



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nduvi v Munge & 2 others (Civil Case E004 of 2021)  
[2023] KEHC 23060 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23060 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE E004 OF 2021  
MW MUIGAI, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**CATHERINE NZILANI NDUVI ..... PLAINTIFF**

**AND**

**JACOB WAEMA MUNGE ..... 1<sup>ST</sup> RESPONDENT**

**DR. GEDION KARIUKI ..... 2<sup>ND</sup> RESPONDENT**

**RISPER CHERUYOT ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Vide a Notice of Motion dated 9<sup>th</sup> December 2021, the Applicant seeks the following orders;
  - a. Spent
  - b. That pending the hearing and determination of this application, the 2<sup>nd</sup> Contemnor be ordered to produce Bank Statement for A/C 01120XXXXXX700 in the name of Jacob Munge held at Co-operative Bank Mlolongo Branch for the period between 11.01.2022 to 17.10.2022.
  - c. That pending the hearing and determination of this application, the 1<sup>st</sup> Contemnor be ordered to produce certified copies of M-pesa Account Statements for his mobile number 0722XXXX50 for the period between 11.01.2022 to 17.10.2022.
  - d. That this Honourable Court be pleased to order the 1<sup>st</sup> Contemnor and the Directors of the 2<sup>nd</sup> Contemnor herein Dr. Gedion Kariuki and Risper Cheruiyot be arrested and committed to civil jail for a term not exceeding 6 months for contempt or fined for disobedience of the orders given on 11<sup>th</sup> January 2022 by this Honourable Court.
  - e. That this Honourable Court be pleased to order that all the rental income herein collected from the developments on plot NO.177, Plot No.64C, Plot NO.64D and the Leasehold



interest in Plot No. 22 Phase 1 under the Mavoko Land Development Company Limited Scheme in Ngwata area Mlolongo, Mavoko Sub-County in Machakos County be remitted and paid to the Plaintiff/Applicant's account No.011160XXXXXX400 held in Co-operative Bank of Kenya, Mlolongo Branch to be held in trust for the parties herein.

- f. That the said respondents herein to pay for the cost of the Application.
2. The Application was supported by the affidavit of Catherine Nzilani Nduva Waema sworn on 28<sup>th</sup> October 2022 in which she deponed that on 11.01.2022, the Honourable Court gave an order in the matter pending hearing and determination of the Originating Summons in the matter.
3. The Applicant deponed that the above Stated Order was served upon the 1<sup>st</sup> Contemnor on the 18<sup>th</sup> and 20<sup>th</sup> January 2022 via email thus had full knowledge of the said Orders of the Court and that the above stated order was also served upon the 2<sup>nd</sup> and 3<sup>rd</sup> Contemnors on 4.02.2022 who acknowledged receipt by stamping on a copy of the forwarding letter and even sought to verify the veracity of the Order.
4. The applicant Contended that despite having knowledge of the above Order, the 1<sup>st</sup> Contemnor defied the said order by:
  - a. Attempting to dispose of the Matrimonial Properties enumerated in the Order to 3<sup>rd</sup> Parties,
  - b. failure to hold in trust the rent receivable for both parties to the marriage, failure to render accounts for rent income collected,
  - c. failure to account for the maintenance of the rentals of the suit properties to the point where 8 of 10 tenants in the shop premises have vacated due to the state of disrepair of the said properties and finally directing the tenants and property agents of the subject matrimonial properties to stop depositing monies to his known accounts namely Cooperative Bank Mlolongo Branch A/C 011200XXXXXX00 in the name of Jacob Munge and A/C 0360XXXXXX81 Family Bank Mlolongo Branch in the name of Jacob Munge, instead to deposit the said rent receivables either in cash or to his Mpesa number 0722XXXX50 all in bid to defeat the Order of the Court.
5. The Applicant contended that she was reliably informed that the 1<sup>st</sup> Contemnor received rent monies from tenants vide his m Mpesa number 0722XXXX50 and thus it was important that he be directed to produce certified copies of his Mpesa statement for the period of 11.01.2022 to 17.10.2022 for accountability and transparency purposes.
6. The Applicant contended that pursuant to the Order given on 11.01.2022, her advocates on 22.03.2022 wrote to the Respondent's advocates seeking that the Respondent undertakes repair of the buildings on the property known as Plot No 64C and 64D and to deliver accounts on the cost of repair and the Responded through his advocates responded by unequivocally stating that they had no intention of obeying the Court Order.
7. The Applicant stated that despite having knowledge of the said Order, the 2<sup>nd</sup> and 3<sup>rd</sup> Contemnors defied the said Order by failing to deduct monthly instalments of Kes 55,000 in respect to monthly loan instalments payable to Cooperative Bank on 8<sup>th</sup> of every month to offset loan A/C for purchase of motor vehicle registration number KCW026Y through standing orders to the respective accounts for the month of February 2022, April 2022 to October 2022. That the Applicant's advocates even wrote to them informing them that they had defied Court Order and sought that they comply with the same.



