Okoiti & another v Afrison Export Import Limited & 5 others; Continental Credit Finance Limited (In Receivership) & 5 others (Interested Party) (Petition 1488 of 2016) [2022] KEELC 2211 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEELC 2211 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION 1488 OF 2016

LC KOMINGOI, J

APRIL 28, 2022

IN THE MATTER OF: ARTICLES1,2,3,4(20,10,19,20,21,22,23,24,27 40, 47, 50(1), 159, 162, 165, 258 & 259 OF THE CONSTITUTION OF KENYA

IN THE MATER OF: ALLEGED VIOLATION AND INFRINGMENT OF ARTICLES 10, 19, 40, 47, 62, 73, 201 AND 232 OF THE CONSTITUTION OF KENYA; AND SECTIONS 68 OF THE PUBLIC FINANCE MANAGEMENT ACT (CAP 412 C)

IN THE MATTER OF: THE CORRECT ACREAGE OF LAND PURCHASED FOR THE GENERAL SERVICE UNIT (GSU) OF THE NATIONAL POLICE SERVICE BY DINT OF HIGH COURT CIVIL CASE NUMBER 617 OF 2012 AND THE THEFT OF SOME 6.7 ACRES OF THE SAID GSU LAND VIDE A FRAUDULENT COMPULSORY ACQUISITION FOR THE OUTER RING ROAD IMPROVEMENT PROJECT

IN THE MATTER OF: THE UNJUST ENRICHMENT BY AFRISON EXPORT IMPORT LIMITED AND HUELANDS LIMITED FROM NUMEROUS FRAUDULENT PPAYMENTS MADE BY THE STATE FOR MULTIPLE ACQUISITION OF L.R NO.

7879/4

IN THE MATTER OF: RECOVERING PUBLIC MONEY IRREGULARLY AND UNLAWFULLY PAID OUT TO AFRISON EXPORT IMPORT LIMITED AND HUELANDS LIMITED FOR THEIR FARUDULENT MULTIPLE SALES OF LR NO.7879/4 TO THE GOVERNMENT

IN THE MATTER OF: DETERMINING THE RIGHTFULL OWNER OF THE 96 ACRE DRIVE INN ESTATE LR

7879/4

BETWEEN

OKIYA OMTATA OKOITI ..... 1ST PETITIONER

NYAKINA WYCLIFE GISEBE ..... 2ND PETITIONER

AND

AFRISON EXPORT IMPORT LIMITED ..... 1ST RESPONDENT

HUELANDS LIMITED ..... 2ND RESPONDENT

KENYA URBAN ROADS AUTHORITY ..... 3RD RESPONDENT

NATIONAL LAND COMMISSION ..... 4TH RESPONDENT

CABINET SECRETARY, LANDS, HOUSING AND URBAN DEVELOPMENT ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

AND

CONTINENTAL CREDIT FINANCE LIMITED (IN RECEIVERSHIP) ..... INTERESTED PARTY

OFFICIAL RECEIVER AND INTERIM LIQUIDATOR ..... INTERESTED PARTY

TELKOM KENYA ..... INTERESTED PARTY

NAIROBI CITY COUNTY ..... INTERESTED PARTY

RAFIKI ENTERPRISES LIMITED ..... INTERESTED PARTY

RAFIKI ENTERPRISES LIMITED ..... INTERESTED PARTY

RULING

1. This is the Notice of Motion application dated 13th April 2018.

2. It seeks orders;

    a. Spent.

    b. That the Honourable court be pleased to commit the directors and/or the chief executive officers of the 1st,2nd and 4th Respondents and the 5th Interested Party for contempt of court for disobeying the valid orders of this Honourable court issued herein on 13th December 2016,and duly effectively served on them.

    c. That the 1st, 2nd and 4th Respondents and the 5th Interested Party be denied audience in this court until and unless they purge the contempt by refunding all monies paid in contravention of the valid orders this Honourable court issued herein on 13th December 2016.

    d. That the 1st, 2nd and 4th Respondents and the 5th Interested Party bear the Petitioner's costs of this application.

