



**Mwangala & another v Kipkai Enterprises Limited & another (Civil Appeal 348 of 2018) [2023] KEHC 26504 (KLR) (Civ) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26504 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 348 OF 2018**

**AN ONGERI, J**

**DECEMBER 15, 2023**

**BETWEEN**

**BENARD MWANGALA ..... 1<sup>ST</sup> APPELLANT**

**LOWERHILL APARTMENTS LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KIPKAI ENTERPRISES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JANE NYABOKE NJAGI T/A NJAGI NYABOKE & CO.**

**ADVOCATES ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling and order of Hon. D. A. OCHARO (SRM) in Milimani CMCC No. 488 of 2014 delivered on 30/7/2018)*

**JUDGMENT**

1. The trial court delivered its ruling on 30/7/2018 committing the 1st appellant to civil jail for a period of five (5) days.
2. The ruling was delivered pursuant to an application dated 16/4/2014 filed pursuant to Order 40 Rule 3 of the Civil Procedure Rules and Section 63(c) of the [Civil Procedure Act](#) seeking committal of the appellant to civil jail for disobedience of a court order stopping the appellant from disconnecting water supply to the respondent.
3. The parties filed affidavits and submissions as follows; the first appellant submitted that it is not disputed that the court gave orders on 29/4/2011 and that the 1<sup>st</sup> appellant was aware of the same. The 1<sup>st</sup> appellant argued that he was committed to civil jail based on the allegation that he disconnected water supply to the respondents' premises in disobedience of the orders. The respondents believed



- that the water supply was disconnected by the 1<sup>st</sup> appellant because he did not permit the respondents' plumber to fix the blockage on the respondents' water meter insisting that only the 2<sup>nd</sup> appellants plumber could fix it.
4. Further that there was no evidence that the 1<sup>st</sup> appellant had disconnected the said water supply as alleged by the respondent. The orders were made on 29/4/2011 and the alleged disobedience happened on 15/4/2014 a period of three years down the line.
  5. It was therefore the 1<sup>st</sup> appellants submission that the trial court did not satisfy himself to the required standards as it was not proved that the 1<sup>st</sup> appellant had indeed cut off the water supply to the respondents. The respondents did not state or prove that the 1<sup>st</sup> appellant was in charge of water supply to the respondents or was capable of disconnecting the said supply.
  6. The 2<sup>nd</sup> appellant in its submissions agreed with the 1<sup>st</sup> appellant and added that given that the high standard of proof expected in contempt proceedings the respondents are expected to reliably prove that the 1<sup>st</sup> appellant cut off the water supply to the respondents' apartment. That as per the letter dated 26/3/2014 the tenants in apartment No. 62 were already experiencing water issues which was nearly two weeks before the respondent faced similar issue. As such the respondents' decision to institute the contempt proceeding was reactionary and completely blown out of proportion.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> respondent on the other hand submitted that the 1<sup>st</sup> appellants conduct clearly depicts him as a person who is out to revenge arising from the appellants own admission of disconnecting water supply and refusing the respondents to access their apartments. The 2<sup>nd</sup> respondent presented a detailed affidavit which was supported by two witnesses Edgar Munene and Alexander Gatimi who testified on oath of the events that lead to water disconnection on 10/4/2014.
  8. It was the respondent's submission that there is no doubt that the 1<sup>st</sup> appellant disconnected water to apartment 35 with malice. This was informed by the fact that the 1<sup>st</sup> appellant constantly evolved stories.
  9. At first, he said that the problem was blockage and when the plumber was availed by the respondents to check he refused to give them access.
  10. Further the respondent argued that it was not a coincidence that out of the 70 plus apartments it was only the respondent's apartment No. 35 without water when the meters are in the common area.
  11. The issues for determination in this Appeal are as follows;
    - i. Whether the 1st Appellant was guilty of contempt of Court.
    - ii. Whether the 1st Appellant should have been given an option of paying a fine.
  12. On the issue as to whether the Appellants were guilty of contempt of Court, I have re-evaluated averments in the Affidavits relied on by the Trial court and also the submissions filed by both parties in the Trial Court.
  13. This is an interlocutory appeal from the ruling dated 30/7/2018. There is evidence the appellant was in blatant disobedience.
  14. The Trial Court was satisfied that the Appellants were aware of the Court Order and that they willfully disobeyed it.



15. The Trial Court relied on the case of the Court of Appeal case of Jacob Zedekiah Ochino & Another – vs- George Aura Okombo & 4 Others Nairobi Civil Appeal No. 36 of 1989(UR):-where it was stated that;

“.....no order of a court requiring a person to do or abstain from doing any act may be enforced by committing him for contempt unless a copy of the order has been served personally on the person required to do or abstain from doing an act”.
16. In the case of Mwangi Mangondu v Nairobi City Commission (Civil Appeal No 95 of 1988), the Court stated as follows;

“This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.”
17. On the issue as to whether the 1st Appellant ought to have been given an option of paying a fine, I find that the Trial Court had a discretion either to fine or jail the Appellants or order both.
18. The power of the lower court to punish for contempt is spelt out in section 10 of the Magistrate’s Court Act, 2015(the Act).
19. Section 10(1) of the Act provides that:

“Subject to the provisions of any other law, the Court shall have power to punish for contempt”.
20. Section 10(3) of the Act provides that:

“In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court”.
21. Section 10 (6) of the Act provides that:

“The Court may sentence a person who commits an offence under subsection (1) to imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shillings, or both”.
22. The Trial court did not say why the jail term was preferred. In the case of Mbugua vs. Mbugua [1992] KLR 448 the court stated as follows;

“The committal to civil jail will be an end in itself, serving no useful purpose. It will be for vindictiveness only; but civil justice is placatory, not retaliatory or revengeful. As Courts administering civil justice we do not sit here unleashing reprisals of vengeance to satisfy egoistic vendetta veneered with some court orders. Committal to civil jail is redressal, not merely punitive.”
23. The 1st Appellant ought to have been given an option of a fine and I accordingly grant him an option of paying a fine of Kshs. 100,000 (one hundred thousand shillings) in lieu of the sentence of five days imprisonment.



24. The 1st Appellant is also ordered to pay the costs of this appeal assessed at Kshs. 20,000.

25. The fine and the costs to be paid within 30 days of this date.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER, 2023.**

.....

**A. N. ONGERI**

**JUDGE**

**In the presence of:**

..... for the 1<sup>st</sup> Appellant

..... For the 2<sup>nd</sup> Appellant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

