



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL CASE NO 62 OF 2004**  
**NDATHI MUGUNDA COMPANY LIMITED.....PLAINTIFF/APPLICANT**  
**VERSUS**  
**PATRICK MATU GITHINJI**  
**MICHAEL NDUNGU NDEGWA**  
**JOSEPH GIKONYO KAGECHA**  
**MICHAEL NDUNGU KAGECHA**  
**JOHN KIRUKI MWANIKI..... DEFENDANTS/RESPONDENT**

**RULING**

By a notice of motion dated 20<sup>th</sup> November 2015 the plaintiff/Applicant herein moved this court under the provisions of Order 50 Rule 1, Order 22 Rule 28, Order 40, Rule 3 of the Civil Procedure Rules, 2010, Sections 28, 63 (c) and (e) of the Civil Procedure Act,[\[1\]](#) the Companies Act[\[2\]](#) and all other enabling provisions of the law seeking orders the following orders:-

- a. **That** this honourable court be pleased to issue orders that Michael Ndungu Ndegwa, Joseph Gakonyo Wanyiri and John Kirugi Mwaniki {the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> defendants herein} and indeed, all the defendants/Respondents be committed to jail for such period as would be deemed necessary by this honourable court for unlawful breach of the decree/orders flowing from the judgement of court delivered on 21<sup>st</sup> February 2014.
- b. **That** in addition to or in lieu of such committal to prison, that this honourable court be pleased to direct/order that the properties of Michael Ndungu Ndegwa, Joseph Gakonyo Wanyiri and John Kirugi Mwaniki{the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> defendants herein} and indeed the properties of all the defendants/Respondents' properties be attached and kept to enforce compliance with the order of injunction, failing compliance the same to be sold and the proceeds thereof be used to defray the loss or damage resulting from the disobedience of the court orders.
- c. **That** the honourable court be pleased to direct and/or order that the certificate of Registration No. 216853 in the name of Kabiruni Kamatongu Block 1 (Samaki) Welfare Group be cancelled/nullified.
- d. **That** the defendants/Respondents be condemned to pay the costs of this application

The application is premised on the annexed affidavit of Charles Kinyua Karoki and the grounds stated on the face of the said application, namely:-

*i. **That** after a full hearing, the court delivered a judgement on 21 February 2014 and inter alia granted a permanent injunction restraining the defendant/Respondents from intermeddling with the affairs and running of the plaintiff company.*

*ii. **That** the defendants/Respondents being fully aware of the existence of the said orders have engaged in blatant acts contrary to the spirit and tenor of the orders.*

*iii. **That** the defendants/Respondents being aware of the said orders had no reason to disobey the same and that their actions are clearly contempt of the said order and that the court cannot issue its orders in vain.*

It is alleged in the supporting affidavit that the defendants/Respondents were served with the said order, that they were represented by an advocate and despite being fully aware of the said orders, the defendants/Respondents engaged in the acts which amounted to disobeying the said order.

It is also alleged that in an attempt to obstruct the course of justice, the defendants registered a welfare group under which they have continued to interfere with the affairs of the company, and that the applicant videotaped a meeting convened by the Respondents and took photographs of the meeting which was held on 28<sup>th</sup> February 2015 as evidenced by the photographs annexed to the supporting affidavit and video tape played in court.

The judgement and order in question is annexed to the supporting affidavit. The terms of the order are *inter alia* that "*a permanent injunction restraining the defendants, their agents or persons claiming under them from interfering with the running of the plaintiff company is hereby issued.*" Also attached to the affidavit is an affidavit of service stating that both decree and a penal notice were served upon all the Respondents.

On 11<sup>th</sup> December 2015 I allowed the Respondents seven days to file their Replying affidavit. By 9<sup>th</sup> January 2016 the Respondents counsel had not filed any affidavit and he asked for two weeks to file the same which I allowed. The next court attendance was on 9<sup>th</sup> March 2013 and again by the said date no affidavit had been filed and the matter was adjourned to 27<sup>th</sup> July 2016 but on the said date counsel for the Respondent did not attend court nor had the affidavit been filed. However, the Respondents namely **Joseph Gakonyo Wanyiri, John Kirugi Mwaniki** in court ready to proceed in person, hence I proceeded to hear the application.

Counsel for the applicant took the court through the contents of the supporting affidavit and documents in support of the application and argued that the Respondents flouted the court order. He also relied on the authorities in his list of authorities which I have considered. Counsel used the video tape to demonstrate the alleged deliberate breach of the court orders, but as the video played, I noted that the same was not in the court language and I ordered that a translated copy be availed to the court. This necessitated an adjournment.