3. The Petition is based on grounds listed on paragraph 1-15 on the face of the application. The main ground is that the 4th Respondent paid Kshs.1.5 billion to the 1st and 2nd Respondents as part of kshs.3.3 billion compensation for part of 96 acres of land located on L.R 7879/4 in deliberate and contemptuous violation of the orders of this Honourable Court (Okong'o J) issued in open court

on 13th December 2016,expressly prohibiting the 3rd,4th,5th and 6th Respondent from making further payments to the 1st and 2nd Respondents in respect of compensation on the suit land pending hearing of the application dated 28th November 2016 inter parties.

4. The application is supported by the annexed affidavit sworn by the 1st Petitioner on 13th April 2018. He re-affirmed the grounds in support of the application and urged the court to stop the Respondents from blatantly disregarding the law.

The 1st and 2nd Respondents' response

5. The 1st and 2nd Respondents opposed the application by way of the replying affidavit sworn by Francis Mburu Mungai, the managing director of the 1st and 2nd Respondents on 20th December 2018.

6. Following this court's ruling of 16th September 2021 allowing the 1st and 2nd Respondents' application dated 7th June 2021,the 1st and 2nd Respondents' replying affidavit sworn on 7th June 2021 by Francis Mburu Mungai was also admitted as part of the 1st and 2nd Defendants evidence.

7. Francis Mburu Mungai deponed that the interim orders issued on 13th December 2016 stopping further payments regarding compensation for part of L.R No.7879/4 were issued erroneously as compensation payments had already been paid in 2015.

8. He further deponed that the orders did not envisage nor could they be read to mean that the Government could not carry out any future compulsory acquisition over the undisputed portions of L.R No.7879/4.

9. He added that the orders in question were directed to the 3rd, 4th, 5th and 6th Respondents thus they cannot be used to punish the 1st and 2nd Respondents for contempt whereas there were no orders issued against them that they could disobey.

10. He also deponed that that injunctive orders are only available for a period of twelve (12) months, thus they have automatically lapsed. He added that in any event, the matter was stayed pending hearing and determination of the appeal pending at the court of appeal being Civil Appeal Application Number 225 of 2016 and Civil Appeal Application Number 115 of 2016 and prayed that the application be dismissed for lack of merit.

The 4th Respondent's response

11. The 4th Respondent opposed the application by way of grounds of opposition dated 29th August 2018 and by way of the replying affidavit sworn on 29th August 2018 by Joash Mogambi Oindo, a registered valuer and acting director, Land Valuation and Taxation at the 4th Respondent.

12. He deponed that the context in which the orders of 13th December 2016 were issued was as to preserve the award of compensation payable to the 1st and 2nd Respondents arising out of acquisition of a portion of L.R 7879/4 for purpose of construction of the outer Ring Road after the Petitioners alleged that the portion under acquisition measuring approximately 6.7 acres was being acquired from 37.4 acres of GSU public land and that it was a ploy by officials of NLC, KURA and the 1st and 2nd Respondents to swindle the government.

13. He deponed that the 4th Respondent had, pursuant to its mandate undertaken compulsory acquisition of approximately 6.9 acres from L.R 7879/4 required from the outering road project and awarded the 1st and 2nd Respondents 1,472,690,000/= in compensation. He added that the money was paid in installments as follows;

a. Ksh.708, 024, 625.50 was paid on or about 29th April 2015.

b. Kshs.500, 000, 000.00 was paid on or about 30th May 2015.

c. Kshs.208, 906, 426.00 was paid on or about 21st July 2015.

14. Mr. Oindo deponed that on account of the entire award of compensation having been paid in full, the orders of the court issued on 13th December 2016 could not be effected by the 4th Respondent and the 4th Respondent has not made any further payments to any party since the orders were issued.

15. He acknowledged that it compulsorily acquired 13.7701 acres situate on L.R 7879/4 required for Drive-In primary school and Ruaraka High School at the behest of the ministry of education and awarded the 1st and 2nd Respondents an award of compensation of kshs.3, 269, 040, 600.00 and the said land is not within the 37.4 cares of GSU land.

16. In response to the pleadings filed in opposition to the application, the Petitioners filed a supplementary affidavit sworn on 11th March 2019 by the 2nd Petitioner.

