



**Danish Organisation for Sustainable Development v Kenya Organisation for Environmental Education.; NGO Cordination Board (Interested Party) (Civil Suit 465 of 2011) [2022] KEHC 11681 (KLR) (Commercial and Tax) (23 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11681 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 465 OF 2011**

**A MSHILA, J**

**MAY 23, 2022**

**BETWEEN**

**DANISH ORGANISATION FOR SUSTAINABLE DEVELOPMENT .. PLAINTIFF**

**AND**

**KENYA ORGANISATION FOR ENVIRONMENTAL  
EDUCATION. .... DEFENDANT**

**AND**

**NGO CORDINATION BOARD ..... INTERESTED PARTY**

**RULING**

**Background**

1. The Applicant filed a Notice of Motion dated April 24, 2019 pursuant to Section 3A and 63(e) of the *Civil Procedure Act* and Order 51 Rules 1 and 3 of the *Civil Procedure Rules*; The Application was supported by the sworn Affidavit of Lars Jacobsen sought for the following orders;
  - a. The Executive Director of the Defendant, Dorcas Otieno and other Directors and officials of Kenya Organization for Environmental Education, the Respondent herein be found and held in contempt of court for disobeying and defying the orders made by this Court on November 21, 2017 and July 2, 2018.
  - b. The Executive Director, directors and officials of the Respondent be committed to and/or detained in prison for a term of six (6) months for contempt.
  - c. The Executive Director, directors and officials of the Respondent be fined such sums of money as this Court may direct and the same be paid into the court forthwith.



- d. The Respondent be denied audience before this Court until such a time as its directors and officials shall have purged their contempt by, inter-alia: -
  - i. Release and delivery of assets listed at paragraphs (B) and (C) of the Decree.
  - ii. Performing any such act as the Court may in its discretion deem fit to order the Respondent to perform.
2. The Respondent it is alleged had, in blatant violation, disobedience and defiance of the orders contained in the decree given by this Court on November 21, 2017 and July 2, 2018 refused to release the assets as listed in paragraphs (B) and (C) of the Decree to Umande Trust Registered Trustees.
3. The conduct of the willful and deliberate disobedience and defiance of the court order and the continued retention of the assets specified in the Decree by the Respondent through its directors and officials has brought the Court into ridicule, odium and disrepute to the great prejudice of the Applicant.
4. Disobedience of the Court orders threatens the very foundations of the administration of justice and paints the Courts as weak, powerless and ineffective.

### **Applicant's Case**

5. The Applicant submitted that the directors of the Respondent are in contempt of the court orders made on November 21, 2017 as modified by the order made on October 2, 2018 where the court ordered for the release of the assets to Umande Trust Registered Trustees.
6. It is trite that court orders must be obeyed without any reservation and that willful and flagrant disobedience of court orders undermines the authority and dignity of the courts and must be dealt with firmly so that the court's authority is not brought into disrepute as was held in the case of *Trust Society of Human Rights Alliance vs Cabinet Secretary for Devolution and Planning and 3 Others* [2017] eKLR.
7. The Applicant disputed the Respondent's contention that it did not disobey the court orders for reason that it had filed an appeal because no appeal has been preferred against the judgment of the court dated November 21, 2017 and an intended appeal does not operate as stay of execution. It is undisputed that the Respondent had knowledge of the court orders and the directors are in contempt of court for failing to release the assets to Umande Trust Registered Trustees.
8. The Applicant urged the Court to exercise its discretion and deny audience to the Respondent until its directors and officials had purged their contempt as there exists a risk that the Respondent will never comply with court order hence impeding the course of justice. The Applicant relied on the case of *PNK vs JKM* [2018] eKLR where the court declined to hear the Applicants until they complied with the full orders of the High Court.