On 6<sup>th</sup> October 2016, the application came up for further hearing. However, the Respondents or their advocate did not attend court. I directed that they be served and a fresh date was taken for 3<sup>rd</sup> November 2016. However on the said date, their advocate did not attend but the following Respondents were in court, namely, **Michael Ndungu Ndegwa, Joseph Gakonyo Wanyiri, John Kirugi Mwaniki** and **Patrick Matu Githinji** and after the court reminded them that they had hitherto not filed a Replying affidavit or grounds of objection, they all stated willingness to proceed and participate in the hearing of the application.

At this point counsel for the applicant stated that he only wished to proceed against the 3<sup>rd</sup> Respondent, namely; **Joseph Gakonyo Wanyiri** and the 5<sup>th</sup> Respondent **John Kirugi Mwaniki**. The two

Respondents insisted willingness to proceed with the application notwithstanding the fact that they had not filed Replying affidavits or grounds of objection and the court agreed to hear them.

Counsel concluded his arguments and confirmed that he had supplied the court with a translated copy of the video sand submitted that he had demonstrated that the above two persons participated in the alleged meeting where they engaged in activities in total and deliberate breach of the orders in question.

The two Respondents addressed the court without being sworn and I find that their evidence was not properly received, hence I will not consider it in this decision. I however mention that the third Respondent denied that the alleged meeting discussed the affairs of the plaintiff while the fifth Respondent stated that he attended the meeting in question as a member of the association under which it was convened. The said association is totally different from the plaintiff herein.

A lot of reliance was placed on the video tape recorded proceedings of the meeting allegedly attended and addressed by the Respondents in which it was alleged they discussed the affairs of the plaintiff company in total breach of the court orders. In view of the importance of this video tape I took time and reviewed it to satisfy myself that the Respondents indeed discussed the affairs of the plaintiff company as alleged contrary to the court order.

I reproduce below the entire translation of the tapped proceedings relied upon by the applicant:-

*"We shall be meeting every Sunday for registration. So if you don't have documents with you today we shall register you on Sunday and registration shall continue until the end of the month. Let me call upon the chairman to tell us the venue...We do not have an established office here that we can fit all of us. We shall still come back to this same venue in April.*

*Wherever the register shall be, we shall know in April. I shall let you know. Didn't I tell you that the documents are with the CID? Next time I shall inform you of the documents we are preparing so that nobody should delay. If you want to delay I shall not question you. We have complaints at the CID, also, we have others and many more are at other places. I have given you till the end of this month of march. A road will be constructed as Samaki farm.*

*QUESTION: Since am a supervisor, am I supposed to attend this meeting?*

*We said we do not know you stood on what grounds.. We shall be identifying you through your clearance certificate when you come carry your clearance certificate. Don't ask just come with the clearance certificate and don't ask more questions. When you come carry your clearance certificate and the money and please don't add that we don't want to.... Since we have talked and we don't know on what grounds some of us came on... Is there anyone who attended the meeting and has not yet registered. The register is here so you can register. Let the one who is at the back finish registering and pray for us.*

*My name is Ndirangu. A'm the secretary of Chaka Plot owners, today we had called a meeting with the members of Chaka plot owners so that they register and also establish the owners of each plot. Since some members have gone ahead and made transfers, some have sold them and haven't yet registered anywhere. We want to be able to know them right now. Since the plots were issued twenty years ago. We want to know the position as of now."*

Contempt of court has been defined as a willful disregard or disobedience of a public authority. In its broad sense, contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body or an interruption of its proceedings by disorderly behavior or insolent language in its presence or so near thereto as to disturb its proceedings or to impair the respect due to such a body. In its restricted and more usual sense, contempt comprehends a despising of the authority, justice, or dignity of a court. The phrase *contempt of court* is generic, embracing within its legal signification a variety of different acts.

The power to punish for contempt is inherent in all courts, and need not be specifically granted by

statute. It lies at the core of the administration of a judicial system. Indeed, there ought to be no question that courts have the power by virtue of their very creation to impose silence, respect, and decorum in their presence, submission to their lawful mandates, and to preserve themselves and their officers from the approach and insults of pollution. The power to punish for contempt essentially exists for the preservation of order in judicial proceedings and for the enforcement of judgments, orders, and mandates of the courts, and, consequently, for the due administration of justice. The reason behind the power to punish for contempt is that respect of the courts guarantees the stability of their institution; without such guarantee, the institution of the courts would be resting on a very shaky foundation. Contempt of court is of two kinds, namely: direct contempt, which is committed in the presence of or so near the judge as to obstruct him in the administration of justice; and constructive or indirect contempt, which consists of willful disobedience of the lawful process or order of the court

According to *Black's Law Dictionary*;[3]