8. The Applicant contended that due to the 2<sup>nd</sup> Contemnor's disobedience of the Court Order, she requested that the 2<sup>nd</sup> Contemnor furnish her with the 1<sup>st</sup> Contemnor's Bank Statements, request which the 2<sup>nd</sup> Contemnor blatantly refused.
9. The Applicant contended that the disobedience of the Court Order by the 1<sup>st</sup> Contemnor has caused her substantial loss since her account continues to be deducted Kes 53,507 which has led to lack of sufficient funds for her to cater for the education of their children, maintenance of their matrimonial home, taking care of the 1<sup>st</sup> Contemnor's parents monthly needs.
10. The Applicant further contended that the properties are in a state of disrepair leading to most of the tenants vacating and which consequently results to loss of income. That she was soon set to retire and will no longer have income to cater for her family's needs.
11. The Applicant Finally deponed that the disobedience of the Court orders by the Respondents/ Contemnors must be frowned upon and punished in order to uphold the rule of law.

### **1<sup>st</sup> Respondent Replying Affidavit**

12. Vide an affidavit sworn on 9<sup>th</sup> December 2022 by Jacob Waema Munge, he deponed that he was served with the Applicant's notice of motion but that the ex-parte Orders were not served upon him and wasn't aware of existence of any Orders to be obeyed and thus was not liable to any Contempt of Court.
13. It was deponed that the since the Respondent had entered Appearance and responded to the application, the ex-parte Orders lapsed and had been overtaken by events and that The court shall consider the Respondent's pleadings for inter-parties Orders.
14. It was deponed that the Applicant interfered with the rental house management and control forcing most of the tenants to vacate and leaving most of the rooms vacant.
15. The court was asked to dismiss the application with costs.

### **2<sup>nd</sup> and 3<sup>rd</sup> Contemnors' Replying Affidavit**

16. Vide an affidavit sworn on 1<sup>st</sup> December 2022 by Risper Cheruyot who works as the Branch Manager of the Co-operative Bank of Kenya Limited Mlolongo Branch, she deponed that she was well versed with the facts giving rise to the matter and that the bank was served with the Court Order and upon receipt, it was forwarded to the Bank's Legal services department for verification and or authentication as is the Bank's policy.
17. It was deponed that upon receipt of confirmation of the authenticity of the Court Order, the Bank's Branch issued instructions to establish standing Order against the 1<sup>st</sup> respondent's bank account number 01XXXXXXXXXX00 as directed by the Court Order and indeed the standing order went through with a debit of Kes 55,000 against the Respondent's account in favour of the Applicant.
18. It was deponed that the following months, the standing order could not go through because the Respondent's bank account had insufficient funds all through and that the 2<sup>nd</sup> Contemnor took every necessary measure to comply with the Court Orders and were not in breach of the said Orders.
19. It was deponed that the standing order could not go through in the period of April and November 2022 due to insufficiency of funds in the respondents bank account and was even admitted in the Applicant's affidavit that the 1<sup>st</sup> Contemnor had instructed tenants and property agents not to deposit any money in the said account and thus institution of Contempt of Court proceedings by the Applicant against the 2<sup>nd</sup> and 3<sup>rd</sup> Contemnors was vexatious and in bad faith.



