



Republic v Nairobi Metropolitan Services (NMS) & 5 others; Kaka Travellers Cooperative Saving and Credit Society Ltd (Exparte); Omurwa (Contemnor); Metro Trans E.A. Ltd (Interested Party) (Judicial Review Cause E131 of 2022) [2023] KEHC 26857 (KLR) (Judicial Review) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26857 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW CAUSE E131 OF 2022
JM CHIGITI, J
DECEMBER 20, 2023

BETWEEN

REPUBLIC APPLICANT

AND

NAIROBI METROPOLITAN SERVICES (NMS) 1ST RESPONDENT

THE DIRECTOR ROADS, PUBLIC WORKS & TRANSPORT

NMS 2ND RESPONDENT

THE DIRECTOR OF ENFORCEMENT, NMS 3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

THE DTO CENTRAL POLICE STATION 5TH RESPONDENT

THE HON.ATTORNEY GENERAL 6TH RESPONDENT

AND

KAKA TRAVELLERS COOPERATIVE SAVING AND CREDIT SOCIETY

LTD EXPARTE

AND

ROSANA OSCAR OMURWA CONTEMNOR

AND

METRO TRANS E.A. LTD INTERESTED PARTY



RULING

1. The application before this Court is dated October 11, 2023 and it seeks the following orders;
 1. Spent.
 2. That this Honourable Court be and is hereby pleased to set aside the Orders issued on 11/10/2023 in Case No. E131/2022 (Kaka Travellers Cooperative Savings and Credit Society Ltd Vs State Law) and subsequent Warrants of Arrest committing the Contemnor/Applicant to civil jail as a result of Contempt of Court pending hearing and determination of this instant Application.
 3. Spent.
 4. That costs of this Application be in the cause.
2. The application is supported by a supporting affidavit sworn by Rosana Oscar Omurwa on even date.
3. The grounds upon which the application is sought are that on the February 23, 2023, Justice A. Ndung'u issued orders holding the Contemnor/Applicant in contempt of court for disobedience of court orders issued by this Honourable Court on November 1, 2022.
4. The Orders are said to have directed as follows;

“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 ex-parte 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.”
5. The Contemnor/Applicant is said to have resigned from being the CEO/ Managing Director of the Interested Party herein and subsequently ceased to have any control whatsoever over the Interested Party and as such cannot facilitate the implementation of the Judicial Review Orders issued by this Honourable Court on the November 1, 2022 by Justice A.K Ndung'u. The Contemnor/ Applicant is said to be apprehensive that he will be committed to jail and this will be highly prejudicial to him.
6. Further that no prejudice whatsoever or at all shall have been occasioned to the *ex-parte*/Respondent upon the grant stay of execution of the warrant of arrest pending the determination of this Application.
7. In response the ex parte Applicant filed a Replying Affidavit sworn by Duncan Muruga Mwaura on October 23, 2023. In the Affidavit Mr. Muruga depones that the Contemnor/Applicant has not shown that he complied with the said Court between the time it was issued and the time he allegedly left the management of the Interested Party.
8. Further that Mr. Omurwa remains in contempt as he has never purged his contempt. The deponent avers that the Contemnor/Applicant ought to have heard appealed against the said Order of February 23, 2023.
9. It is also the ex parte Applicant's case that the Contemnor has not offered any mitigating reasons and as such, the due process of the law has been followed. The deponent also argues that at the time the