*"Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."*

In *Halsbury's Laws of England* it is stated:-

*"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment .....an application to court by him not being entertained until he had purged his contempt"*

In book *The Law of Contempt*[4] learned authors **Nigel Lowe & Brenda Sufrin** state a follows:-

*"Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside."*

In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another*[5] **Ibrahim J** (as he then was) stated as follows:-

*"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by 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 void."*

Contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. It is not sufficient to suspect the persons acted in contempt. Mere suspicion is not enough. The facts and the evidence adduced must demonstrate clear, willful, flagrant or reckless disobedience of the court order. In the case of *Gatharia K. Mutikika vs Baharini Farm Ltd*[6] where it was held as follows:-

*"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in*

*criminal cases. it is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."*

In *Peter K. Yego & Others vs Pauline Nekesa Kode*<sup>[7]</sup> the court recognizing that contempt of court is criminal, and held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in a application for contempt must prove beyond peradventure that the respondent is guilty of contempt.<sup>[8]</sup>

The High Court of South Africa in the case of *Kristen Carla Burchell vs Barry Grant Burchell*<sup>[9]</sup> held 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.<sup>[10]</sup>

Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand*<sup>[11]</sup> have authoritatively stated as follows:-

*"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;*
- (c) the defendant has acted in breach of the terms of the order; and*
- (d) the defendant's conduct was deliberate.*

Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort.

As pointed out above, in an application of this nature we are dealing with the liberty of a person and such an order ought to be granted in the clearest circumstances as evidently demonstrated by the authorities cited herein.

I have carefully evaluated word by word the above text extracted from the video tape attributed to the Respondents' and which triggered the application the subject of this ruling and the court order in question which reads "*a permanent injunction restraining the defendants, their agents or persons claiming under them from interfering with the running of the plaintiff company is hereby issued.*"

The words in the above text are clear and self explanatory. No single word refers even remotely to the affairs of the plaintiff company. The Respondents met under a different outfit and the matters discussed are reproduced above. I find nothing which can be construed to be a violation of the order in question. I am not satisfied that the standard of proof which numerous authorities clearly state must be higher than in civil cases has been attained. In fact there is no evidence at all to support the allegations of contempt.

The applicant also seek an order for attachment of the defendants property. Section **63** of the Civil Procedure Act[12] provides as follows:-

*" In order to prevent the ends of justice from being defeated the court may, if it so prescribed-*

*a.*

*b.*

*c. Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property to be attached and sold.*

*Under Order 40 Rule 3 of the Civil Procedure Act, in case of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.*

Useful guidance can obtained in the New Zealand case of *Morris vs Douglas*,[13] where **Peterson J** discussing an order of this nature explained the nature and effect of a *sequestration* order in the following words:-

*"It is generally considered to be a writ of last resort and it is coercive in its function rather than punitive. It is available only where the person against whom it is sought to be issued is in contempt of court through having willfully disobeyed its order. If the writ does issue, it temporarily places property of the contemnor into the hands of the sequestrates and denies him the right to enjoy or dispose of the property until a further order of the court. ....As the writ is very drastic in form, the courts have generally been reluctant to allow the writ to issue except in the clearest cases and will not normally issue the writ unless the conduct has been intentional or reckless. The conduct must be shown to be willful..." (Emphasis supplied)*

I stand guided by the words expressed in the above case. Attaching a person's property is truly a drastic step and can only be issued in very clear circumstances and also where the conduct is intentional or reckless. Considering the facts and circumstances of this case and the material presented before me, there is no basis at all for the court to grant an order attaching the Respondents property.

I must also point out that no evidence was tendered even reportedly in support of prayer number 5 of the notice of motion and I find no reason to discuss it.

Having concluded as herein above stated, I hereby find that the application dated 20<sup>th</sup> November 2015 has no merits and I hereby dismiss the said application with costs to the Respondents.

Orders accordingly

Dated at **Nyeri** this **24<sup>th</sup>** day of **November** 2016

**John M. Mativo**

**Judge**

Delivered at **Nyeri** this **24<sup>th</sup>** day of **November** 2016

**Hon. Justice Jairus Ngaah**

**Judge**

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[1] Cap 21, Laws of Kenya

[2] Cap 486, Laws of Kenya

[3] 9th Edition, page 360

[4] Butterwoths {1996} Pages 555-569

[5] {2005} 1KLR 828

[6] {1985} KLR 227

[7] Nakuru HCCC No No. 194 of 2004

[8] See G. V. Odunga J in Misc App No 268 of 2014 (J.R.)

[9] Eastern Cape Division Case No. 364 of 2005

[10] Ibid, at page 4

[11] Available at *ip36.publications.lawcom.govt.nz*

[12] Supra

[13] {1996} 10 PRNZ (HC) at 336