20. It was deponed that the Bank cannot pay an amount less than the directed and/or instructed one if that less amount is available at any given time and it was not the obligation of the 2<sup>nd</sup> and 3<sup>rd</sup> Contemnors and the Bank in general to ensure that the Respondent complied with the Court Orders.
21. It was deponed that the Bank owes a duty of secrecy to its customers to both ordinary and extraordinary transactions thus the Banks's position not to disclose the Respondent's bank statements was sound and in order.
22. The 3<sup>rd</sup> Contemnor concluded by contending that the applicant had failed to demonstrate how they had disobeyed the Court Orders and urged that any act of defiance of the said orders ought to be visited upon the 1<sup>st</sup> Contemnor solemnly.
23. The court was urged to dismiss the application with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Contemnors.
24. The application was disposed of by way of written submissions.

### **Applicant's Submissions**

25. The Applicant filed submissions on 3<sup>rd</sup> February 2023 in which she reiterated the contents of its Replying affidavit and while relying on the case of *Katsuri Limited v Kapurchand Depar Shab*(2016) eKLR, *Basil Criticos V Attorney General & 8 others & 4 others*(2012) eKLR, *Sbimmers Plaza Limited v National Bank of Kenya Limited*(2015)eKLR, *Panchal Trading (k) Limited v NF Metals Corporation*(2021) eKLR, *Republic v Kenya School of Law & 2 other Ex parte Juliet Wanjiru Njoroge & Sothers*(2015) submitted that the elements to be met in a contempt application had been met and urged the Court to find the 1<sup>st</sup> Respondent in contempt of Court Order and be punished by being committed to civil jail.
26. It was submitted that as in the case of *Katsuri Limited v Kapurchand Depar Shab*(2016) eKLR, there were essentially four elements that must be proved to make a case for civil contempt. The applicant must prove to the required standard(in civil contempt cases which is higher than in 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.”
27. On the issue of whether the terms of the Order issued on 11.01.2022 were clear, unambiguous and binding on the Respondent, it was submitted that it was not disputed that the Order was clear in substance and on timelines for compliance and the Respondent has not disputed the clear terms of the Order and was required to comply with as per the decision of the Court in *Katsuri Limited* (*supra*).
28. On the issue of Whether the Respondents had knowledge of or proper notice of the terms of the Order, it was submitted that the 1<sup>st</sup> Respondent was served via email which is considered as proper and lawful service pursuant to the Civil Procedure (Amendment) Rules, relied 2020 and he has not denied the emails used to effect service belong to him. He even proceeded to instruct his advocate who entered appearance on the matter and who responded to the Applicant's letter stating that they had no intention of complying with the Court Order. The applicant relied on the case of *Basil Criticos v Attorney General & Sothers & 4 others* (2012) eKLR which cited with approval previous decisions of the superior Court where it was held that knowledge of a Court Order supersedes Service.



29. On the issue of whether the Respondent has acted in breach of the terms of the Order, it was submitted that the 1<sup>st</sup> Respondent by its own replying affidavit admitted to not complying with the Order of the Court alleging that the Order had lapsed because they had entered appearance. There were no provisions of the law cited to excuse the respondent from obeying the Order as directed. The Applicant relied on the case of *Republic v Kenya School of Law & 2 others Exparte Juliet Wanjiru Njoroge & 5 others* (2015)eKLR and prayed that the Court to grant the application against the Respondents Managing Director who despite having known the terms of the Order chose not to obey.
30. On the issue of whether the Ex-parte Respondents' conduct was deliberate, it was submitted that the 1<sup>st</sup> respondent conduct was intentional and deliberate disobedience of the Court Order and that the Applicant had proved contempt by the 1<sup>st</sup> Respondent beyond reasonable doubt. The Applicant urged the Court to find the 1<sup>st</sup> Respondent in Contempt of Court Order and be punished by being committed to civil jail for disobedience of the orders issued on 11.01.2022.

