B. & Another v. R. B.* [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See *Mutitika v Baharini Farm* (supra) and *Republic v. Ahmad Abolfathi Mohammed & Another* (supra)”.

16. Similarly, in *Shimmers Plaza Ltd v National Bank of Kenya Ltd* [2015] eKLR, emphasized as follows:

“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 notice 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”.

17. From the circumstances obtaining herein, the Court having made a considered assessment of the conduct of the Defendants herein all along, which included giving undertakings which failed, it was



of the view, on 08/03/2023, that the Defendants had intentionally for quite a long time, and on many occasions, failed to obey the Court orders despite being indulged and prompted to do so. They do not intend to do so in the near future.

18. Since the Court issued the order on 08/03/2023 by which it was clear that the Defendants were not to participate in subsequent proceedings without having complied with the order of disobedience of the order, it is imperative that this Court enforces its orders. Otherwise the orders would have been issued in vain. Again, it would be a mockery of the rule of law to issue orders which should not be enforced. Moreover, they were not appealed from or reviewed. Instead the defendants engaged a different law firm to come to Court with a 'novel' argument that it was their constitutional right to urge the appeal. Indeed, it is their constitutional right to urge the appeal, and the Court gave them the opportunity to do so. That is why they were able to lodge the Notice of Appeal and request for proceedings. But that is as far as it would go for any other proceedings subsequent to the delivery of the judgment herein until they obeyed the Court order. For that reason, I find that as things are the Defendants have no audience before me. And as they did not even explain when they intend to comply, this Court finds that they cannot be permitted to argue the application before me hence it is not prosecuted. It is for that reason that this Court dismisses the Application dated 17/03/2022 with costs to the Respondent.

19. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 20TH DAY OF APRIL, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

