



**The Market Plaza Ltd & another v Nairobi City County & 6 others; Johnson Sakaja Arthur – Governor Nairobi County & 2 others (Respondent) (Environment & Land Case 544 of 2017 & 97 of 2011 (Consolidated)) [2023] KEELC 17699 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17699 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE 544 OF 2017 & 97 OF 2011 (CONSOLIDATED)**  
**EK WABWOTO, J**  
**MAY 25, 2023**

**BETWEEN**

**THE MARKET PLAZA LTD ..... 1<sup>ST</sup> APPLICANT**

**METROPARK LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**NAIROBI CITY COUNTY ..... 1<sup>ST</sup> DEFENDANT**

**CHINA ROAD AND BRIDGE COPROARATION ..... 2<sup>ND</sup> DEFENDANT**

**CITY MARKET STALL HOLDERS ASSOCIATION ..... 3<sup>RD</sup> DEFENDANT**

**MISHECK MBUTHIA ..... 4<sup>TH</sup> DEFENDANT**

**PETER KIBUE ..... 5<sup>TH</sup> DEFENDANT**

**SUSAN ODOUR ..... 6<sup>TH</sup> DEFENDANT**

**ETHICS AND ANTI-CORRRPTION COMMISSION ..... 7<sup>TH</sup> DEFENDANT**

**AND**

**JOHNSON SAKAJA ARTHUR – GOVERNOR NAIROBI  
COUNTY ..... RESPONDENT**

**JAIRIUS MUSUMBA – NAIROBI CITY COUNTY SECRETARY & HEAD OF  
PUBLIC SERVICE ..... RESPONDENT**

**FREDRICK KARANJA NAIROBI CITY COUNTY CHIEF OFFICER PUBLIC  
WORKS, ROADS AND TRANSPORT ..... RESPONDENT**



## RULING

1. On 31<sup>st</sup> October 2007 and 25<sup>th</sup> August 2011 this court different constituted issued orders restraining the 1<sup>st</sup> - 5<sup>th</sup> Defendants herein jointly, their including their servants and or anyone from acting under their direction from interfering with the Plaintiffs access and or authorized development of L.R No. 209/1855/2 Koinange Street pending hearing and determination of the suit.
2. Subsequently thereafter vide applications dated 18<sup>th</sup> and 21<sup>st</sup> September 2022, the Plaintiffs moved this court seeking to cite the following persons for contempt; H.E Sakaja Arthur Johnson, the Governor County Government of Nairobi, Dr. Jairus Musumba, The Ag. County Secretary and Eng. Fredrick Karanja the County Chief Officer Public Works, Roads and Transport for the reasons that on 31<sup>st</sup> August 2022 despite the existence of the said orders, the County Government officers without the Plaintiffs authority trespassed onto the said property and dug a big hole at its entrance and that despite the Plaintiffs letters dated 1<sup>st</sup> and 19<sup>th</sup> September 2023 addressed to the Respondents and demanding that they fill up the hole and avoid further acts of trespass, the Respondents never complied.
3. The application was opposed by the Respondents and the 3<sup>rd</sup> -6<sup>th</sup> Defendants.
4. It is the Plaintiffs contention that the respondents have refused, neglected and failed to comply with the said order.
5. The Plaintiffs further contend that the deliberate conduct of the Respondents is contemptuous to this court and a real threat to its dignity thus the urgent need for the orders sought.
6. The Plaintiffs also submitted that the continued disobedience of the court's orders is likely to embarrass and delay the just and fair hearing of the suit hence the need for the orders sought in the instant application be allowed.
7. In response to the application, the Respondents herein submitted that the application is misconceived and an abuse of the court process. That the orders sought were issued on 31<sup>st</sup> October 2007 about 15 years ago wherein the matter was initially scheduled to be heard 25<sup>th</sup> and 26<sup>th</sup> February 2008 and that no attempt was made to have the matter concluded and by operation of law the said order lapsed. The Respondent also argued that Respondents had no knowledge of the order since they had not been personally served.
8. The 3<sup>rd</sup> - 6<sup>th</sup> Defendants also opposed the application on the grounds that the orders issued on 31<sup>st</sup> October 2007 and 25<sup>th</sup> August 2011 having lapsed are inconsistent and capable of being enforced. It was also argued that the suit property had been illegally transferred to the 1<sup>st</sup> Plaintiff and that the Registrar of Titles had revoked the title to the suit property and reverted the property back for public use as a market. It was also argued that the High Court through Justice Odunga had declined to quash the decision of the Registrar of Titles in High Court J.R No. 18 of 2011 citing and upholding public interest and that the said decision has never been reviewed, varied and or set aside.
9. In my view, having considered the application and written submissions made by counsel for the parties; the twin issues for consideration are:
  - i. Whether the Respondents are in contempt of the orders of this Honourable court orders issued on 31<sup>st</sup> October 2007 and 25<sup>th</sup> August 2011.
  - ii. Who shall bear the costs of the application?