17. In response to the contention that the orders did not cover the undisputed portions of L.R No.7879/4, he deponed that the crux of the matter is the ownership of 96 acres of land known L.R NO.7879/4 and that order 40 Rule 6 does not apply in the circumstances herein as this is a Constitutional petition filed under Article 22 of *the Constitution*.

18. In response to the contention that the application is not anchored on any law, he deponed that the application is brought under Articles 3(1),22,23,50,159(2)(d),165 and 258 of *the Constitution* of Kenya(Protection of Rights and fundamental freedoms)practice and procedure rules, 2013.

The 3rd, fifth and 6th Respondents' response

19. In response to the application, they filed the preliminary objection dated 16th August 2018, contending that the procedure under which contempt of court may be levied against the government as contained under Section 30(1) of the *contempt of Court Act* has not been adhered to.

20. They also contended that the 3rd Respondent did not make further payments to the 1st and 2nd Respondent in relation to the transaction for which the orders were sought.

21. The Notice of Motion was canvassed by way of written submissions.

The Petitioners' Submissions

22. They are dated 20th February 2019. They raise seven (7) issues for determination. They are:-

i. Whether the respondents were under obligation to obey court orders?

ii. Whether there was an order made by the court?

iii. Whether the Respondents were aware or had notice of the court order?

iv. Whether the Respondents acted in contempt of the court order?

v. Whether the Respondents willfully disobeyed the court order with full knowledge and notice of the existence of the court order?

vi. Whether the Petitioner has established the standard of proof in contempt proceedings.

vii. Whether the High Court's invalidation of the *contempt of court Act* No 46 of 2016 is a bar to these proceedings.

23. The obligation to obey court order is universal, peremptory and unconditional. They have put forward he cases of *Fred Matiangi v Miguna Miguna* (Criminal Appeal No 1 of 2018); *Hadkinson v Hadkinson* [1952] 2 ALL ER 567; Teachers Service Commission vs KNUT [2013] eKLR.

24. On the 13th December 2016, this court (Okong'o J) after hearing the parties, issued the following order:-

(2) That with a view to preserve the subject matter of the suit, the 3rd , 4th, 5th and 6th Respondents are prohibited from making further payments to the 1st and 2nd Respondents directly or through their agents Almasi Ltd in respect of compensation on LR NO 7879/4 pending the hearing of the application dated 28th November 2016 interpartes".

The said order is clear, unambiguous and unequivocal. The said order was never been stayed by his court or by another court of competent jurisdiction.

25. The evidence on record is that the orders were extracted and served on the parties and, that the Respondents were aware or had sufficient notice of the court order. They have put forward the case of *Basil Criticos v AG* [2015] eKLR; *Justus Kariuki Mate v Martin Nyaga Wambora* [2014] eKLR; *Kenya Tea Growers Association v Francis Atwoli* [2015] e KLR; *Shimmers Plaza Ltd v National Bank of Kenya Limited* [2015] e KLR; *Fredrick Okolla Ojwang v Orange Democratic Movement & Another* [2017] e KLR; *James Gitau Mwaura v AG* [2015] eKLR.

The Respondents had ample notice of the court order but chose to contemptuously ignore it.

26. The payment on January 2018 on thereabouts, of Kshs.1.5 billion was made in deliberate and contemptuous violation of the orders still inforce which Okong'o J issued on 13th December 2016. They acted in contempt of the court order and should be punished accordingly as provided for under Section 5 of the *Judicature Act* and Section 13 of the *Employment and Land court Act* , 2012. The factors taken into consideration when determining a contempt of court application were set out in the case of *Ringera & 2 Others v Muite and 10 others* HCCC at Nairobi Civil Suit No 1330 as follows:-

> " .....where contempt proceedings are placed before a court for hearing quite a number of legal issues and principles come to the fore e.g existence of the orders that ought to be obeyed or executed, service, proof of breach, penalties etc. these aspects of fact in committal for contempt proceedings includes fairly basic issues: eg were court orders in existence; did the defendants know of them; were they indeed breached.....".

This position was summarized in the case of *Sarah Wanjiru v Jacinter Wanjiru Nguti* [2014] e KLR.

