



REPUBLIC OF KENYA



**Bonde v Director of Immigration Services & 2 others (Petition 469 of 2017)
[2022] KEHC 15460 (KLR) (Civ) (18 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15460 (KLR)

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

CIVIL

PETITION 469 OF 2017

HI ONG'UDI, J

NOVEMBER 18, 2022

BETWEEN

NIELSEN PETER JOHAN BONDE PETITIONER

AND

DIRECTOR OF IMMIGRATION SERVICES 1ST RESPONDENT

**CABINET SECRETARY FOR INTERIOR & CO-ORDINATION OF NATIONAL
GOVERNMENT 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. By way of a notice of motion dated June 5, 2020 filed pursuant to section 5 (1) of the *judicature act* cap 8 laws of kenya, order 52 rule 3 of the *Rules of the Supreme Court of England* 1965 as modified by the *Civil Procedure (Amendment No 2) Rules, 2012* (rule 81.4 of part 8), the petitioner seeks the following orders:
 - i. This honourable court do find, hold and declare that the contemnor, Alexander Muteshi being the 1st respondent's principal officer, is in contempt of a court order issued on May 18, 2018 by the Hon Justice Chacha Mwita;
 - ii. Upon grant of prayer 1, this honorable court, be pleased to review the petitioner's renewal of permit application in accordance with the law as enjoined by the order of this court dated May 18, 2018 and in any event within the next 14 days;
 - iii. This honourable court be pleased to commit the contemnor, Mr Alexander Muteshi, the director of immigration services to civil jail for a period of six(6) months or for such a period as this court may deem fit, with or without an option of a fine; and



- iv. This honourable court be pleased to make any such order as the justice of the case may demand.

The Petitioner/Applicant's case

2. The application was sustained by the petitioner's supporting affidavit of even date and grounds on the face of the application.
3. The petitioner deposed that he is a Danish national and been a resident in Kenya since 2004. Moreover, that he works under the investor's permit which is renewed periodically. In view of this he made known that he is the director of Oldonyo Laro Estates Ltd.
4. He averred that his petition dated September 26, 2017 had been brought against the respondents for their refusal to renew his investor's work permit. Hon Justice EC Mwita delivered a judgment dated May 18, 2018 in his favour. The court made an order directing the 1st respondent to reconsider the petitioner's application for renewal of the permit.
5. He deposed that the said Orders were extracted and served upon the 1st respondent who had failed and refused to obey them. According to him this conduct is a blatant violation of the said orders which is in contempt of this court. What is more, that the 1st respondent's actions would cause harm upon the court's sanctity and dignity.

The Respondents' case

6. The respondents in opposing the application filed their replying affidavit dated June 29, 2020 sworn by Alfred Omangi, the 1st respondent's principal immigration officer. He deposed that the respondents had not neglected to obey the said court orders. In fact he noted that after receiving the court orders the 1st respondent invited the petitioner and his advocate to appear before it.
7. He further deposed that in the meeting, the petitioner was informed that he was supposed to furnish the permit determination committee further information as communicated to him through the 'efns portal'. Moreso he averred that the petitioner also had a meeting with the deputy director in charge of investigations, Mr Baya who asked him to record a statement. He disclosed that the petitioner never furnished the sought documents and also failed to record a statement as advised.
8. He deposed that the directorate in compliance with the court orders issued the petitioner a six month special pass which has been continually renewed ever since. It was additionally noted that the 1st respondent's permit determination committee re-considered the petitioner's application in its meeting dated June 25, 2020. He averred that following the said meeting, the committee on June 26, 2020 informed the petitioner through his advocate that it had deferred the application for 14 days to allow him submit the relevant statutory requirements before any decision could be made.
9. In view of this he concluded by stating that the respondents' had complied with the court orders and that it was the petitioner's own inaction that had occasioned the delay in re-consideration of his work permit application.

The Petitioner/Applicant's response

10. In response the petitioner filed a supplementary affidavit dated January 13, 2021 where he deposed that the 1st respondent had requested him to produce letters of no objection from Kenya civil aviation authority, the Kenya wildlife services and the firearms license board. He averred that the letters of no objection sought were irrelevant as he had no association with the said authorities. He contended that his work permit had been renewed without issue since 2004 and hence the requirement of the



said letters is an attempt to frustrate his application. He added that the re –consideration was also questionable as was done after receipt of the instant application.

