



REPUBLIC OF KENYA



**Okoti & 6 others v Cabinet Secretary for the National Treasury and Planning & 3 others; Commissioner-General, Kenya Revenue Authority & 3 others (Interested Parties) (Constitutional Petition E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of 2023 (Consolidated)) [2023] KEHC 25874 (KLR) (Constitutional and Human Rights) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25874 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E181, E211, E217, E219, E221,  
E227, E228, E232, E234, E237 & E254 OF 2023 (CONSOLIDATED)  
DAS MAJANJA, CW MEOLI & LN MUGAMBI, JJ  
NOVEMBER 28, 2023**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... 1<sup>ST</sup> PETITIONER  
ELIUD KARANJA MATINDI ..... 2<sup>ND</sup> PETITIONER  
MICHAEL KOJO OTIENO ..... 3<sup>RD</sup> PETITIONER  
BENSON ODIWOUR OTIENO ..... 4<sup>TH</sup> PETITIONER  
BLAIR ANGIMA OIGORO ..... 5<sup>TH</sup> PETITIONER  
VICTOR OKUNA ..... 6<sup>TH</sup> PETITIONER  
FLORENCE KANYUA LICHORO ..... 7<sup>TH</sup> PETITIONER**

**AND**

**THE CABINET SECRETARY FOR THE NATIONAL TREASURY AND  
PLANNING ..... 1<sup>ST</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT  
THE NATIONAL ASSEMBLY ..... 3<sup>RD</sup> RESPONDENT  
THE SPEAKER NATIONAL ASSEMBLY ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**COMMISSIONER-GENERAL, KENYA REVENUE AUTHORITY INTERESTED  
PARTY**



THE SENATE ..... INTERESTED PARTY  
CONSUMERS FEDERATION OF KENYA ..... INTERESTED PARTY  
KENYA EXPORT FLORICULTURE, HORTICULTURE AND ALLIED WORKES  
UNION ..... INTERESTED PARTY

## RULING

1. By an application dated 4<sup>th</sup> July, 2023, the Petitioners moved the court to determine whether Daniel Kiptoo Bargoria, the Director General of Energy and Petroleum Regulatory Authority (EPRA) (“the Alleged Contemnor”) is in contempt of the orders issued by this court on 30<sup>th</sup> June, 2023 that temporarily stayed the implementation of the *Finance Act, 2023*.
2. The court heard oral submissions from Mr. Issa, counsel of the Alleged Contemnor and one of the Petitioners, Sen. Okiya Omtatah.
3. It is trite that court orders are not made in vain and a party against whom the order is directed must obey it (see *Kyoga Hauliers Limited v Long Distance Truck Drivers & Allied Workers Union* [2015] eKLR). *Black’s Law Dictionary (9<sup>th</sup> Ed.)*, defines contempt of court as “conduct that defies the authority or dignity of a court.” The nature of contempt of court was described in *Stewart Robertson v Her Majesty’s Advocate* [2007] HCAC 63 as follows,

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

4. The Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* [2018] eKLR explained the reason why courts punish contempt as follows :

“(24) In *Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828 Ibrahim J (as he then was) relied on the Court of Appeal decision in *Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990* (unreported), where the Court of Appeal 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... In *Hadkinson V. Hadkinson* (1952) 2 All E.R. 567, it was held that:

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.”...

- (26) The Court of Appeal in *A.B. & Another v R.B.*, Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa’s decision in *Burchell v. Burchell*, Case No.364 of 2005 where it was held:

“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 court and requires other organs of the state to assist and protect the court. 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 have 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.”...

- (28) It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen... [Emphasis ours]

5. In the same case, the Supreme Court set out the standard of proof required to find an alleged contemnor guilty of contempt of court and the rationale of laying down the standard as follows:

- “[28] ... We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of *Mutitika v. Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

- (29) The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.

- [30] The question that begs an answer, thus, is: did the applicant willfully disobey this Court’s Orders?” [Emphasis ours]



6. To establish contempt, there are two key ingredients that must be proved namely, willful disobedience and knowledge of the order. In the past, the jurisprudence by the superior courts required an applicant in contempt proceedings to prove personal service of the order and the attendant penal notice upon the alleged contemnor (see *Nyamogo & Another v Kenya Posts and Telecommunications Corporation* [1994] KLR 141). In recent years, Superior Courts have stated that the applicant is only required to prove awareness of the order by the alleged contemnor. Personal service of the order upon the contemnor is no longer a mandatory requirement. (see *Kenya Tea Growers Association v Francis Atwoli & Others* [2012] eKLR).