10. I have taken in to consideration the provisions of the Constitution of Kenya 2010, relevant statutes, judicial decisions, the response by the Respondents and the 3<sup>rd</sup> to 6<sup>th</sup> Defendants.
11. The law relating to contempt of this court is found in section 5 of the judicature Act, section 29 of the Land Act and The Practice Directions on Proceedings in the Environment and Land Court.
12. Section 5 of the Judicature Act provides as follows;
 

The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
13. Section 29 of the Environment and Land Court Act provides as follows
 

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.
14. Practice direction 43 on Proceedings Relating to the Environment and the Use and Occupation of, and title to Land and Proceedings in Other Courts (Gazette Notice No. 5178) provides that non-compliance with the relevant provisions of the CPR, orders, and/or directions issued by a judge shall attract sanctions including but not limited to the imposition of costs, fines, striking out of pleadings, the dismissal of a suit and/or meting out punishment prescribed in the ELC Act or any other Statute as the court may deem fit bearing in mind the overriding interest of justice
15. This application is seeking prayers that the 1<sup>st</sup> - 3<sup>rd</sup> Respondent and the be found to be in contempt. What constitutes contempt of court?
16. In the case of Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR, the Learned Judges of Appeal went to great lengths in tracing the foundations of law on contempt as practiced in Kenya. They state;
 

“Christine Wangari Gachege -vs- Elizabeth Wanjiru Evans & 11 Others, (supra) when dealing with the same issue concerning the applicability of English Law of contempt in our Courts had this to say:

“Following the implementation of the famous Lord Woolf’s Access to Justice Report, 1996’, the Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. Recently on 1<sup>st</sup> October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court of England in its entirety.”

Consequently, a careful consideration must be had to the provisions of the Contempt of Court Act of 1981 Act and PART 81 of Civil Procedure (Amendment No. 2) Rules, 2012 with regard to contempt proceedings in Kenya.”
17. Part 81 provides for four different natures or forms of violations under contempt of court. They are
  - i. Committal for “breach of a judgment, order or undertaking to do or abstain from doing an act” provided for under Rule 81.4.
  - ii. Committal for “interference with the due administration of justice” (applicable only in criminal proceedings) provided for under Rule 81.11.



- iii. Committal for contempt “in the face of the court”, provided for under Rule 81.16.
  - iv. Committal for “making false statement of truth or disclosure statement.” provided for under Rule 81.17.
18. For what it is worth, I have demonstrated that the willful disobedience of any judgment, decree, direction, order, or other constitutes contempt of court.
19. In *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR the Learned Judge cited with approval excerpts from the book “Contempt in Modern New Zealand”. He states as follows;
- “It is an established principle of law 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. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.
- Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who 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;
  - b. the defendant has acted in breach of the terms of the order; and
  - (d) the defendant's conduct was deliberate.”
20. In effect, an applicant seeking to cite another for contempt is held to very high standards of proof, higher than in civil cases. He must prove the following:
- i. That there is in existence of an order/ judgement that is clear unambiguous and binding.
  - ii. That the Defendant/Respondent has knowledge of the said order/ Judgement.
  - iii. That the Defendant/Respondent has acted in breach of the said orders.
  - iv. That the Defendant/Respondent's conduct is deliberate.
21. Looking at the circumstances in the present application, this Honourable Court issued its orders on the 31<sup>st</sup> October 2007 and 25<sup>th</sup> August 2011. The said orders restrained the Defendants from interfering with the suit property in one way or the other. The orders were clear and unambiguous. No appeal has been preferred against the same and neither has the court been approached to make clear and parts of it in the event that they were not understood. The first element is therefore satisfied. The contention by the 3<sup>rd</sup> – 6<sup>th</sup> Defendants that the said orders could not be complied with for the reasons that the High Court through had declined to quash the decision of the Registrar of Titles in High Court J.R No. 18 of 2011 is not for consideration at this stage for the reasons that the same was not brought to the attention of this court with a view of varying or setting to set aside the said orders before the filing



of the present application. Courts have often stated that a party who is aggrieved by any order issued by the court is always at liberty to seek the court's intervention for variation and or setting aside of the said orders.

22. On the second element, I wish to refer to the definition of 'notice' as contained in Black's Law dictionary 12<sup>th</sup> Edition at page 1277;

“A person has notice of a fact or condition if that person Has actual knowledge of it; Has received information about it; Has reason to know about it; Knows about a related fact; Is considered as having been able to ascertain it by checking an official filing or recording.”

23. In the case of Shimmers Plaza Limited (Supra) the learned Judges held;

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings” We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behooves him/her to report back to the client all that transpired in court that has a bearing on the client's case.”