11. Furthermore he deposed that the 1st respondent in its letter dated June 26, 2020 requested that the petitioner provide form 25, a letter of no objection from the Kenya Civil Aviation Authority, Kenya Wildlife Services clearance certificate, police clearance certificate, fire arms license board clearance certificate and a valid Kenya Revenue Authority tax compliance certificate. He deposed that following this communication his advocate informed the 1st respondent that the letter of no objection were not only irrelevant but could not be issued by the said authorities. Nevertheless he informed that the petitioner’s advocate wrote to the concerned authorities requesting for the said letters of no objection.
12. In December 2020, the Kenya Civil Aviation Authority responded in a letter dated November 16, 2020, confirming that the petitioner was not a staff of Kenya Civil Aviation Authority and so could not issue the letter of no objection as requested. Similarly, on December 22, 2020, the Kenya Wildlife Services in response informed that the petitioner had not made any contributions to the wildlife conservation sector. Both were transmitted to the 1st respondent vide a letter dated January 7, 2021.
13. The petitioner with reference to the sought documentation informed that he had applied for the KRA compliance certificate and received it. He noted that he was unable to apply for the police clearance certificate as he had not been supplied with a Special Pass by the 1st respondent which is required to make the application. What is more that the firearms licensing board had not responded to his advocate’s letter on the sought clearance. Lastly, that form 25 was already in the 1st respondent’s custody as it was duly filled and submitted in 2017.
14. In light of this, the petitioner contended that the 1st respondent was contumeliously disobeying this court’s orders including those of June 17, 2020 directing it to issue him a special pass which was an attempt to deny him the work permit.

Submissions

15. The petitioner through his advocates LJA Associates LLP filed written submissions and a list of authorities dated February 9, 2021 where counsel identified the issues for determination as:
 - i. The nature of the court orders sought by the petitioner;
 - ii. Whether the court order issued on May 18, 2018 is valid, clear and unambiguous;
 - iii. Whether the respondents were aware of the court order issued on May 18, 2018; and
 - iv. Whether the 1st respondent should be held in contempt of the court order issued on May 18, 2018.
16. To begin with, counsel submitted that the Court of Appeal in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* (2015) eKLR noted that the High Court and the Court of Appeal under section 5 of the *Judicature Act* have the same power to punish for contempt of court as is for the first time being possessed by the High Court of Justice in England.
17. He submitted hence that contempt of court was defined in the case of *Republic v Director of Immigration Services & another Ex parte Planet Motors Company Limited* (Judicial Review No 392 of 2016) as conduct that defies the authority or dignity of a court because such conduct interferes with the administration of justice. As such, he submitted that for one to prove the existence of contempt of court he has to prove the four elements stated in the case of *James Muchina Wandutu v County Government of Muranga & 5 others* (2019) eKLR. The elements are that the terms of the order were



clear and unambiguous and were binding on the defendant; the defendant had knowledge of or proper notice of the terms of the order; the defendant acted in breach of the terms of the order; and the defendant's conduct was deliberate.

18. On the second issue, counsel submitted that the court order dated May 18, 2018 originated from a petition that was served upon the respondents and ultimately fully argued in court. He therefore submitted that the orders were valid since they had not been set aside. Their orders were also clear and unambiguous. In support reliance was placed on the case of Shimmers Plaza Limited (supra) where it was stated 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 even void.
19. Submitting on the third issue, counsel stated that the judgment dated May 18, 2018 was delivered by Hon Justice E C Mwita in the presence of counsel for the petitioner and respondents. The petitioner likewise went ahead to serve the decree on the respondents.
20. It is noted that the orders were similarly acknowledged by the respondents in their replying affidavit dated June 29, 2020. In support reliance was placed on the case of Shimmers Plaza Limited (supra) where it was observed that the law has changed and as it stands today knowledge supersedes personal service hence 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.
21. On the fourth point, counsel submitted that the petitioner had demonstrated through the pleadings and documentary evidence attached, that the 1st respondent was in breach of the court order issued on May 18, 2018. This was through the continuous refusal to reconsider the petitioner's permit application.
22. He stressed that the breach was wilful since the 1st respondent continually insisted on the production of irrelevant documents which had been difficult to obtain and some were non-existent in law. Besides that the 1st respondent had refused to provide the petitioner with a special pass as directed by this court.
23. Citing the case of James Muchina Wanduta (supra), counsel noted that a court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. Similar reliance was placed on the cases of Republic v Director of Immigration Services & another Ex parte Planet Motors Company Limited (supra) and Shimmers Plaza Limited (supra).
24. The respondents' through the 3rd respondent's principal litigation counsel, Mr Thande Kuria filed written submissions dated August 27, 2021. Counsel submitted that owing to the Court Orders dated May 18, 2018, the 1st respondent was directed to reconsider the petitioner's application for renewal of a work permit in accordance with the law not issue the work permit.
25. Counsel submitted that the petitioner in his initial application had informed the 1st respondent that his nature of business was in the aviation Industry which he was required to demonstrate he had the requisite documentation for. Reiterating the contents of the 1st respondent's affidavit he submitted that the 1st respondent had complied with the court order to re-consider the petitioner's application by granting the petitioner an opportunity to comply with the statutory requirements before a decision was made.