- Contemnor/ Applicant was in control of the Interested Party, there was no evidence to convince the Court that the Contemnor/Applicant was never privy to deliberate Contempt of Court he has been found guilty of.
10. It is averred that Mr. Rosana Oscar Omurwa in his Replying Affidavit sworn on 15th December 2022 in response to the ex parte Applicant's Contempt of Court Proceedings stated that he was familiar with the issues raised and more importantly, that at the material time he was in control and in charge of the operations of the Interested Party.
 11. The Contemnor/Applicant is also said to be aware of the specific terms of the contempt order. It is the deponent's averment that he cannot impute any contempt of court on any other Director of the Interested Party now sought to be substituted in lieu of Rosana Oscar Murwa.
 12. The Ex parte Applicant states that Mr. Rosana Oscar Murwa's capacity, role, influence and position in the Interested Party was not denied or deflected to any other person as at the time the Contempt of Court proceedings were heard. The Contemnor/Applicant it is argued has not provided who is the Managing Director of the Interested Party to be held for sentencing in lieu of himself.
 13. The Application was canvassed by way of written submissions. The Contemnor/Applicant filed written submissions dated November 23, 2023 in which two issues are identified for determination and these are as follows; Has the Interested Party purged the Contempt of Court? and Should the applicant still be cited for contempt of Court?
 14. It is submitted that any person found to be in contempt of court ought to be granted audience before the Court unless it can be established that such a party is in all manners out to demean the rule of law and the Court. Further that the cited person suffers the wrath of the Court, they should be allowed to contest the orders. The cases of *Trust Bank Limited vs Shanzu Villas Limited & 3 others* (2004) KLR, 299 and *John Juma & 2 others v Patrick Libanda & another; Zedekiah Orera & 4 others (Interested Parties)* [2021] eKLR are cited on purging contempt of court orders.
 15. Mr. John Metho Njoroge the Interested Party's director is said to have sworn an affidavit dated November 14, 2023 imitating to this Honorable Court that the Orders issued by this Court on November 21, 2023 had been fully complied with. The Director is said to have even attached photographic evidence to attest to this fact.
 16. On the 2nd issue for determination the Contemnor is said to be a stranger to these proceedings for the sole reason that he no longer holds any legal capacity in the Interested Party nor does he have any authority in the management of the Interested Party's affairs and operations and to further buttress this argument the case of *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR is cited where the Court held as follows;

“The alleged contemnor is a director of the company. He is not a party to these proceedings in his personal capacity. The company is a legal entity. The proper procedure for the applicant was first to apply to lift the corporate veil then go for the directors in their personal capacities.”
 17. It is submitted that in its affidavit, the Interested Party's rightful director, Mr. John Metho Njoroge attests that he is responsible for the day to day management and administrative duties being the Director. Further, Mr. Metho assumed his role as Director effectively as from January, 2023 and the Company's CR12 is attached therein which clearly indicates this stance.



Analysis and Determination

18. I have considered the motion before this court, the affidavit in support together with the ex parte Applicant's replying affidavit and written submissions. The issue for determination is whether the Contemnor/Applicant has made out a case for the orders sought.
19. The Court has had a look at the Contemnor's application dated October 11, 2023 and it is of the opinion that the same is somewhat a replica of the application dated March 3, 2023 to which the Court delivered a Ruling on July 20, 2023 dismissing the same with costs on grounds that have been adduced in the said Ruling.
20. The Application dated March 3, 2023 sought the following orders;
 1. That this application be certified urgent and heard *ex-parte* on the first instance.
 2. That in the interim and pending hearing and the determination of this Application ex-parte, this Honorable Court be and is hereby pleased to stay the execution of the orders issued on the February 23, 2023.
 3. That in the interim and pending hearing and the determination of this Application, this Honorable Court be and is hereby pleased to stay the execution of the orders issued on the February 23, 2023.
 4. That this Honorable Court be and is hereby pleased to review, vary or set aside the order issued on the February 23, 2023.
 5. That Cost be provided.
 6. That the Court do make such order or further orders as it may deem fair and just in the interest of justice.
21. Similarly, the grounds raised by the Contemnor in the above application for review, vary or setting aside of the Court's orders of February 23, 2023 were that he resigned from being the CEO/Managing Director of the Interested Party herein and further that he did not have any control whatsoever over the Interested Party and therefore, could not facilitate the implementation of the orders issued on November 21, 2022.
22. The Contemnor/Applicant in the instant application raises the same issues as those raised in the previous application that effective 1st January 2023 he resigned from being the CEO/Managing Director of the Interested Party and therefore, he is not able to facilitate the implementation of the Judicial Review orders issued on 1st November, 2022 by Justice A.K. Ndung'u. A copy of a CR12 form is also attached to the instant application. The form is the same one that was annexed to the application dated February 23, 2023.
23. The law on setting aside/review of a court's orders is clear. It is trite that the High Court has power to review its own decisions. However it must be emphasized that such power must be exercised within the framework of section 80 of *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*.
24. Section 80 of the *Civil Procedure Act* provides thus: -
 - " 80. Any person who considers himself aggrieved-
 - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or



- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

25. Order 45 rule 1 of the [Civil Procedure Rules, 2010](#) provides as follows: -

- (1) Any person considering himself aggrieved-
 - (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

Disposition:

26. The Court is not convinced that the Contemnor/Applicant has made out a case for the grant of the orders sought as he has not demonstrated the discovery of new and important evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him when the decree was passed nor has he proven an error apparent on the face of the record. He has also not given any cogent or sufficient reason why he desires to obtain the said review and as such his application must fail.

Orders:

In light of the above the Application dated October 11, 2023 is hereby dismissed with costs. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2023

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J. CHIGITI (SC)

JUDGE