### **Respondent's Case**

9. It was the Respondent's position that the legal threshold for establishing contempt of court as was established in the case of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005 rests on three pillars which are as follows: existence of an order of court, knowledge of the terms of order by the Respondent and failure by the Respondent to comply with the terms of the order.
10. The court delivered judgment in favour of the Plaintiff on November 21, 2017 as against the Defendant. It is not in dispute either that the Plaintiff extracted a decree from the said judgment and



served the same on the Defendant. However, the said order could not be implemented as the defendant had preferred an appeal and further filed an application to stay execution of the judgment and decree pending the hearing of the intended appeal. Whereas Koome, Sichale & Kantai JJA dismissed the application and declined to stay execution of the judgment dated 21<sup>st</sup> November 2017, the learned judges at page 8 of their ruling stated as follows:

The assets were always intended to be applied to charitable purposes and it is reasonable that the assets identified in the judgment should be released to the Interested Party (The Nongovernmental Organizations Board) to identify a suitable NGO to implement the projects”.

11. Further, the Respondent submitted that the above directive by the court of appeal in its ruling varied the decision of this court and the consequential orders arising therefrom. It is worth to note therefore that the decision of this court that the assets be surrendered to Umande Trust Registered Trustees and which decision forms the basis of the contempt of court application by the plaintiff was expunged by the ruling of the Court of Appeal.
12. It cannot be gainsaid that the Plaintiff seeks to implement the decision of this court in its entirety notwithstanding the ruling of the Court of Appeal.
13. The Respondent contended that for contempt of court proceedings to be proper, there must be in existence an order of the court which the Respondent has recklessly and intentionally defied. The order purportedly infringed by the Defendant has been overridden by the ruling of the Court of Appeal. Further, the action by the Defendant to prefer an Appeal and consequently file an Application for Stay of Execution was lawful and proper and did not amount to disobedience of this court. The Respondent relied on the decision in *Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waitbaka* [2019] eKLR where the Court stated that the mental element for party either intended to disobey, or made no reasonable attempt to comply with the order.

#### **Issues for Determination**

14. The Court has considered the Application, Response and the written submissions by the parties and the issue for determination is;
  - a. Whether the above observations made by the Court of Appeal in these two cases were ratio decidendi or obiter dictum?
  - b. Whether the Directors should be held in contempt of the Court orders of November 21, 2017 and July 2, 2018?

#### **Analysis**

##### **Whether the above observations made by the Court of Appeal in these two cases were ratio decidendi or obiter dictum?**

15. It is pertinent to note that the Respondent herein had filed an Application before the Court of Appeal. In the said Application, the Court of Appeal was considering the application for stay under Rule 5(2)(b) of *Court of Appeal Rules* where it was prayed in the main that the Court of Appeal stays further proceedings in HCCC No. 465 of 2011 Danish Organization for Sustainable Energy v Kenya Organization for Environmental Education pending the hearing and determination of the Motion and of an intended appeal.



16. The Respondent herein argued that whereas Koome, Sichale & Kantai JJA dismissed the application and declined to stay execution of the judgment dated November 21, 2017, the learned judges at page 8 of their ruling stated as follows: -

“The assets were always intended to be applied to charitable purposes and it is reasonable that the assets identified in the judgment should be released to the Interested Party (The Nongovernmental Organizations Board) to identify a suitable NGO to implement the projects”.

17. Moreover, it was the Respondent’s contention that the above directive by the Court of Appeal in its ruling varied the decision of this court and the consequential orders arising therefrom. Therefore, the Respondent contends that the decision of this court that the assets be surrendered to Umande Trust Registered Trustees and which decision forms the basis of the contempt of court Application by the Applicant was expunged by the ruling of the Court of Appeal.

18. This brings the Court to the question as to whether the directive by the Court of Appeal was an obiter dictum. The definitions of obiter dictum on page 1100 of Black’s Law Dictionary (7<sup>th</sup> Edition), reads:

19. Obiter dictum. [Latin “something said in passing”] A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive). – Often shortened to dictum or, less commonly, obiter.