Analysis and Determination

26. It is plain upon perusal of the pleadings and submissions herein that the application is founded on this court's orders dated May 18, 2018 issued by Hon Justice EC Mwita. The particular orders directed as follows:
- i. A declaration be and is hereby issued that the 1st respondent violated the petitioner's rights for failing to give reasons for refusal to renewal of his permit.
 - ii. An order of *certiorari* be and is hereby issued quashing the 1st respondent's decision communicated through the notice dated July 18, 2017 rejecting the petitioner's application for renewal of his permit.
 - iii. An order be and is hereby issued directing the 1st respondent to re-consider the petitioner's application for renewal of permit in accordance with the law.
 - iv. The petitioner's special pass be and is hereby extended for six months awaiting the outcome of his application for renewal of the permit.
 - v. The costs be to the petitioner.
27. Bearing this in mind I find that the only issue that arises for determination is:
- Whether the petitioner has established the threshold for contempt of court proceedings.
28. The importance of contempt of court proceedings cannot be overstated. the topic has been aptly discussed in a plethora of cases as cited in the petitioner's submissions being *Shimmers Plaza Limited v National Bank of Kenya Limited* (2015) eKLR, *Republic v Director of Immigration Services & another Exparte Planet Motors Company Limited* (Judicial Review No 392 of 2016) and *James Muchina Wandutu v County Government of Muranga & 5 others* (2019) eKLR which I concur with.
29. In addition, the Court of Appeal stressed the importance of obedience to court orders in the case of *Dr Alfred Matiangi v Miguna Miguna & 4 others* (2018) eKLR as follows:
- “...we need to make it clear that as a court we do not take lightly allegations of contempt of court. No court should. When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”
30. The law on contempt of court proceedings following the nullification of the *Contempt of Court Act*, 2016 finds its bearing under section 5 of the *Judicature Act* Cap 8. This section provides as follows:
1. 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 that power shall extend to upholding the authority and dignity of subordinate courts.



2. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
31. Considering this, once the contempt of court proceedings have been instigated in the proper manner the question the court should determine is whether the applicant has met the threshold for contempt of court proceedings.
32. The court in the case of *Samuel MN Mweru & Others v National Land Commission & 2 others* [2020] eKLR just like the case of James Muchina Wandutu (supra) aptly discussed the threshold as summarized by Counsel for the Applicant.
33. In the said case the court concluded by noting that:

“46. Contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.[49]”
34. The petitioner in this matter contends that the 1st respondent is in contempt of court for failure to reconsider his application for the investors’ work permit in violation of the cited court orders. This was opposed by the respondents who informed this court that they had complied with the court order by re –considering the petitioner’s application in accordance with the law.
35. Undoubtedly the burden of proof in this matter lies on the petitioner who is required to prove existence of all the established principles to attain a pronouncement in his favour. Essentially the petitioner is to show that the terms of the order were clear and binding on the 1st respondent, that the 1st respondent had knowledge of/or proper notice of the terms of the order, the 1st respondent has acted in breach of the terms of the order and that the 1st respondent’s conduct was deliberate.
36. A look at the materials placed before this court divulges that the terms of the order were clear and binding on the 1st respondent. Similarly, it was not in dispute whether the 1st respondent had knowledge of the court orders. This was evidenced by the presence of both parties counsel in court at the reading of the judgement, service of the orders on the 1st respondent and acknowledgement of the same by the respondents in their replying affidavit. It is safe to conclude that the petitioner with reference to the first two elements discharged his burden of proof. What remains is a determination as to whether the 1st respondent acted in breach of the said court orders and whether the breach was deliberate.
37. The court order in question directed the 1st respondent to re-consider the petitioner’s application for renewal of the permit in accordance with the law. The 1st respondent through Mr Omangi’s affidavit deposed that in compliance with the court order it invited the petitioner for a meeting. in the meeting, the 1st respondent informed the petitioner on the documentation that would be required by the permit determination committee to re – consider his application. The 1st respondent noted that the documentation was not supplied as instructed. Nevertheless the committee as deposed went on to re-consider the application for the work permit on June 25, 2020.