27. There are two main things an applicant in an application such as the present one has to show:-

a. That the order was disobeyed.

b. That the Respondent in an application for contempt of court had knowledge of the order.

They have put forward the case of *Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another* [2014] eKLR.

28. The Respondents had knowledge of the order but they deliberately did not comply with the court order as required. The Respondents' actions amount to willful disobedience of the court order having full knowledge of the existence of the orders. They have put forward the case of *Fredrick Okolla Ojwang* (Supra); *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another*.

29. The Standard of proof in contempt proceedings has been a matter of contention in the courts with different decisions being made. They have put forward the case of *Jean Claude Adzalla v Jackline Wanjiru Muiruri & Another* [2017] eKLR; *Gatharia K. Mutitika v Baharini Farm Ltd* which was quoted with approval in *Katsuri Limited v Kapunchand Depar Shah* [2016] e KLR; *Kasembeli Sanane v Manhu Muli alias Fredrick Samane & 4 Others* [2013] e KLR;

30. The contempt must be purged by refunding the money in issue with interest compiled at court rates. Having been so ordered not to make the payments, the Respondents had no capacity to make their impugned payments. The impugned payments are nullities abinitio. The Respondents illegal and unconstitutional act of purporting to make impugned payments in defiance of the court order be held as ultra vires, illegal, unreasonable, haphazard, illogical, unwarranted, dangerous, unconstitutional and null and void abinito.

31. In *Katsuri Limited* (*Supra*) Mativo J laid out the procedure of instituting contempt of court proceedings in Kenya before the enactment of the *Contempt of Court Act* No 46 of 2016, Section 5 of the *Judicature Act* is the law governing contempt of court proceedings.

32. A court must protect its dignity and asserts its constitutional authority by both punishing for contempt and by stopping the contempt.

33. The Respondents did not comply with the court order and should be found guilty of contempt of court.

The 1st and 2nd Respondents Submissions

34. They are dated 17th June 2018.Counsel for the 1st and 2nd Respondents submitted on the following issues:-

    a. Whether the orders of 13th November 2016 were made as against the 1st and 2nd Respondents.

    b. What was the purport, scope and circumstance in which the orders were made?

    c. Whether the 1st and 2nd Respondents are in breach of the orders of the Honourable court?

    d. Competence of the contempt application before court.

35. No order of prohibition was issued as against the 1st and 2nd Respondents prohibiting them from doing anything. The order was clearly issued as against the 3rd, 4th, 5th and 6th Respondents to prohibit them from making further payments. The 1st and 2nd Respondents cannot thus be cited for contempt for allegedly breaching an order that was never made against them.

36. The application dated 28th November 2016 to stop a further payment of compensation for compulsory acquisition of part of Drive Inn Estate LR NO 7879/4 and not the entire parcel of land. It is clear that the application and prayers sought were only in respect to the Outer Ring Road compensation and that is the reason why the Petitioners' sought to stop Kenya Urban Roads Authority and National Land Commission from continuing with the compensation which at the said time, the amount of money pending and payable was a sum of Kshs.208,906,426/-.

37. The Subsequent compensation that the Petitioners now challenge and have been made subject to the current contempt proceedings were made and initiated from the Ministry of Education which is not even a party to this suit towards compensation for Ruaraka High School and Drive Inn Primary School. This transaction is distinct and separate from the payments that were being stopped and against Kenya Urban Roads Authority for compensation of Outer Ring Road expansion.

38. In the current case, the Applicants seek to commit the directors of the 1st and 2nd Respondents for contempt where as there has been no application to lift the corporation veil. They have put forward the case of *Katsuri Ltd* (Supra). The Applicants must prove that the said directors were personally served or are personally aware of the orders in their personal capacity. The application must fail. The said part compensation of Kshs.1.5 billion was thus not in contravention of the existing order, but in compliance with the constitutional provisions under Article 40.

39. The 1st and 2nd Respondents committed no breach by virtue of being compensated for a portion that was not in dispute in court as at the time and where no order had stopped the Ministry of Education from acquiring and compensating the 1st and 2nd Respondents. There is no order stating that the entire parcel of land that is LR 7879/4 does not belong to the 1st and 2nd Respondents.

