



**Busia Water and Sewerage Services Company Ltd & another v Pramukh Cash and Carry Limited  
(Environment & Land Case E018 of 2021) [2022] KEELC 2338 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2338 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E018 OF 2021**

**AA OMOLLO, J  
JUNE 30, 2022**

**BETWEEN**

**BUSIA WATER AND SEWERAGE SERVICES COMPANY LTD . 1<sup>ST</sup> APPELLANT**

**ERICK OJIAMBO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PRAMUKH CASH AND CARRY LIMITED ..... RESPONDENT**

*(An appeal from the Ruling and Order of Hon. Lucy Ambasi, Chief Magistrate made on the 25th October, 2021 in Busia Chief Magistrate Court ELC Case No. E.127 of 2021)*

**JUDGMENT**

1. This appeal arises from the Ruling and Order of Hon. Lucy Ambasi, Chief Magistrate delivered on the 25<sup>th</sup> October, 2021 in Busia Chief Magistrate Court ELC Case No. E.127 of 2021. The appeal is premised on the following Grounds listed in the Memorandum of Appeal dated October 28, 2021:
  - i) The Learned Trial Magistrate erred in law and in fact in proceeding to hear and determine a substance issue in a formal application on a mention date;
  - ii) The Learned Trial Magistrate erred in law and in fact in making a finding that the 2<sup>nd</sup> Appellant was in contempt of a court order issued on the 15<sup>th</sup> of October, 2021 when the said order had been issued at the 1<sup>st</sup> Appellant's instance for implementation by the 2<sup>nd</sup> Appellant;
  - iii) The Learned Trial Magistrate erred in law and in fact in finding that the 2<sup>nd</sup> Appellant was in contempt of the court order issued on October 15, 2021 when in fact the order had been stayed and varied by the same court;



- iv) The Learned Trial Magistrate erred in law and in fact in making a finding that the 2<sup>nd</sup> Appellant was in contempt of a court order issued on the 22<sup>nd</sup> of October, 2021 when no such order existed;
  - v) The Learned Magistrate erred in law and in fact in issuing orders she had no jurisdiction to issue;
  - vi) The Learned Magistrate erred in law and in fact in failing to follow the laid down procedures in contempt of court proceedings.
2. A brief background of the case is that on the 18<sup>th</sup> of October, 2021, the Respondent filed an application seeking inter alia;
- i) That this honourable court do cite the Managing Director of the Respondent company for contempt for disobeying this court's order made on 15<sup>th</sup> October 2021 and be summoned to court to explain why he should not be punished for his failure to carry out the court orders in line with the terms of the same.
  - ii) That in the alternative the Managing Director of the Respondent Company Mr. Erick Ojiambo and/or the company be fined Kshs.one million for such disobedience.
3. The Appellants filed their submissions on the 3<sup>rd</sup> of February, 2022. They submitted that the Trial Court record did not indicate how the application dated October 18, 2021 was canvassed as the Court records did not have any indication of the application being placed before the Court and neither are there proceedings recorded on the 15<sup>th</sup> or 19<sup>th</sup> of October, 2021. That the parties appeared before the trial court on the 19<sup>th</sup> of October and the site visit was adjourned to the 21<sup>st</sup> of October, 2021 and a mention fixed for the 25<sup>th</sup> of October, 2021. That on the mention date, the Respondent's counsel appeared exparte and made submissions urging the Court to allow prayers 2 and 3 of his application dated October 8, 2021. That the Court stayed and later varied the orders of October 15, 2021 and as such the order ceased to exist as at the date when the 2<sup>nd</sup> Appellant was purportedly cited.
4. The Appellants submitted further that they fault the Court for citing the 2<sup>nd</sup> Appellant for contempt on an order that does not exist. That despite the Respondent's counsel stating that they visited the site on a Friday, there is no coram for the mentioned date in the proceedings and as such no order was made on the 22<sup>nd</sup> of October, 2021. That a person cannot disobey an order that does not exist or has not been made by the Court.
5. With regards to the issue on jurisdiction, the Appellants submitted that the trial Court lacks the jurisdiction to cite the 2<sup>nd</sup> Appellant as section 8 of the *Magistrates' Act*, 2015 requires the Chief Justice to make rules to regulate procedure relating to contempt of court and no such rules have been made. They relied on the case of Nairobi High Court Petition No. 520 of 2017: *Jimi Wanjigi & Another vs. Inspector General of Police & 3 others* which declared the *Contempt of Court Act* unconstitutional.
6. Despite the timelines set for filing their submissions, the Respondent failed to do so by the time of delivering this judgement.
7. From the reading of the Memorandum of Appeal, the perusal of the Record of Appeal together with the Appellant's written submissions, this Court frames the following issues for the determination of this appeal:
- a) Whether the Trial Court had jurisdiction to cite a party for contempt;
  - b) Whether there was proof of contempt against the Managing Director of the Appellant.