This is the position in other jurisdictions within and outside the commonwealth. In addressing the issue whether service of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at p. 226, LJ Sopinka, held that:- “In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed....”.

24. In *Basil Criticos Vs Attorney General and 8 Others* [2012] eKLR the learned Judge pronounced himself as follows:-

“...the law has changed and as it stands today knowledge supersedes personal service.... where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary”

25. I have no doubt whatsoever that the Respondents had notice of the orders since even after their actions on 31<sup>st</sup> August 2022 they were reminded by the Plaintiffs letters dated 1<sup>st</sup> and 19<sup>th</sup> September 2022 but never bothered to comply.

26. On the third element, there is no doubt that the respondents are in breach. Otherwise, the court would not have to deal with the current applications. In any event, nothing would have been easier than for the Respondents to state that the application has been made in bad faith and prove that they have complied with the orders of the court.

27. Taking into consideration my finding on the above three elements, the logical deduction is that the Respondents conduct was willful and deliberate.

28. While it is essential for the maintenance of the law and order that the authority and dignity of courts must be upheld at all times and the court cannot condone deliberate disobedience of its orders.



29. In the Shimmers plaza case (Supra), The learned judges quoted several decisions to reiterate the importance of obedience of court orders as a corollary to upholding the rule of law, good order and administration of justice in democratic societies. These decisions are:

“Hadkinson –vs- Hadkinson, (1952) ALL ER 567, “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 even void.

Lord Cottenham, L.C., said in *Chuck –vs- Cremer (1) (1 Coop. temp. Cott 342)*: “A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

30. In the Shimmers case (supra) the learned Judges of appeal reaffirmed the position of the court in *Refrigeration and Kitchen Utensils Ltd. –vs- Gulabchand Popatlal Shah & Another*, -Civil Application No.39 of 1990 thus;

“ ... It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times.”

31. I am further fortified in my decision by the provisions of *the Constitution* of Kenya 2010. Article 159(1) of which provides that the judicial authority is derived from the people and is vested upon the courts and Article 10 (1) provides the rule of law is one of the national values and principles binding on all state organs, public and state officers while implementing public policies and decisions.

32. It is not for us to decide when to obey the law. Obedience of the law is not negotiable and is not a question of convenience; It is imperative that we all do. The dignity, and authority of the Court must be protected and it is for this reason that the law provides punishment for those who flagrantly disobey court orders.

33. On the issue of personal service, I must say that the when one says that there is an order to be obeyed by the Nairobi City County, in essence, what is being said is that all employees, agents and all other persons who act at the behest of the County are bound by the said Order. If one of them fails to follow the order, it is the same as saying that Nairobi City County has failed to follow the order. If an application for disobedience is then filed and served upon the County, that to me would be sufficient service. I do not think that it can be argued that the Governor cannot be held liable for acts of disobedience of County employees, unless the Governor shows that the employees acted against some very explicit instructions and were thus on a frolic of their own, and need to be dealt with separately from the County Government. That is not the case here, for the acts of disobedience are attributed to officers of the County, and the Governor is the Chief Executive Officer of the County Government.

34. Having regard to the circumstances of this case, judicial decisions cited and the various provisions of the law, I find that the Respondents to be in contempt of the orders issued by this Court on 31<sup>st</sup> October 2007 and 25<sup>th</sup> August 2011 and hence guilty.



35. Consequently, the applications dated 18<sup>th</sup> and 21<sup>st</sup> September 2022 are allowed in the following terms;
- i. The Respondents are in contempt of the orders issued by this Court on 31<sup>st</sup> October 2007 and 25<sup>th</sup> August 2011 and hence guilty.
  - ii. Pending mitigation and sentencing, the Respondents are at liberty to purge the contempt herein within 14 days from today.
  - iii. The Respondents shall appear before this Honourable court at a date to be set after delivery of this ruling for mitigation and sentencing should they not have purged the said contempt within 14 days.

36. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY 2023.**

**E.K. WABWOTO**

**JUDGE.**

**In the presence of: -**

**Mr. Muriethi h/b for Mr. Kairuki Muigua for the 1<sup>st</sup> Plaintiff.**

**Ms. Nyasewe h/b for Ms. Ashashe for the 2<sup>nd</sup> Plaintiff.**

**Ms. Matila for 1<sup>st</sup> Defendant.**

**Ms. Mutuku for 3<sup>rd</sup> to 6<sup>th</sup> Defendants.**

**Ms. Amutavi h/b for Mr. Okatch for 1<sup>st</sup> -3<sup>rd</sup> Respondents.**

**Mr. Ondego for 2<sup>nd</sup> Defendant.**

**Court Assistant; Ms. Caroline Nafuna.**

**E.K. WABWOTO**

**JUDGE**