40. The notice of motion does not provide the law upon which is based and the section of law upon which it is brought thus rendering the same not only defective, but unfit for determination by this honourable court. They have put forward the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] e KLR. They pray that the application be dismissed with costs.

The 3rd, 5th and 6th Respondents' Submissions

41. They are dated 28th May 2019. On the 30th June 2017, the 4th Respondent caused to be published in the Kenya gazette, gazette notice no 6322 being a notice of intention to acquire 2.855 ha and 2.7472 ha out of the suit property, required for Drive Inn Primary School and Ruaraka High School.

42. Arising out of this new compulsory acquisition, the 4th Respondent issued the 1st and 2nd Respondent an award of compensation of Kshs.3,269,040,600/- which was duly accepted. The 4th Respondent has so far paid out Kshs.1,500,000,000/- to the 1st and 2nd Respondents for this new acquisition. It is the 4th Respondent's case that the payment of Kshs.1.500,000,000 was in relation to an entirely different project from construction of the Outer Ring Road.

43. That as at the time of the issuance of the orders on 13th December 2016, there was nothing to preserve as the 4th Respondent had paid the entire award of compensation arising out of acquisition for the Outer Ring Road.

44. The transactions sought to be questioned in these contempt proceedings did not form part of the petition and cannot be said to be derived from the transaction under review in the petition dated 28th November 2018.

45. As per the Section 5(1) of the *Judicature Act* and Section 13 of the *Environment and Land Court Act* it can be argued that the jurisdiction to punish for contempt of court does not extend to the Environment and Land Court such jurisdiction is conferred upon the High Court and the Court of Appeal. They have put forward the cases of *"Owners of Motor Vessel "S" Caltex Oil (Kenya) Ltd* [1989] KLR1; *Republic v Karisa Chengo & 2 Others* [2017] eKLR.

46. The courts orders issued on 13th December 2016 have not been contravened as the same could not cover that which the applicant contemplated but did not plead. They were unequivocally targeted and limited to payment of the balance of Kshs208,906,426/- arising out of acquisition of 6.7 acres required for expansion for the Outer Ring road. It is evidence that what the applicants sought to preserve was the making of further payments arising out of acquisition of some 6.7 acres pending the determination of whether the said 6.7 acres were public land or not. They have put forward the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] e KLR. They pray that the application be dismissed with costs.

47. I have considered the notice of motion and the affidavit in support and the annexures. I have also considered the grounds of opposition and the affidavits in response, the oral submissions and the authorities cited. The issues for determination are:-

    i. Whether the orders were made against the 1st and 2nd Respondents.

    ii. Whether the Respondents have willfully disobeyed he court orders of 13th December 2016 with full knowledge and notice of the existence of the court orders.

    iii. Who should bear costs of this application?

48. On the 13th December 2016, Honourable Okong'o J issued the following orders:-

> " 2. That with a view to preserve the subject matter of the suit, the 3rd, 4th, 5th and 6th Respondents are prohibited from making further payments to the 1st and 2nd Respondents directly or through their agents Almasi Ltd in respect of compensation on the LR NO 7879/4 pending the hearing of the application date 28th November 2016 interpartes".

These are the orders which the Petitioners allege have been contravened by the Respondents.

49. It is the 3rd, 5th and 6th Respondents' counsel submissions that this court lacks jurisdiction to hear and determine an application for contempt of court proceedings. That it is only the preserve of the High Court and the Court of Appeal as provided for under Section 5(1) of the *Judicature Act*. I disagree. It is my view that this court has the requisite jurisdiction to hear and determine this application.

50. It is clear from the wording of the orders issued on 13th December 2016 that it is the 3rd, 4th, 5th and 6th Respondents were prohibited from making further payments to the 1st and 2nd Respondents directly or through their agent Almasi Limited. This order did not prohibit the 1st and 2nd Respondents from doing anything. I agree with the 1st and 2nd Respondents counsel's submissions that no orders were issued against the 1st and 2nd Respondents on 13th December 2016.