7. As regards the standard of proof, courts continue to emphasize a high degree of proof for contempt as exemplified by the following exhortations of the Court of Appeal in *Mutikika v Baharini Farm Limited* [1985] KLR 227:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit made, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

8. Turning to the factual issue in this case, it is not in dispute that on 30<sup>th</sup> June, 2023, the court issued interim orders upon presentation of Petition E181 of 2023 as follows:

“This Matter coming up on 30<sup>th</sup> June, 23 for directions on the Notice of Motion dated 29<sup>th</sup> June, 2023 before Honourable Justice M. Thande upon considering the same;

It Is Hereby Ordered:

1. That the Application be served today 30<sup>th</sup> June, 2023 upon all parties.
2. That responses be filed and served by 4<sup>th</sup> July 2023.
3. That I am satisfied that the Application meets the test for conservatory orders and I do grant prayers 2 and 3 of the Application until 5<sup>th</sup> July, 2023 when the matter is scheduled for mention for directions.” (sic)

9. It is apposite that we place the above order in the context of the matter before us. At the time of filing, the Respondents in Petition No. E181 of 2023; were the Cabinet Secretary for the National Treasury & Planning, the Attorney General, the National Assembly, and the Speaker of the National Assembly. The Commissioner General, Kenya Revenue Authority, The Senate, Consumers Federation of Kenya



(COFEK) and Kenya Export Floriculture, Horticulture and Allied Workers Union were captured as Interested Parties. The specifics of the conservatory orders issued by the court were that:

“Pending hearing and determination of the application and or the Petition the honorable court hereby issues a conservatory order suspending the Finance Act;

Pending the hearing and determination of the application and or Petition, the honorable court hereby issues an interim order of prohibition prohibiting the Respondent and Interested Parties or their agents howsoever acting from giving effect to the *Finance Act, 2023*” (sic)

10. The thrust of the Petitioners’ case is that despite the alleged contemnor being aware of the existence of the court order issued suspending Finance Act, 2023; he issued a press release setting the increase in the price of petroleum products to comply with the revised VAT rates of Petroleum Products from 8% to 16% as per the *Finance Act* that had been accented to by the President on 26<sup>th</sup> June, 2023 and set to take effect on 1<sup>st</sup> July, 2023.
11. Mr. Issa pointed out that neither the Alleged Contemnor nor EPRA were a party to the proceedings at the time the court issued the orders on 30<sup>th</sup> June, 2023. Further, as they were yet to be joined in these proceedings. He submitted that on 30<sup>th</sup> June, 2023, the Alleged Contemnor was simply discharging his duties as EPRA-DG by issuing a Press Release in a timely fashion as has always been the norm. Thus, the Alleged Contemnor stated that he was being prosecuted for his effectiveness.
12. Sen. Omtatah argued that after the court issued the order, he proceeded to serve it upon the Alleged Contemnor, on the same day via his WhatsApp Number and email address alongside the Petition. That despite being served with court process, the Alleged Contemnor declined and or neglected to recall the Press Release.
13. As explained earlier, the two ingredients necessary for a finding of contempt of court are knowledge of the court order, which the Alleged Contemnor denied, and willful disobedience. On the former, the Alleged Contemnor argues that neither he nor EPRA were and are still not a party to these proceedings. Evidently, the said argument is true but reviewing the “Exhibit 000-5” annexed, it is clear there was a WhatsApp conversation between Sen. Omtatah and the Alleged Contemnor, of which the latter does not dispute. What is contended by the alleged contemnor is that at the time the court issued the order, he had already issued out the Press Release in discharge of his duties as the EPRA Director General.
14. A look at the WhatsApp extract indicates that the Order and accompanying documents were sent to the Alleged Contemnor at around 11.38pm (23.38Hrs) presumably on the 30<sup>th</sup> June, 2023 as the extract does not indicate the date. A further perusal of Alleged Contemnor’s response particularly “Annexure DKB-2” shows that the order of 30<sup>th</sup> June, 2023 was issued at 1425Hrs. This court takes judicial notice that the alleged contemnor issued the Press Release through EPRA’s official X (“formerly Twitter”) handle at 1811Hrs. What emerges from the foregoing is that despite this court’s orders having been issued in the afternoon of 30<sup>th</sup> June, 2023, it was not until twenty- two minutes to the midnight of 30<sup>th</sup> June, 2023 that the Alleged Contemnor was served with the said Order. Consequently, by the time he issued the Press Release, the Order had not been brought to the attention of the Alleged Contemnor by the applicant.
15. From the facts and evidence, we find and hold that the *Finance Act, 2023* having been assented to by the President, took effect on 1<sup>st</sup> July, 2023. The Alleged Contemnor, in the performance of his duties as the Director General of EPRA, issued a Press Release to inform the public of the change of fuel prices as a result of the revised VAT from 8% to 16% on petroleum. We hold the Alleged Contemnor



did not have knowledge of Order by the time he issued the Press Release. Further, the Petitioners have not put forth any evidence that shows willful disobedience of the Order. As was held in the *Abmad Abolfathi Mohammed's case* (supra) the standard of proof in contempt applications is high and the Petitioners have failed to surmount this burden. For the reasons we have set out above, we find Daniel Kiptoo Bargoria not guilty of contempt of court.

16. We dismiss the Notice of Motion dated 4<sup>th</sup> July, 2023. Daniel Kiptoo Bargoria is discharged from these proceedings.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**MAJANJA C MEOLI L N MUGAMBI**

**JUDGE JUDGE JUDGE**