### **1<sup>st</sup> Respondent's Submissions**

31. The 1<sup>st</sup> Respondent filed submissions on 28<sup>th</sup> February 2023 in which he reiterated the contents of his Replying affidavit and relied on the case of; Nairobi ELC NO. 48 of 2014 , *Pauline Nyambura & another versus Peter Wang'ombe Ndirangu & Others*.
32. It was submitted that the Applicant did not serve the Respondent with the Ex-parte Orders and only got to know about its existence when Contempt of Court Proceedings were filed against him and that in order to find one culpable of contempt of Court, the person to whom the Order is directed must be served in person and duly aware of the Court Orders to be Obeyed. He therefore submitted that because he had not been served the contempt of Court should not succeed.
33. It was submitted the Applicant only served the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent and in between that period, the Applicant accompanied by goons visited the rental premises and chased the caretaker and ordered all the tenants to vacate and which applicant's actions has led to loss of income.
34. On whether the 1<sup>st</sup> Respondent was liable for contempt of Court, it was submitted while relying on Nairobi ELC No. 48 Of 2014, Pauline Nyambura & Another Versus Peter Wang'ombe Ndirangu & Others, it was noted that No Orders of court requiring a person to do or abstain from doing any act maybe enforced by committing him for contempt unless a copy of the order has been to do or abstain from doing the act in question. The 1<sup>st</sup> Responded concluded by maintaining that he was not served with the court order and is therefore not liable for contempt of Court. He urged the court to dismiss the Contempt of Court Proceedings Application with costs.
35. I note that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not put in any submissions

### **Determination**

36. I have considered the Application, the responses thereto and the submissions on record. The court notes that In *Katsuri Limited vs. Kapurchand Deepar Shah* [2016] eKLR in defining contempt of court held:

“ According to Black's Law Dictionary,

“Contempt is a disregard if, 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 to impair the respect due to such a body.”

37. In the High Court of South Africa in the case of *Kristen Carla Burchell vs. Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005, court 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 .
38. The learned authors of the book ‘Contempt in Modern New Zealand’ succinctly stated:-
- “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.
39. In light of the above cases relied upon by the Court which define Contempt of Court and even goes ahead to give the elements to look out for when determining whether parties are guilty for Contempt, the issue that then arises is whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are culpable of Contempt of Court.
40. The Court notes on the part of the 1<sup>st</sup> Respondent that he was duly served through his email address and has not disputed that email address belongs to him. The Applicant has provided proof of service via the email which was served on 18.01.2022 and the service was proper and lawful Pursuant to Civil Procedure (Amendment) Rules 2020 & Legal Notice No. 22 of 2020 at Paragraph 11.
41. In find the elements provided for in the Katsuri case have been met by the Applicant in that the Order issued by the Court on 11.01.2022 were clear and the 1<sup>st</sup> Respondent has not disputed as to the clarity of the Order. Further the 1<sup>st</sup> Respondent was served the Court Order through his email address and instructed his advocate to write to the Applicant to the effect that he had no intention to comply with the said Order. It indeed shows that the 1<sup>st</sup> Respondent had knowledge of the Order.
42. I note that the 1<sup>st</sup> respondent was in breach of the terms of the Order and has admitted so on his replying affidavit by stating that the Orders lapsed the moment he entered appearance and responded and through his advocate stated that the Applicant should desist from supervising the Respondent and his properties. This proves element that the 1<sup>st</sup> Respondent’s Conduct was deliberate.
43. On part of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, there was no dispute as to whether they had been served, the issue in contention is whether they ought to be implicated in the Contempt Proceedings, they have proved via their Replying Affidavit that due to insufficient funds in the bank account of the 1<sup>st</sup> Respondent, it was difficult to effect the standing order. I find that being the case, there was no way the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents could have affected the Standing order.



44. The Court's View is that the conduct of the 1<sup>st</sup> respondent clearly establishes disobedience of the Court Order. On the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the Court finds that they did what they could to comply but it proved difficult due to the conduct of the 1<sup>st</sup> Respondent and thus there are not in disobedience of Court Orders.

### **Disposition**

1. The application to find the 1<sup>st</sup> Respondent culpable for Contempt of Court is upheld.
2. The application to find the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents culpable for Contempt of Court is dismissed.
3. The 1<sup>st</sup> Respondent is to show cause within 30 days as to why he should not be committed to civil jail on 26/10/2023.
4. The cost of the suit granted to the Applicant.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 26<sup>TH</sup> SEPTEMBER, 2023 (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

In The Presence Of:

Mr. Kinyanjui H/B Mr. Litoro for the Applicant/Plaintiff

No appearance - For the Respondents/ Defendants