51. It is clear from the notice of motion dated 28th November 2016 that the bone of contention was sum of about Kshs.209 million that was to be paid in further payments towards compensation for the General Service Unit land and as such, sought that the same be stopped so as to preserve the subject matter of the suit.

52. The payment in question relates to an entirely different transaction other than the one that was envisaged and brought to court in the year 2016 by the Petitioners.

53. I have gone through the replying affidavit of Joash Mogambi Oundo, a registered valuer and acting director Land valuation and taxation with the 4th Respondent sworn on the 29th August 2018.

In Paragraph 9 he states:

> "That arising out of acquisition of the 6.7 acres required for the Outer Ring Road improvement project the 4th Respondent has by way of various instalments effected payments of the entire award of compensation to the 1st and 2nd Respondents as follows:-- The 1st instalment of Kshs.708,024,625/50 paid on or about 29th April 2015.- The 2nd Instalment of Kshs.500 million paid on or about 20th May 2015.- The 3rd and final instalment of Kshs.208,906,426/- paid on or about 21st July 2015"

In paragraph 14 he deposes:

> "That the compulsory acquisition of the 13.7701 acres required for Drive Inn Primary School Ruaraka High School as commenced by the Applicant was at the behest of the Ministry of Education Science and Technology through its cabinet secretary, by way of notice made to the applicants on 17th March 2017. The two schools are existent and remain public schools situated on LR NO 7879/4".

In paragraph 15 he depones:-

> "That following publication of the notice of intention to acquire and upon carrying out site inspection and valuation of the 4th Respondent determined the value of the portion of land intended to be acquired to be three billion, two hundred and sixty nine million, forty thousand and six hundred shillings (Kshs.3,2690,040,600/-. Thereafter, an award of compensation of the same sum was issued to the 1st and 2nd Respondents which was duly accepted".

In paragraph 16 he depones

> "That following acceptance of the award of compensation, the 4th Respondent has since paid the sum of Kshs one billion and five hundred million shillings (Kshs.1,500,000,000/- to the 1st and 2nd Respondents through Whispering Palms Estate Limited at the request of the 1st and 2nd Respondents. There therefore remains an outstanding balance of one billion seven hundred and sixty nine million, forty thousand and six hundred shillings (Kshs.1,769,040,600/-) payable to the 1st and 2nd Respondents".

In Paragraph 17 he deposes:

> "That I wish to state that the acquisition of portion of land occupied by Drive In Primary School and Ruaraka High School measures 13.7701 acres is not within the 37.4 acres of General Service Unit Land".

54. The above averments have not been challenged by the Petitioners. The application herein seeks to have the directors of the 1st and 2nd Respondents committed to civil jail for a period not exceeding 6 months for disobeying the orders of this court issued on 13th December 2016. In the case of *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR Mativo J observed thus:

> " The other important aspect to mention is that the alleged contemnor is a director of the company. He is not a party to these proceedings in his personal capacity. The company is a legal entity. The proper procedure for the applicant was first to apply to lift the corporate veil then go for the directors in their personal capacities. As matter stand down the director is not personally liable for debts, actions or omissions of the company, hence the application before me is misdirected..."

55. I agree with the 1st and 2nd Respondents' submissions that the corporate veil ought to be lifted first before directors can be found guilty of contempt and be committed to civil jail. In the case of *Katsuri Ltd* (*Supra*). It was further observed that:-

> " 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. This principle was reiterated in the

case of *Gatharia K Mutitika vs Baharini Farm Ltd [1985] KLR 227* 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.....it 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 an 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 and of 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 the 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 or 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"

56. Similarly in the case of *Alken Communications Ltd v Safricom Ltd & 2 Others* [2013] e KLR it was stated that "where committal for contempt is sought for breach of an injunction, it must be made clear what each defendant is alleged to have done and whether it was in breach of the injunction order".

57. In conclusion, I find that the Petitioners have failed to prove their case to the required standards to warrant the grant of the orders sought.

58. I find no merit in this application and the same is dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 28TH DAY OF APRIL 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Omtatah the 1st Petitioner

No appearance for the Respondents

Mrs. Mbaabu for the 3rd Interested party

Steve - Court Assistant