20. The decision made by the Court of Appeal was on an issue before it which was the Application for Stay and it is this Court’s view that the Court of Appeal’s words; - “We noted in the proceedings that assets were donated by the respondent to the applicant to implement certain charitable works through a formal agreement entered between the applicant and the respondent. That agreement was terminated. The assets did not belong to the applicant and we doubt that the applicant would in any way be entitled to retain such assets. The assets were always intended to be applied to charitable purposes and it is reasonable that the assets identified in the judgment should be released to the Interested Party to identify a suitable NGO to implement the projects.” were said in passing and was not related to the Application before it. In addition, the release of the assets was not an issue for determination in the appeal before the Court of Appeal.

21. In light of the foregoing this court is satisfied that the order of this court dated November 21, 2017 as modified by the order made on October 2, 2018 where the court ordered for the release of the assets to Umande Trust Registered Trustees still stands as the same was not Appealed or reviewed.

### **Whether the Directors should be held in contempt of the Court orders of November 21, 2017 and July 2, 2018?**

22. Section 5 of the *Judicature Act* confers jurisdiction on the superior courts to punish for contempt. Contempt of court is that conduct or action that defies or disrespects authority of court. Black’s Law Dictionary 9<sup>th</sup> Edition, defines contempt as:

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.”

23. The Application before this court seeks to have the Respondent cited contempt of this court’s order of November 21, 2017 as modified by the order made on October 2, 2018 and to be committed to



- civil jail and or fined as the court may deem fit. The Applicant further prayed that the Respondent be directed to purge his contempt by complying with the court order.
24. In *Katsuri Limited v Kapurchand Depor Shab* [2016] eKLR, citing *Kristen Carla Burchell v Barry Grant Burchell* (Eastern Cape Division case No 364 of 2005), it was stated that;
- “in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order.”
25. As already stated above, 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, and
  - iii. Failure by the Respondent to comply with the terms of the order.
26. It is not disputed that the Respondent is well aware of the order dated November 21, 2017 as modified by the order made on October 2, 2018 as well as the term of the order which was release the assets to Umande Trust Registered Trustees. It goes without saying that the Respondent failed to comply with the terms of the said order. However, it must be shown that there was “willful and deliberate disobedience of court orders”.
27. *Amos Mathenge Kabuthu v. Simon Peter Mwangi* [2015] eKLR; *Jihan Freighters Ltd v. Hardware & General Stores Ltd* [2015] eKLR; the courts held that to form the basis of committal for contempt of court, an order must be clear and unambiguous.
28. Likewise, in the case of *Republic v. Ahmad Abolfathi Mohammed & Another*, Cr. App. No. 2 of 2018 the Supreme Court was in support of the proposition that to commit for contempt of court, it must be proved that a person has willfully and deliberately violated a court order.
29. The Respondent made its case on the ground that Court of Appeal in its ruling varied the decision of this court and the consequential orders arising therefrom. By virtue of relying on the words from the Court of Appeal decision, it cannot be said to amount to willful and deliberate disobedience of the court orders.
30. Now that the court has provided guidance on the interpretation of the Court of Appeal’s words as being obiter dictum, the Respondent is required to comply with the orders of this court dated 21<sup>st</sup> November 2017 as modified by the order made on 2<sup>nd</sup> October 2018.

### **Findings and Determination**

31. For the forgoing reasons this court makes the following findings and determinations;
- i. This court finds the observations made by the Court of Appeal were obiter dictum;
  - ii. This court finds that the judgment of this court dated November 21, 2017 as modified by the order made on October 2, 2018 where the court ordered for the release of the assets to Umande Trust Registered Trustees still stands as the same was not Appealed or reviewed;
  - iii. This court finds that the application is partially meritorious on the stanchions of ‘terms of the order and knowledge of the court order’ but finds that there was no willful and deliberate disobedience of the court orders of November 21, 2017 and July 2, 2018;



- iv. In the absence of any orders for stay the Respondent is required to comply with the orders of this court dated November 21, 2017 as modified by the order made on October 2, 2018 within sixty (60) days from the date hereof;
- v. Mention on July 26, 2022 for compliance and final determination of this application;
- vi. Costs shall abide the final outcome.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY, 2022.**

**HON. A. MSHILA**

**JUDGE**

In the presence of;-

Omondi for the Applicant

Ayieko for the Respondent

Lucy-----Court Assistant