- c) Who pays the costs of this Appeal?
8. Likewise, the Supreme Court of Kenya in the case of *Samuel Kamau Macharia Vs KCB & 2 Others*, Civil Application No. 2 of 2011 stated thus:
- “A Court’s jurisdiction flows from either *the Constitution* or Legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”
9. The magistrates’ courts derive their jurisdiction to deal with the issue of contempt of Court from Section 10 of the *Magistrates’ Court Act*, 2016 which specifically provides that: -
1. Subject to the provisions of any other law, the Court shall have power to punish for contempt;
  2. A person who, in the face of the Court-
    - a) Assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;
    - b) Interrupts or obstructs the proceedings of the Court; or
    - c) Without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence
  3. In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.”
10. The declaration of the *Contempt of Court Act* unconstitutional in the *Kenya Human Rights Commission vs. The Attorney General & Another* (2018) eKLR did not invalidate the provisions of section 10 of the Magistrates Court Act. The Court in the Jimi Wanjigi case (supra) stated thus:
- “This section was repealed by section 38 of the *Contempt of Court Act* of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the Judicature Act, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the Judicature Act. This Court is in this regard guided by the applicable English Law which is part 81 of the English Civil Procedure Rules of 1998 as variously amended.....”
11. Does this appeal have merit? The Respondent’s filed an application seeking an order for a temporary injunction against the Appellants stopping them from excavating, digging up, or destroying or working or in any manner whatsoever interfering with the Respondent’s use of L.R Nos. Bukhayo/mundikA/11358, 10926, 10927 and 3242 pending hearing and determination of the application and the suit. The learned magistrate issued an order of temporary injunction pending hearing and determination of the application on the 7<sup>th</sup> of October, 2021. However, by a ruling dated 15<sup>th</sup> October, 2021, the Court varied the orders made on the 7<sup>th</sup> of October, 2021 by allowing the Appellant limited access to the identified area where the 6-inch slab had collapsed to repair the affected pipes in order to reconnect the water supply to the affected areas. The Appellant remained injunctioned with regards to the remainder parts of the slab.



12. On the 18<sup>th</sup> of October, 2021, the Respondent filed another application seeking contempt orders against the Managing Director and asking that he be fined of KShs.1,000,000 for being in contempt. The honourable chief magistrate issued orders on the same date staying execution of her orders made on the 15<sup>th</sup> of October, 2021 pending hearing of show cause against the Appellant’s managing director and a site visit on the 19<sup>th</sup> of October, 2021 to confirm whether the court orders were effected/abused or misused.
13. From the proceedings of the subordinate Court of 19<sup>th</sup> of October, 2021 the Court deferred the site visit to Thursday, 21<sup>st</sup> October, 2021 a date suggested by the Appellants’ counsel with the Respondent’s counsel concurring. The Court visited the site on the said date and varied its orders issued on the 18<sup>th</sup> of October, 2021 providing the Appellant access to the two already excavated sites for the purposes of repairing the leakages. An access road was also identified at the scene to be used temporarily by the Respondent. The matter was then fixed for mention on October 25, 2021.
14. During the mention for compliance on the 25<sup>th</sup> of October, 2021 counsel for the Respondent stated that they visited the site on Friday and found that the orders that had been issued had not been implemented and proceeded to pray for the arrest of the Appellant’s Managing Director. These proceedings were carried out in the absence of the Appellant and their counsel. Article 50 of *the Constitution* of Kenya enshrines the right to a fair hearing. The Supreme Court in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) while quoting the African Commission on Human and People’s Rights established general principles to all legal proceedings stated that the : “General principles applicable to all legal proceedings included a fair hearing and listed the essential elements of a fair hearing to include:
  - a) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
  - b) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings”.
15. The Appellants were not heard when the adverse orders were made against them. The failure to hear the Appellant amounted to being condemned unheard hence making a ground for setting aside the order. The Appellant took issue that a substantive order on a date when the matter was fixed for mention. Indeed the record indicates that the matter had been fixed for mention to confirm compliance. The inference of compliance in this case with the orders of October 15, 2021 and if there was no compliance, the court was to give directions. Essentially, the application dated October 18, 2021 was not due for hearing on the October 25, 2021 and counsel for the Respondent misled the learned magistrate for seeking to be granted orders in the impugned application. This resulted in a misdirection of the learned magistrate granting substantive orders without hearing both parties. Secondly, the absence of the Appellant during the proceedings of October 25, 2022 did not discharge the Respondent’s duty to prove that indeed the Appellant was in contempt of court order. However, from the later proceedings of the trial Court on the 16<sup>th</sup> of November, 2021 the Respondent’s counsel withdrew his application dated 18<sup>th</sup> of October, 2021 that sought the contempt orders rendering all the orders emanating thereof void.
16. The standard of proof of contempt is above the balance of probabilities since it borders on denial of liberty of an individual. The Appellant had filed a replying affidavit dated October 19, 2021 in response to the impugned application of October 18, 2021. Therefore inspite of the Appellant’s absence on Court on October 25, 2022, the law under order 21 rule 5 of Civil Procedure Rule required of the



learned magistrate to give reasons for the decision she made in finding that the Appellant was guilty of contempt. In this instance, no reason was given neither was consideration made of the grounds contained in the replying affidavit in opposition to the application.

17. In light of the analysis given herein above, it is my finding that the appeal is merited. I note from the record of appeal that the impugned application dated October 18, 2021 was withdrawn on November 16, 2021 which essentially means that the order appealed against ceased to have any effect. However for the record of this appeal, the order of the learned chief magistrate made on October 25, 2021 be and is hereby set aside. Costs follow the event and since the appellant is successful, they are awarded costs of this appeal.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 30<sup>TH</sup> DAY OF JUNE 2022.**

**A. OMOLLO**

**JUDGE**