38. In rebuttal the petitioner deposed that the documentation sought was irrelevant as it was not applicable to him or was non-existent. In view of this it was argued that the documents sought were a ruse to frustrate his application.
39. The court order for clarity directed that ‘.....the 1st respondent to re-consider the petitioner’s application for renewal of permit in accordance with the law.’ My understanding of this court order is that the obligation that the 1st respondent had was re-consideration of the petitioner’s application for the work permit. I note that the timelines within which this was to be done was not indicated by Hon Justice Mwita. What is imperative however is that the court did not direct the 1st respondent on the manner in which this reconsideration was to be determined. What is clear is that the process was to be done in accordance with the law.
40. It is not lost to this court that it has the duty to balance the interests of the petitioner as against those of the 1st respondent. Palpably it is not this court’s duty to determine or direct the 1st respondent on how it should conduct its obligations. This mandate is a preserve of the 1st respondent’s permit determination committee which has the required expertise in such matters. The applicant had the duty to demonstrate that the documents the 1st respondent was requesting for were outside the requirements for renewal of a permit under the law. For example what according to the applicant are the requirements for renewal of a permit?
41. This court’s duty in the instant matter is to determine whether the 1st respondent complied with the orders set out. The question therefore is did the 1st respondent re-consider the petitioner’s application? owing to the material placed before this court the answer is in the affirmative. I say so because the 1st respondent’s committee in its meeting dated June 25, 2020 as evidenced by Min.03/25/06/2020 under paragraph 2 considered the petitioner’s application for the work permit. The application was deferred in view of the required documentation which had not been availed by the applicant. The committee in its conclusion noted as follows for ease of reference:
- ‘In compliance with the directive of the High Court that the directorate reconsider the subjects application for renewal of work permit, the committee advised the secretary to write to the applicant advising him to do an online application and resubmit a full set of documents required during the renewal including company and individual tax compliance certificates which are mandatory for class ‘g’ renewals for the committee to take necessary decision upon receipt of the documents.’
42. While this is apparent, it should be remembered that the court categorically directed that the same be done in accordance with the law. The petitioner was aggrieved by the 1st respondent’s requirements arguing that the documentation were irrelevant and non-existent for some. As discussed above what should and should not be considered is not within the purview of this court’s jurisdiction.
43. What would have been significant however is a demonstration by the petitioner that the requirements as dictated by the 1st respondents were unlawful and in contravention of the law and the orders of the court. This was not established by the petitioner. It should be stressed as pronounced in the cited cases that a high standard of proof applies whenever committal to prison for contempt is sought because contempt of court is quasi-criminal in nature. That notwithstanding a party’s difficulty in compliance with the law cannot be the foundation upon which they base their case
44. In light of the foregoing discussion and for avoidance of doubt, I find that the 1st respondent did not act in breach of the court orders dated May 18, 2018. I say so because the petitioner failed to discharge his burden of proof to the effect that the 1st respondent acted in breach of the said court orders and that the breach was done deliberately. Likewise owing to the 1st respondent’s averments in its replying



affidavit and the court record the petitioner has been issued with a special pass which has been renewed continually.

45. Taking this into consideration, it is my humble conclusion that the petitioner's application dated June 5, 2020 does not satisfy the established requirements for this court to grant the orders sought. For this reason I find that the application lacks merit and I dismiss it with costs.

Orders accordingly.

DELIVERED, VIRTUALLY, DATED & SIGNED THIS 18TH DAY OF NOVEMBER, 2022 IN OPEN COURT AT MILIMANI.

H. I. Ong'udi

Judge of the High Court

